UK IN A CHANGING EUROPE

UCD Sutherland School of Law

50 YEARS ON:
DIVERGENT PATHS OF BRITISH AND IRISH MEMBERSHIP OF THE EU

Verfassungsblog
ON MATTERS CONSTITUTIONAL

FOREWORD

2023 marks the 50th anniversary of Ireland and the UK's accession to the now European Union, and three years since the UK withdrew from it. Following nearly fifty years of convergence and integration, it is time to interrogate the meaning and nature of EU membership in a current and former member state, reflecting on common questions including sovereignty, constitutional identity, and the protection of rights.

This series of commentaries, first published on the Verfassungsblog in March-April 2023 in a symposium co-convened by UK in a Changing Europe and the Sutherland School of Law at University College Dublin, reflects on the constitutional evolution brought about by EU membership and Brexit.

The views expressed in this series are those of the author(s) and not necessarily those of the UK in a Changing Europe or UCD Sutherland School of Law.

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Introduction

Joelle Grogan and Imelda Maher

In 1973 and on the third attempt, Ireland and the United Kingdom (UK) with Denmark acceded to the European Communities, while Norway opted not to join following a referendum. For Ireland and the UK, the half-century since has brought about remarkable social, economic, demographic, political, and legal changes in both states leading to the UK leaving the EU in 2020 and Ireland remaining a Member State. Given the shared anniversary and divergent responses to EU membership in the context of strong (if complex) ties between the two states and a shared common law tradition, a reflection on the 50th anniversary of their accession to what is now the European Union (EU) is timely.

In fact, 2023 marks several inter-related anniversaries: 50 years since Ireland's and UK's accession to the EU, seven years since the Brexit referendum and three years since the UK withdrew from the EU. This year also marks 25 years since the UK 'brought rights home' through the domestic implementation of the European Convention on Human Rights through the Human Rights Act 1998, and 20 years ago Ireland enacted the European Convention on Human Rights Act 2003. Most significantly for UK-Ireland relations, 2023 marks 25 years since the Belfast/Good Friday Agreement and the shared commitment of the UK, Republic of Ireland and Northern Irish parties to peace. And, while not yet an anniversary, the Windsor Framework was very recently agreed between the EU and the UK to resolve ongoing differences over the Protocol on Ireland and Northern Ireland in the EU/UK Withdrawal Agreement that leaves the land border open between the UK (Northern Ireland) and Ireland on the island of Ireland for the purposes of trade in goods.

Bringing together academics from British and Irish universities and led by academics in the Sutherland School of Law at University College Dublin and UK in a Changing Europe at King's College London, this symposium reflects on the constitutional evolution brought about by EU membership and withdrawal, and the changing nature of the relationship between these states and with the EU. It gives insight on the nature of EU membership through the convergence, divergence, integration, and disintegration of a current and former member state.

Commentators show how the shared history and broad similarities of common law systems belie far deeper constitutional distinctions between Ireland and the UK. The UK has an uncodified constitution grounded in common law principles and bounded by leading statutes, decisions and conventions – the single most defining feature of which is 'parliamentary sovereignty' or the principle that Parliament can make or unmake any law, except to bind future parliaments. In contrast, Ireland's 1937

constitution gave constitutional expression to 'popular sovereignty', enumerated rights and gave provision for the courts to strike down unconstitutional laws, fifteen years after independence from the UK.

There are common questions, however. Whether it is an absolute authority and a resistance to external decision-making; or a constitutive power, an expression of popular and collective will; or a statement of the purpose of a state, a guarantee to seek the best interests of its citizens; whether it is legal, popular, political or parliamentary – grappling with what '**sovereignty**' for a state means in a Union echoes throughout the Symposium.

'National sovereignty' and the contested and contentious concept of '**constitutional identity**', notably brought to the stage by the Lisbon judgment of the Bundesverfassungsgericht and given a spotlight by Hungary and Poland among others, is played out in the settings of both the British and Irish courts. Ireland's own Supreme Court decisions grappling with conflict between constitutional norms, are contrasted with whether the EU membership 'softened' British parliamentary sovereignty by leading the courts to introduce the concept of 'constitutional statutes', and the interpretive principle that later statutes could not impliedly repeal EU laws or fundamental rights.

In the recognition and protection of **rights** is perhaps the strongest expression of how EU membership has changed the law and lives of people in Ireland and the UK. Free movement of people, goods, capital and services are the foundational freedoms of EU membership, but the scope of EU law has now embraced voting: the enfranchisement of EU citizens in host member states, as well as socio-economic and family rights. Commentators show the transformational character of EU membership – highlighting the radial social shift in attitudes to women's rights and abortion in Ireland under its influence. But they note that such radical socio-legal shifts are not inevitable, nor are they linear. Ireland's embrace of European rights-rhetoric contrasts starkly with the UK's increasing rejection of it, encapsulated in the calls to repeal the Human Rights Act 1998 and to withdraw from the ECHR.

Commentators explore the contrasting perspectives on what it *means* to be an EU member state, exploring UK scepticism on the deepening integration of areas **beyond the single market**, including citizenship, and contrasting it with the choice of Ireland to join the Eurozone, and tie closer through Economic and Monetary Union. Different 'types' of membership are explored too through an analysis of 'differentiated integration' within the context of asylum policy.

Even where EU membership has embedded and cleaved deep within British and Irish constitutionalism, commentators examine the **influence of both states on the EU**. EU adaptation to the language of common law constitutionalism, and both states as drivers of case law before the Court of Justice in

areas such as equality evidences mutual dialogue and co-development. In one study, Ireland's long history of intervention in support of UK-led or UK-related action against the Commission before EU courts is examined, along with its intervention in technical fields of EU law.

Commentators explore the constitutional changes made and mediated by **referenda**. There is a stark contrast between the UK's 2016 Brexit Referendum, with the Irish second referenda following both the Lisbon and Nice Treaties. The Irish Supreme Court decision in *Crotty* which set the constitutional mandate for all EU Treaty changes to be subject to a referendum is analysed for its subsequent impact. While the 2016 Brexit referendum was a political choice, commentators highlight how referenda are now integrated within the UK's devolution settlement: the devolved governments of Scotland and Wales can only be dissolved on the basis of a referendum in either country. The UK is legally obliged to respect the result of a referendum in Northern Ireland on the decision of whether to leave the UK and join Ireland.

The position of **Northern Ireland** is also examined, as it now holds a unique place 'between', with access to both the EU single market and the UK single market, it is between Ireland and the UK, and between the EU and the UK. Its unique post-conflict governance arrangements are analysed, examining the role of EU membership in facilitating the minimisation of barriers across Ireland, Northern Ireland and the UK, and questioning how this can be replicated or replaced in a post-Brexit environment of regulatory divergence.

Commentators take stock of the UK within and now with*out* the EU. They examine how **Brexit** has been a catalyst for constitutional change, most notably in the balance of power by first shifting towards parliament in the unprecedented level of review of an international treaty with the Withdrawal Agreement, and then away in subsequent legislation which delegates broad and sweeping powers to government to change, alter, and amend law consequent to the Brexit process. Following nearly fifty years of convergence and integration, commentators interrogate the challenges of divergence to the UK, Ireland and the EU.

We invite you, reader, to join us in examining the half-century since the beginnings of Irish and UK membership of the EU, reflecting not only the making of history but pathways that lie ahead for both states within and outwith the European Union.

Integration and disintegration: comparing Ireland and the UK's membership of the European Union

Gráinne de Búrca and Kenneth Armstrong

In our analysis below, we examine the convergent and divergent paths of Ireland and the UK on the theme of integration and disintegration in three stages. The first considers the constitutional context and framework within which each of the two countries chose to embark on the path of European integration by acceding to the EEC in the early 1970s. The second examines several key policy choices made by the two states along a continuum between integration and disintegration, as part of a more differentiated, post-Maastricht EU. The final stage examines the implications of Brexit for the UK and Ireland following Britain's departure from the EU.

Constitutional divergence from the outset

The accession of the UK and Ireland in 1973 is often described as a moment that brought two similar common law jurisdictions into a Community legal order that hitherto had engaged only with the civilian legal systems of its founding Member States. Yet that broad similarity at the moment of embarking on the path of European integration belies a deeper constitutional divergence between the UK and Ireland. While the UK has an unwritten constitution embedded in common law principles, including the principle of parliamentary sovereignty, Ireland is more similar to its continental neighbours in having equipped itself in 1922 and 1937 with a written Constitution after declaring independence from British rule. Jettisoning the British version of parliamentary/executive sovereignty, the Irish Constitution is based on the notion of popular sovereignty. These divergent constitutional foundations meant that from the earliest moment of their membership of the European Communities, each state managed and mediated its relationship with European integration in rather different and distinctive ways.

One of the clearest manifestations of this constitutional divergence has been in the use of referendums on European integration in the two countries. Following the judgment of the Irish Supreme Court in *Crotty*, the Irish Constitution was interpreted as requiring key EU treaty changes to be the subject of a constitutional amendment, and constitutional amendments in Ireland require approval by means of a popular referendum. Thereafter, the Irish government generally followed the practice of holding a referendum for most EU treaty changes, which famously resulted in the initial rejection (but later acceptance, following a second plebiscite) of both the Nice and the Lisbon treaties.

By contrast, the UK never held a referendum prior to the approval of an EU treaty, and the referendums held in the UK in 1975 and 2016 were expressly framed as existential plebiscites on UK membership of the European Communities or Union. Notably, however, the UK drew from the experiences of other EU jurisdictions and eventually equipped itself, in its (now repealed) European Union Act 2011, with a mechanism for mandating referendums for future European integration events. However, not least because of the difficulties encountered in Ireland with the referendums on the Nice and Lisbon Treaties, the subsequent decline in resort to EU treaty change as a vehicle for European integration ensured that no British referendums were actually triggered by the 2011 Act. The Brexit referendum in 2016 was a political choice and not a constitutionally or legislatively mandated event.

It might therefore be argued that the UK's system of parliamentary sovereignty, which is typically the handmaiden of executive power, failed to provide a robust mechanism for ongoing popular legitimation of the UK's EU membership. Ireland's provision for referendums in its Constitution, in comparison, reflected a deliberate choice to reject the British system of parliamentary sovereignty in favour of popular sovereignty. And this choice may have helped, in the context of EU membership, to generate ongoing public awareness of and education about the European integration process, as well as a mechanism for expressing popular disquiet or support.

Convergence and divergence in a differentiated post-Maastricht EU

What the UK and Ireland joined in 1973 was principally a Common Market. This pursuit of enhanced conditions for free trade built upon but also superseded a joint initiative in the form of the Anglo Irish Trade Agreement of 1965. As will be discussed later, this type of bilateral economic (and, to some extent, political) cooperation across the two islands and within the island of Ireland, was possible prior to EU membership in a way that could not be easily reproduced once the UK left the EU. Membership of the Common Market, however, and the willingness to accept the discipline of free movement tied both countries into a wider and deeper process of regional economic integration. The subsequent Internal Market programme also saw both countries bound by a growing body of harmonised rules and regulatory standards, a fact that also became important for the all-Ireland economy after Brexit.

Beneath this level of legal and instrumental convergence, however, membership of the Common/Internal Market came to mean different things for both countries. EU membership enabled Ireland to gradually lessen its economic dependence on the UK as a destination for Irish-produced goods, and later, for financial services. And despite the initial rejections of the Nice and Lisbon Treaties by referendum, as well as a lively domestic debate on the ratification of the Maastricht Treaty, the Irish political and social classes on the whole welcomed and engaged actively in the deepening process of

European integration over the decades. For the UK, however, 'market membership' remained the dominant social and political understanding of EU membership. Indeed, post-Maastricht developments – the move from Community to Union, EU citizenship, the expansion beyond primarily market integration to areas of foreign and security policy as well as justice and home affairs, the development of strong EU human rights instruments – were viewed in the UK as bringing about a fundamental, and, for many, a deeply problematic change in the character of European integration. The British political class struggled in subsequent years with these profound underlying tensions, notwithstanding parliamentary approval for successive treaty changes, and ostensibly for the deepening process of integration.

The post-Maastricht period of European integration also heralded an era of greater differentiation and 'variable geometry'. In this respect, Ireland and the UK also diverged somewhat. The UK at the time of the Maastricht Treaty chose to opt out of the EU's new social policy chapter, an opt-out which was later reversed by the Amsterdam Treaty after a change in government, although EU employment policy and labour regulation remained divisive within British politics. Even more consequentially, the UK opted not to participate fully in Economic and Monetary Union, choosing to remain outside the Eurozone. By contrast, Ireland participated fully in EU social policy as well as Economic and Monetary Union. These divergent choices set the UK and Ireland on quite different paths as far as their degree of integration into the developing European polity was concerned.

EMU left fiscal and economic policies in the hands of the Member States. Yet this apparent autonomy is subject to the discipline of a complex system of economic and fiscal governance, whose application and enforcement differentiates between Eurozone insiders and outsiders. The implications of Ireland's Eurozone membership for the conduct of its fiscal and economic policies became painfully clear in the context of the global financial crisis and the subsequent Eurozone crisis. Conditionality requirements which were imposed as part of a package of financial support to Ireland, together with enhanced EU budgetary supervision, highlighted how Eurozone membership could expose core state powers to the influence of the Troika – i.e. the European Commission, the European Central Bank and the International Monetary Fund. The nature and extent of that influence provoked domestic contestation and resistance in Ireland, although not ultimately an existential crisis about EU membership, particularly because Ireland exited the program relatively rapidly even if far from unscathed. Conversely, despite being outside the Eurozone, the domestic politics of austerity voluntarily adopted in the UK in the wake of the financial crisis played a part in the Brexit debate, since many UK voters welcomed what they saw as an opportunity to stop paying into an EU budget, and to spend more money at home.

One particular area of 'convergent differentiation' post-Maastricht in which Ireland chose to follow the UK was in the decision to opt out from the Schengen system, the area of free EU-wide travel without internal border control. Relatedly, Ireland followed a similar path to the UK in maintaining a semi-detached position with regard to Justice and Home Affairs whereby both jurisdictions could opt-in to specific EU measures. The reasons for Ireland's convergence with the UK as regards these aspects of EU policy stem from the complex and closely intertwined history of the two jurisdictions, and more particularly from the Common Travel Area which was established between them in 1923 following Ireland's assertion of independence.

Territorial integrity, integration and disintegration post-Brexit

The 2016 Brexit referendum and the subsequent UK withdrawal from the European Union produced a rapid and steep divergence in the trajectories of the UK and Ireland as regards European integration. Indeed, the UK's departure from the EU has produced, and is the product of, a politics of disruption that aims to critique the purpose and benefits of increased European integration.

One interesting dimension of the post-Brexit integration/disintegration effect worth highlighting is the impact on territorial integrity within the two jurisdictions. Apart from the clear differences in the voting preferences of the populations of Northern Ireland and Scotland (each of which voted by a majority to remain in the EU) as compared with England and Wales (each of which voted by a majority to leave), in the Brexit referendum, the aftermath of the Brexit referendum has renewed interest in the case for Scottish independence, despite the constitutional hurdles. Yet it is not clear that either this value-schism within the UK or the popularity of the pro-EU pro-independence Scottish National Party has proved sufficient to generate support for independence from the rest of the UK amongst a majority of Scottish voters.

Territorial integrity has particular resonance in the relationship between the UK and Ireland given the complex status of Northern Ireland. Having remained a part of the UK rather than becoming part of the newly independent Irish state following the partition of the island of Ireland in 1922, Northern Ireland became the locus of bitter and violent conflict throughout the latter decades of the 20th century between the predominantly Catholic community which sought reunification with Ireland and the predominantly Protestant community which sought to remain part of the United Kingdom. A peace agreement was eventually reached in 1998 in the form of the Belfast/Good Friday Agreement, which resulted in the dismantling of the controversial border between Ireland and Northern Ireland, and a complex set of governing arrangements for Northern Ireland. The disappearance of the border also helped promote the all-Ireland economy that had been developing in the context of European

integration.

The exit of the UK from the European Union however threatened to destabilize not just the fragile peace that had taken hold since the Good Friday agreement, since it seemed probable that a border of some kind would be re-erected, but also to disrupt that developing all-Ireland economy which benefited from a single set of EU regulatory rules north and south, and the absence of any tariffs or customs formalities. The Northern Ireland Protocol signed between the UK and the EU as part of the UK's exit negotiations attempted to avert these twin risks by providing that there would be no hard border and that Northern Ireland would effectively remain part of the EU's regulatory single market. This arrangement would make the continuation of 'frictionless trade' between North and South more likely, although – controversially – it required the introduction of inspection checks between Great Britain and Northern Ireland.

While tensions and challenges to the operation of the Northern Ireland Protocol, and negotiations on its future have continued, Brexit has at the same time energised the debate on a reunification of Northern Ireland and Ireland, particularly in the Irish Republic. Sinn Fein, which in very recent years became the largest political party in both Northern Ireland and Ireland, has long espoused a policy of reunification, and there have been lively debates on whether or not a referendum should be held. In short, while neither Scottish independence nor Irish reunification seem likely to be seriously pursued in the short term, there is no doubt that Brexit has fuelled debates on a United Ireland and on Scottish independence. In other words, while the UK's exit from the EU has put in question the territorial unity of Scotland and England within the UK, it has also put back on the table the question of territorial unification of the island of Ireland.

Post-Brexit sovereignty: regulating rather constituting a (Dis)United Kingdom

Damian Chalmers

In thinking about sovereignty within the United Kingdom, it is helpful to separate out two ways in which sovereignty has historically been identified in both the United Kingdom and elsewhere.

Sovereignty is, first, a power over others, most notably absolute and final authority over a territory. If this allows those holding it to achieve considerable things, it also generates apprehension as it allows them to do many things to others.

Sovereignty is, secondly, a constitutive power. It expresses the authority of an exercise of collective will that has established a political arrangement. When we talk of the sovereignty of France or Germany, therefore we are referring to sovereignty in these terms. Loughlin and Tierney have observed that these arrangements invariably involve settling a relationship between ruling authority, political community and territory. This dimension to sovereignty allows political power to be identified from other forms of power. In this, it both allows collective identity-formation, and legislative action to be taken in the name of that collective identity: be it the public, the State or the people.

EU law has generated debates in many EU States about both these dimensions.

The claim to limit the absolute authority of national law goes to the former. It has led to an accommodation in most EU States where domestic courts have refused to see EU law as founding legal authority within the EU. However, as most exhaustively set out in the edited collection by Albi and Bardutzky, they see primacy of EU law as a conflict of laws rule which, without having this foundational authority, requires EU law to apply at the expense of almost all national law under almost all conditions.

The 'constitutional identity' case law of national courts goes more to the second debate. The position was elaborated in most detail in the 'identity review' reasoning of the *Lisbon Treaty* judgment of the German Constitutional Court. Notably, as that court's *EU Own Resources* decision has recently reiterated, EU law should not restrict Germany's possibility to constitute itself as a democratic State by unduly constraining law-making and policy in fields seen as most central to this democratic constitution. This included fields identified with political community because they had significant distributive features (eg budgetary and social law) or were emblematic of a common lived experience (eg family, religious and civil society law); fields identified with territory (eg foreign and defence) and

fields identified with States' powers of rule (policing and criminal justice) If the Court of Justice has pushed back against this, most notably in *RS*, there is little debate that this dimension has been a central field of contention between the Court of Justice and national courts.

The monocular British vision

During the United Kingdom's period of EU membership, British courts focused on the first dimension of sovereignty, namely which law had ultimate authority over the other within the United Kingdom. Furthermore, this was addressed in a highly contrived way. The authority of EU law was constructed as a matter of UK Parliamentary intent, in particular what authority the European Community Act 1972 had deemed EU law to have.

This had three consequences for the United Kingdom settlement.

First, it widened the gap between EU's legal authority within the United Kingdom and its political authority. The focus on the first dimension of sovereignty meant that EU law enjoyed more practical authority in the UK than in almost any other EU State. As UK Acts never stated that they overrode EU law, all were constructed as intending EU law to be supreme. The absence of a UK written constitution meant, moreover, there were no other limits on EU law's authority. By contrast, the failure to address the relationship between EU law and the constitution of the British State meant EU law's potential effect on political authority was not addressed. It was for others to do this, and most often it was EU law's opponents who sought to dismiss it. This was most visibly done in the press. The clearest institutional expression was the section 18 of the 2011 European Union Act which made clear that EU law only enjoyed any legal status by dint of parliamentary permission.

Secondly, there were no practical legal avenues for mediating tensions between EU law and expressions of UK political community. This became very apparent at the time of Brexit referendum. Two salient issues were pushed by the Leave campaign which sat at the heart of the idea of a British community of free and equals, which had become ongoing sources of grievance. First, free movement of persons rights, which went to conditions of membership of this community for core entitlements (ie voting and socio-economic rights). Secondly, fisheries concerned communities whose socio-economical marginalisation raised questions about where the UK was honoring its commitment to them as members of its political community. The touchstone for this was the extensive regulation of their livelihoods by EU law.

Thirdly, it contributed to the framing of issues during the Brexit referendum. As Sobolewska and Ford's magisterial work show, voting went very much to questions of political community, with issues of collective identity and strong cleavages based on geography, age, and education central to the vote.

Furthermore, the issues outlined above touched very visibly on what commitments were required within in a community of free and equals. However, debates were never framed in terms of the quality of UK political community or citizenship. There was little on whether the EU contributed to British citizens' commitments to one another or softened economic and political inequalities within the UK. Issues were framed either as *ad hoc* grievances or as a question of *juste retour*. The UK was contributing more than it was receiving from the EU.

Sovereignty in the UK after Brexit: parliament, repatriation and no political community

This legacy fed into understandings of sovereignty that have emerged since Brexit.

First, there has been a doubling down of the vision of sovereignty as absolute authority.

On the one hand, the phantom of EU legal authority has led to a vision of sovereignty as resistance to external authority. In discussions about the Ireland/Northern Ireland Protocol, the UK Government's Command Paper emphasized at paragraph 73 that it has special responsibilities to Northern Ireland because it is the 'sovereign Government of all of the United Kingdom'. This provided the basis for its concerns over EU law disrupting trade between Northern Ireland and the rest of the United Kingdom, the exclusive application of EU law regarding the marketing of goods in Northern Ireland, and over the Court of Justice having ultimate authority over the interpretation of the Ireland/Northern Ireland Protocol in the Withdrawal Agreement.

On the other, EU law softened Parliamentary sovereignty. Other doctrines emerged during membership, notably those of constitutional statutes (subsequent statutes would be assumed to comply with these unless they expressly repeal or amend them) and legality (statutes would be assumed to comply with fundamental rights unless they squarely constrained them). With the discipline of membership now absent, more absolutist interpretations of Parliamentary sovereignty are emerging. The most recent example is *Allister and Peeples* concerned a challenge to the Ireland/Northern Ireland Protocol on the ground *inter alia* that it violated article VI of the Act of Union 1800, which provides for a freedom to trade between (now) Northern Ireland and the rest of the United Kingdom. It was argued this latter Act was a constitutional statute, which, along with fundamental rights, could only be repealed or amended expressly. This had not happened here The UKSC was dismissive and stated:

> 66. the interpretative presumption that Parliament does not intend to violate fundamental rights cannot override the clearly expressed will of Parliament. Furthermore, the suspension, subjugation, or modification of rights contained in an earlier statute may be effected by express words in a later statute. The most fundamental rule of UK constitutional law is that

> Parliament, or more precisely the Crown in Parliament, is sovereign and that legislation enacted by Parliament is supreme. A clear answer has been expressly provided by Parliament in relation to any conflict between the Protocol and the rights in the trade limb of article VI.

Secondly, if we turn to the constitutive dimension of sovereignty, courts remain silent and it is only invoked by UK government officials. It is, in particular, identified with policy fields where the United Kingdom can act now because power has been repatriated from the EU. It has thus become identified with territorial exclusivity because free movement of persons was framed as prevented the UK doing this. The irregular crossings into the UK across the English Channel continue to be portrayed, therefore, as a loss of sovereignty, with the Act addressing them, the Nationality and Borders Act 2022, initially known as the Sovereign Borders Bill. Equally, the UK government stated at para 171 of its White Paper on the UK Internal Market that its new subsidy control regime was a 'sovereign' one.

There is a thin, partial and opportunistic feel to these invocations of sovereignty, however. They form rhetorical embellishments rather than any considered restatements on political community within the UK. The notion of internal market, that formed an explicit basis for British political community in both the 1707 and 1800 Acts of Union, is, for example now treated in a heavily technocrat manner. As Armstrong has noted, little creative thought is given for example to how that market could contribute to political and economic cohesion. For this second notion of sovereignty in UK political and administrative discourse focuses above all on territory and administrative power, with little thought for what a richer notion of a British community of free and equals, and its associated notions of citizenship, mutual recognition and social justice, could require UK decision-makers to address.

Constitutional identity, Ireland and the EU

Gavin Barrett

The Irish Supreme Court Ruling Costello v. Government of Ireland

Costello v. Government of Ireland and others is one of the most significant recent Irish Supreme Court rulings concerning EU law. The case involved a member of parliament seeking to restrain the Irish government from ratifying the 2014 EU-Canada Comprehensive Economic and Trade Agreement (CETA) on grounds of alleged unconstitutionality. Costello's claim failed in the High Court in September 2021. However, the Supreme Court granted leave for an appeal (leapfrogging the Court of Appeal) because the case raised important domestic and EU law issues. It ruled 4-3 in favour of Costello on 11 November. Costello is a lengthy ruling: the original texts amounted to an impressive 474 pages, with all seven judges producing his/her own judgment.

Costello's most long-lasting impact is likely to be its introduction of the concept of constitutional identity into Irish constitutional jurisprudence. As is well known, this began life in Karlsruhe: with the doctrine gathering pace in the *Bundesverfassungsgericht*'s 2009 *Lisbon* ruling, in which it produced a lengthy list of *Staatsaufgaben* that it deemed necessary the State not transfer to EU level. Prior to the Supreme Court ruling in *Costello*, constitutional identity was not a concept that had featured in Irish jurisprudence at all. This blog concerns the implications of its introduction in *Costello*.

The seven Supreme Court judgments fall into three categories. The first clearly recognised constitutional identity as a new concept. Thus Hogan J. (a former Advocate General in the Court of Justice) clearly regard constitutional identity as a concept going beyond mere sovereignty, discussing measures "which ensured that the constitutional identity of the State *and* its sovereignty [were] thereby safeguarded." His judgment identified democracy as a facet of constitutional identity, noting that by the declaration in Article 5 of the Irish Constitution (*Bunreacht*) that the State is sovereign and democratic, democracy was "made an indispensable feature of the very constitutional identity of the state."

For Hogan J. – although his views in this regard did not secure the support of the majority of the Court – any amendments to CETA, which included for him CETA Joint Committee interpretive decisions, thus required the approval of the *Dáil* (lower House) under Article 29.5.2 of the *Bunreacht*, even though once adopted CETA would form part of EU law. They would not seemingly benefit from the

Bunreacht's Article 29.4.6° immunity clause for EU measures. For Hogan J. therefore, both conceptually and in terms of its legal significance, constitutional identity appeared novel.

He viewed constitutional identity as encompassing "the legislative and juridical autonomy of the State" and moreover viewed constitutional identity as open-ended, "a *category…perhaps, never closed"*.

Interestingly, the lead minority opinion, that of Chief Justice O'Donnell CJ, was very similar in many regards. Thus, for example, according to O'Donnell J., "no judgment could be enforceable in this jurisdiction where such enforcement was contrary to the constitutional identity of the State".

Other judges however, deployed the concept without stipulating unambiguously that constitutional identity had implications going beyond those of sovereignty as traditionally understood. In these judgments, 'sovereignty' and 'constitutional identity' seemed to be used more or less interchangeably. Hence, Dunne J. (in the majority) hardly referred to constitutional identity. McMenamin J. (in dissent) asserted that (apparently *all* of) what is provided in both Article 5 and Article 6 of the *Bunreacht* is "part of the Constitutional identity of the State". These articles stipulate that Ireland is a sovereign, independent, democratic state, that powers of Government derive from the People and that these powers are exercisable only by, or by the authority of the organs of the Irish State. This seems an extraordinarily broad definition to give to constitutional identity. McMenamin J. asserted that "were it to be found that some action or actions, or decisions on foot of CETA did offend against fundamental constitutional values or the constitutional identity of the State… a court… would have no alternative but to refuse such an award" and that "were it to be shown that there was an alienation of sovereignty, without specific constitutional amendment…then Article 29.4.6° (the *Bunreacht*'s EU immunity clause) could provide no answer. Overall, McMenamin's judgment is striking for the absence of any dividing line between sovereignty and constitutional identity issues.

Power J.'s judgment (in dissent) also showed ambivalence, although she did search in her judgment for the parameters of constitutional identity in a way indicative of a desire to define a new concept.

Two judges, both in the majority, made no explicit reliance on constitutional identity. Baker J. neither referred to nor relied on it. Charleton J.'s judgment admitted of no exception to the duty to enforce EU law. For him, when CETA was "ratified and brought into law…the Treaty will be a necessary part of Ireland's duty of fidelity and cooperation." As far as Charleton J. was concerned, "in Ireland the discretion, *on constitutional grounds*, for refusing to enforce what are likely to be gigantic [CETA tribunal] awards is *so vanishingly small as to be reduced to nothing*." Reliance on "any grounds as to our

constitutional tradition" as grounds to deny enforcement of an award by a CETA investment tribunal was consonant neither with EU law nor with Art. 29.4 (the *Bunreacht*'s Europe clause).

Some observations

Constitutional identity as seen in *Costello* originated differently to constitutional identity in German law (where constitutional identity was conceived as a limit to European integration). In *Costello*, it was instead conceived of as a limit to an international treaty regime which in turn was seen as carrying risks for national legal systems and the EU legal system alike. The Court in *Costello* responded in particular to the potential danger of perverse CETA tribunal decisions and the existence of a legal requirement to enforce these. Hogan J. expressed concerns not merely for Irish constitutional identity but also for the EU legal order (citing the risk of a CETA Tribunal refusing to follow a material decision of the ECJ). O'Donnell CJ's opinion was very similar. Neither judgment evinced hostility to European integration. This does not guarantee that constitutional identity, in Irish law will always be deployed in a way favourable to European integration, however. As in German law, it could develop into a potentially formidable legal obstacle. All depends on the course of future Irish case law in this regard, which is not predictable.

Striking in *Costello* was the wide agreement, in both majority and minority judgments, regarding the existence of the constitutional identity doctrine of in Irish law, notwithstanding the lack of any mention of such a concept either in the *Bunreacht's* text or earlier case-law. On one level, it is surprising to see a heretofore unknown doctrine such as constitutional identity simply appear in the Irish legal landscape. The willingness of the Court to imply such a significant concept into the Constitution contrasts strikingly with its long-standing reluctance to expand the gamut of implied constitutional rights enjoyed by the citizen for fear of trespassing on legislative role. Hence in the 2020 case *Friends of the Irish Environment CLG v. Government of Ireland and others,* then-Chief Justice Clarke declined to recognise an unenumerated right to an environment consistent with human dignity (a right recognised in many other jurisdictions) and objected even to the very use of the term "unenumerated" rights because it conveyed "an impression that judges simply identify rights of which they approve and deem them to be part of the Constitution". He preferred the term "derived rights" as more appropriate, "for it conveys that there must be some root of title in the text or structure of the Constitution from which the right in question can be derived." He grounded his approach to implied rights in the need to prevent judicial overreach, arguing that "what needs to be guarded against is allowing for a blurring of the separation of powers by permitting issues which are more properly political and policy matters (for the legislature and the executive) to impermissibly drift into the judicial sphere." Contrast *Costello,* which marked a significant new judicial restriction on executive action on

external affairs. *Costello* may come to mean that there are policy choices which can not, *regardless of any decision of the Irish executive or legislature,* ever be taken at EU level. It may possibly lead (somewhat analogously to the 1987 *Crotty* ruling) to future referendums.

Another jarring contrast to its implied rights case-law is that one struggles to find any 'root of title' in the Irish Constitution for the constitutional identity doctrine: as already noted, until *Costello,* the doctrine was unheard of in Irish constitutional law.

Finally, another strong contrast with rights jurisprudence is that the Supreme Court in *Friends of the Irish Environment,* in rejecting the existence of a constitutional right to a healthy environment, pointed to the "very vague" and "ill-defined" nature of such a right. This contrasts with the distinctly amorphous shape of constitutional identity, the scope of which produced no unanimity among the six judges who recognised it. In some rulings it was seen as having such an extraordinarily wide ambit as to make it seem inherently unfeasible that it can possibly form a workable limit either to the scope of the empowerment to join the EU conferred in Article 29.4 or the immunity granted by Article to acts of the EU and its institutions or to necessitated laws, acts and measures of the Irish State. A more complete and workable doctrine of constitutional identity remains something for future Irish courts to formulate.

What are the implications of the new doctrine? Notwithstanding the length and number of judgments, this was poorly teased out. Constitutional identity *seemingly* involves the idea that there may be areas of EU law which must now be regarded as falling outside the immunity from constitutional attack granted by Article 29.4.6° of the Irish Constitution both (a) to laws, acts and measures by the EU and its institutions and (b) to laws, acts and measures of the Irish State which are necessitated by membership. This is highly significant and one which could conceivably lead to a need for future referendums in respect of treaties agreed at EU level, even if it was held not to require any referendum in the case of CETA itself. Insofar as *Costello* involves the idea that there are policy choices which ought not as a matter of interpretation be regarded as having been authorised to be transferred to European level under Article 29.4.5°, it is equally significant.

Costello-style constitutional identity might well serve as a guardian of last resort against the possibility – however remote this might be – of being compelled to comply with a perverse ruling by a CETA tribunal. This should not however prevent us from simultaneously acknowledging that (a) the new doctrine sits uncomfortably with the orientation of other recent Supreme Court case-law in particular concerning unenumerated rights; that (b) the doctrine of state constitutional identity has no apparent basis in Irish precedent or written law; that (c) its scope remains either unclear or impracticably broad; and (d) its implications are also obscure, regarding in particular both the implicit constitutional terms

of Ireland's accession to the EU under Article 29.4.5° and the scope of the immunity clauses in Article 29.4.6°. Furthermore (e) the adoption of the constitutional identity clause is a very major potential judicial empowerment *vis-à-vis* the other branches of government, even if the absence of an *Ewigkeitsklausel* in the Irish Constitution means that the impact of state liability does not possess all the drastic potential it possesses in German constitutional law. In Ireland, no apparent obstacle exists to the amendment procedure being used to overcome any judicial interpretation of the Constitution. This leaves open the possibility that judicially-viewed transgressions of constitutional identity may be a constitutional obstacle to executive action (or action by international bodies) which it is possible to overcome through constitutional amendments, although it bears recalling that any such step would require a referendum.

It may be that the concept of constitutional identity will remain for the most part undeployed. In this regard, however, there can be no guarantees. An immensely powerful new judicial weapon has been forged by the Supreme Court in *Costello*. It remains to be seen how it will be used by future Irish Courts.

An interactive relationship: equality, Ireland, and EU Law

Mark Bell

In reflections on fifty years of membership, the employment of women is often identified as a tangible example of how membership changed Ireland. Concretely, in the years immediately following accession, the state was required to enact legislation on equal pay and equal treatment for women and men in employment. This narrative tends to place emphasis on EU law as a cause of law reform in Ireland. 50 years on, both Irish and EU equality law have expanded significantly. While EU legislation and case-law continue to be drivers of change in Ireland, there are also ways in which Ireland has contributed to shaping EU law on equality. This discloses a more interactive and complex relationship than merely the reception and implementation of externally-designed norms.

Prior to Ireland joining the European Community (EC), the 'marriage bar' described measures that required women to resign from their jobs if they got married. As described by Laura Bambrick, this was based upon regulations or contractual provisions that were extensively used in the public sector. There was not an absolute prohibition on any employment of married women, but their dismissal was standard practice, and also occurred in the private sector. The norm of married women remaining 'in the home' was (and remains) echoed in Article 41.2.2 of the Constitution, which provides that the state shall 'endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home'. The Irish government has recently announced that it intends to hold a referendum in November 2023 on revising the text of this provision, as well as the constitutional equality clause, in the light of earlier recommendations from the Citizens' Assembly on Gender Equality.

At the time of accession, Article 119 of the European Economic Community (EEC) Treaty established the principle of equal pay for equal work for women and men. While this had been relatively dormant for much of the Community's early history, the vanguard judgment of the Court of Justice in *Defrenne v SABENA* breathed life into this provision by establishing that it could be relied upon in domestic legal proceedings. This decision was complemented by the adoption of EC legislation on equal pay (1975), equal treatment in employment(1976), and equal treatment in social security (1978). While these developments occurred shortly after Ireland's accession, in his book, *The Tortuous Path: The Course of Ireland's Entry into the EEC 1948-73*, DJ Maher showed that the Irish government understood that Article 119 EEC was going to require change to Ireland's domestic laws and practices on the employment and remuneration of women. Indeed, it sought to negotiate a transitional period before

the principle of equal pay would be fully effective. It was not successful in this request. Accordingly, the marriage bar was dismantled in the public sector and legislation was adopted on equal pay (1974) and equal treatment in employment (1977). Ireland joined at the very moment when EC law and policy on gender equality was taking off and it was brought along with that tide of reform.

In due course, the novelty of this social legislation manifested itself in legal proceedings that sought to explore its full potential. The Court of Justice became an important actor in advancing gender equality law in Ireland. As Judge Síofra O'Leary, President of the European Court of Human Rights, has recently observed, pioneering women and their lawyers brought cases that were referred to Luxembourg. For example, *McDermott and Cotter* on equal treatment in social security benefits and *Murphy and others* on equal pay were cases successfully brought by Mary Robinson, who subsequently held the offices of President of Ireland and UN High Commissioner for Human Rights. Such legal battles forged change not only for women in Ireland, but also for women across the Member States.

Moving into the 1990s, Ireland took its own initiative to replace its existing gender equality legislation with new instruments. The Employment Equality Act of 1998 and the Equal Status Act of 2000, prohibited discrimination on the grounds of gender, family status, marital status, sexual orientation, religion, age, disability, race, and membership of the Traveller community. From a comparative law perspective, Ireland moved from its initial position of laggard towards becoming a leader. In the same period, change was also under way at EU level. The Treaty of Amsterdam, agreed in 1997, amended the EC Treaty to permit the Community to adopt legislation to combat discrimination on grounds of sex, racial or ethnic origin, religion or belief, disability, age, and sexual orientation. Using these legislative powers, the EU adopted two flagship Directives in 2000. The Race Equality Directive prohibited discrimination on grounds of racial or ethnic origin in a wide range of social activities and the Employment Equality Directive prohibited discrimination in employment on grounds of religion or belief, disability, age, and sexual orientation. With regard to the latter, Ireland was one of a minority of Member States who had already enacted laws on discrimination on grounds of age, disability, and sexual orientation. Moreover, Irish law included a duty to provide reasonable accommodation for persons with disabilities. In taking this step, Ireland had been inspired by similar provisions recently adopted in the USA, Australia, and the UK. Reasonable accommodation was not, however, widely found in other Member States' laws on disability. In this light, Ireland's domestic reforms made a constructive contribution to subsequent EU-level instruments insofar as they illustrated the new trajectories rippling across this field of law. Indeed, Ireland's legislation was mentioned in the Commission's proposal for the Employment Equality Directive.

That said, it must be noted that the Irish government had certain reservations about the impact that the new EU Directives would have upon its own recently-adopted legislation. A particular point of sensitivity was the position of organisations with a religious ethos, such as schools and healthcare providers. The Irish legislation balanced the prohibition of discrimination on grounds of religion with broad exceptions for measures to preserve the ethos of such organisations. It was reported that the Catholic Church made representations to the Irish government during the negotiation of the Employment Equality Directive on the breadth of the exceptions for religious ethos organisations. Article 4(2) of the Employment Equality Directive contains a complex and convoluted exception for organisations with an ethos based on religion or belief and it appears that, to a certain extent, this was designed to accommodate the concerns of the Irish government and like-minded states.

In the past twenty years, the Union has become a key actor on law and policy on equality. In part, this is driven by a constant flow of references from national courts and tribunals to the Court of Justice (CJEU). Irish adjudicators continue to play their part in this iterative dialogue through which the legislation unfolds. This spans both the long-standing body of gender equality law and the measures adopted in 2000. For example, in *Z*, the Irish Equality Tribunal sought guidance on whether the denial of paid maternity leave to a woman who became a mother via surrogacy constituted prohibited discrimination on either the grounds of sex or disability. The CJEU held that it did not entail discrimination on either ground.

In recent times, the most striking example of equality litigation stemming from Ireland related to the jurisdiction of its specialised body for adjudicating on complaints of discrimination. This was initially the Equality Tribunal, but in 2015 it was replaced by the Workplace Relations Commission (WRC). In *Boyle and others*, the applicants challenged a rule that only permitted those under the age of 35 to be recruited to An Garda Síochána (Ireland's police service). The rule was laid down in a statutory regulations, but the applicants contended that it was breach of the prohibition of age discrimination found in the Employment Equality Directive. The High Court and the Supreme Court both held that, in accordance with the Constitution of Ireland, only courts enjoyed the jurisdiction to disapply legislation. In contrast, the CJEU focused upon the primacy and effectiveness of Union law. Given that the WRC had been entrusted by Ireland with the application of the rights found in the Directive, then it must have the power to disapply any domestic legal provisions that were contrary to the requirements of EU law. This decision was a reminder of the critical role that EU law plays in underpinning and strengthening domestic law on discrimination, including as regards the mechanisms for its enforcement.

Looking back over 50 years of Irish and European law on equality, the relationship between these two has evolved considerably. Following accession, Community law was instrumental in compelling Ireland to guarantee the right to equal pay and equal treatment in the workplace for women. Had Ireland not joined the Community, the path to law reform would likely have been much slower and less effective. Recent decades reveal a more elaborate relationship. In certain respects, Ireland's domestic legislation moved ahead of the minimum required by EU law and, in this way, it made a positive contribution to the evolution of European law reform. In 2023, the Irish government intends to publish proposals for reform of domestic legislation. This is expected to address issues such as discrimination on grounds of gender identity or socio-economic disadvantaged status, and intersectional forms of discrimination. If these reforms are adopted, Ireland could again offer an example of possible future directions for EU law.

The quality of sovereignty

Iyiola Solanke

It can generally be agreed that the purpose of sovereignty is to enable a government to protect the best interests of its citizens. To what extent did UK membership of the EU preclude this?

In order to answer this question, evaluative criteria are required. In the context of the EU, the discussion on sovereignty tends to focus on *quantity* – the greater the scope of action of the EU and its institutions, the lower the sovereignty of the Member States. From this perspective, sovereignty is a zero-sum affair – less means less. However, sovereignty can also be assessed from a qualitative perspective, with a focus on its *quality*, or character, rather than its scope. Needless to say, the *character* of sovereignty should also protect the best interests of the citizens.

Taking this latter as my focus, my question is therefore whether membership of the EU affects the *character* of sovereignty and prevents Member States from protecting the best interests of its citizens. Such a broad question will be narrowed down in this short contribution to a focus on equality. In the following paragraphs I will therefore explore whether withdrawal from the EU by the UK was a prerequisite to improve the *quality* of sovereignty in the UK and protect the best interests of the citizen in relation to equality.

An answer to this question can be found by examining the response of the British government to the decision of the Court of Justice of the EU (CJEU) in the *Zambrano* case. The response suggests that EU membership did not affect the quality of sovereignty and in contrast demonstrates the ongoing autonomy of the UK to determine the character of sovereignty whilst still an EU Member State. A close examination shows that in fact the government was able to use its sovereign powers to tailor-make inequality by introducing new laws that created a hostile environment not only for tax-paying non-nationals but also for the British citizen children in their care.

The Zambrano decision

The Zambrano case concerned the attempt by the Belgian authorities to deport a family who had remained in the country after an unsuccessful claim for asylum. Despite the failed asylum claim, the family resided lawfully – the father had full employment and paid all relevant taxes. Whilst there, two children were born who were given Belgian citizenship and so as per Article 21 TFEU automatically became EU citizens.

The attempt to deport the parents was deemed contrary to EU law by the CJEU. Disagreeing that this was a 'wholly internal' situation, Advocate General Sharpston argued that persons should not be treated in the same way as goods and services and taking *Rottman* and *Chen* as a new starting point, she argued that once nationality is granted to persons,

> … the children [Jessica and Diego] became citizens of the Union and entitled to exercise the rights conferred on them as citizens, concurrently with their rights as Belgian nationals. They have not yet moved outside their own Member State. Nor, following his naturalisation, had Dr. Rottman. If the parents do not have a derivative right of residence and are required to leave Belgium, the children will, in all probability, have to leave with them. That would, in practical terms, place Diego and Jessica in a position capable of causing them to lose the status conferred [by their citizenship of the Union] and the rights attaching thereto. [para. 95]

In response the Grand Chamber of the CJEU concluded that Article 20 TFEU does indeed preclude a Member State from refusing residency to a third country national upon whom his minor children, who are European Union citizens, are reliant – such a decision was deemed to deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen.

The response in the UK I – legislative autonomy and the quality of sovereignty

Zambrano extended the boundaries of EU citizenship beyond the limits set out in the earlier case of *Chen*: it extended derived rights to the carers of *non*-migrant EU citizens, granting them residency rights under EU law regardless of their status under national law. This seemingly infuriated the British authorities – while some countries, such as Ireland re-opened previous cases to re-appraise removal decisions, in the UK national law was in 2013 specifically changed to limit the impact of *Zambrano*. The objective was to maintain the specific character of a hostile environment to migrants in Britain, as per official Conservative/Liberal Democratic policy by intentionally designing measures to exclude Zambrano carers from key mainstream benefits: sovereignty was ultimately used *against* the best interests of child British citizens.

The legislative response saw the introduction of three Regulations (SI 2012/2587, 2012; SI 2012/2612, 2012; SI 2012/2588, 2012) designed to exclude anybody residing on the basis of *Zambrano* from welfare rights *that they would otherwise have* as lawfully resident persons. In 2012, at the same time that the EEA Regulations 2006 implementing Citizenship Directive 2004/38 were amended to give effect to the *Zambrano* decision, the Coalition government introduced these statutory instruments as part of the Immigration (European Economic Area) (Amendment) (No.2) Regulations 2012 (the 'Zambrano Amendments') which banned Zambrano carers – those in work and those out of work – from mainstream income-linked housing and welfare benefits including income support, jobseekers

allowance, employment allowance, pension credit, housing benefit, council tax benefit, child benefit and child tax credit. Zambrano carers became part of a group that has 'no recourse to public funds' or NRPF.

The response in the UK II – judicial autonomy and the quality of sovereignty

Although challenged before the national courts, the Amendments have been upheld and sanctioned by the UKSC. The judicial response was to support the Amendments as lawful in a series of cases, culminating in the Supreme Court decision in *HC*. Ultimately, the UK Supreme Court focused on the immigration status of the non-UK national rather than parental status or the status of the child.

In one of the first cases, *Harrison,* Elias LJ introduced in the standard dicta for understanding the *Zambrano* principle. Dismissing a broad approach to the CJEU ruling, he stated:

> ... The right of residence is a right to reside in the territory of the EU. It is not a right to any particular quality or life or to any particular standard of living. Accordingly, there is no impediment to exercising the right to reside if residence remains possible as a matter of substance, albeit that the quality of life is diminished (paragraph 67).

The *Harrison* dicta was repeated in all challenges to the Zambrano amendments.

The idea of focusing on the best interests of the child was explicitly excluded – judges confirmed that the quality of life of these infant black British citizens is not a primary concern. For example, in *Hines* Vos J. explicitly stated that the 'best interest of the child' was not a priority. Maureen Hines, a Jamaican citizen without permission to remain in the UK, was refused housing assistance despite being mother to a five-year old British boy, Brandon. Lambeth Council decided that even if the refusal caused Hines to leave the UK, Brandon's father, who had an EU right to permanent residence in the UK, could – and partially did – look after him.

Hines unsuccessfully appealed Lambeth's decision but two specific questions went to the Court of Appeal: first, should a higher level of review apply given the engagement of Article 20 TFEU and secondly, what is the correct test when considering whether the removal of the mother jeopardized the continued residence of the EU citizen: the EU Charter 'best interests' of the child especially given Articles 7 (respect for private and family life) and 24 (rights of the child) CFR or the UK statutory test of practicality laid out in Regulation 15A (4A) (c) of the Immigration Regulations?

Vos J. ruled that

> .... The reviewer was not obliged to consider Brandon's interests as paramount, though his interests were indeed to be taken into account ... (*Hines* EWCA Civ 660, 25).

The courts in the UK held that the substance of the *Zambrano* right to reside remained intact even if the *Zambrano* carer was left destitute and thus unable to care for their child who was a British/EU citizen. *Zambrano* carers were left in no doubt that – at least while the UK was a member of the EU – they had a right to reside; however, they could not expect support to provide safe and secure lives for their British child. For their children who are British citizens and differed from other British citizens only because their primary carer was not an EU national, it meant they had no right to the quality of life guaranteed to their fellow citizens in similar need.

Throughout the cases, only Supreme Court President Lady Hale recognised that Zambrano carers "are not like any other third country nationals. They have British (or other EU citizen) children dependent upon them" (paragraph 41). She made explicit the link between the treatment of the mother and the life-experience of the British child:

> I have found this a very troubling case. It is not a case about adults' rights. It is a case about children's rights – specifically the right of these two very young British children to remain living in their own country and to have the support which they need in order to enable them to do so. Self-evidently they need the support of their mother in the shape of the care which she is able to give them. But they also need support in the shape of a place to live and enough to live on (paragraph 39).

Finally, COVID demonstrates Lady Hale's foresight in posing the fundamental question ignored by all others: how the "…children would be supported if the parent looking after them was unable to work, whether because of the demands of childcare or for any other good reason"' (paragraph 41). Although the Zambrano Amendments were temporarily disapplied by some councils, they may indeed have contributed to the disproportionate rates of infection, hospitalisation and death during COVID-19 in Black and minority ethnic communities across the UK.

Autonomy to determine the quality of sovereignty

The purpose of this post is to consider sovereignty by examining the extent to which membership of the EU prevented the UK government from pursuing the best interests of its citizens. In order to answer this question, I looked not at the scope of sovereignty but at its character, in particular in relation to equality.

Analysing the legislative and judicial response of the government to the CJEU decision in *Zambrano* shows how national law was used to create first, hostility to citizens from beyond the EU and second, a new generation of unequal – predominantly – Black British citizens: the hostile environment for all immigrants was transferred into an especially hostile environment for (black) British citizens. The

Amendments made their parents unequal residents, transforming the children into unequal citizens, a status that could potentially stretch beyond childhood into adolescence and throughout adulthood. Instead of British nationality improving the situation of the non-EU parent, non-EU nationality worsened the situation of the British child.

The Zambrano Amendments demonstrate the ability of the government to exercise legislative autonomy in Britain to maintain the desired character of sovereignty despite membership of the EU. Furthermore, the Zambrano carers were also initially excluded from the EU Settlement Scheme, created for EU citizens in the UK to retain a right to reside. It was only from May 1st 2019 that those resident in the UK as Zambrano carers became eligible to apply for settled status through this scheme, albeit with limited success. The decision by the Court of Appeal in the Akinsanya case further increased the scope of application for Zambrano carers. Since Brexit, Zambrano carers in the UK therefore have lost a right to reside based on EU law and must apply for this right under national law. It is a status that now only applies to those present in the UK prior to Brexit.

The UK response to the *Zambrano* decision illustrates how national sovereignty is exercised as a member of the EU – the government used national law to restrict to the minimum its obligations under EU law to carers and parents from beyond the EU/EEA looking after EU/British nationals. It is noteworthy that during the many years of deliberation on Zambrano Amendments, at no point was a question referred to the CJEU under Article 267 TFEU, highlighting the extent to which the British judiciary claimed competence to determine the quality of sovereignty in the UK. This further suggests that even as part of the EU, the UK retained autonomy to determine the quality of legislative and judicial sovereignty.

This analysis builds upon Iyiola Solanke (2020) 'The Impact of Brexit on Black Women, Children and Citizenship' Journal of Common Market Studies.

Navigating uncharted waters? Ireland's differentiated participation in the Common European Asylum System after 'Brexit'

Janine Silga

This contribution will briefly assess Ireland's participation in the Common European Asylum System (CEAS) after 'Brexit'. It will first review the way in which the 'opt-in/opt-out' arrangements still apply to Ireland, before considering how Ireland's position might have evolved after Brexit. In this respect, it will feature some recent cases of the CJEU.

The focus on the CEAS appears relevant in light of the disturbing developments taking place in the UK with regard to asylum, and especially the recent policy to externalise the assessment of asylum claims to Rwanda. Entailing the physical removal asylum-seekers to this country, this policy has led to serious concerns for their fundamental rights voiced both by scholars (see here and here) and the European Court of Human Rights (see here and here). Although Ireland considers the UK to be a safe third country for refugees, it is likely that their respective asylum policies will diverge even further, owing to their now very different positions with respect to EU law and especially the CEAS.

Overview of the Irish exceptions to the AFSJ

One of the main reasons why Ireland and the UK have followed a similar approach when it comes to the EU migration policy – including asylum – has been their willingness to preserve the special arrangements existing between them as part of the Common Travel Area (CTA) going back to the early twentieth century. In this sense, article 2 of Protocol no. 20 on the application of certain aspects of article 26 of the TFEU to the United Kingdom and to Ireland mentions that they 'may continue to make arrangements between themselves relating to the movement of persons between their territories' designated as the 'Common Travel Area'. This explains why in spite of UK's withdrawal from the EU, Ireland has 'prioritise[d] the CTA' for geographical, historical and political reasons (see Imelda Maher here).

While the Protocol on Ireland and Northern Ireland and the Trade and Cooperation Agreement between the EU and the UK intend to leave the CTA 'untouched' by the consequences of Brexit, they hardly address the way in which third-country nationals – defined as neither EU nor British or Irish citizens – may be affected (see Tobias Lock here).

After the adoption of the Amsterdam Treaty, migration-related issues were transferred from the 'third pillar' on cooperation in the field of Justice and Home Affairs established by the Maastricht Treaty, to the 'first' or 'Community pillar' in Title IV of the Treaty establishing the European Community – now Title V of the TFEU on the Area of Freedom, Security and Justice (AFSJ). In addition to migration, the AFSJ now includes judicial cooperation in civil and criminal matters, and police cooperation.

The Amsterdam Treaty also led to the integration of the Schengen *Acquis* into the framework of the EU through the adoption of a separate protocol. To accommodate the political concerns of some Member States, the Amsterdam Treaty allowed three of them not to participate (fully) to the new Title IV and/or the Schengen *Acquis*. This was the case of Ireland and the United Kingdom – which followed a similar position – and Denmark. For these three Member States, all of whom incidentally joined the EU at the same time, separate protocols were added to determine the extent of their participation in this new policy framework.

These protocols now correspond to Protocol no. 21 on the position of Ireland – and formerly the UK – in respect of the AFSJ and Protocol no. 22 on the position of Denmark. The position of Denmark is more straightforward as it largely corresponds to a complete 'opt-out' from measures adopted under Title V. Indeed, Ireland and the UK were concerned by the very objectives of the measures pertaining to the AFSJ, while Denmark was rather concerned with their legal status. This explains why Denmark has participated in some aspects of the CEAS on the basis of international law (for example, see here), whereas Ireland – and previously the UK – could opt into individual measures based on Title V depending on their subject matter. They were also given the opportunity to participate in some measures of the Schengen *Acquis* as currently provided in Protocol no. 19.

Ireland and the UK largely followed the same approach in the way in which they used their options under the 'opt-in/opt-out' arrangements. The position of Ireland may be described as slightly more open to opting into a broader range of AFSJ measures. This essentially stems from Declaration no. 56 to the Treaties on Article 3 of Protocol no. 21. In this Declaration, Ireland clearly expressed its commitment to the AFSJ and its intention to 'participate to the maximum possible extent in measures in the field of police cooperation.' Also mentioned in Declaration no.56, Ireland may renounce the Protocol altogether, so that 'normal treaty provisions' would apply to it (article 8 of Protocol no. 21).

Protocol no. 21 concerns the whole AFSJ, thus including asylum. In the EU terminology, 'asylum' refers to 'international protection' as part of the CEAS, comprising: statutory asylum – following the criteria of the 1951 Geneva Convention on the Status of Refugees – subsidiary protection and temporary protection (article 78 TFEU).

Under this Protocol, Ireland and the UK were granted a general 'opt-out' from all of these issues. However, Ireland has the possibility to 'opt-into' each measure, according to article 3 of the Protocol. To do so, it may notify the President of the Council of its intention to participate in its adoption within a period of three months after a proposal or initiative is presented at the Council. If Ireland opts into a proposal, then the Council tries to agree on the proposal with its participation. When this is not possible, the Council may adopt the measure without Ireland's participation. Even if it does not opt into a proposed measure within the deadline – or if it opted in but the measure was adopted without it – Ireland may still join in later under the general conditions applying to enhanced cooperation.

An addition of the Lisbon Treaty, the new article 4a regards the position of Ireland when a proposal is made to amend a measure by which it is already bound. Although the protocol applies in such cases, it is possible for the Council to determine that the non-participation of Ireland in the proposed amended measure makes the existing measure 'inoperable' and to urge Ireland to notify its intention to opt into the proposal while it is being discussed or after its adoption. If Ireland fails to do so after a period of two months, the existing measure ceases to apply to this State. The Council may also impose some financial sanctions on Ireland as a result of the cessation of its participation in the existing measure. However, Ireland may always opt into the original act and its amending measure after the latter was adopted.

Article 4 of Protocol no. 19 on the Schengen *Acquis* gave Ireland and the UK the possibility to participate in only part thereof, subject to a favourable unanimous decision of the Council. In practice, the Council accepted the UK's application for partial participation in Schengen in 2000, and the parallel Irish application in 2002. The partial participation of the UK took effect in 2004. In the case of Ireland, the Council only adopted an Implementing Decision in December 2020 putting into effect the provisions of the Schengen *Acquis* on data protection and on the provisional putting into effect of certain provisions of the Schengen *Acquis* in Ireland.

Ireland's participation in the CEAS: state of play and future perspective

Ireland has opted into most of the 'first-phase' measures establishing the CEAS, including: the 'Dublin II' Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining asylum applications, Directive 2004/83 (first 'Qualification' Directive) and Directive 2005/85 (first 'Procedures Directive'). Interestingly, Ireland did not participate in the adoption of the first 'Reception Conditions' Directive (Directive 2003/9/EC) because of the recognition of a right to work for asylum seekers (see here) – but the UK did.

On the other hand, Ireland has opted into the recast 'Reception Conditions' Directive (Directive 2013/33) in 2018, a change welcome by many including Liam Thornton. Also, while Ireland did not initially participate in the adoption of the Temporary Protection Directive (Directive 2001/55), it subsequently requested its participation in this instrument on the basis of enhanced cooperation. This was granted in a Decision of the European Commission of October 2003.

Steve Peers has observed that 'the UK and Ireland have opted into: most or all of the first-phase measures establishing the CEAS but only a few of the second-phase measures…' In this sense, he described the approach of the two Member States as 'largely but not entirely consistent'. This has led to some inconsistencies as illustrated in a case of December 2020, *M.S. and Others v Minister for Justice and Equality* (C-616/19). In this case, the Irish authorities were deprived of the possibility to deem applications for international protection inadmissible on the basis that the applicants had already been granted subsidiary protection in Italy. Under EU law, this could have only resulted from the combined application of the 'Dublin III' Regulation (Regulation 604/3013) – which succeeded to the 'Dublin II' Regulation – and the recast 'Procedures' Directive (Directive 2013/32). Ireland had opted into the 'Dublin III' regulation but it had decided not to opt-into the recast Procedures Directive. This resulted in a situation that was inconsistent with the CEAS 'due to the choices made by Ireland' as noted by Advocate General Saugmandsgaard Øe in his Opinion (paragraph 75). While admitting that this situation might have stemmed from Ireland's choice under Protocol no. 21 (paragraph 46), the Court gave a solution to this legal 'dead end' by ruling that this Member State could still introduce such an inadmissibility condition in its national law. To reach this conclusion, the Court relied on the 'logic' and objectives of the CEAS, mentioning the fundamental importance of the principle of mutual trust on which the whole system is based (paragraphs 45-48).

While this case illustrates the tensions created by the asymmetric participation of Ireland in the CEAS, it is unlikely that the Court would have found otherwise even before Brexit. The two following cases might provide for more tangible illustrations of the impact of Brexit in relation to the – so far – flexible participation of Ireland in the CEAS.

Although it was ruled before the UK formally left the EU, the first case clearly depicts the situation that Ireland might face as a direct consequence of Brexit. In this judgment of January 2019 (*M.A. and Others v The International Protection Appeals Tribunal and Others*, C-661/17), the Court had to address a question on the functioning of the Dublin mechanism concerning a Member State – the UK – that had notified its intention to leave the EU. In this case, the applicants had applied for asylum in Ireland while the UK was the Member State responsible for examining their claim following the 'Dublin' criteria. The applicants sought to challenge their transfer to the UK on grounds relating to the withdrawal of this

State from the EU, leading the referring court to ask the CJEU about the concrete implications for Ireland and especially whether this Member State would have to examine the applications for international protection. In its decision, the Court confirmed that EU law had to apply until the actual withdrawal of the UK meaning that there was no concrete impact for Ireland – at least thus far.

The second case might appear as a 'sequel' to the first judgment, although it focuses on different issues. Joined cases *KS and Others v The International Protection Appeals Tribunal and Others* (C-322/19 and C-385/19) concerned the exclusion of asylum-seekers' from access to the labour market – guaranteed to them by article 15 of the recast Reception Conditions Directive – on the grounds that a transfer decision had been adopted in their regard. With the exception of one of them, all the applicants were subject to a decision to transfer them to the UK from Ireland following 'Dublin' rules. In its judgment, the Court confirmed that such asylum-seekers also benefitted from the right to work under Directive 2013/33 on the basis that there is only one category of applicants for international protection in the CEAS (paragraphs 61-73).

Apart from this key conclusion, the Court provided very interesting guidance on the impact of Protocol no. 21. One of the referring courts had asked whether a national court should take into consideration the recast Procedures Directive – that does not apply to Ireland – to interpret the recast Reception Conditions Directive, which Ireland has decided to implement. The Court gave a positive answer relying on the need to 'ensure a uniform interpretation and application' of the relevant Directive (paragraph 59). The Court especially mentioned that the two instruments 'belong to the same body of law' meaning that the provisions of the Procedures Directive 'constitute relevant and necessary contextual elements' to interpret the Reception Conditions Directive (paragraph 58). Albeit formulated in a rather discreet way, this conclusion of the Court may have a powerful impact on Ireland's opt-in/opt-out practice in the future. Indeed, similar to the Court's findings in *M.S.*, in *K.S.*, the Court clearly prioritised the coherence of the CEAS over the arrangements existing in Protocol no. 21.

It is too early to assess the full impact of Brexit on Ireland's variable participation in the CEAS. Not only because this would require to take into account its implications for the whole AFSJ but also because a deeper attention should be paid to internal political dynamics that can hardly be covered in such a narrow space. However, the recent legal and judicial developments briefly presented here point to somewhat unexpected directions that may be attributed at least in part to Brexit. The first one consists in an increasing functional convergence between the CEAS and the Irish position under Protocol no. 21 with the result that measures of the CEAS are somehow applicable to Ireland even in the absence of an explicit opt-in. Apart from the cases mentioned in this contribution, another clear example is the *SN*

and SD (C-479/21 PPU) case on the European Arrest Warrant. Conversely, Ireland might face more tensions between its special arrangements with the UK suggesting the need for them to develop a common approach to migration and its commitments resulting from EU membership. In light of Brexit – and the relatively isolated position of Ireland in the AFSJ – it is unclear how these tensions will find a resolution fully consistent with both the CTA and the AFSJ.

How EU membership transformed Ireland's socio-legal norms: the case of abortion

Federico Fabbrini

In 1973, Ireland joined what would become the European Union (EU) in the first ever enlargement of the project of European integration. To say that 50 years of EU membership have been transformative for Ireland is an understatement. By all benchmarks considered, Ireland is a radically different country today than it was when it joined the EU.

Economically, in 1973 Ireland was by far the poorest member state, with an agricultural economy, lagging behind the the other member states which had more developed industrial economies. Also thanks to a significant influx of EU regional and structural funds, and the transition to digital tech and financial services, Ireland has become today one of the most thriving economies of the EU and the Eurozone. In fact, notwithstanding the pandemic, Ireland was the only EU member state to grow in 2020, and, in the new EU 7-year budget cycle 2021-7, it became a net payer, rather than a net beneficiary, of EU fiscal transfers.

Politically, in 1973 Ireland was a marginal member state, still suffering from the legacy of centuries of British rule. Largely thanks to EU membership – and the dividends of the peace process in Northern Ireland reaped through the 1998 Belfast/Good Friday Agreement – Ireland has acquired a role in EU affairs which far outweighs its small size. In fact, following Brexit, Ireland turned into a hub of EU decision-making, and today, despite its small population (5M) the country punches above its weight, filling key posts in the EU institutions, including the Presidency of the Eurogroup and the Chief economist of the European Central Bank.

However, arguably an even more remarkable change for Ireland occurred at the socio-legal level. As Fintan O'Toole has pointed out in his award winning book "We Don't Know Ourselves", in 1973, Ireland was a back-ward, conservative country, heavily dominated by the Roman Catholic Church's theology. The influence of religious doctrine imbued the 1937 Irish Constitution, which among others prohibited divorce. Legislation dating to the early years of the Irish state compelled women who got married to resign from work. And most famously, the 8th Amendment to the Irish Constitution, introduced in 1983, prohibited abortions in almost all circumstances – except when necessary to save the life of the mother, as the Irish Supreme Court held in the 1992 *X* case.

Fifty years later, Ireland stands today as one of the most liberal, and progressive countries – not just in the EU, but arguably of the whole Western world. As is well known, also in response to the increasing awareness of the abuses of the Catholic clergy, in recent years the country consciously rejected its past, and moved convincingly in the direction of greater equality. Indeed, a string of constitutional referendums paved the way for legalized divorce (1995), marriage equality (2015), abortion (2018), and blasphemy (2018), with a new ballot announced for November 2023 remove reference from the Irish Constitution to role of the women in the family

As I have argued in my work, including in my recent article "The 'European' Future of American Abortion Law", EU membership and the influence of European laws have a key role in explaining such profound transformations in Ireland's social and legal norms. This influence at time was direct – as when in 1977, EU anti-discrimination law required Ireland to ditch its marriage bar for women in employment. Nevertheless, at other times the influence was indirect, and interplayed with domestic movement for change.

Abortion provides the best example of this. When Ireland introduced its abortion ban, European law seemed silent on the matter. Nevertheless, in the early 1990s, rulings by the European Court of Justice in *Grogan*, and the European Court of Human Rights (ECtHR) in *Open Doors Counselling*, began to edge the Irish abortion ban – allowing women in Ireland to travel overseas to seek abortion, as an EU service, and entitling them to receive information about a service lawfully provided out of state. This led to a first round of legal reforms in Ireland, with the approval of the 13th and 14th amendments to the Irish Constitution in 1992 recognizing a right to interstate travel and a right to access information about abortion.

Moreover, while the Irish abortion ban ultimately withstood scrutiny for compliance with the European Convention of Human Rights (ECHR), in the landmark 2010 ruling in *A., B., & C. v. Ireland* the ECtHR held that Ireland had breached its positive obligation under the ECHR for failing to institute an effective process whereby a patient could obtain an abortion in the limited cases when it was entitled to it under the *X* doctrine. This force Ireland back again to the drawing board, and in 2013 the state adopted its first abortion law – the Protection of Life During Pregnancy Act – eventually regulating termination of pregnancy in some few cases in the state.

Needless to say, the Irish government also sought to fend off the influence of European law. In particular, during the Maastricht Treaty negotiations, Ireland secured a special Protocol designed to shield its abortion ban. Similarly, following the 2008 referendum rejecting the Lisbon Treaty, the European Council approved at Ireland's request a declaration, confirming that the Treaty would not affect the Irish abortion prohibition. Yet, resistance to EU law only confirms the powerful transnational

pressures that the EU wielded on Ireland's socio-legal norms. In fact, the option to escape the Irish abortion ban that was offered by European law progressively undermined the fairness of a draconian prohibition that only applied to those disadvantaged women who had no means to travel overseas and oppressed those who could not remain ‚at home' when undergoing the procedure.

As is well known, eventually in 2018 the Irish people voted in a landslide to remove the controversial procedure banning abortion. And the Health Regulation of Termination of Pregnancy Act—which entered into force in 2019 – implemented the referendum by permitting abortion any time in cases of risk to the woman's health and life, and fatal foetal abnormality, and introducing an early pregnancy termination at the request of the woman subject to the medical practitioner certification that the pregnancy has not exceeded 12 weeks. The Act sets a three-day waiting period before elective abortions, but no counselling process is required. As such, Ireland's abortion law is today (at least on the books) one of the most liberal across the EU.

Certainly, other factors played a role in the transformation of Ireland's abortion law. To emphasize the impact of European law does not imply to diminish the importance of grass-root women's activism for repealing the 8th Amendment, and indeed the significance of the bottom-up deliberative process led in 2017 by a citizen's assembly that paved the way to the abortion referendum. But there is no doubt that, in institutional terms, supranational law provided language, leverage and legitimacy to a domestic movement to repeal the abortion ban. The EU, and the ECHR for that matter, required Ireland to adapt, and empowered human rights activists who fought for domestic change.

As Ireland celebrates its 50th anniversary in the EU, its trajectory represents an example of how European integration can transform countries, and promote an adjustment of socio-legal norms, also in sensitive ethical domains. Needless to say, comparative research is needed to assess whether what is true for Ireland holds for other member states too. For example, 20 years since joining the EU, Malta's abortion laws have not been loosened, and Poland's have even been tightened. Yet, Ireland's success story in the EU – its economic, political and socio-legal growth – is a testament of the power of European integration, and an explanation why EU membership continues to be craved (pace Brexit) from Ukraine to the Balkans and beyond.

A fond embrace? 50 years of EU law before the Irish courts

Suzanne Kingston

As with any relationship, significant anniversaries offer us an opportunity to take stock. Looking backwards allows us not only to appreciate how far we have come, but also, perhaps, to reflect on the direction in which we might be heading.

To date, upwards of 2,200 judgments of the Irish courts have considered EU or Community law in some form (this contribution uses the term "EU law" as a catch-all for both). It is easy to lose oneself in the sheer volume of case-law being handed down in increasingly complex and technical fields where EU law plays an important role. Added to that, the nature of the EU has, as we know, changed in rather fundamental respects over the past fifty years, spanning five Treaty amendments and expanding the acquis to now major fields that were nowhere foreseen in the original Treaty of Rome – think of environmental law, asylum and immigration law, data protection law, extradition law. Ireland's own role in contributing to the development of EU law has also changed, not least because, post-Brexit, we are now the only fully common law jurisdiction within the EU.

Against this context, this short contribution reflects on the reception of EU law in the Irish courts since 1973. While it is impossible to do justice to the richness and variety of judicial approaches discernable over five decades of jurisprudence, it argues that three major themes can be identified in Irish courts' approach to EU law to date. The first is *openness*: a willingness of courts, but also of legal practitioners, to engage with and invoke EU law, from almost the outset after accession. The second theme is *confidence*: Irish courts' confidence in interpreting and applying EU law – and assessing when not to apply it – is increasingly striking, in particular over the past decade. The final theme is *limits*: looking back, one can discern certain potential constitutional limits on EU law, although these have never materialized in practice.

Openness

The openness of Irish courts to EU law, from early on, may in part be explained by the nature of the Irish Constitution. That provides, *inter alia*, that the sole and exclusive power of making laws for the State is vested in the Irish Parliament and that no other legislative authority has power to make laws for the State (present Article 15.2.1°). It also provides for a typically dualist approach to the reception of international law, namely, that no international agreement shall be part of the domestic law of the State save as may be determined by the Parliament (present Article 29.6). The Constitution was

amended in 1972, following a referendum, to enable membership of the EEC, Euratom and the ECSC, in the following terms:

"No provision of the Constitution invalidates laws enacted, acts done or measures adopted by the State *necessitated by* the obligations of membership of the Communities or prevents laws enacted, acts done or measures adopted by the Communities, or institutions therefore, from having the force of law in the State." (emphasis added)

This amendment was followed by the enactment of the European Communities Act 1972 which provided, inter alia, that Community law "shall be part of the domestic law of the State" (section 2).

This clear and straightforward language sought to avoid any reluctance that might otherwise have been anticipated in applying Community law in Irish courts, given the otherwise dualist approach to international law foreseen by the Constitution. Added to this, Irish courts had, at the time of accession to the Communities, already developed a robust line of jurisprudence making clear that judicial review extended to assessing the compatibility of legislation with the Constitution. As a result, the concept of upholding rights conferred by a higher law in the face of inconsistent legislation was not, as such, novel.

All of this meant that Irish judges were, from the outset, rather comfortable with the potential implications of Community law as a matter of principle (in contrast to their brethren across the Irish Sea for instance, where, in the absence of a written constitution, matters were rather different). Writing in the early years after accession, for instance, one of Ireland's most renowned Supreme Court judges, Brian Walsh, observed that most Irish judges had already accepted that, when applying Community law, they had "in effect ceased to be a national judge" and had become a Community judge. Indeed, it is striking how readily the doctrine of supremacy of Community law was recognised by Irish courts, with Finlay CJ confirming in the Supreme Court that the "decisions of the ECJ on the interpretation of the Treaty and on questions covering its implementation take precedence, in case of conflict, over the domestic law and the decisions of national courts of Member States" (*Crotty v An Taoiseach*).

Similarly, the Irish courts had no hesitation in granting an interlocutory injunction suspending the application of domestic legislation pending the outcome of a preliminary reference on its compatibility with Community law (*Pesca Valentia*). Again, one can compare the difficulties encountered in the House of Lords, which had wrestled with the fact that the English courts had no power to make interim injunctions restraining the enforcement of a statute, a problem ultimately resolved by the preliminary reference in the *Factortame* litigation. Further, the Irish Supreme Court has long recognised the

"untrammeled discretion" of Irish judges to make a preliminary reference to the CJEU (*Campus Oil (No. 2)*). Nor did Irish judges have any difficulty as a matter of principle with the concept of Member State liability in damages for breach of Community law, with the Irish courts, quite remarkably, accepting this principle as a logical consequence of the State's Treaty obligations some four months before the CJEU's seminal ruling in the *Francovich* case.

While this openness to the fundamental precepts of Community law may seem obvious in retrospect, it is worth pausing to reflect on those constitutional conflicts that have never occurred before the Irish courts. The Irish courts have had, for instance, no *Simmenthal* or *Frontini* moment, concerning the question whether it is for national courts, or the CJEU, to decide whether or not supremacy is engaged; nor have they had a *Solange* moment, reserving to themselves the ultimate right to review national measures implementing EU law for compliance with national fundamental rights; neither have they had a *Weiss* moment, applying the doctrine of *ultra vires* to CJEU jurisprudence. This relative ease of reception is arguably due to the manner in which Community law was given constitutional recognition in Ireland from the very outset. There was simply no need for an Irish judge to consider whether or not to recognise any self-standing principle of supremacy of Community law, because Article 29.4.6 of the Irish Constitution required recognition as a matter of Irish constitutional law.

Against this, an examination of the case-law shows that, while Irish judges were generally notably open to Community law when it came before them, such cases were in reality relatively rare. Furthermore, this openness did not initially extend to frequent use of the preliminary reference mechanism. Thus, for the first three decades after accession, Ireland had the lowest rate of referral across Member States. Significantly, however, it was the Irish Supreme Court, rather than lower courts, that initially took the lead in referring matters to Luxembourg, particularly from the 2000s onward, influenced no doubt by the presence of a number of former EU judges on the Supreme Court (Dónal Barrington, Nial Fennelly, Fidelma Macken and John Murray). Again this may be contrasted with certain other Member States, where it has taken longer for apex courts to start making references. Moreover, in the past ten years, the data show that there has been an explosion in the numbers of preliminary references being made by the Irish courts. While 68 cases were referred in total in the first forty years after accession, in the ten years thereafter 84 references were made. Of these 84, 47 (i.e., almost 56%) were referred by the Irish Supreme Court, showing a remarkable level of engagement by Ireland's court of last resort with the CJEU.

Confidence

Added to this, the years since 2010 have witnessed what may be viewed as a new era of engagement between the Irish courts with EU law. A significant number of cases have gone beyond the application of EU law, to seek actively to develop the substance of vital principles of EU law, via the preliminary reference procedure.

Perhaps the most obvious example of this phenomenon are the data protection and privacy cases referred by the Irish courts, which have given rise to seminal CJEU judgments such as *Digital Rights Ireland*, on the validity of the Data Retention Directive, *Schrems I*, on the validity of the Safe Harbour decision, *Schrems II*, on the validity of the Privacy Shield, and G.D., on data retention and serious crime. The fact that these cases have emanated from the Irish courts is in part a function of the system of jurisdiction of supervisory authorities instituted by the General Data Protection Regulation. Nevertheless, it has undoubtedly given a distinctively common law flavour to the references – enabling, for instance, a detailed adversarial hearing and subsequent judgment considering the content of relevant US privacy law prior to the reference in *Schrems II*, for instance.

Beyond data protection, Irish references have given rise to seminal CJEU judgments in, for instance, asylum and immigration law (for example, *N.S.* on the limits of the Dublin Regulation system in cases of systemic deficiencies in fundamental rights protection), European Arrest Warrant law (for example, *L.M.* on the interaction between the rule of law and the EAW system) and EU constitutional law (for example, *Pringle* on the validity of the European Stability Mechanism Treaty).

These are cases that have established ground-breaking principles that have implications across the EU, and beyond. Moreover, Irish courts at the highest level have continued to make references, and accept the CJEU's ruling in response, even when they do not necessarily agree with the outcome. Recent examples might include the *Workplace Relations Commission* case, concerning the power of an administrative tribunal to set aside a legislative provision, and the recent *Orlowski* case, concerning the surrender of a suspect to Poland under the EAW system. In the latter case, the Supreme Court accepted and applied the CJEU's ruling despite, it would seem, being uncomfortable with the idea that an applicant would have to provide specific evidence of lack of independence of the judges that would deal with his case in Poland, where the identity of those judges had not yet been decided.

Limits

The case-law also demonstrates, however, that there have been limits – and perhaps distinctively Irish limits – to the openness of the Irish courts to EU law. Writing in 1973, Brian Walsh predicted that, if

there was one subject to which Irish judges would be particularly sensitive in applying Community law, it would be human rights.

And so it turned out to be. To date, the most extraordinary constitutional moment highlighting the limits of EU law before the Irish courts has indeed concerned competing rights, and in particular the interaction between the Treaty provisions on free movement of services and the (now repealed) constitutional provision protecting the right to life of the unborn (then Article 40.3.3). In *SPUC v Grogan*, the High Court (Carroll J) had refused to grant an interlocutory injunction prohibiting the distribution of information on abortion services in the UK, referring a question to the CJEU on whether a prohibition of such distribution was compatible with a woman's right to travel to receive services in another Member State under Community law. On appeal of that refusal to the Supreme Court, Walsh J was clear that the CJEU's answer "will have to be considered in the light of our own constitutional provisions." In the last analysis, he ruled, only the Supreme Court could finally decide what the effects of the interaction of Article 40.3.3 and what is now Article 29.4.6 were. Constitutional crisis was ultimately averted by the fact that the CJEU did not answer the central question directly, holding that, on the facts of that particular case, the link between free distribution of leaflets providing information on abortion services and the free movement of services guaranteed by Community law was too remote. The Constitution was subsequently amended to specify that Article 40.3.3 did not limit freedom to travel to another State, and the Article was ultimately repealed in 2018 following a referendum.

Since *Grogan*, however, tensions of this nature have been rare, although the Supreme Court has recalled, considering the implications of the CJEU's *Melloni* judgment, that if the CJEU were to require it to disapply long-established constitutional rights, this would require "careful consideration in appropriate case and indeed sensitive and respectful dialogue between national courts and the ECJ" (*Balmer*).

Conclusion

Over the past half century, the Irish courts' approach to EU law has been characterised by openness, constructive engagement and, in recent years, a notable confidence in raising novel and difficult issues going to the core of the EU legal order. As with any healthy relationship, the dialogue has at times been reflective. Yet there is little doubt that this openness has enabled Irish courts to play a vital role not only in applying and enforcing EU law but in helping to develop its foundational principles – in EU fundamental rights law, EU constitutional law and beyond – with implications far beyond the Irish borders. *Go maire sé* – long may it continue.

This contribution is an excerpt from a paper given on the occasion of the Irish Society of European Law's 20th Brian Walsh Annual Memorial Lecture, Dublin, 8 December 2022. A full version of the paper is forthcoming in the Irish Journal of European Law. Thanks to Sophie Tuffy for excellent research assistance.

Number crunching EU Law and the Irish legal order: on data of the landscape of CJEU litigation (and glass house tomato law)

Elaine Fahey

In this short piece, I will outline a few of the extremes of the Irish relationship with Europe that I have personally studied or encountered and its impact in my view. Many years ago, I wrote a dissertation on the relationship between EU law and the Irish legal order, on the unravelling dynamic since accession, focussing upon the preliminary reference data (see here). I felt it was a deserving topic precisely because there was so little interest as to the relationship between EU law and Ireland. Ireland was uniformly always excluded from major US and EU political science studies that have been iconic in shaping views on EU integration, generally on account of its size, its extreme results (ie very few, very limited engagement) and perhaps also – from my own perspective – its limited political salience as a small island generally following the UK with limited resources to litigate – which I felt was a good reason to work on it. I no longer work so much on this area as much but always view recent developments in practice with much interest – mainly because there are many developments that appear to evolve dramatically my findings and make it a rich source of study.

For the first 30 years of membership: not so many references

In the 30 years of membership of the EU that I wrote about from 1973-2003 (in the early 2000s'), the preliminary reference mechanism provided for in ex Article 234 EC now Article 267 TFEU, I argued had performed a tremendous function in European legal integration despite the dearth of data. Yet the Irish judicial experience of European legal integration had been particularly remarkable and not in line with what one might expect. The total number of preliminary references from the Irish courts at 44 was comparably the lowest in all of the EU back at the time of the study, with the exception of certain states that recently joined the 1995 wave of accessions. My thinking then was to try to capture how the total number of preliminary references could not be seen as the measure of all things, being merely numerical. Agricultural law still notably dominated as the area of law most likely to be the subject matter of preliminary reference disputes and agricultural lobbies and farming-related organisations remained still notably the most litigious group eager to employ or test Community law in the Irish courts. Despite the fact that more and more areas of law are coming under EU law, the number of references overall made by the superior courts remained static, and indeed the rate of referral of references from some courts appeared to be in decline. Moreover, in general EU law appeared to arise

only infrequently in Irish courts, and the rate of refusals of preliminary reference applications appeared to be significant. I concluded that the High Court remained the most active referring court generally, although it appeared to have gone into decline in this regard of late.

Having presented and published this work in various fora thereafter, I felt there was a lot of interest in the numerical outcomes and also surprise generally at the extremities that the data showed up. Beyond the data and the caselaw and legal research narrative, I discerned from informal interviews limited interest in EU law related litigation across Irish government departments on account of limited staff with salient high level political, technical and legal knowledge to synthesise an Irish position and to participate in preliminary reference proceedings. The UK was and remained the key focus point for the academic study of litigation generally in EU law then as to common law countries and there was limited capacity to draw attention to Ireland's problems- arguably Brexit dramatically intervened in these debates. There was then also an extremely skeletal presence for Ireland in Luxembourg with capacity to intervene in EU litigation, up until very recent times. There was perhaps also a relatively high level of disinterest in EU law amongst practitioners in Ireland except for in highly specialist fields until more recent times. Very few members of the Irish judiciary then had sat on the CJEU bench. My conclusions were thus certainly despondent to a high degree- but luckily many issues identified by me rapidly shifted.

A dramatic shift in recent preliminary reference stats

Fast forward several years later and the picture is radically different. While only 44 cases were referred in its first 30 years of membership (1973- 2003), 45 references were made in the six years between 2013-2018, attracting much further attention: see Krommendijk and Fahey. A significant wave of Irish judges appointed to the CJEU and General Court and their return to the bench in Ireland often had a positive effect upon the EUY law expertise of Irish Supreme Court, with up to half of the Irish Supreme Court at one time recently having sat on the Luxembourg Court. (It is indicated by many- informally- post-Brexit that Irish lawyers now feature regularly (sources indicate 'weekly') before the CJEU on account of rule changes as to professional representation (although official data on this is hard to obtain and confirm at this juncture.) The last year of published data at the time of writing of 838 CJEU cases in 2021, 569 preliminary references does not feature Ireland in the top 5 of referring courts but Irish Courts are commonly understood now to refer 10-12 cases per year consistently. Environmental law has been a source of litigation, partly linked to Ireland's very poor track record in implementing EU environmental law- also the subject itself of many infringement proceedings- but is not the subject of the most recent year of litigation, with many private law fields dominating instead, indicating considerable economic and legal diversification of the Irish economy and its legal order.

Direct actions and Ireland

There is another way to see the context of this litigation history differently: Ireland had been an early and successful litigator in somewhat controversial circumstances, in a direct action. Subsequently, Ireland did not litigate much against the Council directly in its several decades of membership, perhaps exposing its voting patterns at the Council and its accord politically with much EU law and policy-making to date. A rare example was Case C-301/06 *Ireland v Parliament and Council* to annul a directive (data retention) on legal base grounds, litigated by the current Irish Advocate General. Instead, Ireland has a wealth of litigation initiated against the Commission, of at least 200 cases at the time of writing- and a lengthy history of intervening in support of UK-led or UK-related proceedings.

The first Irish direct action against the Council: glass house tomato law

One direct action case of note to me personally (only as a recent personal discovery I should doubly digress) is the rather curious first litigation of Ireland against the Council in 1974 on accession about glass house tomatoes- which is a bit more revealing than might meet the eye! Ironically, the place of glass house tomatoes resulted in a notable first Irish victory in the proceedings very shortly after its entry to the Communities in the field of agriculture. It even exposed tense engagement with a highly protected economy affected acutely by liberalisation of its markets. Ireland was to be protected by the Act on Conditions of Accession and the operation of a compensation system. Still, Ireland challenged the process for the new Member States related to tomatoes grown under glass. All tomatoes in Ireland were grown under glass given the climate, and were thus significantly protected before entry into the common market by temporary measures prohibiting imports, or making the latter subject to customs duty. Ireland argued that the applicable conversion factor was incorrectly applied in this instance.

Ultimately, the Court declared Regulation 1365/73 to be void, finding that the system of compensatory amounts laid down in Article 65 of the Act on Conditions of Accession was to facilitate adaptation to the Common Agriculture Policy and would otherwise would disregard the spirit and the letter of the Act on Conditions of Accession. One amusing feature of the case is the evidence of the use of the case as a favourable tool for new accession countries.

The case arguments expose well an early example of significant inter-institutional tension as to the process of accession and the place of discretion as to new Member States and hardship criteria. However, the case also suggests a highly misleading stance as to Irish engagement with the EU institutions through EU law and litigation, which ultimately would not be carried out.

The decision is simply notable for Ireland to have a direct action, to litigate it and succeed early on- and not to be followed through further- indicative of the highly curious and variable place of data in the Irish relationship with the EU legal order.

In law as in life? The (legally) divergent paths of British and Irish membership of the EU

Niamh NicSuibhne

On New Year's Day in 2002, my late uncle, visiting us in Kerry at the time, walked to the local shop and came back with a pristine €5 note for everyone in the house. Spend it, keep it, do whatever you like with it; but this, he said, is history.

Ireland adopting the euro as its currency marked one of the most significant divergent choices in the history of British and Irish membership of the European Union.

The dense and complicated ties between the two states were otherwise reflected in so many ways across their EU membership profiles, from their coterminous application paths to shared exemptions from certain legal obligations. However, this contribution suggests that Ireland and the UK diverged in a critical respect as regards their approach to membership of the EU: not with respect to Article 2 of the Treaty on European Union – which underlines the shared values on which the Union is founded (respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities)– but in terms of how ensuring respect for these values compels the Member States and the Union to work together; to find solutions cooperatively when there might be disagreement or differing perspectives on certain questions.

To consider this point in more detail, we can return in the first instance to the exemptions that Ireland and the UK had negotiated with the Union, which were recognised in Protocols added to the EU Treaties. In particular, Protocols No 20 and No 21 concerned the decisions, first, to remain outside of the Schengen *acquis* and its framework of border control and, second, not to participate as a matter of course in the Union's Area of Freedom, Security and Justice (AFSJ). At the same time, Article 2 of Protocol No 20 recognised the longstanding Common Travel Area between Ireland and the UK. Additionally, and representing a common pragmatism, the Schengen and AFSJ exemptions were designed as opt-outs that included the opportunity to opt-in for specific measures, also detailing applicable processes for that purpose.

Mostly, the provisions of these Protocols refer to 'the United Kingdom and Ireland' and 'the United Kingdom or Ireland' (note: the UK always comes first). Looking at them more closely, however, we find signals of something distinctive with respect to Ireland, especially in Protocol No 21 on the AFSJ.

Article 8 of that Protocol provides that 'Ireland may notify the Council in writing that it no longer wishes to be covered by the terms of the Protocol. In that case, the normal treaty provisions will apply to Ireland'. There was no corresponding statement with respect to the UK.

Similarly, Article 9 establishes that, '[w]ith regard to Ireland, this Protocol shall not apply to Article 75 of the Treaty on the Functioning of the European Union'. Article 75 TFEU sets out EU competence 'as regards preventing and combating terrorism and related activities'. More specifically, it enables the European Parliament and the Council, acting under the EU's ordinary legislative procedure, to 'define a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities'.

Ireland also attached a separate Declaration as regards the opportunity to opt-in to AFSJ proposals and initiatives. It first affirmed its 'commitment' to the Union 'as an area of freedom, security and justice' and then continued:

- Accordingly, Ireland declares its firm intention to exercise its right under Article 3 of the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice to take part in the adoption of measures pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union to the maximum extent it deems possible.
- Ireland will, in particular, participate to the maximum possible extent in measures in the field of police cooperation.
- Furthermore, Ireland recalls that in accordance with Article 8 of the Protocol it may notify the Council in writing that it no longer wishes to be covered by the terms of the Protocol. Ireland intends to review the operation of these arrangements within three years of the entry into force of the Treaty of Lisbon.

To date, Ireland does remain 'covered' by the terms of Protocol No 21. But Articles 8 and 9 of the Protocol as well as the Declaration that Ireland unilaterally attached to the EU Treaties suggest something more than a strike for some degree of positional independence.

Through their framing around values and their concurrent alertness to diversity and appreciation of collective response, these statements also capture something vital about the legal essence of EU membership. The 27 EU Member States are so profoundly different in so many, many ways: constitutionally, culturally, economically, geographically, linguistically, socially, politically. From a legal perspective, however, three qualities of EU membership can be highlighted.

First, notwithstanding their differences, Article 4(2) of the Treaty on European Union compels the EU to 'respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government'.

In reality, of course, some Member States are necessarily more equal – more powerful – than others. However, the principle of the equality of the EU Member States is indispensable. It creates the conditions of mutual respect and aspiration from which not just membership but ownership of the European Union, as an infrastructure for closer cooperation and integration among the peoples of Europe, can further progress.

Second, adding substance to the EU membership starting point of equality before the Treaties, the Member States have agreed that, as expressed in Article 2 of the Treaty on European Union, '[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail'. Importantly, that statement is not one of ideals or rhetoric only.

In its recent case law, in the context of EU budget conditionality and respect for the rule of law, the Court of Justice first confirmed that respect for the values in Article 2 TEU is a 'prerequisite for the accession to the European Union of any European State applying to become a member of the European Union'.

However, it then determined that 'once a candidate State becomes a Member State, it joins a legal structure that is based on the fundamental premise that each Member State shares with all the other Member States, *and recognizes that they share with it*, the common values contained in Article 2 TEU, on which the European Union is founded'.

Thus, for a continuing EU Member State, 'compliance…with the values contained in Article 2 TEU is a condition for the enjoyment of all the rights deriving from the application of the Treaties to that Member State' and 'cannot be reduced to an obligation which a candidate State must meet in order to accede to the European Union and which it may disregard after its accession'. Rather, the values expressed in Article 2 TEU 'define *the very identity of the European Union as a common legal order*'. In consequence, the EU 'must be able to defend those values, within the limits of its powers as laid down by the Treaties'.

The 'common legal order' of the EU to which the Court referred is distinctive. It is 'based on the *specific and essential characteristics* of EU law, which stem from the very nature of EU law and the *autonomy* it enjoys in relation to the laws of the Member States and to international law'.

That idea bridges to the third legal feature of EU membership highlighted here: that the 'essential characteristics' of the EU's common legal order both constitute and are constituted by, again in the words of the Court, a '*structured network of principles, rules and mutually interdependent legal relations* binding the EU and its Member States reciprocally and binding its Member States to each other'.

The autonomy of the EU legal order applies 'with respect both to the law of the Member States and to international law'. Its 'essential characteristics' relate 'in particular to the constitutional structure of the EU and the very nature of that law. EU law is characterised by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States, and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves'. And the resulting legal interdependency – between the Union and its Member States, and between the Member States themselves – is further underpinned by the critical principles of mutual trust and sincere cooperation, which serve both functional and normative purposes in gluing the EU's constitutional pieces together.

If the three elements identified above provide a legal template for membership of the EU, the key point for this contribution is that Ireland 'gets' this: it agrees to it, and sticks with it, and values it – in ways and to a degree that perhaps the UK never fully did.

The fact that the UK sought (and was granted) escape from the commitment in the EU Treaties to 'the process of creating an ever closer union among the peoples of Europe' as a pre-referendum commitment in February 2016 speaks volumes by way of example.

It has not been plain sailing for Ireland as an EU Member State. It has sometimes been frustrating. It has occasionally been humiliating. But Ireland's commitment to its membership of the EU has, above all, been worthwhile and rewarding. Most fundamentally, it has shown a willingness to confront the challenges that it faces in concert with rather than in exception from its fellow Member States and the EU's institutions.

The tensions that membership can provoke were clearly evident in the Supreme Court's August 2022 ruling in the *Orlowski* case. In the context of serious concerns about the independence of the judiciary in Poland, the Irish courts have contributed to shaping the position of the Court of Justice as regards the execution of European arrest warrants through the cooperative mechanism for preliminary references provided for in Article 267 TFEU.

In the *LM* case, the Court of Justice affirmed that an executing court must ascertain both a systemic and an individual risk as regards the person concerned before refraining from surrendering that person to a requesting State. The Court of Justice rejected the Supreme Court's continuing concerns about the appropriateness and efficacy of that test by Order in July 2022.

The Supreme Court's dignified response managed, in turn, to convey its understandable unease yet acceptance of the obligations of EU membership, especially in the statement that '[t]he appellants have not been able to establish that in their cases the systemic deficiencies that have been identified in relation to the appointment of judges in Poland will have an impact specific to them, notwithstanding that it seems that there may not be an effective remedy to seek the removal of any judge in respect of whom there is a concern. That being so, and despite the concerns of this Court in relation to issues as to the rule of law in Poland, it seems that there is no alternative at this stage but to direct the surrender of the appellants to the issuing state'.

The Irish electorate's rejection of the Lisbon Treaty ended not in rejection, too, of the process through which the revised Treaty was finally adopted or indeed Ireland's membership of the EU altogether. It ended in the sort of political dialogue and self-reflection and agreed, legally captured compromise that exemplifies what it means to be interdependent, to cooperate sincerely, and to be open to the idea of being bound by extra-state law. It is hoped that similar processes might also confront the problems around execution of European arrest warrants in situations of non-independent judiciaries.

Overall, the deeper bonds of EU membership that grow from legal commitment were not *created* through the consistent and enduring support extended to Ireland during the process of negotiating Brexit. They were *reflected* through it. And they were also strengthened through it. That does not mean that it will always be plain sailing into the future. Ireland faces a number of difficult decisions as a continuing EU Member State, notably on its fiscal policy and its role in military cooperation.

But Ireland has committed, legally as much as in other ways, to its membership of the EU. And it is that decision, that approach, that represents perhaps the most significant point of divergence of all between the continuing and former EU memberships of Ireland and the UK respectively.

* I still have that €5 note.

Imposing Brexit onto Northern Ireland's post-conflict governance order

Colin Murray

The Westphalian state provides for an all-but ubiquitous building block of governance. It stacks neatly into dominant accounts of multi-level governance, with all states being presented as nominal equals on the plain of international law. Where reasons of scale or the needs of diverse societies require, sub-state levels of governance can be introduced into the equation. Multiple states, moreover, can pool aspects of their law and decision making where they see the advantages of so doing, resulting in regional supra-national bodies such as the EU.

The neatness of the model, even if its flaws have long been identified, makes it all the more difficult for policy makers to interact with polities which refuse to fit obediently within it. Familiarity generates a self-sustaining set of expectations. Northern Ireland, however, continues to defy these expectations, with the Belfast/Good Friday Agreement 1998 instituting a complex multi-level governance order, sustained by a sophisticated electorate (although one deeply divided by rival accounts of how the polity should be governed) and an active civil society. For the better part of half a century, the UK and Ireland's shared membership of the EU helped them to cooperate, even amid the Northern Ireland conflict. It also made the 1998 Agreement a more focused package to reach; the operation of the four freedoms under EU membership was already operating to soften many practical impacts of the border. This legal-political order provides a vibrant, frequently frustrating, counterpoint to simplified accounts of statehood. It has also generated intractable problems for the EU and UK, with its place in the Withdrawal Agreement continuing to sour their post-Brexit relationship.

The preeminent challenge for the UK Government regarding Northern Ireland has long been one of scale. Northern Ireland has only "broken through" onto the agenda in Westminster and Whitehall in instances of governance breakdown such as the long years of direct rule from Westminster during the Northern Ireland conflict. In the wake of the conflict, it was thus attractive for UK policy and lawmakers to "devolve and forget", even if the ongoing peace process and the conflict's legacy meant that Northern Ireland issues continued to intermittently intrude onto their agenda. The UK Government paid little attention to how Brexit would affect Northern Ireland until it was deep in negotiations with the EU, and then Brexit's prime movers resented the complexity it introduced as 'the tail wagging the dog'.

Seven years into the Brexit saga, it is no longer the case that policy makers lack a general appreciation of Northern Ireland's distinct governance order, although the learning curve in the months after the Brexit referendum was steep and Brussels was faster to master it. The EU Commission's ability to pinpoint significant elements of the 1998 Agreement, on rights protections and North-South cooperation, to connect these to other factors, including the island of Ireland being a single unit for SPS purpose and the all-island electricity market, and to build these elements into its proposals for a Withdrawal Agreement, repeatedly wrong-footed the UK Government. But having achieved an Agreement which addresses these issues by keeping Northern Ireland in a state of high alignment with the Single Market for goods and maintaining an extensive range of EU rights and equality protections, the EU's challenge has become making this work amid the Johnson Government's recalcitrance towards this deal.

The Brexit deal recognises the instability of Northern Ireland under simplified conceptions of statehood. The EU and the UK agreed that its post-1998 governance arrangements could not have been sustained if these considerations did not condition either the Brexit deal as a whole (Theresa May's attempt towards a UK-wide high-alignment model under the backstop version of the Protocol) or Northern Ireland's part in it (Boris Johnson's ultimate deal). But three years on from Brexit, policy makers in Brussels and London still struggle with the task of making such a special governance order work in practice, especially when it is in the interests of London to leverage Northern Ireland's stability to attempt to secure improved terms. Many of the frictions resultant from the Northern Ireland Protocol's operation are as much a facet of the Johnson Government's refusal to countenance more extensive alignment with EU law under the Trade and Co-operation Agreement, particularly where SPS rules are at issue, as with any feature of the Protocol itself. Both parties knew what the Protocol required if such steps were not taken in the 2020 negotiations.

Such machinations, however, should always have been expected. Special governance arrangements have intermittently been relied upon in an effort to address urgent issues in contested polities, and those inauspicious circumstances have almost invariably played a role in unravelling them. The aftermath of the First World War was a high point of such constitutional experimentation. From French control of the Territory of the Saar Basin, to the creation of the Free City of Danzig, swathes of the Versailles Treaty were devoted to using novel arrangements to abridge or attenuate aspects of statehood in order to provide rough-and-ready fixes for particular challenges. Poland needs a major Baltic Port? Carve out a predominantly German-populated city and tie it into a customs union with Poland, allowing the latter to manage its foreign relations. Sovereignty was exceedingly mutable in the hands of the victorious powers.

None of the schemes, however, would survive the inter-war period. No matter how committed French officials were (in the words of one report in the League of Nations archives) to not administering customs in the Saarland too strictly, so as to avoid „clashing with the habits of the locals", the special arrangements would be swept away after the 1935 plebiscite. And at Danzig, the constant friction between the Poland and the city authorities led to hundreds of disputes before successive League of Nations High Commissioners and accounted for much of the caseload of the Permanent Court of International Justice in the 1920s. Such special arrangements, especially if they are seen as being externally imposed, are invariably contentious.

Undeterred by the persistent instability around these arrangements and their ultimate collapse, one of the newly-minted United Nations' first major initiatives was to advance a plan, promulgated by its Special Committee on Palestine, for the partition of the mandate territory of Palestine, already gripped by internal conflict from the latter stages of the Second World War, which would see the two new proposed states conjoined in a full economic union. In a startling example of not letting the facts on the ground get in the way of constitutional experimentation, the newly created states would put aside the ongoing conflicts and immediately cooperate in terms of trade in goods, currency and infrastructure, in a level of integration which it would take the Eurozone members decades to achieve under the auspices of the EU. The imposition of the shekel as a common currency for Israel and the occupied territories would follow the 1967 war, as would a de facto customs union, but this would be an arrangement hedged with protectionist measures in favour of Israel (a major point of contention in the negotiation of the Oslo Accords).

The Protocol is not a reprise of any of these schemes. EU officials do not administer customs within Northern Ireland, and there is nothing therein approaching Poland's management of Danzig's foreign affairs. The deal, moreover, was hardly imposed upon the UK Government; then Prime Minister Johnson concluded it willingly as a means of addressing commitments made towards Northern Ireland in a manner which imposed minimal restrictions on post-Brexit freedom of action with regard to Great Britain. It is, however, a marker of how alienated Unionist sentiment is from London that the Protocol can continue to be presented as an external imposition. Furthermore, the complexities of managing a border between modern product standards regimes, and not simply customs duties, dwarfs some of the challenges of these antecedents. The depth of the EU Single Market for goods makes it very difficult to operate what is, in effect, part of that Market's external boundary, in a flexible way in the Northern Ireland context. Protocol mitigations, which for weeks seemed tantalisingly close, rest not on trust but on the UK finally providing the EU with the real-time data on goods movements across the Irish Sea.

A strikingly similar discourse swirls around the Protocol as these antecedent "special arrangements". Lord Frost consistently portrayed the Protocol as unwelcome experimentation imposed on the UK at a time of weakness: 'the Protocol represents a moment of EU overreach when the UK's negotiating hand was tied, and therefore cannot reasonably last in its current form'. Likewise, in 1919, his ministerial predecessor Lord Birkenhead, no stranger to rousing Unionist sentiment, foresaw the '[h]alf-measures' around Danzig generating a 'a crop of troubles'. Claims that Northern Ireland has been subject to EU vassalage or has been cut off from the rest of the UK mirror the twin (Nazi) campaign slogans of „Zurück zum Reich" (Back to Germany) and „Gegen vertragliche Willkür" (Against [Versailles] Treaty Arbitrariness) regarding Danzig in the late 1930s. This is not to say that the anti-Protocol campaigns are in some way fascistic, but to illustrate that (supposedly imposed) special governance arrangements have the capacity to provoke visceral responses.

The UK and EU established a new composite governance order for Northern Ireland through the Brexit deal. As the courts have made clear in implementing this deal, the UK is not a unitary state when it comes to its internal trade rules and goods regulation. But this deal will not be stable for as long as Eurosceptic actors continue to harness Unionist concerns over the impact on Northern Ireland's resultant constitutional status as a way to undermine the Protocol. Once the UK Supreme Court accepted that there was nothing constitutionally improper in the way that the Protocol was concluded, Rishi Sunak's Government was in a better position to grasp the opportunity to co-operate with the EU in mitigating many of the resultant barriers to trade. There is, however, no grand "solution" to the issues of the Protocol; notwithstanding the Windsor Framework, there will inevitably be further hurdles to cross. The Withdrawal Agreement nonetheless includes structures for managing these and a deal does hold out the possibility of lancing the dangerous discourse which has upended constitutional governance in Northern Ireland.

All of which raises the question of the extent to which the 1998 arrangements themselves are worth this effort. In 1998, attempts to develop workable governance arrangements for the "two communities" in Northern Ireland understandably prioritised an 'end' to the conflict, with relative peace and stability being the accepted preconditions of effective governance. This 'end', however, was incomplete; the overarching narrative of conflict/peace process/transition/normality has yet to reach its fulfilment. Indeed, the space for alternate political agendas became increasingly constricted because of the 1998 Agreement's prioritisation of Unionist/Nationalist identities. Nonetheless, amid Brexit's upheavals, reproductive rights, same-sex marriage, language and legacy questions have all forced their way onto the national legislative agenda. If power sharing is not restored, an opportunity

instead emerges to rework the post-1998 governance arrangements to better address interests which they have, to date, marginalised.

Notwithstanding that opportunity, EU membership can be appreciated as a vital lubricant within Northern Ireland's distinct governance order, one that has been very difficult to replace. It connected multiple strands of law and policy across the islands of Great Britain and Ireland. In doing so, it provided an operative dilution of the differences between the UK and Ireland. But it also sustained alternate constitutional visions for Northern Ireland. Supporters of the reunification of Ireland would be able to point to the shared requirements of EU membership as a platform of commonality, facilitating transition if there was a referendum vote in favour of it. Unionist opponents of that outcome could instead emphasise that the existing level of commonality rendered any vote for reunification nugatory.

Brexit, for some Northern Ireland Unionists, held out the possibility of increasing the differences between Ireland and the UK (including Northern Ireland), driving the sort of wedge between their legal orders that it would dramatically increase the transactional costs of any future effort at reunification. Instead, with the combination of an intractable governance crisis in Northern Ireland and a set of special arrangements maintaining significant aspects of alignment between Ireland and Northern Ireland under the auspices of EU law, the people of Northern Ireland have more reasons than ever to contemplate reunification as a way out of the current malaise. Without consistent and sustained effort to make them work, European history suggests special governance arrangements tend to be transitory.

Constitutional change in the UK – people or party?

Alison Young

The UK's membership of, and later exit from, the EU has had a dramatic effect on the UK constitution. It also provided a catalyst for further change. These demonstrate the relative ease with which the UK constitution can be modified, reinforcing the UK's characterisation as a predominantly political, flexible constitution.

This post will argue that these transformations illustrate something more fundamental that applies to all constitutions – be they predominantly codified or uncodified, with or without the ability of the courts to strike down unconstitutional legislation. They illustrate that the success, or otherwise, of constitutional change depends on interactions between institutions of the constitution and on shifting constitutional cultures.

A constitutional volte face

The UK joined the EU on 1 March 1973. EU law was incorporated into domestic law by the European Communities Act 1972. According to the majority in the first *Miller* case, this created a new source of domestic law.

The recognition of direct effect and the supremacy of EU following *Factortame* had an even greater impact on the UK constitution. Until the UK's membership of the EU, no case law had challenged the traditional view of Parliamentary sovereignty that Parliament can enact legislation on any subject it wished and that Acts of Parliament could not be questioned, let alone struck down, by the courts. The only limit on the powers of Parliament was that any one Parliament could not restrict the powers of a future Parliament. The supremacy of directly effective EU law, however, required EU law to be applied in preference to Acts of Parliament, even those enacted after 1973. Whilst constitutional theorists may argue about how this recognition was achieved, it is hard to deny the impact of decisions like *Benkharbouche*, where the UK Supreme Court was willing to disapply provisions of an Act of Parliament that contradicted the EU Charter.

The UK's membership of the EU was also a catalyst for further constitutional change. Would the UK courts have developed a concept of constitutional statutes if they had not provided a means of explaining why later legislation could not impliedly repeal the provisions of the European Communities Act 1972? Would there have been the same desire to legislate to devolve power to Scotland, Wales, and Northern Ireland, or to incorporate Convention rights through the Human Rights Act 1998 if the UK

had not joined the European Union? Joining the EU provided experience of greater European co-operation and a transfer of law-making powers, as well as concepts of legislation limited by rights and shared sovereignty. The UK's membership of the EU may even be regarded as a first step in the UK's move towards a legal constitution.

Brexit necessitated equally fundamental constitutional change. It created a new form of law, retained EU law. Unlike domestic law, its provisions continue to have supremacy, at least as regards UK laws enacted prior to Brexit. Retained EU law is also interpreted differently, in line with general principles of EU law and retained case law.

However, this new hierarchy of laws is about to change. The Retained EU Law (Revocation and Reform) Bill 2022-23 provides for most of the provisions of retained EU law to be revoked at the end of 2023. Ministers may make regulations to preserve, restate, replace, or later revoke, retained EU law made by EU institutions or implemented by UK secondary legislation. Measures that are preserved will be known as assimilated law. Assimilated law also will not have supremacy over domestic law and will need to be interpreted in line with all domestic law, unless ministers, by regulation, provide for this effect to be reversed in a specific restatement of retained EU law or assimilated law.

One change has remained. The Northern Ireland Protocol and the protection of the rights of EU citizens residing in the UK, continue to have supremacy. However, these provisions can be specifically or expressly repealed – as illustrated by the provisions of the Northern Ireland Protocol Bill 2022-23. The Bill is now no longer on the legislative timetable, following the drafting of the Windsor Framework. However, should the Windsor Framework fail, the Bill, or a similar Bill, may reappear.

Brexit, too, has been a catalyst for constitutional change. It has caused shifts in the balance of power between the executive and the legislature, though this may also be due to the minority government in 2019. Parliament was given a much greater role in the scrutiny over the Withdrawal Agreement than is usually the case for international Treaties. The need for future trade agreements led to the creation of a new House of Lords Committee, tasked with overseeing international agreements.

Frustrations over the assertion of control by the legislature led to the reversal of the Fixed-term Parliaments Act 2011. This Act replaced the power of the Monarch to dissolve Parliament, triggering a general election, with a fixed-term Parliament, with legislation setting out when Parliament could be dissolved, triggering an early general election. This would only occur with the involvement of the House of Commons – either through a vote of no confidence in the government or where two-thirds of the members of the House of Commons voted in favour of an early general election. The Dissolution and

Calling of Parliament Act 2022 revives the power of the Monarch to dissolve Parliament at the request of the Prime Minister.

Brexit has also given rise to increasing tension in the Union of England, Scotland, Wales, and Northern Ireland. Acts of Parliament designed to implement Brexit were enacted without the consent of at least some of the devolved administrations, despite the Sewel convention which states that the UK will not normally legislate in an area of devolved competence without consent. The devolved administrations regard this as a breach of the convention. The UK government, however, argues that 'Brexit' was not normal.

The distribution of power between the UK and the devolved administrations has also been affected, with power becoming more centralised (see, for example, the UK Internal Market Act 2020). The Northern Ireland Protocol has further exacerbated tensions in Northern Ireland which, for the second time during the Brexit process, is currently being governed by civil servants rather than the Northern Ireland executive and Assembly.

A flexible political constitution?

The relative ease with which the UK constitution was able to accommodate EU membership and Brexit appears to confirm our understanding of the UK's predominantly political constitution. Most changes were made by an Act of Parliament requiring only a simple majority. Some changes did not, or will not, even require Parliament. Vast amounts of retained EU law was modified by delegated legislation in order to deal with deficiencies arising from the UK's exit from the EU. If the Retained EU Law (Revocation and Reform) Bill 2022-23 is enacted in its current form, ministers will have the power to determine whether to revive, revoke, restate, or replace retained EU law. If the Northern Ireland Protocol Bill 2022-23 had been enacted, ministers would have been able to determine what measures will replace provisions of the Northern Ireland Protocol that will no longer apply in the UK.

Conventions and practices are even easier to change. There are no legal consequences for breaching the Sewel convention. There are also disputes as to when the Sewel convention applies. Did it not apply, for example, to legislation implementing Brexit as this was not 'normal' legislation? The more legislation can be enacted in breach of its provisions, the more the existence or effect of the Convention can be questioned. In other words, fundamental elements of the UK constitution can be changed through merely changing practice, or through disputing the scope of a constitutional convention. This is despite the fact that the Sewel convention plays a key role in facilitating inter-governmental relations necessary to maintain devolution and this being recognised by legislation and in a memorandum of understanding between the UK and the devolved governments.

However, this assessment misses the extent to which constitutional change occurred because of the actions of all three branches of the UK constitution. For example, whilst the provisions of the European Communities Act 1972 may have provided the impetus for the recognition of the supremacy of directly effective EU law, it was the courts that determined how this took effect. Courts developed the concept of constitutional statutes, including how they are identified, that constitutional statutes cannot be repealed by implication by ordinary legislation, as well as the existence of a possible hierarchy between constitutional statutes. It is unclear, however, how far the executive or the legislature have accepted the constitutional implications of constitutional statutes.

Constitutional change was also initiated by the courts. The circumstances surrounding Brexit gave rise to both *Miller* decisions, the only decisions to date where the Supreme Court has sat with its maximum of 11 members. The first concerned whether the UK government could notify the EU of its intention to withdraw from the Treaties using prerogative powers. The second concerned the prorogation of Parliament, bringing one session of Parliament to an end and preventing Parliament from sitting for five weeks. Both changed the law regarding controls over prerogative powers. The second *Miller* case, in particular, recognised how the common law principles of parliamentary sovereignty and parliamentary accountability could limit the scope of the Crown's prerogative powers. The Supreme Court clearly stated that Parliament, and not the government, is the most important institution of the constitution. The government is meant to be held to account by Parliament.

More fundamentally, the UK's membership of the EU and Brexit recognised the importance of the people and the role of referendums in constitutional change. The UK's continued membership of the EU was subject to a referendum in 1975. It was a referendum that prompted Brexit. Referendums were also used in support of devolution to Scotland and Wales, and to determine whether the voting system should change from first-past-the-post to the alternative vote.

This growing role of the people in constitutional change may be hard to reverse. It was legally possible for the UK to leave the EU without a referendum. Would it have been politically or constitutionally possible to do so, given the use of a referendum to confirm the UK's membership of the EU?

Referendums have also become integrated into the devolution settlement. There are legal obligations placed on the UK government in response to a referendum where the result is that a majority of the people in Northern Ireland voted in favour of Northern Ireland leaving the UK and joining Ireland. Legislation 'declares' that both the Scottish Parliament and Scottish Government and the Senedd Cymru (Welsh Parliament) and Welsh government 'are not to be abolished except on the basis of a decision of the people' of Scotland or Wales, 'voting in a referendum'. However, this is not enough to make this a legally enforceable requirement. It may, however, reinforce the constitutional and political

importance of the need for referendums to initiate this specific, and more general, constitutional change.

Populism and political parties

The above paints an idealistic account of constitutional change, occurring through inter-institutional acceptance or following a referendum. However, we also need to recognise how far constitutional change is dependent on politics, particularly party-politics. The decision to hold a Brexit referendum was motivated, at least in part, by a desire to resolve tensions within the Conservative Party. The extent to which the legislature was able to assert control over the government in 2019 relied on backbench MPs being willing to join with opposition MPs, this being easier to achieve during a minority government. The large governmental majority made it easy for the government to push through legislation to implement Brexit, and the retention and possible future revocation, of retained EU law.

Large majorities also enable governments to initiate and successfully implement a programme of constitutional change. For example, the Human Rights Act 1998 may be reversed in the near future. The influence of backbench MPs was also key to the removal of both Boris Johnson and Liz Truss as leader of the Conservative Party, and thus Prime Minister.

Politics has always played a role. The UK constitution has also relied on those in power exercising self-restraint – either out of respect for the role of other institutions, or to uphold good principles of constitutional government, or to secure votes in a future general election. Whilst the extent to which this acts as an effective check on governmental power has always ebbed and flowed, the emerging post-Brexit constitution paints a worrying picture.

Referendums may engage the people in constitutional change. They may also homogenise the will of the people, providing governments with a justification for pursuing constitution change that is only perceived to reflect the will of the electorate. Implementing the will of the people can also be used as a justification for ignoring constitutional restraints.

If the UK constitution is to learn from these episodes of constitutional change, it needs to reflect on the role of the people and of referendums in the UK constitution.

Integration as disintegration: towards a confederation of the isles?

Michelle Everson

50 years after accession of Ireland and the UK to the EEC and seven years after the disastrous Brexit referendum, Ireland still sits pretty in the EU, but the UK and its Constitution have been called into possibly fatal doubt, especially as regards their integrative capacity, or continuing ability to bind distinct political classes and the nations of the Union to one another. Writing in early 2023, amidst the ruins of a Brexit reality, if not the end of the Brexit delusion, this short commentary foresees – possibly foolishly – a radical future of independent nations within a loose 'Confederation of the Isles', wherein Ireland might share some (symbolic) competences with Scotland, England and Wales, enabling a peaceful a prosperous coexistence within the North-western European archipelago.

'Nowhere else to go', a sad tale of goalless secession

We have barely begun to grasp the reasons why Brexit became a possibility, why it has unravelled at a speed that has surprised the most ardent of its critics, or to begin to accept its inherent inevitabilities such as the fundamental reshaping of the polities of the British Isles. Even for those of us with skin in the game, or an expertise in European integration processes and their impacts upon national polities, Brexit has precipitated much surprise and not a little learning, about the intensity of (class and national) schism within the British polity or the absurd fragilities of the British Constitution. Given the wholly misplaced dedication of the self-styled 'buccaneering Brexiteers' to the notion that the UK has 'somewhere else to go', or that Brexit would secure a glorious future for Great Britain within a resurgent 'Empire 2.0', it has also underlined how central post-colonial analysis of interchange between the periphery and the core of empire must be to our modern self-understandings of nationhood and sovereignty. At the same time, however, it continues to reveal the paucity of our general understandings of political economy, or the relevance of markets to the construction of society and politics as a whole.

The Court of Justice case of *Cassis de Dijon* from the distant year of 1979 mattered then and matters still today. Running in tandem with, but vitally distinct from the then *Zeitenwende*, or nascent turn to free market thinking, *Cassis* marked the point at which traditional, international-law-based trade regimes shifted on their axes. This was the day on which the international system of courts began to give prominence to the idea of an autonomous market, or to disentangle the dense webs of societal

norms and institutions that gave a distinct cultural-historical identity to each national political economy, that grounded the market in national society and politics. Vitally, however, it was also the moment at which international economic law, firstly within the EEC framework, began the long, seemingly unlikely trek back to the 're-embedding' of Europeanising and internationalising markets within their own set of post-national norms. The nod to Karl Polayni and his theory of the socially embedded economy is wholly intentional: markets cannot and do not exist outside cultural-historical-legal norms. The sweeping away of German regulations determining acceptably high levels of alcohol for liqueurs as a barrier to European trade might be dismissed as an amusing legal happening. Nevertheless, with its recognition that non-discriminatory market rules also act as non-tariff-barriers to trade (NTBs) and its contemporaneous acceptance of the legitimacy of member state social regulation, the European Court of Justice had not simply been caught up in deregulatory enthusiasms. It had instead also been implicated, as per Polayni's writings, within 'counter-movements', or necessary processes of the re-socialisation of the emerging European market; a process that has culminated in the establishment of famous regulatory institutions, such as European (regulatory) agencies.

It was perhaps an inability to understand the full import of *Cassis*, together with the current, far too ready acceptance of theologies worshipping the imagined autonomy of markets from society that explain the readiness of a British Prime Minister such as Theresa May to expose the UK to the admittedly serious, but not limitless damage of hard Brexit calculated within the blinkered parameters of (purely economic) international trade models. By the same token however, this blind-spot also sheds light on the ongoing failure of academic analysis properly to frame the Brexit process as an act of secession, with all of its catastrophic, innumerable and unforeseen reverberations around the whole of the British political economy and society: broken supply chains, collapse of SMEs and FDI, loss of the UK motor industry and skilled working class jobs, as well as heightened post-Covid labour market shortages compared to neighbouring economies.

The phrase 'integration as disintegration' was coined back in the 1990s, in order to shed light on the economically 'rationalising' impacts of European integration, or the ability of (European) law to unveil hidden protectionism and irrationalities within member state economies through application of a legal proportionality principle, and its simultaneous demand that national and European social regulation must be refashioned in order to facilitate supranational market integration (ie., must be made market-friendly). What those of us who helped develop the concept underestimated at the time, however, was the degree to which legally-instituted disintegration processes have been followed by post-national legal re-embedding that positively re-affirms the dense web of broader societal relations within which

markets function. It is this mechanism, for example, the process of regulatory convergence of labour, social and environmental standards in the EU, that explains the far deeper historical-cultural damage currently being played out within the UK: Brexit equals secession, is far more than simple trade disaggregation, entailing instead a comprehensive unravelling of our existing frameworks of market opportunity and socio-economic security. Equally, it is the process of re-embedding which explains relative (to the rest of the UK) success of the Northern Irish economy and resilience of the Irish economy, all post-Brexit political uncertainties notwithstanding. Seen from within a socially embedded European market, not only does the secession of the UK political economy give rise to enhanced economic prospects for its neighbours, but the entrepreneurial (European or Protocol-based) rights and regulatory frameworks within which those opportunities might be realised are already firmly in place.

Most bitterly however, for those Brexit buccaneers who truly believe that destruction is opportunity, that Empire 2.0 is where Brexit ends glorious, the process of re-embedding of economies is also a global one, with *Cassis* consequences being inexorably transmitted to an international level, most significantly, within a web of new generation Free Trade Agreements wherein the overcoming of NTBs is pursued by means of negotiation of regulatory convergence. Certainly, successive UK Governments are seeking or have signed (inadequate) trade agreements with the 'the White Dominions' of their imperial dreams. Yet, where Canada, New Zealand and Australia, all have good geopolitical reason to unite with the EU in the geo-political effort to secure the global dominance of shared environmental, labour and social standards, the room for UK regulatory divergence remains limited indeed. Verily, there is nowhere left for the UK to go.

Who is lying to whom? Constitutional disintegration and resettlement

The Twittersphere often complains that arch-Brexiter Jacob Rees-Mogg lied to the Queen, misrepresenting the grounds for Parliamentary suspension, or 'prorogation' in September 2019; a polemical view maybe, but one confirmed by the UK Supreme Court. In the view of this author however, Twitter's obsession only detracts from greater, more unpalatable lies found at the heart of the UK Constitution. First, the uncomfortable reality that the UK Monarchy proved far less adept at defending constituted democratic process against the blindingly obvious deceptions of power-seeking populists than did an Italian President in the same fateful Summer. But second, recalling Harold Laski, then British Labour Party Chair, and his prescient critique of the 1945 constitutional moment, or establishment of the British welfare state, the continuing lack of shared, concretised value in the UK Constitution, the inbuilt vulnerability of its majoritarian politics to electoral coup d'état, and its

consequent inability ever to overcome class schism, let alone pay integrative attention to excluded others within or beyond its sovereign borders.

On this reading, QEII's signature adherence to the principle of 'apolitical' monarchy is readily explained in all of its preposterous constitutional inadequacy: the institutional apex of the UK Constitution can never intervene to defend it, no matter how egregious the assault, since to do so would necessarily be an act of social-cultural partiality. More impactful yet, Laski's complaint that Clement Atlee's post-war Labour Government had merely enacted its own power-grabbing coup upon the British polity within the principle of parliamentary sovereignty, leaving its integrative social reforms forever exposed to subsequent reassertions of counter-class-interest, must now surely ring very loud in the ears of 'Lexiters', those left-leaning Brexiters, who believed that their more or less legitimate campaign against the real or perceived neo-liberal failings of the EU as an international economic organisation should be pursued within the unreformed UK polity rather than directly at EU level.

Laski's observation, however, should also now be taken very seriously by a UK Labour Party leadership consistently polling over 45% and set, under first past the post rules to achieve a landslide victory in the next election. The schisms revealed and heightened within populist Brexit manipulations include but extend far beyond those of class conflict, traditionally conceived. Above all, intensified post-colonial divisions determine that that Labour would be foolish to conceive of itself ruling in accordance with a principle of 'business as usual', or the usually counterproductive business of pursuit of class interest within a sovereign UK parliament. Schismatic problems are myriad: the manipulations by right-leaning populists of the Commonwealth loyalties of UK citizens of all colours, the underlying racism and xenophobia of those on the left who affirm false dichotomies established between the interests of disadvantaged classes in declining industrial regions and those of impoverished metropolitan communities, including many migrant groups. They also, however, include the inevitable final rift, the overdue unravelling of empire within the North-West-European archipelago.

In February 2023 it is striking how many commentators equate the unexpected resignation of Nicola Sturgeon as Scottish First Minister with the end of nationalist aspirations in Scotland, or the death of 'independence sentiment' in Great Britain itself. This is mistaken. Certainly, there is no clear path to independence for Wales or Scotland within an absolutist Westminster sovereignty which makes mockery of the term 'Union'. But there is a (murky) path for NI to continue to participate in the success of the embedded Irish/European political economy either within the NI Protocol, or within a unification vote under the Belfast/Good Friday Agreement (GFA). Vitally, nether the Protocol nor the GFA operate within the parameters of geographically delineated sovereignty. Arguably, it is here in the grey zones of pragmatic, constitutionally-relevant treaty-making that it is not simply conceivable but

wholly inevitable that Wales and Scotland, consistently insulted and abused by Brexit-Westminster, will pursue their post-colonial identities, and emulate the enhanced influence exerted by Ireland on the European and global stage. For the sake of the sanity of English voters, one can only hope that a future Labour Government can escape the Brexit delusion, can begin explicitly to address and to resolve eternal division, as well as the damage done to democracy and the Constitution by populist Brexit machinations. Nevertheless, even where it cannot find the requisite political courage or skill, the far greater devolution of powers to the periphery already inherent in Labour Party programmes designed (tellingly by Gordon Brown) to save the Union, will see Westminster sovereignty fade away in fact if not in constitutional ink.

A European sting in the tail

For this author, an ideal post-colonial settlement of the United Kingdom and Northern Ireland would be a loose and differentiated confederal one, a super Benelux perhaps, wherein Ireland might share some (symbolic) functional competences with the independent nations of the 'Confederation of the Isles' in an embedded European political economy (EEA), or the EU proper. A primary advantage of such an arrangement would be full-scale reproduction of the Protocol/GFA's existing constructive confusion of sovereignties and individual loyalties, for example in their establishment of a schism-solving paradigm wherein citizens are free to profess their own allegiances (to the Confederation, to the Crown, to Europe, to the Nation, or to all at once). A secondary consideration is also important: the embedded post-national political economy is still prone to the charge that it is undemocratic, irredeemably technocratic. Even at this time of renewed *Zeitenwende* (back) to economic steering and redistributive economic-social agendas, it remains in need of legitimating ideals. Can we find these legitimating ideals in more refined but emotionally grounded complexes of constitutional differentiation, in constitutional differentiation? Can we also transfer these ideals to the supranational level?

Democracy, sovereignty and Europe: the contrasting European trajectories of Ireland and the UK

Colm O'Cinnede

Fifty years after Ireland and UK joined the EEC together in January 1973, the two states find themselves on radically different European trajectories. Ireland is deeply integrated within the EU, with popular approval. Similarly, Irish adherence to the ECHR is politically uncontentious – with the Irish government recently celebrating the rights protective role of the Strasbourg Court in unequivocally positive terms. The UK, in contrast, has Brexited. Furthermore, not content with merely leaving the EU, the British government is proceeding with its quixotic attempt to cleanse UK law of any taint of 'retained EU law'. It remains signed up to the ECHR, but with some senior government ministers openly advocate denunciation of the Convention.

All this makes for a stark contrast between these two island states on the north-west fringe of the European continent. Both are common law countries with shared traditions of parliamentary governance and strong cultural links to the wider Anglosphere. However, in Ireland there is broad elite and popular support for maintaining alignment with the requirements of EU and ECHR law – while, in the UK, such European influences trigger a sharp allergic reaction. What explains this dramatic divergence? The answer perhaps lies partially in the differing 'constitutional imaginaries' of Ireland and the UK, and how EU and ECHR alignment is understood to impact on the exercise of popular sovereignty in both states.

Explaining the divergence

Openness to Europe (including the ECHR) has accelerated the radical economic, political and social transformation of Irish society over the last half century. It has also helped Ireland escape the gravitational pull of British dominance. A commitment to Europe has thus marched hand in hand with the Irish state-building project, helping it to attract support across the political spectrum.

In contrast, in the UK, as Martin Loughlin has argued, elite support for Europe – often motivated by a desire to cement together the post-imperial British state – has historically struggled to attract wide public support. This has left European alignment vulnerable to political attack, whether it comes in the form of EU law or ECHR requirements. Sceptics have consistently portrayed such external influences as alien to, and corrosive of, the British way of doing politics, law and democracy. Even as buyers' remorse

palpably sets in after Brexit, such sceptical arguments still retain plenty of appeal – as illustrated by the political attacks on the ECHR.

European alignment and the 'constitutional imaginaries' of Ireland and the UK

These diverging political dynamics have impacted on how European alignment is conceptualised in constitutional terms in both states. Significant differences now exist between how 'Europe' fits within the constitutional imaginary of Ireland and the UK, i.e. the values, doctrines and institutional ways of functioning that shape the collective constitutional culture of both states. In turn, these differences affect how the rhetoric of democracy and sovereignty are deployed in debates about European alignment.

In this respect, a cliched narrative is sometimes trotted out, which suggests that the UK clings to a hypertropic concept of national sovereignty that prevents it embracing European alignment – whereas Ireland, along with other European states, adopts a much more mature, nuanced and grown-up approach to the whole business. I think it is important to dig a little deeper in comparing Ireland and the UK in this way. More is going on than this simplistic picture would suggest.

European alignment and Irish popular sovereignty: formal tensions, substantive congruence

To start with, it is worth noting that national sovereignty – or, to be more precise, a commitment to respecting the popular sovereignty of the Irish people taken as a unitary whole – has always been central to Irish constitutional narratives. Famously, in introducing the 1937 Constitution, Éamon De Valera, the Irish Taoiseach of the time, commented that '[i]f there is one thing more than another that is clear and shining through this whole Constitution, it is the fact that the people are the masters' (67 *Dáil Debates* Col.40, May 11, 1937). Since then, paramount importance has been assigned to popular sovereignty in the constitutional scheme of values – and the Irish courts have been jealous in protecting this value.

Thus, in the famous case of *Crotty v An Taoiseach* [1987] IR 713, the Irish Supreme Court concluded that the executive's power to conduct foreign relations under Article 29(4) of the 1937 Constitution could not be used to ratify the Single European Act (SEA), as the SEA's provisions would generate a 'diminution of Ireland's sovereignty which is declared in unqualified terms in the Irish Constitution' (Henchy J). Such an erosion of state sovereignty would only permissible if explicitly endorsed in a referendum by the Irish people, the ultimate arbiters of how state power could be exercised. Since then, popular approval via a referendum vote has been required for every EU treaty change involving an expansion of competence.

More recently, the majority of the Irish Supreme Court in *Costello v Government of Ireland* [2022] IESC 44 ruled that Ireland could not ratify the EU-Canada Comprehensive Economic and Trade Agreement (CETA) under the current state of Irish law, as it would breach the 'judicial sovereignty' of the Irish state by permitting an international arbitration tribunal to make binding decisions enforceable in Irish law without intervening supervision by Irish courts. Such a state of affairs was deemed to cross the national/popular sovereignty line, as it was not to be read as authorised by any existing constitutional provision approved by the people.

Furthermore, in passing, several judges of the Court discussed whether the binding status of Strasbourg Court judgments in international law came close to crossing this 'sovereignty line'. (Ireland's ECHR membership has never been put to a referendum – or even been the subject of a court challenge on this point.) The majority of the Court took the view that the fact that Strasbourg judgments were not directly enforceable in national law distinguished the ECHR from the CETA arbitration mechanism. But it is notable that one judge in particular, Hogan J., thought Ireland's membership of the ECHR was best thought of as a once-off exception to the sovereignty principle: he viewed it as a *de facto* conferral of sovereign power on an external court, that could only be justified on the basis of the particular value of the Convention as a tool of rights protection.

Thus, Ireland is formally wedded to a robust understanding of popular sovereignty, which is hardwired into constitutional doctrine. This potentially casts a shadow over both EU and ECHR alignment. However, this shadow has not in practice substantially impeded European alignment.

Irish governments have always been able (eventually) to put together broad coalitions of popular support for continued full EU alignment, as tested through the referendum process. Neither political elites or the general public have been particularly possessive about national sovereignty in this regard, viewing the enabling advantages of EU membership as more than compensating for any nominal loss of state-centred self-determination. And these positive referendum results insulate the requirements of EU law from legal or political challenges invoking national sovereignty. (In *Costello*, the Supreme Court were at pains to note that CETA ratification was not required by EU law.)

In contrast, as already mentioned, Irish ratification of the ECHR has not been subject to a referendum vote. But there is widespread support and enthusiasm for the ECHR. The Convention is seen as a crucial instrument for protecting rights across Europe, while the Good Friday Agreement recognises it as an essential 'safeguard' of the Northern Irish peace process. As such, irrespective of whether it presents a formal threat to sovereignty, ECHR alignment is in practice viewed as constitutionally legitimate. This is illustrated by Hogan J's judgment in *Costello*, as discussed above. While he raised doubts about the Convention's formal compatibility with sovereignty, Hogan J. in a remarkable

passage made it clear he thought ECHR membership was entirely compatible with the value system of Irish constitutionalism – describing it as a 'favourite of the law *and our constitutional order'*. (Author's italics.)

In other words, European alignment in both its EU and ECHR aspects fits well with the Irish constitutional imaginary. The forms of international co-operation they involve chime with other core values of the Irish constitutional system, and advance important national objectives. Furthermore, the 'external' delegation of power to European institutions – whether political or judicial in character – is in some respects comparable to how popular sovereignty is 'internally' delegated to the political and judicial organs of the Irish state. Taken together, this all helps to explain why the formal challenge European alignment presents to Irish popular sovereignty has not become a substantive sticking point in Irish law or politics – as yet, anyway.

European alignment and UK Parliamentary sovereignty: formal congruence, substantive tensions

The situation is interestingly different in the UK. There, another form of sovereignty is in play – parliamentary sovereignty. This core norm of the unwritten UK constitutional order treats the Westminster Parliament as the ultimate source of law-making authority. In some ways, it can be viewed as the functional equivalent of the popular sovereignty principle in the Irish constitutional order. But its influence on the framing of European alignment within the British constitutional imaginary has been quite different.

Often seen as part of the UK's problem with Europe, parliamentary sovereignty actually smoothed the way for UK alignment with EU law when it was still a member state – at least at the level of legal doctrine. After Parliament enacted the European Communities Act in 1972, the UK courts interpreted this legislation as requiring them to give full and faithful effect to EU law. In the famous case of *R (Factortame Ltd) v Secretary of State for Transport (No 2)* [1991] 1 AC 603, this resulted in the courts suspending the application of another Act of Parliament which conflicted with EU law. Similarly, enactment of the Human Rights Act 1998 (HRA) incorporated ECHR rights into national law, and opened the way for British courts to take into account Strasbourg jurisprudence. The UK courts only recognised the existence of 'sovereignist' doctrinal limits to European alignment in one case pre-Brexit, namely *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3 – which concerned the very specific jurisdictional question of whether British courts could review the conduct of parliamentary proceedings.

So, unlike in Ireland, sovereignist concerns have not generated doctrinal obstacles to alignment. But the doctrine of parliamentary sovereignty is closely bound up with the view that political decision-making as channelled through the Westminster Parliament should have the final say as to what is law in Britain. And this belief is in turn linked with the idea that any delegation of this law-making authority to other political or judicial bodies, whether national or European/international in character, is intrinsically problematic, as it dilutes the core constitutional value of democratic self-government. This is an important element of the British constitutional imaginary, often encapsulated in the concept of the 'political constitution'. The persisting strength of this attachment to the political constitution lies at the heart of much British hostility to the requirements of European alignment.

Conclusion – future convergence?

Thus, in Ireland, sovereignty concerns present doctrinal obstacles to European alignment, but are overcome by the substantive congruence of the EU and ECHR with national constitutional values. Whereas, in the UK, sovereignty concerns have not generated much of the way of doctrinal obstacles to European alignment – but the delegated and judicialised character of much of EU and ECHR law does not sit comfortably with the emphasis on political constitutionalism that forms an important part of the UK constitutional imaginary. This has given sceptics considerable leverage to challenge both EU and ECHR alignment.

As a conclusion, it is worth asking whether the contrasting European trajectories of Ireland and the UK might begin to converge in the future. In Ireland, might the substantive congruence between European alignment and national constitutional values begin to fray – perhaps due to the democratic deficits of important elements of EU decision-making? This could well lead to the emergence of new strands of Irish political constitutionalism with a more eurosceptic edge, prefigured perhaps by some of e.g. Sinn Féin's political rhetoric following the economic crisis of 2008. The critical work of UK legal scholars writing on Europe from a political constitutionalist perspective, like Mike Wilkinson, could have some intellectual influence in this regard.

However, Brexit has exposed the limitations of forms of political constitutionalism that are overly nationalistic in focus, and incapable of accommodating the need for systemic inter-state co-ordination in the European space. (More generally, much of the currently fashionable academic literature demanding a 're-politicisation' of Europe is hopelessly vague on this latter point, and lacking in specificity.) Furthermore, the way political constitutionalism has been used in Britain as a cosh to attack international human rights frameworks such as the ECHR also sours its appeal. Thus, as the UK emerges from the morass of Brexit, it is possible that Irish and British attitudes towards European

alignment may over time converge a little more than they do at present – but the place of Europe within their constitutional imaginaries is likely to remain very distinct.

Closure and continuity: the EU, Ireland and the United Kingdom 50 years on

Imelda Maher and Joelle Grogan

Trade, sovereignty, rights and freedoms, courts, and constitutional change are lenses through which we can examine how two politically, culturally, and linguistically inextricably linked common law countries have defined their diverging relationship with the EU. 50 years on the divergence is complete. The UK is now a third country, charting a future outside the EU, while Ireland remains one of 27 Member States reporting high levels of trust and support for the EU.

Hence 50 years on we have both the desire for closure (for the UK) and continuity (for Ireland). Both terms suggest stability – a desirable political goal and one to which law, as the framing devise for society, is key. In fact, we argue that closure and continuity are necessary for the relations between both states and their relationship with the EU now and in the next half century.

Trade and regulation

Closure was encapsulated in the political slogan 'Get Brexit Done' which came to define the British public and political mood in the aftermath of the 2016 Brexit referendum. But like the slogan, closure on the UK's EU membership belies the complexities involved. Leaving the EU, including the single market and the customs union, after 47 years of convergence and integration necessitated a radical reframing of trade relations and their regulation in only a fraction of that time.

Far more than red tape, regulation – or standard-setting, monitoring and enforcement – defines the terms upon which goods and services are traded and is at the heart of international trade. Maintaining EU standards would enable the UK to keep borders (and particularly the Ireland/Northern Ireland border) relatively free of 'red tape' but does not give closure on the fraught debate over standard-setting beyond them. Different standards can preclude im/exportation, while excessive or poorly resourced monitoring can slow trade down to such an extent as to render it unattractive. Poor enforcement can undermine standards while zealous enforcement can diminish trust between different systems and restrict trade. In trying to navigate these challenges to ensure the continuity of trade, the dynamism of negotiation between Ireland, the UK and the EU was shown in the conclusion of the Ireland-Northern Ireland Protocol, and now the Windsor Framework.

What debates over trade and regulation have shown is that while legal interdependence between the UK and EU has been hugely decreased since Brexit in 2020, it has not disappeared. Arrangements concerning Northern Ireland show that such interdependence for the UK, the EU and Ireland will remain a defining characteristic of their relationships. Looking forward, while legal norms like the Trade and Cooperation Agreement and the Withdrawal Agreement provide the foundational framework, the detailed rules will continue to evolve. Trust, system resilience, and a shared view of what is needed can provide the necessary continuity that allows for closure – and stability – on constitutional questions which border and define the UK, Ireland, and EU relationships.

Constitutional change in the UK

Sovereignty in the UK is tied even more now to the idea of sole and exclusive authority over a territory. Control over laws and borders in conflict with free movement rights, particularly of families and dependents, was a central point of contention for those advocating for UK withdrawal from the EU. This is reflected in the increasingly restrictive approach to migration of non-economically active third country nationals. This was evident even when the UK was a Member State for example in the case of EU children, especially black British children, dependent on the care of a non-EU national in the UK.

The extent to which membership and then withdrawal from the EU precipitated – at some points radical – constitutional reframing in the UK was not anticipated perhaps in part because the UK had struggled politically to see the EU as anything more than the single market. EU membership introduced the concept of a 'constitutional statute' placed atop a hierarchy of statutes, as well as limits on parliamentary sovereignty, and also introduced new principles, for example, proportionality into the nomenclature of the British courts. Post-Brexit, questions over the balance of power between the government and parliament have been tested. Successive draft laws have been introduced to assert autonomy and to remove the vestiges of EU law from the statute book but have so far not become law in the face of the need for legal certainty and to meet international obligations.

EU membership and withdrawal have also altered the balance of power between the constituent parts of the UK: Wales, Scotland, Northern Ireland, and England. While the referendum treated the UK as a single entity, Scotland has grown more assertive of its autonomy. The conventions that shape the relations of the different governments in the UK have also been diminished in post-Brexit arrangements further recalibrating the constitution with future changes between the constituent elements and Ireland possible to envisage.

No more so is this seen than in Northern Ireland, which remains without a government while the UK government considers steps less than direct rule from Westminster. Political contestation over post-

Brexit governance arrangements, and the impact of the Protocol/Windsor Framework have prevented power-sharing arrangements and forming the executive in Northern Ireland. The changes wrought by Brexit necessitated a constitutional rebalancing that risks, however, further destabilisation. Where sovereignty looks to territory and part of that territory remains contingent as in Northern Ireland, then unusual governance arrangements are created. However, European history shows these do not provide grand solutions. There can be no closure without the sustained efforts required to provide continuity and to reduce contestation to allow arrangements to work, or even flourish within all constituent parts of the UK and at all its borders.

Constitutional continuity and change in Ireland

The issues of closure and continuity also arise for Ireland after this first half century of EU membership. The EU was associated with modernity in Ireland: transforming what was a predominantly agrarian economy and becoming a key European hub for multinationals especially in pharma and tech. The status of women was transformed with EU law providing the tools through which equality could be asserted and latterly providing legitimacy, levers and law that helped underpin ultimately radical reform of abortion law. There were however a number of ruptures that also fractured these narratives of continuous economic and social progress.

First, the EU has had a major impact on the Irish constitution. The constitution can only be changed by referendum of which there have been 38 since it was adopted in 1937. Thirty-four of these amendments have been since the referendum to join the EU in 1972 and eleven of these have arisen out of EU membership. Unlike other referendums which focus on specific issues such as the introduction of divorce or removal of the death penalty, the EU referendums require inclusion of major international agreements within Irish law, often with debate on the EU generally as a proxy for discussion of specifics in the Treaties given the complexity of these documents. With two treaty revisions voted on twice (Nice and Lisbon), the legitimacy of the process is weakened. At the same time, while debates were intense, the Irish electorate have repeatedly revisited and ultimately reaffirmed Ireland as an EU member state.

The courts have been able to incorporate the core principles of primacy and direct effect into Irish law, albeit the threshold was set low for treaty revisions that would trigger a referendum to change the constitution. Having had a slow start, in recent years the Irish superior courts have made far more references to the CJEU some of which have had a major effect on EU Law for example in relation to the status of the European Stability Mechanism; the independence of the judiciary in Poland and data protection. Most recently, and perhaps following the surprise decision of the CJEU that a tribunal set

up to give effect to the equality directives could disapply national law under the primacy principle, the Supreme Court has adopted the language of constitutional identity suggesting a core set of principles or ideals vaguely defined which could however be invoked in the future against EU law.

The most fundamental rupture was the fiscal crisis of 2008 – and the requirements imposed by the Troika to overcome it. The impact on certain sectors of the economy were profound with the most long lasting effect being a housing crisis– not specifically attributed to EU policies – now proving a serious problem. In general, Ireland recovered well economically but the promise of prosperity so long associated with the EU was strained. At the same time, cooperation around vaccine purchase and rollout, the limited impact of the Mediterranean migration crisis on Ireland (and the relative ease with which large numbers of Ukrainian refugees have been welcomed), have restored the sense of continuity and optimism in the EU. And of course, Brexit has loomed large. Ireland has benefitted most from EU supports to mitigate negative economic effects of Brexit and will also receive €989 million under the post-covid EU Recovery and Resilience Facility. More significantly, the EU has been willing to develop a multifaceted bespoke response in light of the Belfast/Good Friday Agreement: the Common Travel Area continues, Ireland remains outside Schengen under Protocols 20 and 21, and now the Windsor Framework, have been put in place.

The future of Ireland and the EU

Ireland remains an optimistic EU Member State with little debate on withdrawal, the UK experience of political polarisation, constitutional impact and increased trade regulation having proved salutary. The next EU treaty revision will require a further referendum allowing for renewed debate and engagement at the level of constitutional politics and law. While Ireland was sometimes the only state to hold a referendum, the challenge for the EU is that treaty revision is now much more complex with over 40 parliamentary chambers required to give approval and several states likely to hold referendums.

The EU for now has shied away from treaty revision instead using the low key Conference on the Future of Europe to garner (limited) discussion among citizens. There are at least three issues that will be of concern in the future. First, the war in Ukraine has prompted some discussion on Irish military neutrality, and a discussion on the triple lock whereby UN permission is required to deploy Irish troops abroad. The issue is politically sensitive rendering it likely that Ireland will continue to retain special status under the EU defence regime, as this was a 'hot button' issue in previous EU referendums.

Second, Ireland is likely to remain outside Schengen instead retaining the common travel area with the UK which ensures free movement and related rights for citizens of both states. The limited legal status of arrangements between the two states means that high levels of trust and cooperation are required

between both governments and their civil servants for it to continue to work. Hence the recent removal of e-visa requirements for those EU nationals crossing the land border is welcome given the extent to which the border is porous for people's daily lives.

Finally, Ireland is a small state and while legally all states are equal in EU law, and while Brexit has shown the extraordinary extent to which the EU is willing to take on board the particular concerns of one Member State, a key issue in the Lisbon 'no' vote was the loss of a Commissioner – which was restored for all Member States. It is likely the EU will continue to grow. New members will continue to raise necessary questions as to how governance is structured – including how the Member States are represented in the institutions, and it will be important but difficult to balance effective representation and effective governance.

The continuity of EU membership for Ireland ensures stability around trade, travel and inward investment. Constitutionally, it can and will continue to accommodate the vision and values of the EU. The impact in the future on the legal order is uncertain as Ireland is now the only fully common law in the EU. In particular the courts and criminal law systems are now outliers in the EU as the only non-civil law regimes (although the civil law is not a monolith so differences can be exaggerated). The criminal law system is protected through the (convoluted) opt outs Ireland has under Protocols 21 and 22. The EU has no interest in dismantling any national legal order that adheres to EU values, but it is not at all clear how the common law will change in the next 50 years. And it begs the question should serious concerns arise between a specifically common law concern and EU law, the Supreme Court would look to the currently vague notion of constitutional identity to seek to shape the relationship between EU law and Irish common law.

50 years on

Economically inextricably interlinked, Ireland had to join the EEC when the UK did in 1973. Both of them tried three times to join, and both have had referendums on Europe since – constitutionally binding in Ireland and consultative in the UK. Beyond this, however, the parallel paths of both the UK and Ireland at the beginning have widely diverged. Ireland has remained an EU member state, with a judiciary constructively engaged with EU Law and the realisation of EU rights. Continuity of Irish membership seems politically certain, though no doubt crises will continue to arise for the EU there will be inevitable moments of constitutional reflection on the meaning and nature of Irish membership. For the UK, Brexit is done but the promise and hope of closure following withdrawal has had to be tempered. The unique situation and constitutional arrangements of Northern Ireland require the

recognition of interdependence, while good neighbourly relationships need continuity and engagement.

In reflecting on the past 50 years, we can predict the future with no certainty. However, we can perhaps hope for mutual prosperity and commitment to the values of constitutionalism as we close on this moment and continue to the next.

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