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**IRELAND'S BREXIT TROUBLES:
A COMPARATIVE CONSTITUTIONAL INQUIRY**

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Alla mia famiglia.

Preamble

Irish history is characterised by outstanding and opposing experiences. Indeed, throughout the last two centuries Ireland had to face the most disastrous famine of modern times but – at the same time – it became Europe’s fastest growing industrial economy, shifting from an economic system based on subsistence farming to an economy completely identified with the most advanced and globalized ones.¹

A hundred years ago, in fact, Irish people were considered as potato eaters,² while today the Republic of Ireland is a country which is currently fighting against the possible consequences of UK’s withdrawal from the European Union and which managed to brilliantly emerge from the 2008 economic crisis, as it successfully exited the bailout in 2013 and its economy kept growing since then, exceeding the rosiest expectations.³

Ireland is now considered as an economic miracle as it became the headquarter of many of the most important multinational corporations among those known as dot.com.

It all happened mostly due to an extremely favourable fiscal regime which indeed made Ireland the European country where taxation on the income of enterprises reaches its lowest.⁴ Specifically, the elements that make investments in Ireland exceptionally attractive include the amortisation of intellectual property rights and tax exemption on dividends.⁵

¹ Sean Dorgan, “*How Ireland Became the Celtic Tiger*”, Executive Summary Backgrounder, The Heritage Foundation, n°1945, 23rd June 2006

² The origin of the bizarre nickname given to the Irish people mainly came out because of a tragic event that upset the whole island of Ireland during the Nineteenth Century. Indeed, between 1845 and 1849 a huge famine occurred in Ireland due to the perpetrated failure of the potato crops, causing mass emigration and some one million deaths, thus somehow emphasising Irish people dependence on potatoes as a source of food and livelihood.

³ Cliff Taylor, “*The Crash–10 years on: scars remain amid the recovery*”, The Irish Times 6th January 2018 [online: www.irishtimes.com]

⁴ Moreover the Irish Government guarantees incentives for new businesses, benefits on hiring and on those dot.com enterprises investing in research and development.

⁵ Irish fiscal regime includes a tax on corporate profits, whose rate stands at 12.5% on all corporate profits, including those deriving from subsidiaries or coming from branches not resident in the Republic. Other interesting aspects belonging to the Irish fiscal regime comprise tax-credit – which amount to 30% on research and development activities – and tax deduction – which amount to 12.5% on research and development expenditure.

As regards incentives and benefits, the Republic of Ireland opted for fostering foreign investments in specific – strategic – sectors, such as the chemical-pharmaceutical one and the IT one.

Moreover, throughout the last five years, many American corporations chose to settle their headquarters in Ireland, as they preferred the Irish one to any other jurisdiction. As a consequence, the Republic benefited from huge FDIs (Foreign Direct Investments) coming from US, the latter being the country that invested the most in Ireland – much more than the People's Republic of China, the Russian Federation and the Federative Republic of Brazil combined.⁶ Furthermore, since 2015, more than seven hundred American firms hired some 130.000 Irish workers, most of which were employed by Facebook, Apple and Alphabet – a multinational corporation which is the parent company of Google and of numerous Google subsidiaries.⁷

Besides being affected by a troubled economic history, the Emerald isle has been the stronghold of both the Catholic and the protestant fundamentalism.

Indeed, meanwhile the Republic of Ireland was struggling to get its part within the global economic scene, Northern Ireland outlined its – no less surprising – history, as its society proved to be strong enough to survive and to recover from the longest and most violent civil conflict in contemporary history of West Europe.

The current political, economical and legal relationship between the North and the South of the island, the past more or less successful experiments in reconciliation, and the dynamics behind the several attempts aiming at democratic reconstruction, ground their roots in the way Ireland – understood not by means of its geographical definition, as the island of Ireland but rather through the political one, as a sovereign nation and therefore as the Republic of Ireland – related to the United Kingdom and, in turn, to the devolved regions of which it consists of, England, Wales, Scotland and Northern Ireland.

The pluralism which is intrinsic in the Irish society, not only within the British scenario, where Ireland faces the extremely modern and developed United Kingdom, but also towards the entire world – namely, Europe, the US and that part of the world which is commonly known as the Anglo-world and which includes Canada, Australia, New Zealand and South Africa – is reinforced and somehow exacerbated by the opposing cultural and religious influences which the country has been subject to since ever.

⁶ Pacione Di Bello, “*L'Irlanda è un paradiso*”, Italia Oggi, 27th July 2018 [online: www.italiaoggi.it]

⁷ *Ibidem*.

Indeed, since the most ancient times and throughout the modern and contemporary age, the Irish people shaped itself by means of its endurance and thanks to the compromises it had to reach in order to preserve its precarious peace, continuously undermined by more or less intense waves of migration and of invasion – starting from the Vikings up to the protestant exiles who were escaping from the religious wars fought in France during the Seventeenth century.⁸

The melting pot that followed and the homogenisation of a society which – at the beginning – was extremely heterogeneous and varied, are features of the current Irish society. Moreover, these are peculiarities of which Irish statesmen and politicians have always been politically proud of, since these traits enable to strengthen the pluralist vocation of the country.

However, in 2016, while peace among the thirty-two counties seemed to be a goal achieved and the Good Friday Agreement stood out as a brilliant success of both Irish and Northern Irish history, the ever stronger sovereign pushes and the rise of independence and national ideals began to move new socio-political contrasts.⁹

On 23rd June 2016, the British people was summoned to choose and it chose. Citizens coming from England, Wales, Scotland and Northern Ireland, were asked whether they wished *the¹⁰ United Kingdom to remain a member of the European Union or to leave the European Union*,¹¹ and they answered with a feeble¹² – albeit decisive – “leave”.

Among astonishment and dread resulted from the outcome of the United Kingdom European Union membership referendum, Northern Irishmen immediately perceived the risk and the hazard linked to such a choice, as they felt that Northern Ireland would have been the part of the UK most manifestly influenced by Brexit.

⁸ “Huguenot History”, The Huguenot Society of Great Britain and Ireland
[online: www.huguenotsociety.org.uk/]

⁹ See Paragraph 1, Chapter 4.

¹⁰ This citation, as well as all the following ones, will be highlighted within the text by using the *Italic font*.

¹¹ Official question of the United Kingdom European Union membership referendum
[online: www.gov.uk/]

¹² As a whole British people voted for “leave” (51.89%) but while England and Wales votes were in line with the final outcome (English and Welsh results were respectively 53.38% and 52.53% for leave), Northern Ireland and Scotland majorities showed different results (Northern Irish and Scottish results were respectively 55.78% and 62.00% for remain).

On 24th June 2016, Northern Irish people found out to be subject to a decision that they could not take – and that they wouldn't even wanted to.¹³

When the negotiations aiming at defining the terms of UK's withdrawal from the European Union begun, the searing shadow of the border between the Six Counties and the Republic of Ireland rekindled as a burning memory in Northern Irish people's mind, being not only the dividing line between two nations, but also the cut-off line between a EU member state and a – future – non-EU country.

On 24th June 2016, the threat of sectarian conflicts and discriminations slowly reappeared, and in the minds of Northern Irish – and Irish – citizens the gloomy images of an uncertain future started to take shape: border checks, custom duties and cash-strapped economy, a future deemed to be marked by anger and fear on both sides of the border.

The main aim of this work lies in the analysis of the possible – legal and constitutional – consequences over Ireland and Northern Ireland, which may result from UK's withdrawal from the European Union.

Such a question can't be answered nor fully understood unless preceded by a deep and detailed study of the constitutional and political history of both the two nations lying on the Irish island. A first – historical – chapter will thus be followed by two main chapters aimed at investigating the relationships elapsing both between Irish and Northern Irish institutions and between Northern Irish political organs and the British Government, as well as the links existing among EU institutions, the European Convention on Human Rights (ECHR), and Irish and British governmental bodies. One last chapter will finally focus on the several consequences resulted from UK withdrawal from the European Union, as well as on the arrangements agreed during the negotiations begun on 19th June 2017.¹⁴

¹³ Indeed, the relationship with the European Union – as well as its termination – falls among the so called excepted power, namely those competences which hadn't been devolved to Northern Irish Assembly. In such a scenario, where Northern Ireland has no autonomy over Brexit, Northern Irish vote seems to be of no significance.

¹⁴ See Paragraph 1, Chapter 4.

Glossary of Irish terms

<i>Áras an Uachtarán</i>	Home of the President
<i>Bunreacht na hÉireann</i>	The Irish Constitution
<i>Ceann Comhairle</i>	Speaker of the <i>Dáil</i>
<i>Cumann na nGaedheal</i>	Early pro-treaty party, usually translated as " <i>League of the Gaels</i> "
<i>Dáil Éireann</i>	Lower House of the Irish Parliament
<i>Fianna Fáil</i>	Political party, usually translated as " <i>Soldiers of Destiny</i> "
<i>Fine Gael</i>	Political party, usually translated as " <i>Tribes of the Gael</i> "
<i>Gaeltacht</i>	Irish-speaking area
<i>Garda Síochána</i>	Irish Police
<i>Oireachtas</i>	Irish Parliament
<i>Saorstát Éireann</i>	Irish Free State
<i>Seanad Éireann</i>	Upper House (Senate) of the Irish Parliament
<i>Sinn Féin</i>	Political party, usually translated as " <i>Ourselves alone</i> "
<i>Tánaiste</i>	Deputy Prime Minister
<i>Taoiseach</i>	Prime Minister
<i>Teachta Dála (TD)</i>	Deputy or Member of the <i>Dáil</i>
<i>Uachtarán na hÉireann</i>	President of Ireland

Chapter I Historical introduction

Ireland is a country which has always been afflicted by historical contrasts but besides this, it is a nation which has been torn apart by inner geopolitical tensions since its very inception and the latter help explaining the current diversities within the Republic. The Northeast is separated from the South by means of several lakes and swamplands – specifically, Shannon wetlands, which are rich in minerals and in peat, occupy most of the central territories. Moreover, low but steep hills – known as drumlins – divide the island and, up until the first half of the XIX century, they obstructed the circulation of traffic and domestic trade.

Similar obstacles divide the Southeast from the West, as the two sides of the island are crossed by several streams and short rivers, a few of which are navigable.

As a consequence, communication, trade and coastal shipping towards Great Britain were by far easier than domestic exchange.

As a matter of fact, the geographical barriers hindered the development of an efficient system of domestic communication and slowed down the improvement of trade, therefore delaying Irish economic development. Furthermore, since most of the inland territories were harsh and hard to pass through, the enlargement of economic markets and the urban development were severely discouraged.

The lack of an efficient and prosperous domestic economic market and of a dynamic trade system, made it difficult to reach a political and cultural unification, particularly due to the fact that the various Irish provinces tended to be isolated from the one from the others and they were inclined to gravitate towards British trade markets and to revolve around the densely populated areas of England, Scotland and Wales.

By the way, this attitude helps to explain the ability and the penchant – typical of the region of Ulster – for preserving cultural and linguistic traditions which were akin to those hailing from the city of Glasgow, in the South of Scotland, and not to the South of the island of Ireland.

The stumbling blocks stemming from the geographical shape of the isle and the resulting political, economical and cultural divergences, contributed to support and to emphasize the meaning laying behind the four historical provinces into which the island was, and still is divided: Ulster (*Cúige Uladh*) in the North, Leinster (*Cúige Laighean*) in the Southeast, Munster (*Cúige Mumhan*) in the South and Connacht (*Cúige Chonnacht*) in the West.

At present, the four historical provinces – which have no political significance – are themselves divided into 32 counties.¹⁵ The most interesting characteristic of the Irish local government system lies in the northernmost province, Ulster, which is geographically divided into nine counties (Antrim, Armagh, Cavan, Donegal, Down, Fermanagh, Londonderry, Monaghan and Tyrone), just three of which belong to the Republic of Ireland (Cavan, Donegal and Monaghan), while the remaining six (Antrim, Armagh, Down, Fermanagh, Londonderry and Tyrone) are part of the British territories and together they form the so-called Northern Ireland.¹⁶

Even though starting with the pre-Christian Era, thus dating back to the Fourth Century, may seem exaggerated and misleading, if compared to the core theme of the thesis – a constitutional analysis of the possible way through which *Brexit* may affect Irish and Northern Irish constitutional systems – I do believe that it is fundamental to dig up into Irish people's past so as to completely assimilate the deepest roots and origins of Irish past and current conflicts and political issues.

¹⁵ The Local Government Act [Local Government (Ireland) Act, Chapter XXXVII, 12th August 1898] was the act which instituted the current local government system, while the constitutional recognition of the system itself was guaranteed by the Twentieth Amendment to the Irish Constitution [Twentieth Amendment of the Constitution Act, 1999].

¹⁶ Actually, for the sake of clarity, the counties are gathered together into eight regions – Dublin, Midlands East, South East, Cork/Kerry, Shannon, West, North West and Northern Ireland), which have no direct administrative function as such, but which are useful in order to better plan and coordinate counties' specific issues.

Counties and regions of the island of Ireland.



Source: www.irishpoliticalmaps.blogspot.com

The geographical peculiarities corresponded to diverging interests about economy and culture. The divergences were more or less emphasized depending on how much the different sides of the island had been subject to the economic influence – mainly caused by British investments in the Emerald Isle – and to the cultural ones – produced by the spread of new ideas, philosophies and thoughts that, leaving from continental Europe and crossing both England and Scotland, managed to reach the island. The ideas that landed on the Irish steep coasts comprised philosophical movements, including Enlightenment and Romanticism, and religious ones, such as Protestantism and Catholicism coming from continental Europe. Moreover, the geopolitical particularities resembled remarkable

religious and ethnical differences. The Protestant Reformation, for instance, established its roots mainly in Ulster and the success of the religious movement was guaranteed by Plantation,¹⁷ the colonisation whereby British merchants and Scottish farmers were exiled to Ireland.

However, to fully understand the dynamics that – today – govern the relationship between Ireland and Northern Ireland and, as a consequence, between the Republic and the United Kingdom, it is essential to take one further step back throughout the history of the Emerald Isle. Indeed, it is fundamental to deeply understand the historical, cultural and political processes that led not only to the drafting of the Constitution of the Irish Free State in 1922 and to the Irish one in 1937, but that also provoked the signing of some historical treaties, such as the Act of Union (1800) and the Anglo-Irish Agreement (1921).

Today's Ireland is a single island whose political and administrative entity has been united for most of its history, but things eventually changed during the 20th century, when the island became split into two nations: the future Ireland and the United Kingdom.

In order to comprehend the entire history of Ireland and to grasp the reasons behind its controversial political relationship with the United Kingdom the following chapter will go through a chronological analysis of the main events that have characterized Irish socio-political and cultural development, briefly starting from the very first wave of colonization of the island – dating back to the years Before Christ – up to the current days.

1. Plantation, since 300 B.C. to XVII century

The first inhabitants of the island of Ireland were the Celts, an Indo-European people who migrated from the European continent after the last Ice age – approximately in 300 BC – and then settled down on the Emerald Isle, calling the new land *Éire*¹⁸ after their Matron Goddess, *Ériu*.

¹⁷ The phenomenon of Plantation occurred after the confiscation of the Irish agricultural lands at the hands of the British Crown: indeed, during the XVI and XVII century, those lands were colonised and somehow invaded by settlers coming from Scotland and England, where Protestant ideas had been disseminated since the Reign of Henry VIII (22nd April 1509 – 28th January 1547)

¹⁸ *Éire* is still today the Irish name for "Ireland", stating both the island and the sovereign state. Indeed, Article 4 of the Irish Constitution [Constitution of Ireland (*Bunreacht Na hÉireann*), 1st July 1937] specifies that *Éire* stands for the name of the Irish nation state, otherwise known, in the English language, as Ireland.

Christianity made its way to Ireland from Roman Britain, largely aided by the bishop St. Patrick,¹⁹ who managed to convert the Irish from Paganism to Catholicism.

Ireland was then subject to raids and devastations by the Vikings, who eventually settled there and set up small towns that were deemed to become the future Dublin and Belfast. Nevertheless, the Vikings were fought off and replaced by the Normans, who went ashore the Irish coasts when the exiled King of Leinster (*Diarmuid Mac Murchadha Caomhánach*, ... – 1171) fled to Aquitaine and asked for help to the Normans' King, Henry II (1133 – 1189). However, Normans failed to control the entire island and, since the XIII century, their rule over Ireland started being threatened by new local monarchs and weakened by the abating of English laws and customs, as many Normans were becoming more Irish than the Irish themselves – *Hiberniores Hibernis ipsis*.

The Statutes of Kilkenny – whose main aim was that of limiting the decline of the Hiberno-Norman Lordship of Ireland – were finally signed in 1366: they provided for a ban over marriage between native Irish and English ones, forbade the use of the Irish language and clarified that Ireland had to be ruled by English Common Law instead of the Irish *Brehon* Law.

By the middle of the XV century Norman holdings had been limited and they were reduced even more because of the War of the Roses (1455 – 1487) and due to the outbreak of Black Plague, which killed far more Normans than Irishmen.

One further change in the government and in the administrative system of Ireland occurred when Henry VIII (1491 – 1547) ascended the British throne. Known for murder of his second wife, for his several weddings and divorces, and for being the one who took the first step towards the English Reformation, Henry VIII aimed to increase his power and to conquer the various Irish kingdoms. The King – as well as his heir daughters Queen Mary (1516 – 1558) and Queen Elisabeth I (1533 – 1603) – managed to create the Kingdom of Ireland and to expand it after the victory of the War of the Nine Years (*Cogadh na Naoi mBlíana*, 1594 – 1603), a war which ended with the defeat of the Irish lords, forced to escape into exile.²⁰

Moreover, the term is used from the very first lines of the Constitution as the Preamble of both the Irish and English version recites: “*We, the people of Éire...*”.

¹⁹ Saint Patrick (Pádraig) (385–431), was a Christian preacher and bishop in Ireland. He is today identified as the "Apostle of Ireland" and he is Ireland's main saint patron.

²⁰ The Nine Years War ended with the sign of the Treaty of Mellifont (1603) and with the escape of Hugh O'Neill, Earl of Tyrone and Rory O'Donnell, Earl of Tyrconnell, as well as that of many other Irish lords and

The abandonment of Ulster by the Irish earls signed the end of Celtic Ireland and paved the way to the policies of Plantation.

In 1604, Ireland was fully united under English rule and King James I (1566 – 1623), who was born as a Scottish prince belonging to the Stuart House, eventually became the king of England, therefore uniting the three kingdoms – England, Scotland and Ireland – under one single monarch. However, the British people were Protestants, while Irishmen worshipped Catholic faith, and religious contrasts were not long in coming. Indeed, Catholics of Ireland felt resentment towards the Protestants rulers and, as a consequence, riots and rebellions were a daily occurrence. To gain better control over the island, the English monarch confiscated many lands and territories from Irish lords and farmers who, in turn, were replaced by Protestant English and Scots settlers, bringing on the Plantation of Ulster (1609). The British rulers hoped that settling some Protestants throughout the Irish lands and therefore shaping a population with a strong British national identity, would have helped quell rebellions. Nevertheless, the policies of Plantation worked successfully only in Ulster, where some counties housed Presbyterian and Protestant majorities.

During the Wars of the Three Kingdoms (1639 – 1651), Irish people staged rebellions against British rule, but they were eventually defeated by Oliver Cromwell (1599 – 1658).

Irish peace was further threatened when James II (1633 – 1701) – the last Catholic monarch governing the British Isles – was overthrown and forced to exile during the Glorious Revolution (1688 – 1689). The Crown fell to the hands of the protestant daughter, Queen Mary II (1662 – 1694) and to her groom, William III of Orange (1650 – 1702). Still, King James II could not give up and he hoped to reach London to reconquer his throne, by way of the Catholic and loyal Ireland. However, notwithstanding the large amount of supporters, James II was defeated during the battle that was fought along the banks of the river Boyne (1690)²¹, thus allowing William III to gain absolute control over Ireland.

earls, which is better known as the Flight of the Earls (*Imeacht na nIarlai*, 1607). Indeed, most of the Irish lords left Ulster after the defeat and settled in mainland Europe.

²¹ The Battle of the Boyne, which took place on 1st July 1690, has an intrinsic symbolic meaning, as it represented the defeat of Catholics by Protestants. Moreover, it is a cornerstone of the traditions celebrated by the Orange Order (Loyal Orange Institution), a Protestant organization, mainly based in Northern Ireland, whose name is indeed a tribute to the Protestant King William III of Orange. Today the Orange Order is also known as a conservative British unionist association that shows clear bonds with Ulster loyalism.

2. Act of Union, 1800

In the XVII century Ireland was involved in a personal union with England through the Monarch. It has been like that since the signing of the Crown of Ireland Act, which stated that from then on the King of England – at that time King Henry VIII – would have been the King of Ireland as well.

The Irish Parliament eventually approved the Act in 1541, therefore allowing the merging of the two kingdoms.

The personal union was then enlarged in 1603 when the Union of the Crowns occurred because of the lack of direct heirs to the English throne, after the death of Queen Elisabeth I. Indeed King James I managed to get the power to jointly rule the three kingdoms, the English, the Irish and the Scottish one. Moreover, in 1707, the Kingdom of England and that of Scotland were formally merged together into the Kingdom of Great Britain.

Meanwhile, the Irish Kingdom and, as a consequence, the Irish Parliament was subject to many restrictions and technically subordinated to the English Parliament, a constraint that caused the envy and the resentment of most of Irish MPs²² who – although having gained legislative independence from Great Britain by means of the 1782 Constitution²³ – refused the first proposal regarding a possible union (1799).

Indeed, notwithstanding the effective legislative independence gained in 1782, the access to Irish institutional power was still limited and set aside for a narrow entourage. The Catholic majority was in fact excluded from positions of power, as – according to the Irish Penal laws – the only ones who were allowed to take the power in Ireland were those belonging to the tiny group of the Anglo-Irish of the Protestant Ascendancy.

The Catholics' sense of injustice, frustration and impotence did not take it long to show up and it eventually culminated in a bloody rebellion (1798).

However, the fear and uncertainty that followed the rebellion, together with a strong and vivid British campaign guaranteeing a potential future Catholic emancipation – which

²² The abbreviation “MPs” stands for “Member of Parliament”.

²³ The Constitution of 1782 included several legal changes aimed at making the Irish Parliament free from all those legal restrictions which had been enacted throughout the previous decades – namely by Norman and English Governments – whereby Lord Lieutenant of Ireland was allowed to oversee and decide the parliamentary agenda.

would have included Catholics' permission to enter the Irish Parliament²⁴ – made the idea of a Union somehow more acceptable, and the Union was definitely approved by the Irish Parliament with a notable majority, although some MPs took a position against the Acts. Today the Union Acts are still in place, although amended, in the United Kingdom, while they have no validity in the Republic of Ireland since they were abrogated in 1962.

“Whereas in pursuance of his Majesty’s most gracious recommendation to the two Houses of Parliament in Great Britain and Ireland respectively, to consider of such measures as might best tend to strengthen and consolidate the connection between the two kingdoms, the two Houses of the Parliament of Great Britain and the two Houses of the Parliament of Ireland have severally agreed and resolved, that, in order to promote and secure the essential interests of Great Britain and Ireland, and to consolidate the strength, power and resources of the British Empire, it will be adviseable to concur in such measures as may best tend to unite the two kingdoms of Great Britain and Ireland into one kingdom, in such manner, and on such terms and conditions, as may be established by the Acts of the respective Parliaments of Great Britain and Ireland...”

Preamble to the Union with Ireland Act, 1800²⁵

²⁴ However, King George III (1738 – 1820) opposed the Catholic Emancipation, and the ban on Irish Catholic MPs was kept until 1829.

²⁵ The Union with Ireland Act 1800 [online: www.rahbarnes.co.uk]

The Act of Union, which eventually came into force on 1st January 1801, was in fact composed by two separate, although complementary, Acts:

- The Union with Ireland Act 1800 (39 & 40 Geo. 3 c. 67), approved by the British Parliament on 2nd July 1800
- The Act of Union (Ireland) 1800 (40 Geo. 3 c. 38), approved by the Irish Parliament on 1st August 1800

Although the two different denominations, both the Acts were ratified by the respective Parliaments with the same title “An Act for the Union of Great Britain and Ireland” and they set forth the merging of the Kingdom of Great Britain – resulted from the union, ratified in 1707, of England, Scotland and Wales – together with the Kingdom of Ireland, thus giving rise to the United Kingdom of Great Britain and Ireland, unified under a single common flag²⁶ and ruled by one unique monarch.

By approving the Acts, the British Parliament and the Irish one accepted to ratify eight articles:²⁷

- Articles I – IV were about the creation of a United Parliament of Great Britain and Ireland and provided for the presence of four bishops of the Church of Ireland in the House of Lords, together with the previous members of the Parliament of Great Britain, while the House of Commons had to hold one hundred more members from Ireland;
- Article V related to the merging of the Church of England and Church of Ireland into "*One Protestant Episcopal Church, to be called, The United Church of England and Ireland*";
- Article VI provided for the institution of a custom union;

²⁶ The flag created during the signing of the Union Acts, to celebrate the new-born United Kingdom of Great Britain and Ireland, still is UK's flag. It resulted from the merging of the previous flag of England and Scotland with St. Patrick's cross, so as to represent the Kingdom of Ireland as well.

²⁷ The Union with Ireland Act 1800 [online: www.rahbarnes.co.uk]

- [Article VII](#) set forth some principles related to the Irish contribution to the expenditures of the United Kingdom;
- [Article VIII](#) defined the legal and judicial architecture of the Union.

The Englishmen took great advantage of the approval of the Act of Union and they set up large land estates across Ireland, soon gaining huge wealth. However, with the approach of the middle of the XIX century, the green and prosperous Ireland was shaken both by a human and a natural event.

The Great Famine (*Gorta Mór*) swamped Ireland in 1845 when an extremely serious food crisis occurred because of a potato disease that had infected potato harvests. The crisis spread throughout Ireland causing some one million deaths and forcing another one million to emigrate.

In 1849 Irish population was almost halved and among those who survived an increasing sense of bitterness towards Great Britain began to catch on, exacerbated by the heightened sectarian conflicts and by the indifferent – and insufficient – answer the British Government gave when facing the death of so many of its citizens.

On the other hand, the Catholic fight for emancipation reached its peak in 1929, when the Roman Catholic relief Act was eventually ratified by the Parliament of the United Kingdom, which provided for the repealing of the remaining Penal Laws which have hindered Irish Catholics' lives since the XVII century.

3. Home Rule Bills, since 1886 to 1914

The great famine, the resulting wave of emigration – mainly directed to the US – and the inevitable impoverishment and depletion of the country, together with some other unresolved issues, contributed to embitter Anglo-Irish relationships and inadvertently incited Irish patriotic and nationalist ideals.

Indeed, during the second half of the XIX century, Irish citizens not only began asking out loud for Home Rule, but they also developed new socio-political and cultural movements. The latter shaped the Gaelic Revival (*Athbheochan na Gaeilge*), a form of cultural

nationalism that improved and fostered Irish language, culture, folklore, and even Gaelic sport traditions.

It all started in 1830, with the institution of the Ulster Gaelic Society, which was soon followed by the Society for the Preservation of the Irish Language (*Cumann Buan-Choimeáda na Gaeilge*, 1876) – which aimed at safeguarding and promoting the Irish language – and by the Gaelic Union (1880), whose greatest success surely was the publication of the first Gaelic Journal (*Irisleabhar na Gaedhilge*) in 1882.

However, Irish patriotism did not limit itself to the maintenance and the promotion of Irish language, art and literature. Quite the opposite, the wave of nationalist feeling that overwhelmed Ireland during the second half of 1800, also involved Irish sport – considered to be the key of strength e cohesiveness of a people – whose fostering eventually led to the creation of the Gaelic Athletics Association (*Cumann Lúthchleas Gael*), which was instituted in 1884.

The Gaelic League (*Conradh na Gaeilge*), which aimed at supporting the use of Irish traditional language so as to oppose the Anglicisation of Ireland, was founded a few years later, in 1893.

Although both the Gaelic Athletics Association and the Gaelic League were theoretically independent from everyday politics, the reasons behind the safeguarding of Irish sports and language were clearly linked with the ideals promoted by Irish nationalists and indeed many signatories of the 1916 Proclamation of Independence – first among everyone Patrick Pearse²⁸ (*Pádraig Anraí Mac Piarais*) – were members of the Gaelic League

Moreover, besides literary and sport associations, some social and political movements began to spread all over Ireland. Among the latter, the Irish Republican Brotherhood (*Bráithreachas Phoblacht na hÉireann*), founded in 1858, aimed at establishing an Irish independent democratic republic, while Sinn Féin²⁹ – which was established a few years later, in 1905 – was a real political party, whose ideals were linked with Irish republicanism and democratic socialism.

Still, at the end of the century, Irish patriotic feeling and the desire for independence became so strong to emerge into an explicit request for Home Rule.

²⁸ Patrick Henry Pearse (1879 – 1916) was an Irish lawyer and writer who, due to his nationalist beliefs, decided to be a republican activist and revolutionary, eventually becoming one of the leaders of the Easter Rising in 1916.

²⁹ www.sinnfein.ie [official website of Sinn Féin Party]

Home Rule is a locution that generically indicates the set of rules that have to be adopted and respected within the nation boundaries, so as to gain and guarantee the recognition of a country's legislative independence from a central government or a colonial power.

However, the definition of Home Rule may include – by and large – those emancipation processes carried out to first gain independence, as the one occurred in Ireland between the 1870s and 1914.

Ireland had been embedded into the United Kingdom since the Acts of Union and although some protests arose through the years – mainly in 1930s, when Daniel O'Connell³⁰ attempted to abrogate the Acts of Union so as to re-establish the Kingdom of Ireland and to cut every bond with the British Crown – Ireland was still subject to the alert and austere gaze of the British monarch.

During the 1850s, Irish intolerance had become no longer sustainable, their impatience was at that point undeniable and, in 1875, the Irish Question suddenly speeded up due to MP Charles Stewart Parnell³¹ who, together with the Home Rule League members, triggered a strong protest deliberately using obstructionism and fuelling countryside rebellions. Meanwhile riots and protests were overflowing Ireland, in 1874 Isaac Butt³² was about to establish the Home Rule League, which would have been soon replaced by the Irish Parliamentary Party – better known as the Home Rule Party – in order to provide Irish nationalist MPs with a proper parliamentary group, able to support Irish requests concerning the Home Rule and the Land reform.³³

³⁰ Daniel O'Connell (*Dónall Ó Conaill*, 1775 –1847) was an Irishman devoted to political issues concerning Catholic emancipation and the repeal of the Acts of Union.

³¹ Charles Stewart Parnell (1846 – 1891) was an Irish politician with strong nationalist ideals. He served as an MP in the House of Commons of the United Kingdom of Great Britain and Ireland and as a leader of the Irish Parliamentary Party. He was still the leader when the party eventually held the balance of power in the House of Commons during the Home Rule discussions of 1885-1890.

³² Isaac Butt (1813 – 1879) was an Irish attorney and a politician. He served as MP in the House of Commons of the United Kingdom and as a Queen's Counsellor. Moreover, he founded many Irish nationalist parties and associations, including the Irish Metropolitan Conservative Society (1836), the Home Government Association (1870) and Home Rule League (1873).

³³ Land reforms had always been asked for by Irish people, but never granted by the British Government. However, since the 1870s, riots and protests increased and eventually gave rise to a Land War (*Cogadh na Talún*) which Irish farmers fought – led by Irish National Land League – so as to improve the position of tenant farmers by means of a reallocation of land to tenants from absentee landlords.

Home Rule became an obsession, an irrepressible desire that Irish nationalist had to achieve.

Ultimately, in 1886, the Nationalist Party managed to hold the balance of power and Prime Minister William Ewart Gladstone³⁴ sustained the Home Rule request as a price to be paid for Irish parliamentary support. Nevertheless, despite the efforts made, the Home Rule Bill of 1886 – the first of three – was defeated in the House of Common where the Liberal Party, initially favourable to the Home Rule, did not ensure and in fact spilt into two counterpoised factions.

Despite the failure, the first Home Rule Bill symbolized a significant step towards Irish independence and caused alarmism among Ulster Unionists who – being supporters of the maintenance of a tight Anglo-Irish bond – reacted creating the Irish Loyal and Patriotic Union (1885), which was soon followed by a revival of the Orange Order's³⁵ ideals and by the foundation of both the Loyalist Anti-Repeal Union (1886) and the Ulster Unionist Party³⁶ (1905).

In conjunction with Gladstone return to power – after a long period during which Conservatives' policies, clearly in favour of Unionist ideals, may be resumed as "*killing Home Rule with kindness*" – a second Home Rule Bill managed to be approved by the House of Commons in 1893, but it was defeated again by the conservative House of Lords. The veto power held by the House of Lords was in fact the reason behind the failure of the second Home Rule Bill. Indeed, the Home Rule Bill – the third one – managed to be approved by both Houses only when, in 1911,³⁷ the Lords' veto power was abolished.

³⁴ William Ewart Gladstone (1809–1898) was a British politician belonging to the Liberal Party, who served as Prime Minister of the United Kingdom and as Chancellor of the Exchequer.

³⁵ The Orange Order (Loyal Orange Institution) is a Protestant organization – its name is indeed a tribute to the Protestant King William III of Orange – which was founded in 1795 and whose main headquarter is Northern Ireland. Today the Orange Order is also known as a conservative British unionist association that shows clear bonds with Ulster loyalism.

³⁶ The Ulster Unionist Party (UUP) is a Northern Irish unionist political party which gathered support during the late XIX century and the first years of the following one, ultimately being able to govern Northern Ireland between 1921 and 1972.

³⁷ In 1911, as a consequence of a political compromise, the House of Lords' veto power was heavily modified: although not completely abolished, it was ultimately transformed into a suspensory power (maximum 2 years) being no more an absolute one and therefore avoiding the possibility of defeating once again the Home Rule Bill (*Parliament Act 1911*, 1 & 2 Geo. 5 c. 13) [online: www.legislation.gov.uk]

In 1910, Home Rule Party held again the balance of power and, although a strong opposition campaign led by the Unionists, the third Home Rule Bill was finally passed in 1912, to become law in 1914.

Home Rule Bills main provisions (1886, 1893, 1914).

Home Rule Bill, 1886	Home Rule Bill, 1893	Home Rule Bill, 1914
<ul style="list-style-type: none"> • Unicameral assembly comprising two Orders allowed to meet either together or separately; • The first Order, consisting of the 28 Irish representative peers as well as 75 members elected by means of an extremely limited franchise, was allowed to delay the approval of laws for a maximum of 3 years; • The second Order, consisting of 204 (or 206: the decision on including two members appointed by the graduates of the Royal University had not yet been taken); • Exclusion of all Irish MPs from Westminster; • Lord Lieutenant of Ireland held the executive and his decisions would not be responsible to the two Orders; • Peace, war, defence, treaties with foreign states, trade and coinage were issues still subjected to British control; • British control over the Royal Irish Constabulary; • Irish control over the Dublin Metropolitan Police. 	<ul style="list-style-type: none"> • Bicameral Irish Parliament, ruling over domestic affairs, consisting of a Legislative Council and an Assembly; • Legislative Council consisting of 48 councillors (eight-year, four-year intervals), elected by means of a franchise based on a £20 property qualification; • Legislative Assembly consisting of 103 members (maximum five-years term), elected by means of a franchise based on a £10 property qualification; • Lord Lieutenant of Ireland held the executive and controlled the Executive Committee of the Privy Council of Ireland; • The Lord Lieutenant of Ireland's executive was not responsible to the Irish Parliament; • 80 Irish MPs allowed to vote in Westminster. 	<ul style="list-style-type: none"> • Bicameral Irish Parliament in Dublin allowed to rule over most national affairs; • Senate consisting of 40 members; • House of Commons consisting of 164 members; • 42 Irish MPs allowed to vote in Westminster; • Abolition of the administration of Dublin Castle, but preserving the Lord Lieutenant.

Source: www.parliament.uk; own reworked version.^{38 39 40}

³⁸ First Home Rule Bill, Government of Ireland Act (1886), [online: www.parliament.uk]

³⁹ Second Home Rule Bill, Government of Ireland Act (1893), [online: www.parliament.uk]

⁴⁰ Third Home Rule Bill, Government of Ireland Act (1914), [online: www.parliament.uk]

Ultimately, the outbreak of the First World War caused the proper implementation of the Third Home Rule Bill – which was meant to guarantee national autonomy to Ireland, but still considering the Emerald isle as part of the United Kingdom of Great Britain and Northern Ireland – to be deferred.⁴¹

The third Home Rule Bill was finally fully implemented after the end of the First World War but meanwhile uncertainty, rebellion, fear and turmoil began to shake Ireland once again.

The crisis brought about by the approval of the third Home Rule Bill proved to be a real conflict between the Nationalist majority and the Ulster Unionist minority: soon the differing opinions regarding Home Rule and the dialectic and parliamentary clashes concerning its implementation escaped the walls of the Parliament and poured out into the streets of Irish and Northern Irish cities, where realized themselves into armed groups composed by men who were willing to die so as to defend their ideals.

In 1912, in Belfast, a large group of Unionists signed the Solemn League and Covenant,⁴² declaring their opposition to the concession of the Home Rule and swearing to use *all means which may be found necessary to defeat the present conspiracy to set up a Home Rule Parliament in Ireland*.⁴³

The creation of the Ulster Volunteers as the armed branch of the Solemn League and Covenant, followed in 1913.⁴⁴

Meanwhile, in Dublin, some Nationalists belonging to the Irish Republican Brotherhood (IRB), established the first small team of Irish Volunteers, apparently as an answer to the creation of the Ulster Volunteers. Indeed, Irish Volunteers (*Óglaigh na hEireann*) – whose members belonged to the Gaelic League and to the *Sinn Féin* Party – proved to be a real military organisation which played the role of the *guarantee of the liberties which the Irish*

⁴¹ A fourth Home Rule Bill, the 1920 Government of Ireland Act, passed in 1920, was then properly implemented throughout Northern Ireland and in Ireland, albeit partially.

⁴² Ulster Volunteer Force (1913-1920), Ulster's Solemn League and Covenant, 1912.

⁴³ Katy Stoddard, “*Archive: Irish Home Rule and the Ulster Covenant*”, The Guardian, 29th September 2014. [online: www.theguardian.com/]

⁴⁴ In 1966, another Northern Irish loyalist military organisation – the Ulster Volunteer Force (UVF) – was created recalling the Ulster Volunteers’ name and claiming to be its descendant, although no link formally exists between the two. During the Northern Irish Troubles, the Ulster Volunteer Force fought the IRA (Irish republican Army), the reunification of Northern Ireland and Éire and Irish republicanism – embodied into the Irish Republican Army – making itself the author of some five hundred murders.

*people shall have secured*⁴⁵ and which aimed at *securing and maintaining the rights and liberties common to all the people of Ireland*.⁴⁶ Irish Volunteers fought during the Easter Rising (1916) to achieve Ireland's independence and ultimately they joined the Irish Citizen Army, *Cumann na mBan*⁴⁷ and *Na Fianna Éireann*⁴⁸ so as to create the Irish republican Army (IRA).

⁴⁵“*Manifesto of the Irish Volunteers*”, promulgated at the Rotunda Meeting, 25th November 1913

[online: www.rte.ie/]

⁴⁶“*Manifesto of the Irish Volunteers*”, promulgated at the Rotunda Meeting, 25th November 1913

[online: www.rte.ie/]

⁴⁷ *Cumann na mBan*, "The Women's Council" was an Irish republican women's paramilitary organisation formed in 1914, which served as an auxiliary of the Irish Volunteers.

⁴⁸ *Na Fianna Éireann* was an Irish nationalist youth paramilitary organisation formed in 1909, which served as an auxiliary of the Irish Volunteers.

4. Easter Rising, 1916

*O when may it suffice?
That is Heaven's part, our part
To murmur name upon name,
As a mother names her child
When sleep at last has come
On limbs that had run wild.
What is it but nightfall?
No, no, not night but death;
Was it needless death after all?
For England may keep faith
For all that is done and said.
We know their dream; enough
To know they dreamed and are dead;
And what if excess of love
Bewildered them till they died?
I write it out in a verse –
MacDonagh and MacBride
And Connolly and Pearse
Now and in time to be,
Wherever green is worn,
Are changed, changed utterly:
A terrible beauty is born.*

Easter 1916, W. B. Yeats⁴⁹

Most nations identify an intense melodramatic event as the cornerstone on which their history is built on: for the USA is Independence Day (4th July) and for France is Bastille Day (14th July), but while many episodes could be chosen in the Irish case, one has more significance than the others: Easter Rising 1916.⁵⁰ Indeed, in contemporary Irish history does not exist another local event which has had such a strong, enduring and deep impact both over scholars and public opinion.

However, the 1916 Irish revolution was anything but a mass uprising. The ones who rose up in Dublin, between the 24th and 30th of April, were in fact slightly more than a thousands of men and women guided by just seven leaders - Patrick Pearse, James

⁴⁹ William Butler Yeats, "Easter 1916", 25th September 1916

⁵⁰ Coakley J., "Politics in the Republic of Ireland", Part I - Chapter I, Routledge, VI Edition, 2018.

Connolly, Thomas Clarke, Sean MacDermott, Joseph Plunkett, Eamonn Ceannt and Thomas MacDonagh – and belonging to the Irish Volunteers nationalist militia, to the socialist union Irish Citizens Army and to the female team, *Cumann na mBann*.⁵¹

At the end of the World Conflict, British power appeared to be weak and abated and the Irish nationalist rebels got the chance to realize those revolutionary ideas that had been theorised by Theobald Wolfe Tone⁵² already during the XVIII century.

That was how nationalist rebels – reinvigorated by the Gaelic Revival and by the creation of many military organisations – managed to plan the insurrection against British control, while London was committed into facing a possible German victory on the Western front.

The ever-increasing desire for independence and the fear that a sudden conclusion of the World War might make the chance fading away, contributed to persuade the rebels that the time has come, and indeed, on Monday 24th April 1916, the insurgents' main unit walked through Dublin's streets and made the building of the General post Office the insurrection's headquarter. Here, standing in front of the majestic white pillars, Patrick Pearse⁵³ proclaimed the new Republic of Ireland.

⁵¹ The League of Women (*Cumann na mBan*) was an auxiliary force – independent but executively subordinated to the Volunteers – aimed at complementing the Irish Volunteer Force (IVF) since 1914. Although it included women coming from several different backgrounds, most of them were professional women or belonged to the white-collar workers.

“*Cumann na mBan, Easter Risings Profiles*”, BBC – History [online: www.bbc.co.uk]

⁵² According to Theobald Wolfe Tone (1763 – 1798) – the father of Irish republicanism – the only way to turn the Anglo-Irish conflict, intrinsically uneven, in Ireland's favour was in fact catching a British difficulty, and ultimately, he summarized his thought by stating that “*England's difficulty [was] Ireland's opportunity*”.

⁵³ Patrick Henry Pearse (*Pádraig Anraí Mac Piarais*, 1879 – 1916) was an Irish lawyer and writer who, due to his nationalist beliefs, decided to be a republican activist and revolutionary, eventually becoming one of the leaders of the Easter Rising in 1916 and being shot because of his leader role in the uprising.

POBLACHT NA hÉIREANN
THE PROVISIONAL GOVERNMENT OF THE IRISH REPUBLIC
TO THE PEOPLE OF IRELAND

IRISHMEN AND IRISHWOMEN: In the name of God and of the dead generations from which she receives her old tradition of nationhood, Ireland, through us, summons her children to her flag and strikes for her freedom.

Having organised and trained her manhood through her secret revolutionary organisation, the Irish Republican Brotherhood, and through her open military organisations, the Irish Volunteers and the Irish Citizen Army, having patiently perfected her discipline, having resolutely waited for the right moment to reveal itself, she now seizes that moment, and supported by her exiled children in America and by gallant allies in Europe, but relying in the first on her own strength, she strikes in full confidence of victory.

We declare the right of the people of Ireland to the ownership of Ireland and to the unfettered control of Irish destinies, to be sovereign and indefeasible. The long usurpation of that right by a foreign people and government has not extinguished the right, nor can it ever be extinguished except by the destruction of the Irish people. In every generation the Irish people have asserted their right to national freedom and sovereignty; six times during the past three hundred years they have asserted it in arms. Standing on that fundamental right and again asserting it in arms in the face of the world, we hereby proclaim the Irish Republic as a Sovereign Independent State, and we pledge our lives and the lives of our comrades in arms to the cause of its freedom, of its welfare, and of its exaltation among the nations.

The Irish Republic is entitled to, and hereby claims, the allegiance of every Irishman and Irishwoman. The Republic guarantees religious and civil liberty, equal rights and equal opportunities to all its citizens, and declares its resolve to pursue the happiness and prosperity of the whole nation and of all its parts, cherishing all of the children of the nation equally, and oblivious of the differences carefully fostered by an alien Government, which have divided a minority from the majority in the past. [...]

Irish Proclamation of Independence, 1916

Protests, riots and turmoil followed.

Nationalist rebels attempted to fight the British Army and to seize Dublin's main strategic locations, but they happened to face not only the Crown's military forces, but also Dubliners themselves who – suspicious and sceptical – denied their support to the insurrection.

Nationalists' insurrection proved to be hopeless and despaired right away, but the lack of an appropriate arsenal⁵⁴ and the danger of that rebellious challenge couldn't stop the revolutionaries. The answer of the British Crown was not late in coming, and it was as inescapable as relentless. In less than a week time, some 16000 British soldiers were deployed on Irish soil: the uprising was brutally put down and those who managed to survive the armed conflict were sentenced⁵⁵ to death or imprisoned.⁵⁶

Dublin people, until then bewildered and confused, suddenly changed their point of view. Those who had been considered as criminals deserving severe sentences as they were fighting on their own Irish land and against their own Irish brothers,⁵⁷ unexpectedly turned to be martyrs and national heroes who scarified their own lives for Ireland's freedom and independence.

Besides Dubliners' changed opinion, the aftermath of the Easter Rising included huge destruction, deaths and injured civilians. Moreover, the Home Rule Party had been weakened by the insurrection while unionists were confident and pleased by the rebels' defeat. However, the introduction of compulsory conscription, in 1918, and the political radicalism which had been spreading throughout Europe during the last few years, fostered *Sinn Féin* – which had been re-instituted in 1917.

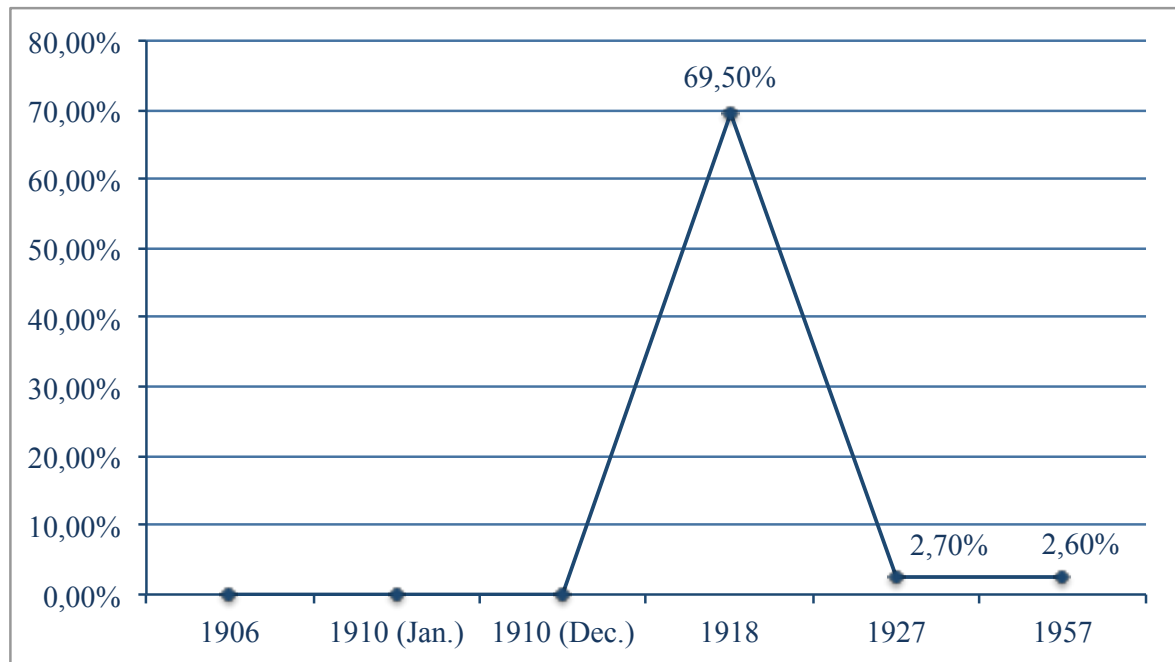
⁵⁴ The danger of the insurrection has been proven to be real already a few days before the uprising. Indeed, on 21st April 1916, the English forces managed to catch a huge shipment – containing arms and weapons – which was carried by the German ship *Libau (Aud)*, which in turn was meant to dock at the nearest Irish port.

⁵⁵ Once the rising had been repressed, English forces shot 15 leaders of the rebels and some other 60 death penalties were eventually commuted into prison sentences.

⁵⁶ Some 3000 people were arrested – being it three times the real number of the rebels – and among those, some 1400 were sentenced to life in prison.

⁵⁷ Irish citizens, as citizens of the United Kingdom of Great Britain and Ireland, were compelled to join – together with English, Welsh and Scottish soldiers – the British army, that same army which had been lined up to fight and repress 1916 Easter Rising.

Electoral percentage gained by *Sinn Féin* in United Kingdom General Elections⁵⁸



Source: www.electionsireland.org; own calculations.

Led by Éamon De Valera⁵⁹ – the most influential one among the survived rebels' leaders – *Sinn Féin* suddenly gathered increasing support (see Graphic 1) and succeeded in gaining a overwhelming victory during the 1918 General Election. In this occasion, *Sinn Féin* managed to get 73 out of the 105 Irish seats in the British Parliament, therefore amply overtaking the Nationalist Party, which in turn only got six seats.

Surprisingly, notwithstanding the victory, *Sinn Féin* members refused to take their seats in Westminster, twenty-seven among them began to call themselves as *Teachtaí Dála*⁶⁰ (TDs) and eventually, in 1919, they established in Dublin their own revolutionary assembly, the *Dáil Éireann* (Assembly of Ireland).

⁵⁸ Online: [www.electionsireland.org] and [www.election.demon.co.uk]

⁵⁹ Éamon de Valera (1882 – 1975) was an Irish politician and statesman who strongly sustained Irish independence. He served more than once as Head of Government and as Head of State.

⁶⁰ The term *Teachtaí Dála* was used for the first time in 1918. The term labelled those Irish parliamentarians who – although being elected at the 1918 General Election – refused to seat at the British House of Commons in London and instead decided to meet in Dublin, thus giving birth to the First *Dáil Éireann*. Initially "*Feisire Dáil Éireann*" was suggested, but eventually "*Teachta*" was the term used. The term kept to be used throughout the years and it's still used today.

Ultimately, the *Dáil Éireann* ratified the 1916 Independence Declaration, according to which Ireland had to be proclaimed an independent republic, and Éamon De Valera – back from his visit in the USA⁶¹ – was elected President of the *Dáil Éireann*.

However, in Ireland there wasn't peace yet. British forces were in fact still opposing the Republic and Ireland's new institution were not able to guarantee certainties to Irish people: soon contrasts between British authorities and the *Dáil Éireann* – declared illegal since its foundation in 1919 – gave rise to a guerrilla war (Irish War of Independence) which saw the British forces – British Army, Royal Irish Constabulary and Ulster Special Constabulary – fighting against the Irish republican Army (IRA), as the army of the Irish republic. The conflict escalated slowly, but it abruptly reached its worst on a Sunday,⁶² in November 1920.

Ultimately, in 1921, the British Parliament approved the Government of Ireland Act, aiming at providing for a Government of Ireland⁶³ by means of separate Home Rule institutions and by dividing the island into two main parts:

- Northern Ireland, having Belfast as capital city and comprising six out of nine Ulster's counties (Antrim, Armagh, Down, Fermanagh, Londonderry and Tyrone);
- Southern Ireland, having Dublin as capital city and including the remaining twenty-six counties.

Although the Government of Ireland Act – fully implemented in Northern Ireland and partially applied in Southern Ireland as well – provided for a certain degree of independence, it still established both the “Irelands” to be part of the United Kingdom of

⁶¹ In summer 1919, Éamon De Valera went to the United States, so as to achieve three main aims. Firstly, he wanted the new-born Irish Republic to be officially recognised; secondly, he hoped to get a loan to support Irish Government and the army (Irish republican Army); thirdly, De Valera wanted to make sure that US support for the Republic was real and sincere. Eventually – through successes and defeats – De Valera managed to raise \$5,500,000, hence exceeding the *Dáil*'s greatest expectations.

⁶² Sunday 21st November 1920 is commonly remembered as the Bloody Sunday (*Domhnach na Fola*) and as the worst day of Irish War of Independence since thirty-two people were killed or fatally wounded in Dublin, in just one day.

⁶³ Government of Ireland Act, 1920 (10 & 11 Geo. 5 Ch. 67.) [online: www.legislation.gov.uk]

Great Britain and Ireland, therefore being compelled to acknowledge the British monarch as the legitimate Head of State.

A truce, which was announced by the British forces and the Irish army, came after the signing of the Government of Ireland Act, and it was then followed by talks between the two factions, which eventually resulted into the ratification of the Anglo-Irish Treaty (1921).

Anglo – Irish Treaty, 1921

- Superiority of the Anglo-Irish Treaty over Irish Free State Law and Irish Free State Constitution (1922);
- Withdraw of most of the British forces from Ireland;
- Ireland's belonging to the British Commonwealth as a self-governing dominion of the British Empire;
- Acknowledgement of the British monarch as the Head of State of the Irish Free State (*Saorstát Éireann*);
- Oath of Allegiance to the Irish Free State;
- Opt-out clause to withdraw from the Irish Free State, would have been granted to Northern Ireland – previously established by the Government of Ireland Act in 1920;
- Boundary Commission to draw the boundary between the Irish Free State and Northern Ireland in case of Northern Ireland withdrawal;
- British Royal Navy control over a few Irish ports – the Treaty Ports.

Source: www.difp.ie; own reworked version.⁶⁴

The Anglo-Irish Treaty has probably been one of the most contested legislative acts in both Irish and British institutional history. The Treaty – founding the Irish Free State (6th December 1921) – caused chaos and dismay not due to its content – summarized in 18 detailed articles – but because of its intrinsic meaning. The signing of the Treaty represented in fact Irish Nationalists' surrender; it was a compromise that proved Irish inferiority as well as Ireland's dependence on the British Crown.

⁶⁴ Final text of the Articles of Agreement for a Treaty between Great Britain and Ireland, London, 6th December 1921 [online: www.difp.ie]

Dissatisfaction and disapproval eventually led to a deep split within *Sinn Féin* and to the Civil War. Indeed, *Sinn Féin* separated into those who judged the Treaty as a success, albeit incomplete, and those who firmly believed that signing the Treaty had been an irreparable mistake. First among the anti-Treaty *Sinn Féin* members was Éamon De Valera, who considered the Treaty as a defeat and as setback on the path towards Irish complete independence from the United Kingdom.

Ultimately, Éamon De Valera, leading the anti-Treaty *Sinn Féin* members, established a new political party from the ashes of *Sinn Féin*. The new republican political party, *Fianna Fáil* (*Fianna Fáil – An Páirtí Poblachtánach*, 1926), was clearly contrary to the Anglo-Irish Treaty and it endorsed liberal conservative ideals, soon becoming one of Ireland's major parties. The other *Sinn Féin*'s heir happened to be *Fine Gael*⁶⁵ (the Tribe of the Irish, 1933), a supporter of liberal conservative principles and – in contrast to *Fianna Fáil* – of the Anglo-Irish Treaty. Nonetheless, *Sinn Féin* was not the only social organisation that split apart after the signing of the Treaty: the very same army, the Irish Republican Army, crumbled and pro-Treaty soldiers eventually left the IRA so as to become the army of the new Irish Free State. Pro-Treaty forces – supported by the British Government – finally managed to win the Civil War and a ceasefire – soon followed by anti-Treaty forces' complete surrender – was agreed in 1923.

“Soldiers of the Republic. Legion of the Rearguard: The Republic can no longer be defended successfully by your arms. Further sacrifice of life would now be in vain and the continuance of the struggle in arms unwise in the national interest and prejudicial to the future of our cause. Military victory must be allowed to rest for the moment with those who have destroyed the Republic.”

De Valera's statement to anti-Treaty fighters after the signing of the ceasefire in 1923⁶⁶

⁶⁵ *Fine Gael* history is not as simple as it may seem. Indeed, the party resulted not only from the struggle caused by the split happened to be within *Sinn Féin*, but also from the merging occurred between *Cumann na nGaedheal* (Society of the Gaels), the National Centre Party and the right-wing movement embodied by the National Guard.

⁶⁶ Thomas E. Hachey, Lawrence J. McCaffrey, *“The Irish Experience Since 1800: A Concise History”*, Routledge, Third Edition, 2015, pp. 170–171

Once the Civil War was over, the institutional and political scenario consisted of an Irish Free State – as provided for by the Anglo-Irish Treaty – which was independent from the United Kingdom but belonging to the British Commonwealth, having the status of British Dominion.

5. Constitution of the Irish Free State, 1922

The new-born Irish Free State, almost free from the bonds that used to tie it to the United Kingdom of Great Britain and Ireland, counted twenty-six counties and had an institutional structure which was nearly independent from the British one. Indeed, the new state's fundamental law order and the political system derived from the Constitution of the Irish Free State,⁶⁷ which had been signed in 1922. The Constitution of the Irish Free State embodied the certainty of the existence of a free Irish state and it declared the state's independence from the United Kingdom: the 1922 Constitution gave guarantee to a people that, during the last decade, had been overwhelmed by riots, political uprisings and civil wars.

However, notwithstanding its intrinsic significance as the banner of Irish independence, the 1922 Constitution was not an absolute Act, but instead the result of the umpteenth compromise. The Irish Free State, holding fully sovereign domestic powers, was in fact not allowed to act as a complete sovereign nation outside its borders because of its own nature, as a Dominion of the British Empire. Indeed, although being an independent state, Ireland – as well as Canada, Australia, New Zealand and South Africa – was compelled to host a representative of the royal power, a substitute of the king, an institutional figure whose powers ranged from reserving a Bill *for the signification of the King's pleasure*,⁶⁸ to the summons and the dissolution of the *Oireachtas*,⁶⁹ to exclusively holding the Executive

⁶⁷ Constitution of The Irish Free State (*Saorstát Éireann*) Act, 1922 [online: www.irishstatutebook.ie]

⁶⁸ Article 41, Constitution of the Irish Free State (*Saorstát Éireann*) Act, 1922
[online: www.irishstatutebook.ie]

⁶⁹ Article 24, Constitution of the Irish Free State (*Saorstát Éireann*) Act, 1922
[online: www.irishstatutebook.ie]

Authority of the Irish Free State (*Saorstát Éireann*),⁷⁰ to appointing the members of the Executive Council.⁷¹

Furthermore, the 1922 Constitution had to be drafted *with reference to the Articles of Agreement for a Treaty between Great Britain and Ireland*,⁷² namely the Anglo-Irish Agreement – which indeed included some meaningful limitations on Irish sovereignty – and respecting the hierarchical superiority of such Articles over Irish Constitution itself⁷³ and over the amending power of the *Oireachts*.⁷⁴

“The [said] Constitution shall be construed with reference to the Articles of Agreement for a Treaty between Great Britain and Ireland set forth in the Second Schedule hereto annexed which are hereby given the force of law, and if any provision of the said Constitution or of any amendment thereof or of any law made thereunder is in any respect repugnant to any of the provisions of the Scheduled Treaty, it shall, to the extent only of such repugnancy, be absolutely void and inoperative and the Parliament and the Executive Council of the Irish Free State (Saorstát Éireann) shall respectively pass such further legislation and do all such other things as may be necessary to implement the Scheduled Treaty.”

Section 2, Constitution of the Irish Free State (*Saorstát Éireann*) Act, 1922⁷⁵

Proofs of the past dependence on the British Crown hid in most of the articles of the Irish Free State Constitution, more or less concealed by political and legal stratagems. Most of the remaining bonds between Dublin and London generically derived from the implementation of Section 2 of the Constitution of the Irish Free State (*Saorstát Éireann*) Act, 1922 and, as a consequence, they were due to the drafters’ duty to abide by the articles of the Anglo-Irish Treaty, an Act without which there would have been neither a state nor a the need for a Constitution.

⁷⁰ Article 51, Constitution of the Irish Free State (*Saorstát Éireann*) Act, 1922 [online: www.irishstatutebook.ie]

⁷¹ *Ibidem*.

⁷² Section 2, Constitution of the Irish Free State (*Saorstát Éireann*) Act, 1922

⁷³ *Ibidem*.

⁷⁴ Section 2 & Article 50, Constitution of the Irish Free State (*Saorstát Éireann*) Act, 1922

⁷⁵ Section 2, Constitution of the Irish Free State (*Saorstát Éireann*) Act, 1922

Constitution of the Irish Free State (<i>Saorstát Éireann</i>), 1922	
Article 1 , The Irish Free State member of the Community of Nations forming the British Commonwealth of Nations.	Ireland shall have the same constitutional status in the Community of Nations known as the British Empire Section 1, Articles of Anglo-Irish Agreement, 1921
Article 17 , The oath to be taken by members of the <i>Oireachtas</i> shall be in the following form: “I _____ do solemnly swear true faith and allegiance to the Constitution of the Irish Free State as by law established and that I will be faithful to H.M. King George V, his heirs and successors by law, in virtue of the common citizenship of Ireland with Great Britain and her adherence to and membership of the group of nations forming the British Commonwealth of Nations.”	The oath to be taken by Members of the Parliament of the Irish Free State shall be in the following form: Section 4, Articles of Anglo-Irish Agreement, 1921
Article 24 , The <i>Oireachtas</i> shall be summoned and dissolved by the Representative of the Crown [...].	
Article 41 , So soon as any Bill shall have been passed [...] the Executive Council shall present the same to the Representative of the Crown for the signification by him, in the King's name, of the King's assent, and such Representative may withhold the King's assent or reserve the Bill for the signification of the King's pleasure [...].	
Article 46 , The <i>Oireachtas</i> has the exclusive right to regulate the raising and maintaining of such armed forces as are mentioned in the Scheduled Treaty in the territory of the Irish Free State [...].	[...] But this shall not prevent the construction or maintenance by the Government of the Irish Free State of such vessels as are necessary for the protection of the Revenue or the Fisheries. Section 6, Articles of Anglo-Irish Agreement, 1921
Article 50 Amendments of this Constitution within the terms of the Scheduled Treaty may be made by the <i>Oireachtas</i> [...] and after it has been passed or deemed to have been passed by the said two Houses of the <i>Oireachtas</i> , have been submitted to a Referendum of the people.	
Article 51 The Executive Authority of the Irish Free State is declared to be vested in the King, and shall be exercisable [...] by the Representative of the Crown. There shall be a Council to aid and advise in the government of the Irish Free State to be styled the Executive Council. The Executive Council shall be responsible to <i>Dáil Éireann</i> , and shall consist of not more than seven nor less than five Ministers appointed by the Representative of the Crown [...]	

Constitution of the Irish Free State (Saorstát Eireann), 1922

Article 60. The Representative of the Crown, who shall be styled the Governor-General of the Irish Free State, shall be appointed in like manner as the Governor-General of Canada and in accordance with the practice observed in the making of such appointments.

The representative of the Crown in Ireland shall be appointed in like manner as the Governor-General of Canada and in accordance with the practice observed in the making of such appointments.

Section 3, Articles of Anglo-Irish Agreement, 1921

Source: www.irishstatutebook.ie; own reworked version.

Nevertheless, although the evidence of the British Crown over the green Irish soil was still clear, the Constitution of the Irish Free State showed some original features – occasionally extremely different from the British law system – and strong evidences of independence and autonomy.

As an example, among the very first articles of the Constitution of the Irish Free State, Article 4 (concerning National Language)⁷⁶ and Article 5 (avoiding titles of honour)⁷⁷ were obvious manifestations of the Irish struggle to distinguish themselves from the British neighbours, while deeper and more extreme innovations were introduced by means of Article 65⁷⁸ and Article 66.⁷⁹ Indeed, the latter provided the High Court the power to put

⁷⁶ “The National language of the Irish Free State (Saorstát Eireann) is the Irish language, but the English language shall be equally recognised as an official language. Nothing in this Article shall prevent special provisions being made by the Parliament of the Irish Free State (otherwise called and herein generally referred to as the “Oireachtas”) for districts or areas in which only one language is in general use.” Article 4, Constitution of the Irish Free State (Saorstát Eireann) Act, 1922 [online: www.irishstatutebook.ie/]

⁷⁷ “No title of honour in respect of any services rendered in or in relation to the Irish Free State (Saorstát Eireann) may be conferred on any citizen of the Irish Free State (Saorstát Eireann) except with the approval or upon the advice of the Executive Council of the State.” Article 5, Constitution of the Irish Free State (Saorstát Eireann) Act, 1922 [online: www.irishstatutebook.ie/]

⁷⁸ “The judicial power of the High Court shall extend to the question of the validity of any law having regard to the provisions of the Constitution. In all cases in which such matters shall come into question, the High Court alone shall exercise original jurisdiction.” Article 65, Constitution of the Irish Free State (Saorstát Eireann) Act, 1922 [online: www.irishstatutebook.ie/]

⁷⁹ “The Supreme Court of the Irish Free State (Saorstát Eireann) shall, with such exceptions (not including cases which involve questions as to the validity of any law) and subject to such regulations as may be prescribed by law, have appellate jurisdiction from all decisions of the High Court. The decision of the Supreme Court shall in all cases be final and conclusive, and shall not be reviewed or capable of being reviewed by any other Court, Tribunal or Authority whatsoever: [...]” Article 66, Constitution of the Irish Free State (Saorstát Eireann) Act, 1922 [online: www.irishstatutebook.ie/]

into question *the validity of any law having regard to the provisions of the Constitution*,⁸⁰ thus marking a clear cut with the British legal tradition. However, the mentioned mechanism of judicial review – completely ignored in the United Kingdom, where Parliamentary supremacy is an indisputable feature – has been invoked only twice between 1922 and 1937, as it was part of a law culture which was still tied to the past and wary of the new legal tool.

Eventually, the 1922 Constitution proved to be an efficient compromise between the Irish wishes for independence and the British wills for control, but during 1930s it was subject to legal turmoil and political changes.

The 1922 Constitution had in fact been approved by the pro-Treaty faction of *Sinn Féin* – emerged as the winner from the Irish Civil War – which re-organised as *Cumann na nGaedheal* (Society of the Gaels). During the early years of life of the Irish Free State, the *Cumann na nGaedheal* gathered large support and Irish people used to see it as the political party which had been able to create the Irish Free State. However, since 1930s, the extremely conservative political ideals, the despised economic policies and the party violent repression of its political antagonists, made the *Cumann na nGaedheal* an unpopular and disregarded political party.

Meanwhile, the anti-Treaty faction of the *Sinn Féin* rounded up its members into *Fianna Fáil* and – led by Éamon de Valera – they took up seating again in the *Dáil Éireann* (since 1927). *Fianna Fáil* slowly rallied consensus, taking advantage of the increasing unpopularity of *Cumann na nGaedheal* and ultimately the party won the 1932 elections by means of a less conservative political plan based on creating jobs, developing Irish industry and improving social welfare, and thanks to a coalition⁸¹ with the Labour Party.⁸²

Once entered in Government (1932), *Fianna Fáil* promoted policies aiming at eliminating all the bonds that still tied Ireland to the United Kingdom, by taking advantage of the just signed Statute of Westminster⁸³ and of the general political sentiment. Indeed, during

⁸⁰ Article 65, Constitution of the Irish Free State (*Saorstát Éireann*) Act, 1922

[online: www.irishstatutebook.ie]

⁸¹ However, the following election, in 1933, saw *Fianna Fáil* as the political party gaining absolute majority, with no need of a coalition.

⁸² The Labour Party (*Páirtí an Lucht Oibre*) is an Irish political party which was founded in 1912 to be political wing of the Irish Trades Union Congress. It fosters social-democratic ideals and its own Constitution defines the party itself as a "*democratic socialist party*".

⁸³ Statute of Westminster 1931, (Chapter 4 22 and 23 Geo 5), 1931 [online: www.legislation.gov.uk]

1930s, amendments to the Irish Free State Constitution followed one another, starting from the abolition of the Oath of Allegiance⁸⁴ – by means of the Constitution (Removal of Oath) Act⁸⁵ – to the proper dismantling of the 1922 Constitution, a process which sped up due to the 1930s socio-political scenario,⁸⁶ and which has been made possible by the signing of the Statute of Westminster, a particular – although fundamental – piece of British Law.

Statute of Westminster, 1931

Section 1

Meaning of Dominion in this Act

In this Act the expression “Dominion” means any of the following Dominions, that is to say, the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland.

Section 2

Validity of laws made by Parliament of a Dominion

- 1) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.
- 2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.

Section 3

Power of parliament of Dominion to legislate extraterritorially

It is thereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation.

⁸⁴ Article 17, Constitution of the Irish Free State (*Saorstát Éireann*) Act, 1922

[online: www.irishstatutebook.ie]

⁸⁵ Constitution (Removal of Oath) Act, 1933, n°6 of 1933 [online: www.irishstatutebook.ie]

⁸⁶ See as an example, the criticized Constitution (Amendment n° 17) Act, 1931 – better known as the Public Safety Act 1931 – which involved the introduction of Article 2A, thus authorising the Executive Council to declare the state of emergency. The amendment was largely contested but ultimately, in 1934, the Supreme Court of Ireland – judging the “*Ryan v. The Attorney General - Supreme Court*” case [online: www.supremecourt.ie] – held that the *Oireachtas* approval of the 1931 Constitution Amendment has not been an ultra vires action.

Statute of Westminster, 1931

Section 4

Parliament of United Kingdom not to legislate for Dominion except by consent

No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.

Source: www.legislation.gov.uk; own reworked version.⁸⁷

6. Constitution of the Republic of Ireland, 1937

As happened in most of the British Dominions and in those territories under London control, the Constitution of the Irish Free State was grounded on the British model, which was characterised by a strong, positive correlation between the Executive power and the Lower House of Parliament.⁸⁸

The Constitution itself seemed to have been legitimized by a Westminster Act, therefore the implicit origin of its authority was – at the same time – a guarantee proving its legitimacy, and a proof of the weakness of the Irish Free State, which was clearly unable to draft an independent Irish Constitution to rule its own, Irish, people.

Moreover, the norms and provisions included in the 1922 Constitution described a constitutional system according to which the Articles of the Anglo-Irish Treaty – already hierarchically superior to the Articles of the Constitution – were not modifiable.

The 1922 Constitution thus appeared as innovative as bonded to its past and to the British legal traditions. Slowly, the credibility and the trust Irish people used to place in the institutions established by means of the Constitution of the Irish Free State faded away: eventually the mistrust led to a downfall of the 1922 Constitution itself and to the drafting of the 1937 one.

Meanwhile, in 1934 Éamon De Valera – supported by his own party, *Fianna Fáil* – managed to prove one more time his strong desire for a permanent and complete Irish

⁸⁷ Statute of Westminster, 1931, (22 Geo. 5. Ch. 4) [online: www.legislation.gov.uk]

⁸⁸ Doyle Oran, “*The Constitution of Ireland – A Contextual Analysis*”, Chapter I. III, p. 7, Constitutional Systems of the World, Hart, 2018

independence. Indeed, after having abolished the Oath of Allegiance to the King (1933⁸⁹) and after having largely diminished the role played by the Governor General (1933⁹⁰), in 1934 Éamon De Valera established a Constitutional Review Committee, being that the first step towards a new Constitution. The aim of the Constitutional Review Committee was double. *In primis*, De Valera entrusted the Committee with the task of verifying if any provision of the 1922 Constitution may be judged as democratic and therefore fundamental. Secondly, the role of the Committee was that of finding a way to preserve those provisions guaranteeing democratic rights, from the constitutional change that was deemed to happen just one year later (1935), when Éamon De Valera declared he was willing to draft a new Irish Constitution. Eventually, the talks regarding a new Constitution led to the creation of a small group of civil servants, entitled to write the new Irish fundamental law, which then had to be presented to the Dail Eireann so as to be approved by means of a plebiscite.

The need for a plebiscite was indeed an essential feature of the new Constitution, as the law of the Irish people had to be enacted by Irish people themselves and not thanks to some other courtesy of Westminster.

The legitimacy and the authority of the 1937 Constitution thus derived from the Irish people – not from Westminster – therefore marking a clear cut with the United Kingdom and showing the definitive establishment of Irish independence.

*“In the Name of the Most Holy Trinity, from Whom is all authority
and to Whom, as our final end, all actions both of men and States
must be referred,*

We, the people of Éire,

*Humbly acknowledging all our obligations to our Divine Lord, Jesus
Christ, Who sustained our fathers through centuries of trial,*

*Gratefully remembering their heroic and unremitting struggle to
regain the rightful independence of our Nation,*

*And seeking to promote the common good, with due observance of
Prudence, Justice and Charity, so that the dignity and freedom of the
individual may be assured, true social order attained, the unity of our
country restored, and concord established with other nations,*

Do hereby adopt, enact, and give to ourselves this Constitution.”

Preamble, Constitution of Ireland (*Bunreacht na hÉireann*), 1937

⁸⁹ Constitution (Removal of Oath) Act, 1933 [online: www.irishstatutebook.ie]

⁹⁰ *Ibidem*.

Nonetheless, although the 1937 Constitution signed a break with that past tied to London and notwithstanding it was much more Irish than the 1922 Constitution, many of the provisions included in the previous Constitution of the Irish Free State were maintained, as they were estimated fundamental and democratic, and in fact they were introduced in the new 1937 Constitution with almost no changes.⁹¹

However, notwithstanding the enthusiasm of Éamon De Valera and *Fianna Fáil* strong support, the path that led to the drafting of the 1937 Irish Constitution was not free of obstacles, first of all the influence of religion. Indeed, although the 1937 Constitution aimed at being more democratic than the 1922 one, it was in fact much more inspired by religious figures and the Preamble itself was not far from being a prayer.

The religious tone of the 1937 Constitution was definitely evident and it was mostly remarkable in Article 44, which lied among the chapter regarding Fundamental Rights. The original version of Article 44 was indeed a clear compromise as it was the only solution De Valera found to meet the several – opposing – opinions and requests regarding religion without undermining the guarantee over the freedom of worship.

Eventually, the final draft of Article 44 managed to satisfy – albeit partially – the different religious denominations living on the island of Ireland as, besides openly admitting a certain number of denominations belonging to the Christian Church and the Jewish Congregations (Article 44.1.3⁹²), it explicitly recognised to the Roman Catholic Church a special position, albeit in a vague way (Article 44.1.2⁹³).

The second issue Éamon De Valera had to face was due to scepticism and mistrust, as *Fianna Fáil*'s political opponents believed that his ultimate – and indeed real – aim was that of instituting a presidential dictatorship. The doubts of De Valera's political enemies derived from the new broader role of the figure of the President, which in fact had become popularly elected and had inherited – more or less – the those duties and responsibilities

⁹¹ Doyle Oran, *"The Constitution of Ireland, A Contextual Analysis"*, Hart Publishing, 2018

⁹² *"The State also recognises the Church of Ireland, the Presbyterian Church in Ireland, the Methodist Church in Ireland, the Religious Society of Friends in Ireland, as well as the Jewish Congregations and the other religious denominations existing in Ireland at the date of the coming into operation of this Constitution."* Article 44.1.3 Constitution of Ireland (*Bunreacht na hÉireann*), 1937

[online: www.irishstatutebook.ie/]

⁹³ *"The State recognises the special position of the Holy Catholic Apostolic and Roman Church as the guardian of the Faith professed by the great majority of the citizens."* Article 44.1.2 Constitution of Ireland (*Bunreacht na hÉireann*), 1937 [online: www.irishstatutebook.ie/]

which previously belonged to the Governor General. Nonetheless, that gut feeling was indeed unfounded, as there was no cue for a President to be a dictator as his powers had been strictly circumscribed. Moreover, De Valera didn't actually need to gain more consensuses, as at the time he already held a domestic position of supreme power as his party had a solid and firm majority within the *Dáil Éireann*. However, notwithstanding obstacles, mistrust, and the strong opposition of some political enemies who were reluctant to change, the new Constitution eventually obtained the approval of the Irish people.⁹⁴

Constitution of Ireland (<i>Bunreacht na hÉireann</i>), 1937	
Articles 1 – 3	The Nation
Articles 4 – 11	The State
Articles 12 – 14	The President
Articles 15 – 27	The National Parliament
	Article 15 Constitution and Powers Articles 16 – 17 <i>Dáil Éireann</i> Articles 18 – 19 <i>Seanad Éireann</i> Articles 20 – 27 Legislation
Article 28	The Government
Article 28A	Local Government
Article 29	International Relations
Article 30	The Attorney General
Articles 31 – 32	The Council of State
Article 33	The Comptroller And Auditor General
Articles 34 – 37	The Courts
Articles 38 – 39	Trial of Offences
Articles 40 – 44	Fundamental Rights
	Article 40 Personal Rights Article 41 The Family Article 42 Education Article 42A Children Article 43 Private Property Article 44 Religion
Article 45	Directive Principles of Social Policy
Article 46	Amendment of the Constitution
Article 47	The Referendum
Articles 48 – 50	Repeal of Constitution of <i>Saorstát Éireann</i> and Continuance of Laws

Source: www.irishstatutebook.ie; own reworked version.

⁹⁴ The plebiscite turnout reached 75% of those entitled to vote, while the positive response towards the new Constitution only reached 56% against the 44% of those who were contrary to the innovation.

The 1937 Constitution ultimately managed to calm down De Valera's concerns regarding the Irish nature of the Constitution itself, as the new Irish Constitution (*Bunreacht na hÉireann*) was extremely Irish. The 1937 Constitution was in fact so Irish to claim lawful authority over the entire island of Ireland, as it was evident since the very first articles of the constitution itself.

Indeed, Article 2, besides implicitly considering all the inhabitants of the island as Irish citizens, originally had attempted to make a territorial claim to the six counties of Northern Ireland by stating that *the national territory consisted of the whole island of Ireland, its islands and the territorial seas*.⁹⁵ However, that clause was eventually amended (1998) and, although the 1937 Constitution seemed to claim the whole island of Ireland to be part of Ireland, the people who actually had written the Constitution were not representative coming from all the thirty-two counties, as the inhabitants of the six counties of Northern Ireland had not been entitled neither draft nor to vote the 1937 Constitution.

"The national territory consists of the whole island of Ireland, its islands and the territorial seas."

Article 2 (original draft)⁹⁶

"It is the entitlement and birth right of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish Nation. That is also the entitlement of all persons otherwise qualified in accordance with law to be citizens of Ireland. Furthermore, the Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage."

Article 2 (current draft)⁹⁷

Thus, the 1937 Constitution made Ireland a *sovereign, independent, democratic state*,⁹⁸ although it was never stated at that time that Ireland was a Republic.

⁹⁵ Article 2 (original draft), Constitution of Ireland (*Bunreacht na hÉireann*), 1937

⁹⁶ *Ibidem*.

⁹⁷ Article 2, Constitution of Ireland (*Bunreacht na hÉireann*), 1937 [online: www.irishstatutebook.ie]

⁹⁸ Article 5, Constitution of Ireland (*Bunreacht na hÉireann*), 1937 [online: www.irishstatutebook.ie]

The 1937 Constitution in fact did not explicitly defined Ireland as a Republic but it restricted itself to highlighting Ireland's complete independence from the British Crown. It was only in 1948 that the Republic of Ireland Act⁹⁹ *declared that the [Irish] state should be the Republic of Ireland*.¹⁰⁰

7. Good Friday Agreement, 1998

Ireland's complete independence was officially proved a few years after the 1937 Irish Constitution had been enacted when – during the outbreak of the Second World War – the Irish State autonomously chose to declare its neutrality¹⁰¹ and the war itself was neither described nor seen as a worldwide conflict, but – to use the Government official tone – as a mere emergency.

The neutrality policies implemented by the then *Taoiseach*, Éamon De Valera, albeit strengthening Irish independence, caused a deeper split between the North – belonging to the United Kingdom, hence involved into WW2 – and the South – neutral and extraneous to the brutalities of the war.¹⁰²

When the Second World War ended Irish people had opposing feelings and opinions as – on the one hand – De Valera's strategic political choices managed to shield the country from bombings and air strikes, and to bolster Irish independence and democracy, but – on the other hand – those impartial policies caused chaos and disapproval throughout the twenty-six counties.¹⁰³

Politically, the success of the decisions taken by Éamon De Valera during the Second World War was showed by the lousy result of 1948 general Elections, when Éamon De Valera was indeed defeated and replaced by a weak and heterogeneous coalition

⁹⁹ The Republic of Ireland Act, 1948 [online: www.irishstatutebook.ie]

¹⁰⁰ *Ibidem*.

¹⁰¹ Actually, the position held by Ireland was not fully neutral as the Irish state used to swap secret information to London and allowed the Royal Air Force (RAF) pilots to go back to the United Kingdom, while interning those belonging to the German *Luftwaffe*.

¹⁰² However, the feeling of belonging to the same country and to the same people despite the counties' boundaries, led some 60000 Irish citizens to voluntarily join the British Army, sometimes even abandoning their own Irish Army so as to fight next to their Northern Irish brothers.

¹⁰³ Moreover, once the war had finished, Ireland – because of its neutrality – was excluded from the American monetary aid, which was indeed helping many European countries to recover after the war.

government – the Inter-Party Government¹⁰⁴ – led by John Aloysius Costello,¹⁰⁵ the leader of *Fine Gael*.

However, the new Government managed to achieve positive – although debatable – results only in the field of foreign policy. The Republic of Ireland had in fact been proclaimed under Costello's Government but the proclamation proved to be the cause of some negative implications, as it forced London to promulgate some emergency laws so as to govern the position of Northern Ireland.¹⁰⁶

The first Inter-Party Government was followed by a second one,¹⁰⁷ which was able to support Irish economy and its image on the international scenario by means of its participation to the Council of Europe (1955) and thanks to its admission into the United Nations (1955).

In the meantime, while *Éire* was struggling to support its economy and to affirm itself on the international scenario, Northern Ireland was overwhelmed by sectarian conflicts, protest movements and unpredictable armed attacks carried by several paramilitary organisations.

Notwithstanding the moderate and calm attitude of the then Northern Irish government,¹⁰⁸ Northern Irish people didn't feel neither peace nor a proper political representation and – in the wake of the civil rights campaign led by Martin Luther King in the USA – many Northern Irish people gathered together into a new political force, the Northern Ireland

¹⁰⁴ The Inter-Party Government resulted from an unusual and unstable coalition including *Fine Gael*, the Labour Party, some agrarian parties and the republican party *Clann na Poblachta*.

¹⁰⁵ John Aloysius Costello (1891–1976) was an Irish political man. He served as the leader of *Fine Gael* and hence as the leader of the Opposition (1951–1954, 1957–1959) when Éamon De Valera's *Fianna Fáil* was at the Government. He also served as *Taoiseach* (1948–1951, 1954–1957).

¹⁰⁶ Indeed – until then – the position of Northern Ireland has been ambiguous and deliberately constitutionally unclear, as it stood halfway between being part of the United Kingdom and belonging to a possible united Ireland.

¹⁰⁷ The first Inter-Party Government, led by J.A. Costello was actually followed by *Fianna Fáil*'s political comeback, which in turn was defeated again by the coalition carried by J.A. Costello in 1954. The political alternation, albeit being a proof of political instability and disapproval, clearly showed the achieved democratic maturity of the country.

¹⁰⁸ The Parliament of Northern Ireland had been introduced by the Government of Ireland Act (1920), whereby a Northern Irish Parliament had to be established and it had to be a bicameral one, consisting of a House of Commons (52 seats) and a Senate (26 seats). The Governor General – originally the Lord Lieutenant – had to represent the Sovereign and to grant royal assent to Acts of Parliament, while the Prime Minister, namely the leader of the major party in the House of Commons, held executive power.

Civil Rights Association (NICRA, 1967), which in turn was followed by other – more or less peaceful – civil organisations.

The Northern Ireland Civil Rights Association hoped to break through into the political situation and the old religious beliefs by means of parades and protests aiming at obtaining equal social and civil rights, and NICRA's first official march pacifically occurred in August 1968, while the second one (October 1968) was suddenly interrupted by the Royal Ulster Constabulary (RUC). Riot and turmoil came after and they got more and more aggressive and violent, slowly making the gap between the two Northern Irish communities – the catholic/nationalist group and the protestant/unionist one – so large to undermine the idea of a potential pacific and civil coexistence.¹⁰⁹ Paranoia and mistrust towards the other were indeed on the agenda, as the Unionists were fearfully waiting for a rebellion led by the Irish Republican Army (IRA), while Nationalists were afraid that a *pogrom* against the catholic people was likely to happen.

However, the Troubles' violence peaked on a Sunday in 1972 (30th January 1972), when a crowd, which had gathered in Derry to pacifically protest against imprisonment, was crushed by gunshots and by brutally stopped by the intervention of a battalion belonging to the British parachute regiment.

London military intervention was as unpredictable as understandable, as Troubles were triggering political uprising also overseas. Driven by a lack of interest into Northern Ireland and influenced by old political coalitions (at the time Westminster was held by the Tory Edward Heath, traditionally close to the Northern Irish Unionists), London opted for repressing the march occurred in Derry into a Bloody Sunday.

At the end of Sunday 30th January 1972, fourteen protesters' bodies were strewn across Derry's streets and the Catholic minority inevitably felt abandoned by everyone. Most of Catholics indeed resorted to armed struggle, and the fact that – at the time – armed protests were very common within the extreme-left *milieu* (e.g. Italian Red Brigades, German *Baader-Meinhof* Group, etc.), contributed to grant credibility to the IRA, which was in fact seen as a new revolutionary phenomenon.¹¹⁰

¹⁰⁹ Riot and uprisings intensified exponentially despite the religious faith or the political beliefs behind the protests themselves. Insurrections were in fact a daily occurrence: riot during the march of the *Orangemen* (12th July 1969), revolts during the parade carried by the *Apprentice Boy* (12th August 1969), conflicts in the Bogside area in Derry (12th – 14th August 1969), etc.

¹¹⁰ However, IRA's militants soon split into more or less politically involved factions, starting from the Official IRA, to the Provisional IRA, up to the Irish National Liberation Army (INLA).

However, the battle has just begun as 1972 eventually proved to be the bloodiest year of the Troubles as well as the starting point of a more intense phase of the conflict.

As a response, London interrupted indefinitely the Stormont Government,¹¹¹ hence introducing direct rule in Northern Ireland, and a few months later the British Government completely ban any kind of Northern Irish devolved power by means of the Northern Ireland Constitution Act,¹¹² which indeed aimed at overcoming the civil war.

Ultimately, in 1973 a referendum was held so as to define Northern Irish constitutional future. The referendum was fiercely opposed by those non-unionist political parties but, despite the strong opposition of the Social Democratic and Labour Party (SDLP)¹¹³ and the abstention of its voters, the referendum was eventually held and – unsurprisingly – the 99% of the votes¹¹⁴ supported the idea of having Northern Ireland as part of the United Kingdom.

Eventually – in order to represent the Northern Irish people – London established the Northern Ireland Assembly, which – albeit not substituting Stormont Parliament – provided for an efficient advisory body.

The issue regarding the government of the six counties of Northern Ireland was faced again in 1973, when Westminster (Prime Minister Edward Heath), Dublin (*Taoiseach* Liam Cosgrave) and some Northern Irish parties sent their representatives to Sunningdale to discuss the new model of government that London was designing, aiming at establishing a form of power-sharing in Northern Ireland.

Eventually the talks led to an agreement concerning the theoretical establishment of a Council of Ireland – constituted by a Council of Ministers and a Consultative Assembly¹¹⁵

¹¹¹ The Stormont Government was Northern Ireland's system of government. It was created in 1920 by means of the Government of Ireland Act but, in 1972, the Northern Ireland (Temporary Provisions) Act – whereby Stormont system had to be suspended – was passed by the British Government.

[online: www.legislation.gov.uk]

¹¹² The Stormont Government was eventually completely abolished in 1973 by means of the Northern Ireland Constitution Act, enacted by the Government of the United Kingdom. [online: www.legislation.gov.uk/]

¹¹³ The Social Democratic and Labour Party (*Páirtí Sóisialta Daonlathach an Lucht Oibre*) is a Northern Irish political party – founded in 1970 – which supports social democratic ideals and nationalist beliefs.

¹¹⁴ Biagini Eugenio, “*Storia dell'Irlanda dal 1845 a oggi*”, chapter 7, p. 171, Il Mulino, 2014

¹¹⁵ According to the agreement, the Council of Ministers had to be equally composed, therefore including seven members from the power-sharing executive, and seven members from the Irish Government, so as to guarantee executive and harmonising functions and a consultative role. On the other side, the Consultative

– which had to promote the cooperation between the six and the twenty-six counties’ representatives. Originally the institution of the Council of Ireland was sustained both by the Ulster Unionist Party (UUP) and by the Social Democratic and Liberal Party (SDLP) but the idea was weakened by the opposition of the Unionists led by Ian Paisley¹¹⁶ and it was finally torn apart by a general strike declared by the Ulster Workers’ Council (12th – 28th May 1974).

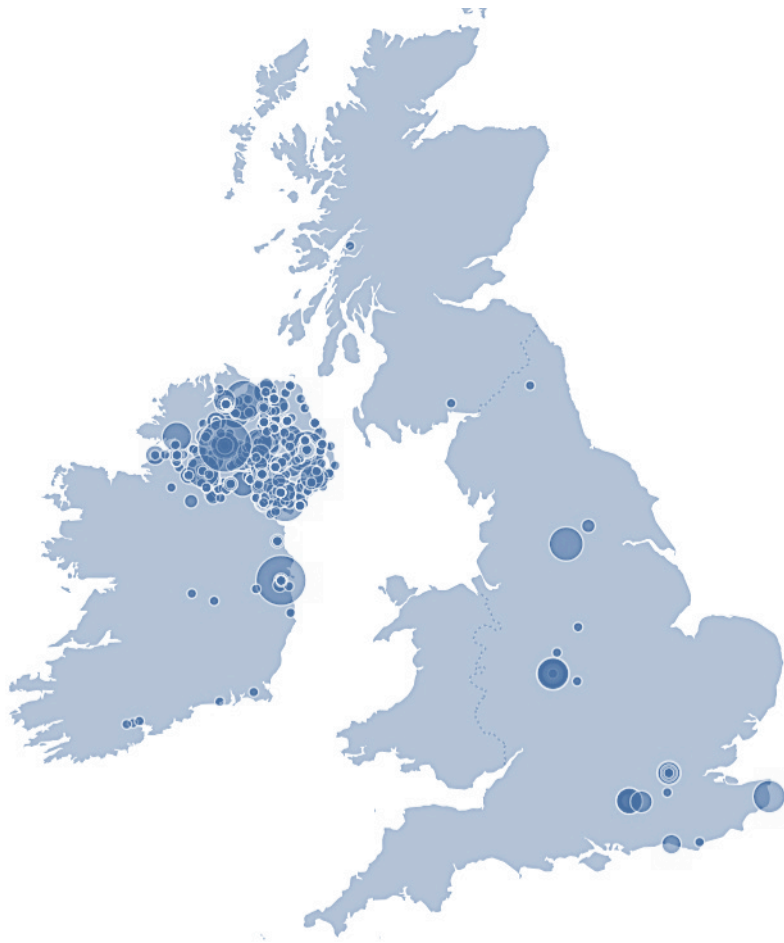
The failure of the Sunningdale Agreement led Whig Prime Minister Harold Wilson to contemplate a possible UK’s unilateral retirement from Northern Ireland, but the Republic of Ireland ironically fought his idea, as it clearly didn’t want to take care of the six rebellious Northern counties. However, notwithstanding the ruinous outcome, the Sunningdale Agreement marked a key step as it was the first attempt to establish power-sharing and a system of devolved powers in Northern Ireland, and as it paved the way to the 1998 Good Friday Agreement, which was later on described as a *Sunningdale for slow learner*.¹¹⁷

Assembly – which had advisory and review functions – had to be evenly made as well, thus comprising thirty members from *Dáil Éireann* and thirty members from the Northern Ireland Assembly.

¹¹⁶ Ian Richard Kyle Paisley (1926 –2014) was a Northern Irish politician who strongly sustained his loyalist and protestant beliefs. He was involved in Ulster politics in the late 1950s as well as in religious issues and, in 1951, he happened to be the co-founder of the fundamentalist Free Presbyterian Church of Ulster. In 1970 Paisley became Member of Parliament for North Antrim and in 1971 he created the Democratic Unionist Party (DUP). He also served as a member of the European Parliament in 1979.

¹¹⁷ Séamus Frederick Mallon (1936) is an Irish politician. He served both as deputy First Minister of Northern Ireland (1998 – 2001) and as Deputy Leader of the Social Democratic and Labour Party (1979 – 2001).

Location of 2298 Troubles' fatalities between 1970 and 2000.



Source: Start's Global Terrorism Database, University of Maryland, Irish Times research.

During the years between 1974 and 1981 armed attacks followed one another as – on the one hand – Unionists were more and more aggressive, while – on the other hand – the Irish Republican Army (IRA) started to plan brutally violent armed uprisings.

However, in 1981 things changed as conservative Margaret Thatcher had been appointed British Prime Minister: her attitude towards the Troubles was indeed as emotionless as brutal,¹¹⁸ as she declared that there would have been no more concession to the terrorists in Northern Ireland. Nevertheless, the strategy based on armed struggle and political repression proved to be useless, and in 1993 an agreement was finally reached and signed by British Prime Minister John Major and Irish *Taoiseach* Albert Reynolds: the Downing

¹¹⁸ Margaret Thatcher's attitude was so severe that neither the death for starvation of many catholic protesters – including Bobby Sands (1981) – nor the Brighton hotel bombing (1984) managed to frighten her or to persuade her to relieve her fight against Northern Irish terrorism.

Street Declaration¹¹⁹ – *a charter for peace and reconciliation*¹²⁰ – managed in fact to provide for the joint resolution of Northern Irish issue, with due regard for the will of the Northern Irish people. Moreover, in 1995, the USA intervened too, as US president Bill Clinton appointed George Mitchell as US special envoy in Northern Ireland. As a response, Dublin and London jointly established an international commission, aimed at the disarmament of Northern Irish paramilitary groups, whose presidency was indeed entrusted to George Mitchell.

Six Mitchell principles, 1996

The report of the International Body on Arms Decommissioning recommended that participants in all party negotiations seeking "an agreed political settlement and to take the gun out of Irish politics" should affirm their commitment to the following six principles:

- a.** To democratic and exclusively peaceful means of resolving political issues;
- b.** To the total disarmament of all paramilitary organisations;
- c.** To agree that such disarmament must be verifiable to the satisfaction of an independent commission;
- d.** To renounce for themselves and to oppose any effort by others to use force, or threaten to use force to influence the course or the outcome of all party negotiations;
- e.** To agree to abide by the terms of any agreement reached in all party negotiations and to resort to democratic and exclusively peaceful methods trying to alter any aspect of that outcome with which they may disagree;
- f.** To urge that "punishment" killings and beating a stop and to take effective steps to prevent such actions.

Source: www.irishtimes.com; own reworked version.¹²¹

The IRA finally signed a ceasefire in 1997 and multi-party negotiations followed the truce and, together with Dublin and some of Belfast political parties,¹²² London eventually drafted the text of what was going to be the Good Friday Agreement, hence declaring their

¹¹⁹ Joint Declaration (Downing St. Declaration), 15th December 1993 [online: www.dfa.ie]

¹²⁰ Joint Declaration (Downing St. Declaration), 15th December 1993 [online: www.dfa.ie]

¹²¹ "Six Mitchell principles", The Irish Times, 27th January 1996 [online: www.irishtimes.com]

¹²² Eight Northern Irish political parties indeed joined the talks regarding the drafting of the Good Friday Agreement, namely: the Ulster Unionist Party (UUP), the Social Democratic and Labour Party (SDLP), *Sinn Féin*, the Alliance Party, the Progressive Unionist Party, the Northern Ireland Women's Coalition, the Ulster Democratic Party and the Labour Party.

*total and absolute commitment to exclusively democratic and peaceful means of resolving differences on political issues.*¹²³

The Agreement was indeed meant to *offer a truly historic opportunity for a new beginning*¹²⁴ by means of *equality and mutual respect*,¹²⁵ as *the tragedies of the past [had] left a deep and profoundly regrettable legacy of suffering*.¹²⁶

The Agreement – actually composed by two correlated documents¹²⁷ – recognised in fact the legitimacy of both Unionist and Republican beliefs and it also declared the principle of popular sovereignty. Moreover, it annulled the 1920 law which granted large autonomy to Ireland and it established few new institutions, which had to evenly comprise both nationalists and unionists and which were based on the principle of power-sharing.

Index of the Good Friday Agreement, 1998.

Good Friday Agreement, 1998	
1. Declaration of Support	
2. Constitutional Issues	
3. Strand One:	<i>(Democratic Institutions in Northern Ireland)</i>
4. Strand Two:	<i>(North/South Ministerial Council)</i>
5. Strand Three:	<i>(British-Irish Council & Conference)</i>
6. Rights, Safeguards and Equality of Opportunity	
7. Decommissioning	
8. Security	
9. Policing and Justice	
10. Prisoners	
11. Validation, Implementation and Review	

Source: www.dfa.ie; own reworked version.

¹²³ Good Friday Agreement, Declaration of Support (4), 1998 [online: www.dfa.ie]

¹²⁴ Good Friday Agreement, Declaration of Support (1), 1998 [online: www.dfa.ie]

¹²⁵ Good Friday Agreement, Declaration of Support (3), 1998 [online: www.dfa.ie]

¹²⁶ Good Friday Agreement, Declaration of Support (2), 1998 [online: www.dfa.ie]

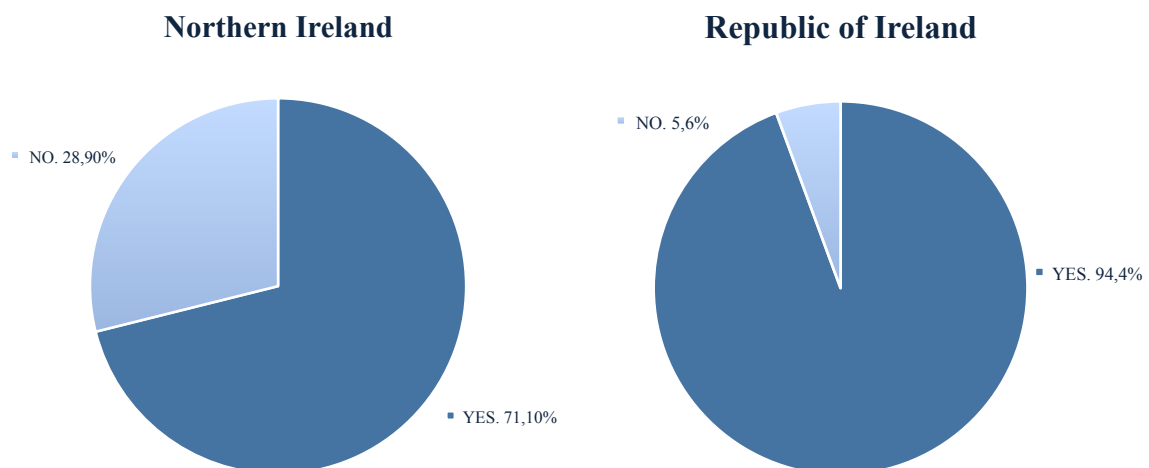
¹²⁷ Because of the large set of issues involved in the agreement, the Good Friday Agreement was indeed composed by two documents, both signed in Belfast on 10th April 1998. The first one was an agreement involving most of Northern Ireland's political parties (Multi-Party Agreement) while the second document concerned the international relationship between the British and the Irish governments (the British-Irish Agreement).

The Good Friday Agreement was the proof that, for the very first time, the Government of the Republic of Ireland had officially agreed to give up claiming its legitimacy over Northern Ireland,¹²⁸ hence bearing that the six counties were part of the United Kingdom.

On the other hand, London relaxed its attitude granting both Northern Irish and Irish people to freely *exercise their right of self-determination on the basis of consent*,¹²⁹ and thus recognising the legitimacy of a possible future united Ireland in case a majority of people wished so.¹³⁰

The Good Friday Agreement – eventually approved thanks to two referendums held on the island of Ireland (22nd May 1999) – besides generally calming down the glowing relationship between the United Kingdom and the Republic of Ireland, specifically dealt with three main issues, which were in fact solved separately by means of the three strands composing the core of the Agreement itself.

Results of the referendums held on 22nd May 1999.



Source: www.ark.ac.uk; own calculations.¹³¹

¹²⁸ Indeed, the Irish Constitution was properly amended (Article 2 and Article 3) to remove any claim over Northern Irish territory, therefore implicitly declaring it as part of the United Kingdom's sovereign area.

¹²⁹ Good Friday Agreement, Constitutional Issues (1.ii), 1998 [online: www.dfa.ie]

¹³⁰ Good Friday Agreement, Constitutional Issues (1.i, 1.ii, 1.iii), 1998 [online: www.dfa.ie]

¹³¹ The Good Friday Agreement was ratified in referendums both in Northern Ireland and in the Republic of Ireland on 22nd May 1998. However, the questions on the ballot paper were structured differently in the two jurisdictions: “Do you support the Agreement reached at the multi-party talks on Northern Ireland and set out in Command Paper 3883?” in Northern Ireland and “Do you approve of the proposal to amend the Constitution contained in the undermentioned Bill?” in the Republic of Ireland. Although the turnout was

Good Friday Agreement: Three Strands

Strand One: Democratic Institutions in Northern Ireland

- Northern Ireland Assembly¹³²
(108-member assembly elected by PR(STV) from existing Westminster constituencies, allowed to exercise full legislative and executive authority in respect of those matters currently within the responsibility of the six Northern Ireland Government Departments, and operating on a cross-community basis.)
- Northern Ireland Executive¹³³
(executive authority discharged by a First Minister and Deputy First Minister – jointly elected into office by the Assembly voting on a cross-community basis – and up to ten Ministers – with Departmental responsibilities – whose posts will be allocated to parties on the basis of the *düHondt* system and who will jointly constitute an Executive Committee, presided by the First Minister and Deputy First Minister.)

Strand Two: North/South Ministerial Council

- North/South Ministerial Council¹³⁴
(council established to bring together those with executive responsibilities in Northern Ireland and the Irish Government, to develop consultation, cooperation and decisions – mutually agreed by the two sides – within the island of Ireland on matters of mutual interest within the competence of the Administrations, North – being represented by the First Minister, Deputy First Minister and any relevant Ministers – and South – being represented by the Taoiseach and relevant Ministers.)

Strand Three: British - Irish Council and Intergovernmental Conference

- British – Irish Council (BIC)¹³⁵
(council established to promote the harmonious and mutually beneficial development of the totality of relationships among the peoples of these islands, hence comprising representatives of the British and Irish Governments, devolved institutions in Northern Ireland, Scotland and Wales, when established, and, if appropriate, elsewhere in the United Kingdom, together with representatives of the Isle of Man and the Channel Islands.)
- British – Irish Intergovernmental Conference¹³⁶
(conference – subsuming both the Anglo-Irish Intergovernmental Council and the Intergovernmental Conference established under the 1985 Agreement – which will bring together the British and Irish Governments to promote bilateral co-operation at all levels on all matters of mutual interest within the competence of both Governments.)

Source: www.dfa.ie; own reworked version.

higher in the Six Counties (81.1% in Northern Ireland, 55.6% in the Republic), the relative percentage of “YES” votes proved to be higher in the Republic than in Northern Ireland.

¹³² Good Friday Agreement, Strand 1 (2, 3, 4), 1998 [online: www.dfa.ie]

¹³³ Good Friday Agreement, Strand 1 (14, 15, 16, 17), 1998 [online: www.dfa.ie]

¹³⁴ Good Friday Agreement, Strand 2 (1, 2), 1998 [online: www.dfa.ie]

¹³⁵ Good Friday Agreement, Strand 3, British-Irish Council (1, 2), 1998 [online: www.dfa.ie]

¹³⁶ Good Friday Agreement, Strand 3, British-Irish Conference (1, 2), 1998 [online: www.dfa.ie]

8. Accession to the European Community, 1973

While bombs were blowing up in Northern Irish Catholic neighbourhood, the international scenario was equally upset by political contrast and struggle for power, as Europe seemed to be a chessboard where pawns and bishops depended on the contrasting will of the king and the queen, France and United Kingdom.

United Kingdom accession to the European Economic Community – which at the time included only the six founding members (Italy, France, FDR, Belgium, Netherlands and Luxembourg) – was at stake. Indeed, in 1957, when the Treaty of Rome had been signed – instituting the European Economic Community (EEC) and the European Atomic Energy Community (Euratom) – the United Kingdom, as well as the neighbouring Republic of Ireland, was not among the signatory countries.

Kept out, the British Government answered by establishing an alternative organisation – the European Free Trade Association (EFTA)¹³⁷ – which was somehow similar to the EEC, albeit exclusively aiming at liberalising trade and progressively eliminating customs duties on industrial products.

However, the severe economic downturn that hit the United Kingdom during the 1950s – worsened by the huge costs incurred in order to appease the pressing and persistent requests for independence coming from the British colonies – heavily weakened the United Kingdom.¹³⁸ Upset by the economic recession and by the socio-political crisis occurring within the borders of the British Empire, London Government saw the accession to the European Economic Community as the only choice.

Notwithstanding the suspicion and the dissent of some of his compatriots who saw UK's accession to the European Economic Community as a threat to the economic relationships

¹³⁷ On 12th January 1960, the Treaty on the European Free Trade Association was signed in Stockholm by the seven founding countries – United Kingdom, Austria, Denmark, Norway, Portugal, Sweden and Switzerland – later on joined by Finland (associate member in 1961), Iceland (member in 1970) and Liechtenstein (member in 1991). Currently, the European Free Trade Association, which now counts only four member states (Iceland, Liechtenstein, Norway and Switzerland), is defined as a regional trade organization and it works in parallel with the European Union.

¹³⁸ In the 1950s economic scenario, the United Kingdom stood among the countries whose GDP was extremely low and whose unemployment rate was increasing.

existing within the Commonwealth,¹³⁹ in August 1960, the then British Prime Minister Henry Macmillan¹⁴⁰ submitted an official application aimed at making the United Kingdom a EEC member state. However, the first British attempt proved to be a failure as the then French President Charles De Gaulle¹⁴¹ replied with a loud “no” to Macmillan’s request. The French general strenuously fought to avoid the United Kingdom to enter “his” Europe as he saw the United Kingdom as the American Troy Horse, strongly believing that London would have always considered the Anglo-American relationship as a priority. Indeed, President De Gaulle’s worst fear was that the UK’s accession – besides causing an Americanization of the European project and a slowdown of the European integration process – would have undermined France’s leadership role within the European Communities.



Source: www.cvce.eu

¹³⁹ The Commonwealth of Nations is a distinctive political association whose Head currently is Queen Elizabeth II, and which comprises 53 countries across all continents, including India, Pakistan, Nigeria, Bangladesh and – of course – the United Kingdom.

¹⁴⁰ Maurice Harold Macmillan (1894 –1986) was a British conservative politician who served as Prime Minister of the United Kingdom from 1957 to 1963.

¹⁴¹ Charles André Joseph Marie de Gaulle (1890 – 1970) was a French army officer and politician. Besides leading the French Resistance against Nazi Germany during WWII, he chaired the Provisional Government of the French Republic (1944 – 1946), aiming at re-establishing democracy in France. In 1958, he was appointed President of the Council of Ministers by the then President René Coty, who also asked him to rewrite the French Constitution. Eventually De Gaulle managed to found the Fifth Republic after approval by referendum and he was elected President of France later that year.

Nevertheless, the British way to the accession to the European Economic Community was just begun. Appointed Prime Minister, Labour J. H. Wilson submitted UK's application for the second time, and for the second time the British Government had to face France's veto. President De Gaulle justified the second rejection showing how UK's accession would have posed a risk to the whole architecture of the European Economic Community, unless combined with the full compliance with EEC requirements.¹⁴²

Notwithstanding France's reluctance, the British Government was confident in its choices and – thanks to a favourable chain of events¹⁴³ – in 1971, the negotiations aimed at defining UK's terms of accession to the European Communities finally began and in 1972 the Treaty of Accession of United Kingdom, Ireland and Denmark was eventually signed. Indeed, simultaneously with the neighbouring United Kingdom, also Ireland tried more than once to enter the European Communities as during the 1950s – when the Irish scenario was characterised by a slow economy and ever increasing emigration rates – the accession to the European Economic Community, albeit not warmly welcomed by the six founding members, seemed to be the only choice.¹⁴⁴ Essentially pushed by economic motivations and by the fear of losing its main commercial partner – United Kingdom – in 1971 the Irish Government finally joined the negotiations regarding the enlargement of the European Communities membership and, in 1972, it signed the Treaty of Accession¹⁴⁵ together with United Kingdom and Denmark.

¹⁴² E.g. By refusing to comply with the standards required by the Common Agricultural Policy (CAP), the United Kingdom would have jeopardised the entire common market.

¹⁴³ Indeed, in 1969, in the aftermath of a failing referendum, Charles De Gaulle resigned as President and was replaced by the more open-minded Georges Pompidou. Meanwhile, in 1970, Edward Heath, who was willing to do anything to make the United Kingdom joining the European Economic Community, was appointed British Prime Minister.

¹⁴⁴ While the six founding members were not enthusiastic about Ireland's accession to the European Communities, Irish politicians – including *Taoiseach* Sean Lemass first and Jack Lynch after – considered it to be the only possible choice.

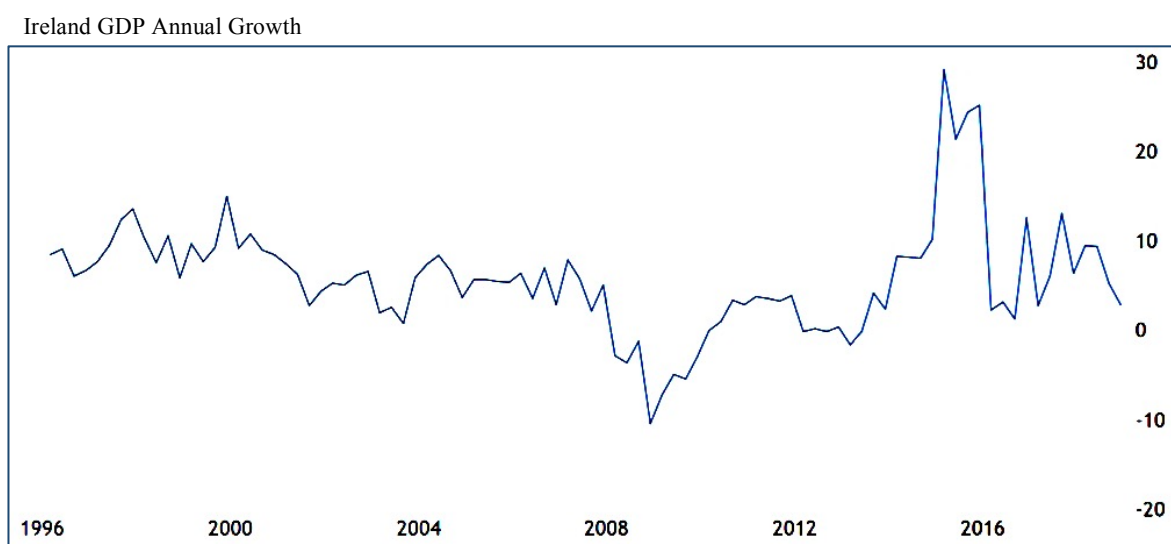
¹⁴⁵ The “Irish” Treaty of Accession was fully enacted only in 1973, following a referendum – resulted in the Third Amendment of the Constitution Act, 1972 [online: www.irishstatutebook.ie] – which had showed Irish citizens' stated will (turnout: 71.1%) in favour of Ireland's accession to the European Communities (83.1% yes votes).

9. Recently, since late 1990s up to today

After the signing of the Good Friday Agreement (1998) British watchtowers were dismantled¹⁴⁶ and the border between Northern Ireland and the Republic of Ireland – both the physical and the psychological and political one – slowly faded away.

Moreover, once reconciliation had been achieved, many administrations – guided both by *Fianna Fáil* and by the coalition comprising *Fine Gael* and the Labour Party – proved that they were willing to be more open and sympathetic towards the Northern Irish issue.

The Republic's pacific attitude towards the six counties went along with some deep transformation that indeed occurred throughout the last three decades of the XX century, and which affected both the society and the economy of the state. A slow increase in population – not due to an increase in natality rate but instead to a decrease in emigration – was indeed observed since 1970s and, together with the positive demographic trend, economy improved as well. Thanks to some lucky economic policies aimed at enhancing Ireland on the international economic scenario, and because of a young, hard-working and well-read population, Irish economy went in fact far beyond the expectations of those politician who had made a huge effort in order to allow Ireland to be part of the European Economic Community (EEC, 1972), and indeed Irish economic growth proved to be so impressive that the Republic earned the right to be called Celtic Tiger (*Tiogar Ceilteach*).



Source: www.tradingeconomics.com¹⁴⁷

¹⁴⁶ The last British watchtower was actually demolished in 2006.

However, a sharp growth was observed as well in the field of civil and social rights, as the traditional attitude of the Irish Government – usually extremely conservative and Catholic – slowly turned to be more open towards innovation and to slacken the ties of the religious morality. As a proof of the new, open-minded and progressive approach Dublin adopted, since the signing of the Good Friday Agreement (1998), seventeen constitutional amendments – most of which concerning social and civil rights¹⁴⁸ – have been introduced into the Irish Constitution.

A catastrophe occurred unexpectedly in 2008. Economic growth had – since then – been stable and incessant, and positive trends had been observed especially within the real estate, which in 2007 represented more than 20% of Irish national income. However, in contrast to what had happened at the beginning of the economic boom, in 2008 banks appeared to be less cautious in offering loans and indeed in 2008 loans regarding the sector of the real estate exceeded by 40% the total amount of loans granted by Irish banks in 2000.

In 2008 panic overwhelmed the Republic: suddenly banks reduced the offer of loans, construction firms and private owners desperately tried to sell their properties and many of them went bankrupt. International markets' reaction was not long in coming and soon Irish stocks plunged.

However, notwithstanding the import of the economic crisis, the determination of the Irish people and some severe economic policies implemented by the *Fine Gael* Government led by Enda Kenny, enabled Ireland to exit the economic crisis earlier than expected.

A few years later, while the Republic of Ireland was enjoying its economic success and its restored peace, London voted to leave the European Union,¹⁴⁹ not concerning about the fact that United Kingdom's withdrawal from European Union might have reopened an old wound along the Northern Irish border, which indeed healed just eighteen years before thanks to the signing of the Good Friday Agreement.

¹⁴⁷ Ireland GDP Annual Growth Rate, Central Statistic Office Ireland [online source: www.tradingeconomics.com]

¹⁴⁸ E.g. 21st, 25th, 27th, 31st, 34th, 35th Amendment of the Constitution Acts [online: www.irishstatutebook.ie]

¹⁴⁹ United Kingdom European Union membership referendum (*Brexit* referendum), 23rd June 2016

Chapter II Anglo-Irish relationship with the European Union and the European Convention on Human Rights

2018 should have been the chance to celebrate the Good Friday Agreement, the memorable peace agreement which managed – since April 1998 – to put an end to the longest European conflict in the post-war period.

Conversely, all the parades, events and conferences which were meant to commemorate the twenty years anniversary of the Good Friday Agreement – and which had been planned throughout the two islands, from London, to Belfast, and up to Dublin – were blurred by the sense of insecurity and abandonment caused by *Brexit* talks, and therefore by the fear due to the uncertain future of the border between the two Irelands, as the British people's choice might undermine the fundamental pillars of the Good Friday Agreement.

Indeed, the withdrawal of the United Kingdom from the European Union hides a long list of consequences, which are more or less problematic and easy to solve.

In 1998 – after thirty years signed by riots, terroristic attacks and political uprisings - the Good Friday Agreement declared the equality between the catholic/nationalist community – proudly Irish and hopefuls for a future where the two Irelands would have been united – and protestant/unionist one – firmly committed to the United Kingdom.¹⁵⁰

¹⁵⁰ The Troubles always raised interest among scholars, since they were both political and chauvinistic conflicts, but they also had ethnic, social and religious features. However, while political aspects and ideologies have always been easily distinguishable from the smoke and the dust of the fight, religion eluded a clear classification. It surely cannot be said that the conflict in Northern Ireland had been driven by religious differences but, although it is not the main cause, religion and religious differences played an important and active role in the Northern Irish conflict. Indeed, religion hasn't been a triggering factor *per se*, as contrasts were not due to faith itself but because of what a specific religious creed implicitly represented. Namely, being Catholic meant being Nationalist, while Protestantism was a synonym used to refer to the Unionist ideology. Hence, faith was an identity marker, as religious differences were used to label different communities and specific groups of people, besides the inner meaning of being Catholic or Protestant. Moreover, Northern Irish people began to clash and to be classified as belonging to a Catholic or to a Protestant group because of the clearly imbalanced composition of the Northern Irish population. Eventually, it can be said that the Troubles had been a conflict over culture, social rights, labour market and political

But the exit of the United Kingdom from the European Union, although apparently distant from the ideological conflicts and the problems occurred during the Troubles, risks to reawaken old sectarian contrasts which were numbed long ago and that are now concealed by the lush green grass growing along the 499km that mark the border between United Kingdom and the Republic of Ireland.

As a too trodden pencil mark, the Troubles left a permanent sign on the paper of Irish and Northern Irish history, which the firm action of the Good Friday Agreement managed to erase only partially. Today, *Brexit* – graphite dust on a white paper – menaces to highlight again the lines of the old conflict and to sketch once more a border that marks not only the end of the United Kingdom and the beginning of the Republic of Ireland, but also the end of a country which is no more part of the European Union, and the beginning of one that still belong to the Community.

Brexit therefore signs the end of a British experience which has always seen the two countries – the United Kingdom and the Republic of Ireland – somehow linked to each other.

This chapter is thus meant to go beyond a mere chronological listing of the events that led both the United Kingdom and the Republic of Ireland to joining the European Community. Conversely, the main aim of this chapter is that of being a specific and detailed analysis concerning how European law influenced the development of the Irish and Northern Irish Constitutional order.

Moreover, it will also be analysed how the norms belonging to the European Convention on Human Rights have been included into the Irish set of laws.

Indeed, the foregoing considerations prove to be fundamental in order to examine – in the third chapter – the consequences *Brexit* will cause, namely the effects that are likely to follow the withdrawal – should it ever happen – and therefore the suspension of the validity of the European norms¹⁵¹ in Northern Ireland.

discrimination, and within this scenario religion had been just one further – easily identifiable – difference between the two clashing communities.

¹⁵¹ Actually, the suspension of the validity of the European norms doesn't seem to be a temporary answer, but rather the full loss of their validity sine die.

1. Anglo-Irish European Union membership

Ireland's history as a member of the European Union dates back to 1972.

Back then, the Republic of Ireland, although constitutionally independent, still relied on British economy. Indeed, while the United Kingdom was advanced and prosperous, and was playing a leading role within the international economic scenario, the Republic of Ireland, having a small economy based on an obsolete agricultural system, struggled to establish itself within the international market. The entire island was in fact known by the international community as a small – almost insignificant – isle that was still breathlessly chasing the United Kingdom, striving to achieve its same economic results.

As well as for the United Kingdom, Ireland's joining to the European Community was not a sudden and unexpected choice, but rather the result of long series of talks during which the idea of an Ireland belonging to the European Community was supported by Sean Lemass,¹⁵² first, and Jack Lynch,¹⁵³ then.

However, notwithstanding the strong support of the two *Fianna Fáil* representatives, Europe didn't seem to be so close to Irish shores: *in primis*, it was due to Ireland's underdeveloped and agriculture-led economy and to its high rates of unemployment and emigration, and secondly, because of the still strong economic bond that tied Ireland to the British market and, therefore, to the United Kingdom itself, whose accession to the European Community had always been hindered.

Indeed, despite its economic and political relevance, the United Kingdom was neither among the six countries founding the European Coal and Steel Community, nor one of those who signed the Treaty of Rome (1967), by means of which the European Economic Community (EEC) was established.

The United Kingdom attempted to join the European Economic Community a few years after it had been instituted, namely in 1963 and in 1966, but both times had to face the dreads and the diffidence of the then French President, Charles De Gaulle, worries which eventually turned into a veto towards the accession of the United Kingdom into the

¹⁵² Seán Francis Lemass (1899 – 1971) was an Irish politician and a member of the *Fianna Fáil*. He served as *Taoiseach* (1959 – 1966) and as *Tánaiste* (1957 – 1959, 1951 – 1954, 1945 – 1948).

¹⁵³ John Mary Lynch (1917 – 1999) was an Irish politician and a member of the *Fianna Fáil*. He served as *Taoiseach* (1966 – 1973, 1977 – 1979) and as the Leader of the party (1966 – 1979).

European Community. Ultimately, in 1969, London made one last try to access the European Community and – aided by the fact that Charles De Gaulle¹⁵⁴ had resigned as a President earlier in April – it finally became a member state by means of the European Communities Act 1972,¹⁵⁵ when the British Prime Minister was Edward Heath.¹⁵⁶

However, the doubts and hesitations of the six founding members of the European Community were not only due to the request for accession of the United Kingdom, but also to Ireland's one.¹⁵⁷ Indeed, the small Irish State – having a precarious economy and aiming at implementing protectionist economic policies – did not provide guarantees for stability and progress and it did not prove to be suitable for joining an economic community which was meant to promote and improve trade.

However, UK's successful application for membership – in 1969 – paved the way to Ireland accession as well, and after a few talks Ireland was allowed to negotiate the Accession Agreement, which was eventually signed in 1972, and adopted the Treaty of Accession Act.

On the other hand, Irish people, who had always been quite favourable to Ireland's accession to the European Community, had the chance to state their own opinion concerning Irish European membership and to adopt a related constitutional amendment, by means of a referendum which was held on 10th May 1972, and which ended up with almost 83% of positive votes.

¹⁵⁴ In his later years, Charles De Gaulle's double veto to Britain's entry into the European Economic Community generated considerable controversy. Despite that, he was re-elected as a president in 1965 and he eventually managed to overcome the 1968 protests and to gain again a large majority in the National Assembly. However, in 1969 he had to resign after losing a referendum and he was succeeded by the moderate conservative Georges Jean Raymond Pompidou.

¹⁵⁵ European Communities Act, Chapter 68, 1972 [online: www.legislation.gov.uk]

¹⁵⁶ From the European perspective, the accession of the United Kingdom – as well as that of Ireland and Denmark – was formalized by means of the Treaty of Accession Act [online: www.eur-lex.europa.eu/], which was enacted in 1972 and which provided for the admission of the United Kingdom into all the three organisations composing the European Communities, hence the European Economic Community (EEC), the Euratom and the European Coal and Steel Community (ECSC).

¹⁵⁷ Actually, Ireland's first attempt to join the European Community dates back to 1961 when Dublin tried to apply for membership but it then opted to withdraw once the French President Charles De Gaulle vetoed British accession. However, as well as the United Kingdom did, the Republic waited for the official assignment of the new French President, Georges Pompidou, to try to apply again and ultimately Ireland's second application (1967) proved to be successful.

Third Amendment of the Constitution Act, 10 th May 1972		
Results of the Referendum held to amend the Irish Constitution		
	Votes	%
Favourable votes (YES)	1.041.890	83,10% of the valid votes
Contrary votes (NO)	211.891	16,90% of the valid votes
Valid votes	1.253.781	99,17% of the total votes
Invalid or blank votes	10.497	0,83% of the total votes
Total votes	1.264.278	
Registered voters	1.783.604	
Turnout		70,88%

Source: www.irishstatutebook.ie; own calculations.

The positive result of the referendum thus led to the Third Amendment of the Irish Constitution,¹⁵⁹ a constitutional change which allowed the Republic of Ireland to be a member state of the European Economic Community and which established a new competences' order among Irish sources of law, hence providing that European laws had to be a further source of law. That amendment was strictly necessary because of the incompatibility existing between some provisions included into the Irish Constitution (Article 28.3.3°)¹⁶⁰ and a community – resulting from the decision of the European Court

¹⁵⁸ Third Amendment of the Constitution Act, 1972 [online: www.irishstatutebook.ie]

¹⁵⁹ *Ibidem*.

¹⁶⁰ “Nothing in this Constitution other than Article 15.5.2° shall be invoked to invalidate any law enacted by the Oireachtas which is expressed to be for the purpose of securing the public safety and the preservation of the State in time of war or armed rebellion, or to nullify any act done or purporting to be done in time of war or armed rebellion in pursuance of any such law. In this subsection “time of war” includes a time when there is taking place an armed conflict in which the State is not a participant but in respect of which each of the Houses of the Oireachtas shall have resolved that, arising out of such armed conflict, a national emergency exists affecting the vital interests of the State and “time of war or armed rebellion” includes such time after the termination of any war, or of any such armed conflict as aforesaid, or of an armed rebellion, as may elapse until each of the Houses of the Oireachtas shall have resolved that the national emergency occasioned by such war, armed conflict, or armed rebellion has ceased to exist.”

Article 28.3.3°, Irish Constitution [online: www.irishstatutebook.ie]

of Justice “*Costa v ENEL*”¹⁶¹ – according to which European law prevails over domestic laws in matters of European Community’s competence.

The Third Amendment of the Constitution Act ultimately managed to solve the issue by adding a new subsection to section 4 of Article 29 of the Irish Constitution, namely subsection 29.4.3°, which – after a few talks occurred between some members of the *Fine Gael*, who supported the amendment, and some more reluctant ones, belonging to the Labour Party – was finally approved and managed to pass all the stages in the *Seanad* on 8th June 1972.

[8th June, 1972]

Article 29 of the Constitution is hereby amended as follows:

“3° The State may become a member of the European Coal and Steel Community (established by Treaty signed at Paris on the 18th day of April, 1951), the European Economic Community (established by Treaty signed at Rome on the 25th day of March, 1957) and the European Atomic Energy Community (established by Treaty signed at Rome on the 25th day of March, 1957). No provision of this 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 thereof, from having the force of law in the State.”

Third Amendment Of The Constitution Act (1.b), 1972¹⁶²

Ireland’s accession to the European Economic Community eased Irish development and economic improvement as the European Community always promoted the transition from a superseded, agriculture-led economy to a modern, industry-based one by means of constant substantial funds and thanks to a continuous promotion of Irish businesses both on the European and on the international markets.¹⁶³

¹⁶¹ Case 6-64, “*Flaminio Costa v E.N.E.L*”, Judgment of the Court of 15th July 1964

[online: www.eur-lex.europa.eu]

¹⁶² Third Amendment of the Constitution Act, Irish Constitution (*Bunreacht na hÉireann*), 1972

[online: www.irishstatutebook.ie]

¹⁶³ Since its accession to the European Economic Community in 1972, Ireland has been a net recipient of European funds. Indeed, according to some European Commission figures, Ireland’s net gain from European Union’s budget has been €44.6 billion since 1976. [online: www.ec.europa.eu]

2. EU influence over the Good Friday Agreement

Besides the economic advantages that, in the long term, allowed the small and closed Irish economy to turn into an international and modern one, based on trade and industry, and steadily increasing, Ireland's accession to the European Community produced some other positive results.

First among everything, the European Community has always granted Ireland – as well as the United Kingdom, as sovereign state to which Northern Ireland belongs – considerable support concerning the maintenance of the peace relations achieved by means of the Good Friday Agreement and the improvement of the performance of those new institutions operating on the bases of the principle of power-sharing, thus aiming at putting an end to riots and sectarian conflicts.

Since the signing of the Good Friday Agreement, the European Community played in fact an increasingly influential role within the development of the Northern Irish peace process, and indeed its activity resulted – *in primis* – in the drafting of a set of European norms which, in turn, happened to be the framework within which the relationships between the United Kingdom and the Republic of Ireland were eventually defined, and – secondly – in the implementation of cohesion policies particularly attentive to the Northern Irish issue and thus aiming at supporting, economically and socially, the six counties.

The clear bond existing between the European laws and the Good Friday Agreement is implicitly showed by the nature of the Agreement itself, being simultaneously a peace treaty and the cornerstone for the construction of a new government structure in Northern Ireland. In order to achieve the coveted peace, the Good Friday Agreement was drafted according to the multitude of fundamental rights that needed to be safeguarded and respected, and indeed the rights are indeed the essence of this document, being the *fil rouge* that not only tethers the three strands¹⁶⁴ composing the Good Friday Agreement but which also ties the Agreement itself to the European laws.

¹⁶⁴ As already mentioned, the core of the Good Friday Agreement is divided into three main subsections: Strand One, Two and Three. Strand One involves a domestic dimension completely enclosed in the Northern Irish boundaries and it concerns the internal conflict occurring between Nationalists and Unionists. On the other hand, Strand Two offers a wider perspective as it regards the North – South relationship, namely a relation which, albeit broader, still lingers within the Irish coastline. Finally, Strand Three defines the rougher relationship between the United Kingdom and the Republic of Ireland, thus representing a perspective which stretches from East to West.

The rights listed into the Good Friday Agreement originated from diverse sources, which in turn range – albeit following a precise hierarchical order – from sources belonging to the national level, up to the international and the supranational ones, depending on which right needs to be safeguarded.

Indeed, Strand One of the Good Friday Agreement mostly relies on those rights guaranteeing the respect of different political ideologies and social and religious beliefs, and generically aiming at providing the foundation for a peaceful coexistence between the two Northern Irish communities.¹⁶⁵

Thus, the set of laws that lies behind Strand One, is the one including the safeguard of the fundamental human rights as protected by the general principles of EU law and the European Convention on Human Rights, which in turn represent a class of rights that ranges from formal and substantial equality up to the principle of non-discrimination.

The strengthening of the protection of these rights, essential for the establishment of a peaceful Northern Ireland, is indeed provided for by the Good Friday Agreement, which explicitly states that the safeguard of fundamental human rights is meant to occur in accordance with the European Convention on Human Rights (ECHR).¹⁶⁶

On the other hand, Strand Two – concerning North-South relationships – points out that those fundamental human rights,¹⁶⁷ which are guaranteed throughout the six counties, will similarly be safeguarded within the borders of the Republic of Ireland.¹⁶⁸

¹⁶⁵ Besides the traditional labelling used to identify the two Northern Irish communities on the bases of religious faith and political belief (catholic/nationalist and protestant/unionist), there's one more feature that has to be bear in mind, as the two communities living side by side throughout the six counties distinguish themselves not only by means of the political ideologies they support, but also according to the different perspectives they hold concerning their social and civil status. Indeed some Northern Irish men feel like they belong Ireland, while others define themselves as British, and finally others aim at holding dual citizenship.

¹⁶⁶ See Paragraph 3, Chapter 2.

¹⁶⁷ *"The parties affirm their commitment to the mutual respect, the civil rights and the religious liberties of everyone in the community. Against the background of the recent history of communal conflict, the parties affirm in particular: – the right of free political thought; – the right to freedom and expression of religion; – the right to pursue democratically national and political aspirations; – the right to seek constitutional change by peaceful and legitimate means; – the right to freely choose one's place of residence; – the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity; – the right to freedom from sectarian harassment; – the right of women to full and equal political participation."* Rights, Safeguards and Equality Of Opportunity (1), Good Friday Agreement, 1998

[online: www.gov.uk]

¹⁶⁸ See Paragraph 3, Chapter 2.

However, before the Good Friday Agreement was signed, some specific rights were already listed among the set of rules establishing the Common Travel Area (CTA),¹⁶⁹ which indeed granted Irish and British citizens full freedom of movement throughout the borders of the two British isles, namely across the North – South border and over the Irish Sea.

In 1998, the premises on which the Good Friday Agreement drafters relied on clearly resulted from a British-Irish common feature, namely the fact that they were both member of the European Community.

Indeed, that particular feature of both the United Kingdom and the Republic of Ireland – because of its intrinsic relevance – deeply shaped the way in which fundamental human rights were listed and safeguarded in the Good Friday Agreement.

The approach adopted to deal with the protection of fundamental human rights, in turn, influenced the set of rules within which the Northern Ireland Act¹⁷⁰ was drafted, and thus the Northern Irish devolution system itself.

Notwithstanding the essential role it eventually played within the Northern Irish scenario, the European Community wasn't meant to be the only guarantor of fundamental human rights throughout the six counties.

However, despite that, the rights resulted from the reworking of community laws eventually happened to be the pillars and the lintels upon which lied not only the architecture of the Good Friday Agreement, but also the one that followed the signing of the peace Agreement.

Moreover, Irish and Northern Irish citizens were granted many rights – included the EU Single Markets four freedoms,¹⁷¹ namely the free movement of goods,¹⁷² capital, services

¹⁶⁹ The Common Travel Area (CTA) was established in 1923, short after the creation of the Irish Free State (1922), and fully implemented in 1925. It was meant to ease the free movement across the Irish-British borders, therefore minimising check and passport controls, albeit with certain exceptions. The Common Travel Area open borders area includes the United Kingdom, the Republic of Ireland, the Isle of Man, and the Channel Islands, while British Overseas Territories are not comprised. The Common Travel Area – which is based on not legally binding deals – eventually proved to be a successful proof of British-Irish collaboration.

¹⁷⁰ The Northern Ireland Act was approved in 1998 by the Parliament of the United Kingdom, providing for a set of rules establishing a devolved legislature for Northern Ireland, namely the Northern Ireland Assembly. Northern Ireland Act, 1998 [online: www.legislation.gov.uk/]

¹⁷¹ The deals resulting from the establishment of the Common Travel Area between the United Kingdom and the Republic of Ireland were simultaneously enacted together with the implementation of EU Single Markets

and people¹⁷³ – which resulted from the set of European laws itself and which, together with some other community fundamental rights concerning the principle of equality, as well as some Irish and Northern Irish non-discriminatory norms, managed to honour the duties provided for by the Good Friday Agreement.

In addition, the United Kingdom and the Republic of Ireland's membership to the European Community defines a particular scenario in which Ireland and Northern Ireland are not only required to follow the principles listed within the Good Friday Agreement, but they are also – equally – bound by European law, as both the Republic of Ireland and Northern Ireland are indeed subject to the fundamental rights jurisprudence of the European Court of Justice (CJEU) committed to observe the norms of the European Charter of Fundamental Rights since 2009.¹⁷⁴

However, the listed fundamental human rights are guaranteed in every state belonging to the European Union and – because of their intrinsic supranational origin – go beyond the local and national dimension, therefore being a proof of the hierarchical superiority of communitarian laws over the domestic norms.¹⁷⁵

Thus, the principle stating the primacy of European law, together with the one providing for the direct effect of the community law at the domestic level, led to a scenario within which national tribunals – Irish and British – are required to disapply their laws if these prove to be inconsistent with the set of European norms.

Considering Northern Ireland's past – which has been marked by discrimination and sectarian conflicts – the principle declaring EU laws' supremacy happens to gain even more relevance as it manages to guarantee an equal supervision of the norms, as well as

four freedoms, thus making it difficult to draw the line between those rights originating from communitarian laws, and those whose source lies in the bilateral agreement signed by London and Dublin.

¹⁷² “*Free movement of Goods*”, Article 29, Title II, Treaty on the Functioning of the European Union

[online: www.eur-lex.europa.eu]

¹⁷³ “*Free movement of Persons, Capital and Services*”, Title IV, Treaty on the Functioning of the European Union [online: www.eur-lex.europa.eu]

¹⁷⁴ The fundamental rights jurisprudence of the CJEU is part of EU law's general principles, which are indeed applied by both the European Court of Justice and national courts, as a tool to ease the interpretation of communitarian laws.

¹⁷⁵ See Paragraph 1, Chapter 2.

granting European citizens the right to the eventual – albeit decisive – implementation of rights at the supranational level.¹⁷⁶

European laws thus happen to be a further last guarantee which is linked to – and consistent with – the rights and the principles listed in the Good Friday Agreement.

Ultimately, the European Union guarantees the citizens of its member states the services provided for by the European Court of Justice (ECJ).¹⁷⁷

Being the supreme court and the judicial institution of the European Union,¹⁷⁸ the European Court of Justice is entrusted with a wide set of multifaceted competences, having the ultimate purpose of gathering together the principles listed throughout EU law so as to share them by making each EU member state committed to incorporate them into each own domestic law; on the other hand, the Court of Justice's task is that of ensuring that the interpretation and application of EU Treaties – including the provisions laid down by the competent Community institutions – is in compliance with EU law and equally carried out within the boundaries of the European Union.

The European Court of Justice – which was established in 1952 – sits in Luxembourg, where the by twenty-eight judges,¹⁷⁹ one from each member state, meet together with eleven Advocate Generals¹⁸⁰ whose competence is that of delivering analytic opinions on cases in order to contribute in reaching the decisions the European Court of Justice has to make. Being the highest judicial institution of the European Union, the European Court of Justice besides facing – and possibly solving – disputes arising between parties as well as national courts do, has to deal with:

¹⁷⁶ Specifically, the access to the Court of Justice of the European Union – which allow European citizens to defend their communitarian rights and which grant them a broad range of remedies – may occur by means of references to the CJEU through national courts.

¹⁷⁷ www.europa.eu; www.curia.europa.eu

¹⁷⁸ Moreover, the European Court of Justice is part of the Court of Justice of the European Union, which indeed consists of two separate courts: the Court of Justice itself and the General Court.

¹⁷⁹ Judges and Advocate Generals of the European Court of Justice must show the qualifications to be appointed to the highest national courts in their own member states. European Court of Justice's Judges and Advocate Generals may also be *jurisconsults* (academic lawyers) so as to be appointed. Moreover, their independence must be beyond doubt, meaning that once they are appointed, they may not hold any other office of an administrative or political nature and they may not engage in any occupation, paid or unpaid.

¹⁸⁰ Both the Judges and Advocate Generals of the European Court of Justice are appointed by joint agreement of the governments of EU member states, having a renewable term of six years.

- Infringements procedures (*ex Article 258, Treaty on the Functioning of the European Union*);¹⁸¹
- Actions for annulment (*ex Article 263 & 264, Treaty on the Functioning of the European Union*);¹⁸²
- Actions for failure to act (*ex article 265, Treaty on the Functioning of the European Union*);¹⁸³
- Application for compensation based on non-contractual liability (*ex Article 256, Treaty on the Functioning of the European Union*);¹⁸⁴
- References for a preliminary ruling¹⁸⁵ (*ex Article 267, Treaty on the Functioning of the European Union*).¹⁸⁶

Given the status of EU member states held by the Republic of Ireland – as well as (so far) by the United Kingdom – the two countries are both “represented” by a judge sitting at the European Court of Justice.

¹⁸¹ Consolidated Version of the Treaty on the Functioning of the European Union
[online: www.eur-lex.europa.eu]

¹⁸² *Ibidem.*

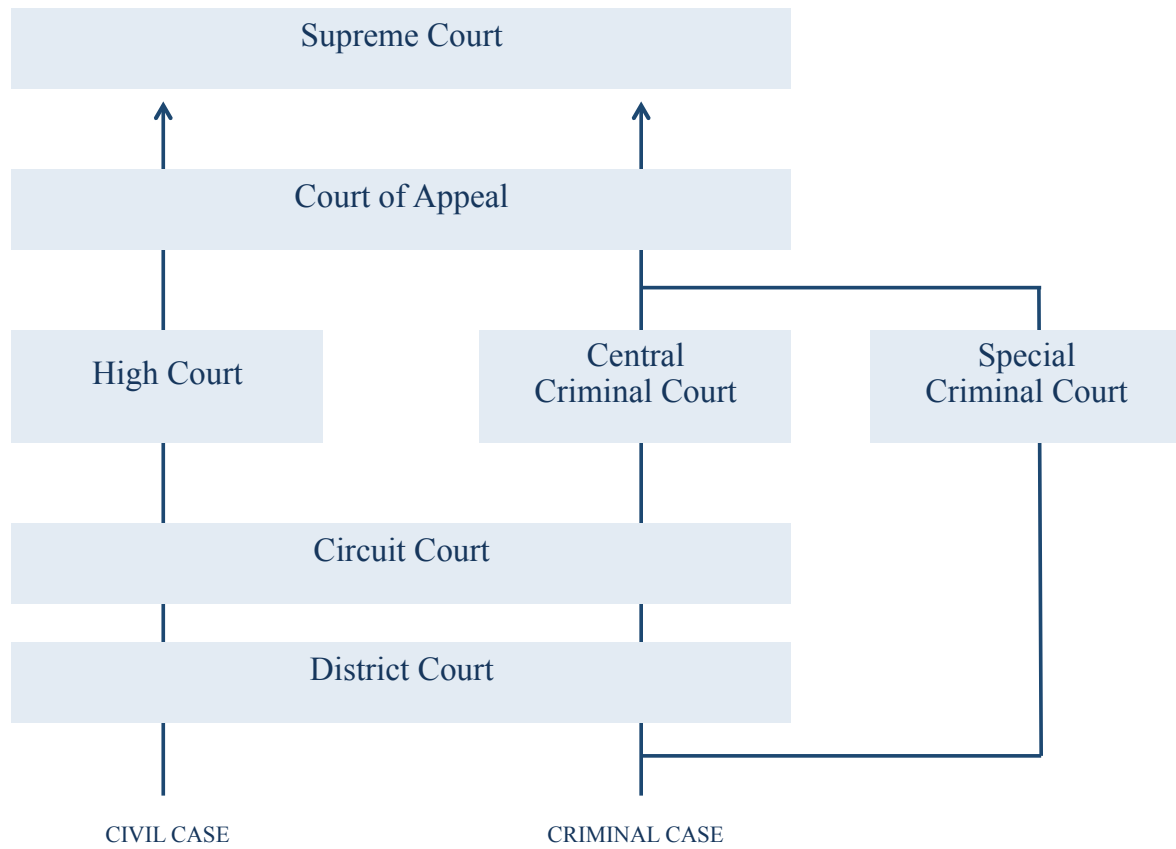
¹⁸³ *Ibidem.*

¹⁸⁴ *Ibidem.*

¹⁸⁵ Notably, preliminary rulings, allowing ac cooperation between the European Court of Justice and national courts, are meant to avoid differences of interpretation of EU law by domestic courts.

¹⁸⁶ Consolidated Version of the Treaty on the Functioning of the European Union [online: www.eur-lex.europa.eu]

Simplified diagram of Irish courts system.



Own reworked version.

On the other hand, Ireland's judicial system – which proves to be fairly complex, including the Supreme Court, the Court of Appeal, the High Court, the Circuit Court, the District Court and the Special Criminal Court¹⁸⁷ – is clearly meant to apply the laws of the Republic of Ireland, which in turn are fundamentally based on four sources of law:

- Irish Constitution;¹⁸⁸
- European Union Law;
- Statute Law;¹⁸⁹
- Common Law.

¹⁸⁷ While all courts have to deal with both civil and criminal matters, the Special Criminal Court only has to face criminal cases, not holding civil jurisdiction.

¹⁸⁸ The High Court, the Court of Appeal, and the Supreme Court are allowed to establish the compatibility of Common Law and Statute Law with the constitutional provisions.

¹⁸⁹ Moreover, the High Court, the Court of Appeal, and the Supreme Court may determine the compatibility of Common Law with Statute Law.

European Court of Justice: main cases involving Ireland	
<u>2019</u>	<u>Commission / Ireland (C-257/19)</u> <ul style="list-style-type: none"> • <i>Pending case.</i>
<u>2nd May 2019</u>	<u>Chefaro Ireland / EUIPO (C-739/18 P) ECLI:EU:C:2019:356</u> <ul style="list-style-type: none"> • <i>By its appeal, Chefaro Ireland DAC asks the Court to set aside the judgment of the General Court of the European Union of 12 September 2018, Chefaro Ireland v EUIPO — Laboratoires M&L (NUIT PRECIEUSE) (T-905/16, not published, ‘the judgment under appeal’, EU:T:2018:527), dismissing its action for annulment of the decision of the Fourth Board of Appeal of the European Union Intellectual Property Office (EUIPO) of 19 October 2016 (Case R 2596/2015-4) relating to invalidity proceedings between Chefaro Ireland and Laboratoires M&L. In support of its appeal, the appellant relies on a single ground of appeal, alleging errors of law vitiating the General Court’s application of Article 8(1)(b) of Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p. 1).</i>
<u>2018</u>	<u>Commission / Ireland (C-550/18)</u> <ul style="list-style-type: none"> • <i>Pending case.</i>
<u>2018</u>	<u>Google Ireland (C-482/18)</u> <ul style="list-style-type: none"> • <i>Pending case.</i>
<u>2018</u>	<u>EMA / Shire Pharmaceuticals Ireland (C- 359/18 P)</u> <ul style="list-style-type: none"> • <i>Pending case.</i>
<u>2018</u>	<u>Facebook Ireland and Schrems (C-311/18)</u> <ul style="list-style-type: none"> • <i>Pending case.</i>
<u>2018</u>	<u>Commission / Ireland (Parc éolien de Derrybrien) (C-261/18)</u> <ul style="list-style-type: none"> • <i>Pending case.</i>
<u>8th November 2018</u>	<u>Commission / Ireland (C-678/17) ECLI:EU:C:2018:927</u> <ul style="list-style-type: none"> • <i>Action for failure to comply with obligations under Article 108(2) TFEU brought on 5 December 2017. European Commission, represented by P.J. Loewenthal and A. Bouchagiar, acting as Agents (applicant) v. Ireland, represented by M. Browne, J. Quaney and A. Joyce, acting as Agents, and by P. Gallagher, Senior Counsel, M.G. Collins, Senior Counsel, B. Doherty, Barrister-at-Law, and S. Kingston, Barrister-at-Law (defendant).</i>

European Court of Justice: main cases involving Ireland

<u>17th October 2018</u>	<p><u>Commission / Ireland (C- 504/17) ECLI:EU:C:2018:832</u></p> <ul style="list-style-type: none"> • <i>Action under Article 258 TFEU for failure to fulfil obligations, brought on 21 August 2017. European Commission, represented by F. Tomat and J. Tomkin, acting as Agents (applicant) v. Ireland, represented by M. Browne, G. Hodge, J. Quaney and A. Joyce, acting as Agents, and by F. Callanan, Senior Counsel, and B. Doherty, Barrister-at-Law (defendant).</i>
<u>28th March 2019</u>	<p><u>Commission / Ireland (Système de collecte and de traitement des eaux usées) (C-427/17) ECLI:EU:C:2019:269</u></p> <ul style="list-style-type: none"> • <i>Action under Article 258 TFEU for failure to fulfil obligations, brought on 14 July 2017. European Commission, represented by K. Mifsud-Bonnici and E. Manhaeve, acting as Agents (applicant) v. Ireland, represented by J. Quaney, M. Browne and A. Joyce, acting as Agents, and by S. Kingston, Barrister-at-Law, C. Toland, Senior Counsel, and B. Murray, Senior Counsel (defendant).</i>
<u>21st June 2018</u>	<p><u>Pfizer Ireland Pharmaceuticals, Operations Support Group (C-681/16) ECLI:EU:C:2018:484</u></p> <ul style="list-style-type: none"> • <i>This request for a preliminary ruling concerns the interpretation of the Specific Mechanisms laid down in Chapter 2 of Annex IV to the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded [...]. The request has been made in proceedings between Pfizer Ireland Pharmaceuticals, Operations Support Group and Orifarm GmbH concerning parallel imports into Germany of the medicinal product 'Enbrel' from new Member States.</i>
<u>7th December 2017</u>	<p><u>Ireland / Commission (C- 369/16 P) ECLI:EU:C:2017:955</u></p> <ul style="list-style-type: none"> • <i>Appeal under Article 56 of the Statute of the Court of Justice of the European Union, brought on 5 July 2016. Ireland, represented by E. Creedon, L. Williams and A. Joyce, acting as Agents, and by P. McGarry, Senior Counsel (applicant), supported by: the French Republic, represented by R. Coesme and D. Colas, acting as Agents (intervener in the appeal), the other parties to the proceedings being: Aughinish Alumina Ltd, established in Askeaton (Ireland), represented by C. Little and C. Waterson, Solicitors (applicant at first instance), European Commission, represented by V. Bottka and N. Khan, acting as Agents (defendant at first instance).</i>

Source: www.curia.europa.eu; own reworked version.

3. ECHR influence over the Good Friday Agreement

As previously seen, community norms guarantee the functioning of an efficient system whereby those who act in contrast to any fundamental right are held accountable and thus compelled to remedy with due regard to both European norms and domestic laws – hence Irish and Northern Irish ones – and in parallel with those judicial remedies provide for by the European Convention on Human Rights¹⁹⁰ (ECHR),¹⁹¹ which Ireland and the United Kingdom respectively signed in 1953¹⁹² and in 1950.¹⁹³

¹⁹⁰ Although the link between EU law and the European Convention on Human Rights is not a direct one (the European Union is not a member of the European Convention on Human Rights), Article 6 of the Treaty on European Union includes references to the European Convention on Human Rights as EU law interpretative tool: “1) *The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.* 2) *The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.* 3) *Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.*”

¹⁹¹ The European Convention on Human Rights (ECHR) – officially, the “Convention for the Protection of Human Rights and Fundamental Freedoms” – was drafted in 1950 by the Council of Europe and it properly entered into force on 3rd September 1953. The European Convention on Human Rights was meant to be a tool – common to all member states of the Council of Europe – to safeguard fundamental rights and freedoms. The European Convention on Human Rights also provided for the creation of the European Court of Human Rights (ECtHR) – Section II ECHR. The Court’s judgement may be invoked by any citizens of any member state of the Council of Europe whenever he/she feels his/her rights and freedoms – as listed in Section I ECHR – have been violated by a state party. In addition, the European Convention on Human Rights is correlated with some protocols aiming amending and improving the set of rules established by the Convention.

¹⁹² Ireland ratified the European Convention on Human Rights in 1953 [online: www.echr.coe.int]

¹⁹³ The United Kingdom was one of the first members of the Council of Europe to ratify the Convention – which then came into force on 3rd September 1953 – when it passed through Parliament in 1951.

European Convention on Human Rights, 1950	
<u>Article 1</u>	Obligation to respect Human Rights
Section I, “ <i>Rights and Freedoms</i> ”	
<u>Article 2</u>	Right to life
<u>Article 3</u>	Prohibition of torture
<u>Article 4</u>	Prohibition of slavery and forced labour
<u>Article 5</u>	Right to liberty and security
<u>Article 6</u>	Right to a fair trial
<u>Article 7</u>	No punishment without law
<u>Article 8</u>	Right to respect for private and family life
<u>Article 9</u>	Freedom of thought, conscience and religion
<u>Article 10</u>	Freedom of expression
<u>Article 11</u>	Freedom of assembly and association
<u>Article 12</u>	Right to marry
<u>Article 13</u>	Right to an effective remedy
<u>Article 14</u>	Prohibition of discrimination
<u>Article 15 - 18</u>	
Section II, “ <i>European Court of Human Rights</i> ”	
<u>Article 19 - 51</u>	
Section III, “ <i>Miscellaneous provisions</i> ”	
<u>Article 52 - 59</u>	

Source: www.echr.coe.int; own reworked version.

The link between the Good Friday Agreement and the European norms aiming at safeguarding fundamental human rights is likewise clear, as by signing the Agreement the parties explicitly declared *their commitment to the mutual respect, the civil rights and the religious liberties*¹⁹⁵ of every citizens – whether Irish or British – hence recognising *the importance of respect, understanding and tolerance*.¹⁹⁶

¹⁹⁴ European Convention on Human Rights, 1950 [online: www.echr.coe.int/]

¹⁹⁵ Section 1, “Rights, Safeguards And Equality Of Opportunity - Human Rights”, Good Friday Agreement, 1998 [online: www.dfa.ie/]

¹⁹⁶ Section 3, “Rights, Safeguards And Equality Of Opportunity - Economic, Social and Cultural Issues”, Good Friday Agreement, 1998 [online: www.dfa.ie/]

In order to better comply with the aim of preserving peace in Northern Ireland and safeguarding Northern Irish citizens' fundamental rights and freedoms, the British Government opted for incorporating the European Convention on Human Rights into Northern Irish law, thus granting Northern Irish inhabitants *the direct access to the courts and remedies for breach of the Convention*.¹⁹⁷

Moreover, London declared that a Northern Ireland Human Rights Commission would have been established within the territory of the six counties, having an *extended and enhanced role*¹⁹⁸ that might overcome the one *exercised by the Standing Advisory Commission on Human Rights*, hence being entitled to *review the adequacy and effectiveness of laws and practices*,¹⁹⁹ and to make *recommendations to the Government as necessary*.²⁰⁰

Indeed, before the Northern Ireland Human Rights Commission was instituted by means of the Good Friday Agreement, the legal and institutional safeguard of fundamental human rights was entrusted with the action of the Standing Advisory Commission on Human Rights, which had been established in 1973, as during the 1970s Northern Irish people started to increasingly feel the lack of a proper protection of human rights and to ask for a constitutional change so as to solve the issue, as the national courts had proved to be unable to deal with that.²⁰¹

Although the Standing Advisory Commission on Human Rights was originally meant to play a broader role in the field of the protection of human rights, the Northern Ireland Constitution Act (1973) – establishing the Commission – eventually provided that the Commission would have had two main purposes, namely advising and keeping informed the Secretary of State on the adequacy of laws, so as to prevent discrimination and inequalities.

¹⁹⁷ Section 2, “Rights, Safeguards And Equality Of Opportunity – United Kingdom Legislation”, Good Friday Agreement, 1998 [online: www.dfa.ie/]

¹⁹⁸ Section 5, “Rights, Safeguards And Equality Of Opportunity – New Institution in Northern Ireland”, Good Friday Agreement, 1998 [online: www.dfa.ie/]

¹⁹⁹ *Ibidem*.

²⁰⁰ *Ibidem*.

²⁰¹ Due to national courts' ineptitude many Northern Irish political parties promoted a potential Bill of Rights for Northern Ireland, declaring the protection of fundamental human rights the six counties. However, the proposal seemed to be too drastic for London – worried that such an innovation would have caused too many issues concerning the choice regarding the rights to be preserved and the tribunals to be held responsible – and eventually the proposal regarding the establishment of a Commission was suggested.

Therefore, the Standing Advisory Commission on Human Rights clearly proved not to be the institution safeguarding human rights that Northern Irish citizens were asking for, and indeed an organization able – and willing – to deal with the protection of rights and freedoms was still strongly needed.

The answer came in 1998, when the Northern Ireland Human Rights Commission was established. It was indeed meant to be a broader institution *providing information and promoting awareness of human rights*,²⁰² with due regard to Northern Ireland's need to avoid discrimination and to *promote equality of opportunity*,²⁰³ mostly in relation to religious faith and political beliefs, as well as *gender, race, disability, age, marital status, dependants and sexual orientation*.²⁰⁴

Meanwhile the Republic of Ireland was implementing similar provisions so as *to further strengthen the protection of human rights in its jurisdiction*²⁰⁵ with due regard to the European Convention on Human Rights, and thus aiming at ensuring *at least an equivalent level of protection of human rights*²⁰⁶ as the one granted in the six counties.

Furthermore, Dublin Government committed to establish a Human Rights Commission reflecting the one settled in Belfast, and to ratify the Council of Europe Framework Convention on National Minorities, which London had already approved.

In addition, employment equality legislation was deemed to be implemented and equal status laws were to be introduced too, so as to prove the Republic's *respect for the different traditions in the island of Ireland*.²⁰⁷

Finally, a Joint Committee was planned to be established²⁰⁸ to deal with human right issues on the whole island of Ireland. The Committee had to include representatives of both the two Human Rights Commission – North and South – and to eventually consider to

²⁰² Section 5, “Rights, Safeguards And Equality Of Opportunity – New Institution in Northern Ireland”, Good Friday Agreement, 1998 [online: www.dfa.ie/]

²⁰³ Section 3, “Rights, Safeguards And Equality Of Opportunity – United Kingdom Legislation”, Good Friday Agreement, 1998 [online: www.dfa.ie/]

²⁰⁴ *Ibidem*.

²⁰⁵ Section 9, “Rights, Safeguards And Equality Of Opportunity – Comparable Steps by the Irish Government”, Good Friday Agreement, 1998 [online: www.dfa.ie/]

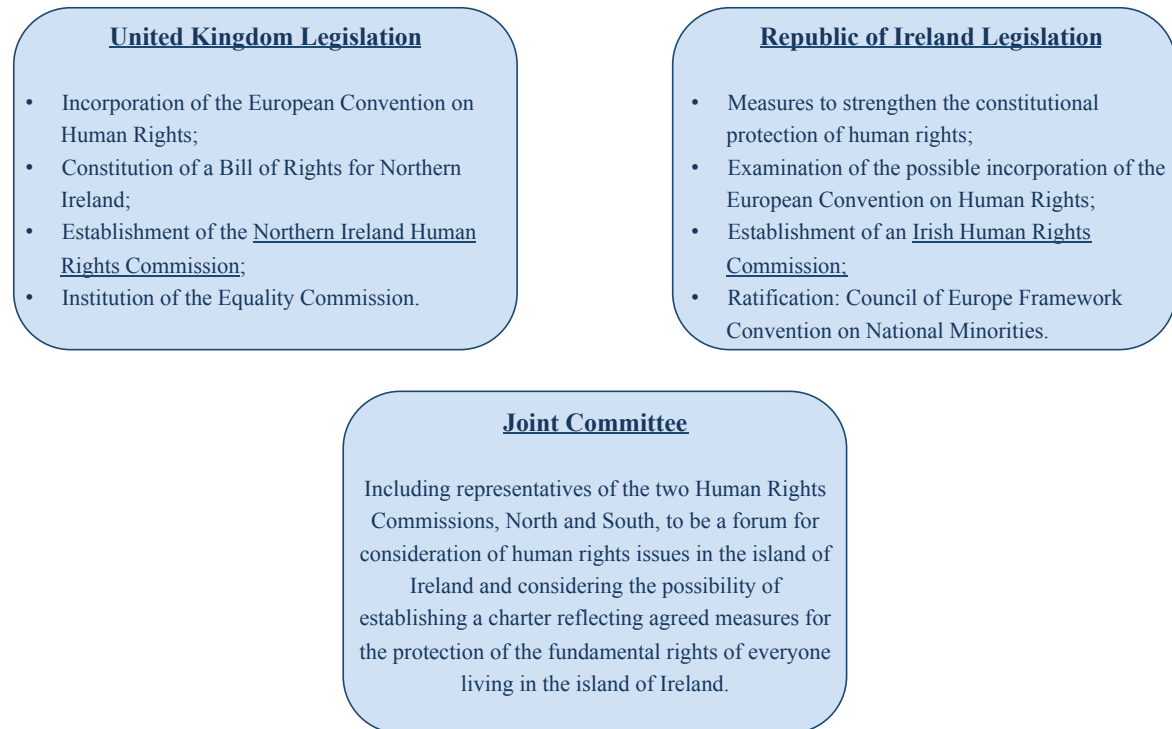
²⁰⁶ *Ibidem*.

²⁰⁷ *Ibidem*.

²⁰⁸ The first official meeting of the Joint Committee took place in November 2001 and, since then, members have engaged on several key issues and collaborated on all-island events.

introduce a joint charter – *open to signature by all democratic political parties*²⁰⁹ – aiming at *endorsing agreed measures for the protection of the fundamental rights of everyone living in the island of Ireland*.²¹⁰

Rights, Safeguards and Equality of Opportunity”, Good Friday Agreement²¹¹



Source: www.dfa.ie; own reworked version.

On 9th November 1998, in the UK the Human Rights Act²¹² ultimately received the Royal Assent, having already been fully approved by the Parliament of the United Kingdom. The United Kingdom Human Rights Act was meant to officially include into the British set of rules the rights and freedoms listed in the European Convention on Human Rights, thus giving them further effect and granting British citizens remedies for breaches of Convention rights in their own national courts, sparing them to be forced to go to the European Court of Human Rights (ECtHR) in Strasbourg.

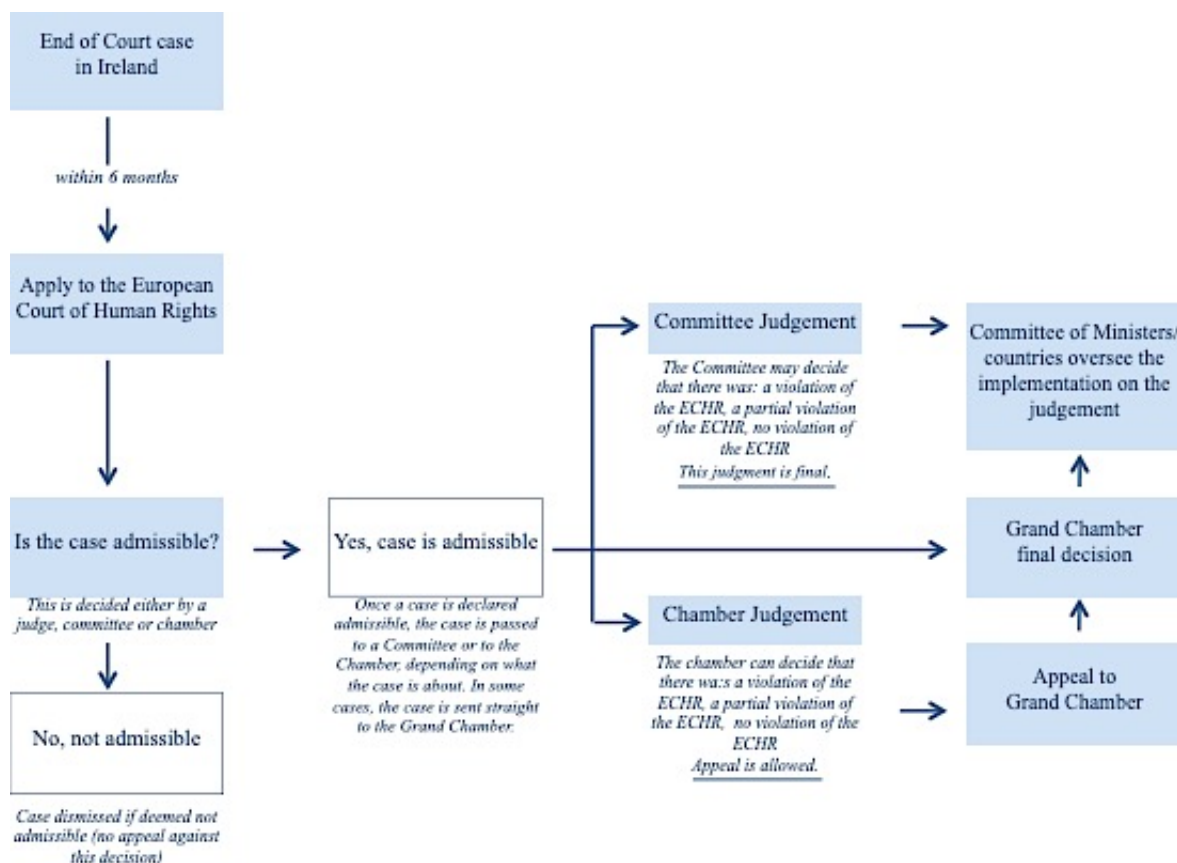
²⁰⁹ Section 10, “Rights, Safeguards And Equality Of Opportunity – A Joint Committee”, Good Friday Agreement, 1998 [online: www.dfa.ie/]

²¹⁰ *Ibidem*.

²¹¹ “Rights, Safeguards And Equality Of Opportunity – A Joint Committee”, Good Friday Agreement, 1998 [online: www.dfa.ie/]

²¹² Human Rights Act, 1998 [online: www.legislation.gov.uk/]

Summary process to bring a case to the European Court of Human Rights (ECtHR)



Source: www.iccl.ie; own reworked version.

A symmetrical act – the European Convention of Human Rights Act – was passed by the *Oireachtas* in 2003, enabling *further effect to be given, subject to the constitution, to certain provisions of the convention for the protection of human rights and fundamental freedoms*²¹³ listed in the European Convention of Human Rights. Although not incorporating the European Convention of Human Rights into the set of constitutional law of the Irish Republic, the European Convention of Human Rights Act had a considerable relevance as it required Irish courts – as well as other public bodies – to operate with due regard to the Convention, hence interpreting Irish norms in line with the Convention's ones. Moreover, the Act allowed Irish courts to make a declaration of incompatibility²¹⁴ in

²¹³ Preamble, European Convention on Human Rights Act, 2003 [online: www.irishstatutebook.ie]

²¹⁴ Being a central feature of British constitutional law, declaration of incompatibility are also provided for within the UK. Such a declaration may be issued by a British judge, proving that a statute is incompatible with the European Convention of Human Rights under the Human Rights Act 1998 section 4.

case a *statutory provision or rule of law is incompatible with the State's obligations under the Convention provisions*.²¹⁵

4. Today's Anglo-Irish protection of human rights

As previously seen, several European norms at large, namely both EU law and the European Convention on Human Rights, deal with human rights – first among all those included by the European Convention on Human Rights – and many institutions and bodies had planned to be established in order to safeguard human rights and fundamental freedoms.²¹⁶ Given their importance²¹⁷ – as basic rights not given by the state but belonging to everyone, and whose core idea concerns the respect of life and dignity of every human being – fundamental human rights are protected by legal provisions that operate in Northern Ireland and in the Republic of Ireland based on both national and international law.

Today Ireland's commitment to safeguard fundamental human rights includes a broad set of laws and provisions which bond Ireland not only on the national dimension, but also on the regional – hence, European – and international one.²¹⁸ Currently Irish human rights framework thus includes Ireland's commitment to the European Convention on Human Rights, the Charter of Fundamental Rights of the European Union and all those laws and

²¹⁵ Section 5, European Convention on Human Rights Act, 2003 [online: www.irishstatutebook.ie]

²¹⁶ The European regional system concerning the safeguard of human rights, grants European citizens the protection of their rights and freedoms by means of two main sets of institution, namely the Council of Europe and the European Union itself. The former – established in 1949 to safeguard human rights, democracy and the rule of law – comprises the European Convention on Human Rights, the Revised European Social Charter and the European Court of Human Rights, while the European Union system contains the Charter of Fundamental Rights, the EU Directives on Equality and the Court of Justice of the European Union.

²¹⁷ The relevance of human rights lies in their intrinsic nature, as they are inherent – meaning that they belong to all human beings without discrimination, interdependent and indivisible – therefore linked one to the other, and universally agreed and recognized. The broad set of rights known as human rights therefore include both: civil and political rights (right to life, right to a fair trial, right not to be subjected to torture, etc.) and economic, social and cultural rights (right to work, right to health, right to education, etc.).

²¹⁸ The international dimension of the safeguard of fundamental human rights mostly concerns the United Nations and their treaties, which include: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

provision protecting human rights which are passed at the national level, thus including the Constitution²¹⁹ and the European Convention on Human Rights Act.

Moreover Irish citizens are allowed to make complaints to the European Court of Human Rights²²⁰ whenever they have been personally and directly affected by a violation of one of the rights included in the European Convention on Human Rights and, up to now, several involving Ireland as a party have been brought to the European Court of Human Rights.

European Court of Human Rights: main cases involving Ireland	
1978 ²²¹	<p><u>Ireland v United Kingdom</u></p> <ul style="list-style-type: none"> Article 3, Prohibition of Torture <p>This is the first case between two states to be brought before the European Court. It was about the use of five sensory deprivation and disorientation techniques in places of detention in Northern Ireland.</p>
1979	<p><u>Airey v Ireland</u></p> <ul style="list-style-type: none"> Article 6, Right to a Fair Trial <p>Ms Airey took her case to the European Court, which found that her Article 6 rights had been violated because without legal aid and a lawyer, she had no access to the court. The decision resulted in the introduction of Civil Legal Aid in Ireland.</p>

²¹⁹ The Irish Constitution [online: www.irishstatutebook.ie/] explicitly comprises some fundamental rights in Articles 38-44, namely: right to a fair trial (Article 38.1), equality before the law (Article 40.1), right to life (Article 40.3), right to liberty (Article 40.4), right to freedom of expression, assembly and association (Article 40.6.1); and protection of the family (Article 41). Moreover Irish Courts [online: www.courts.ie/] interpreted constitutional laws as comprising some other human rights, which are known as unenumerated rights – as they are not explicitly included in the Constitution –and which comprise: the right to bodily integrity, the right to freedom from torture, inhuman or degrading treatment or punishment, the right to work and earn a livelihood and the right to privacy.

²²⁰ Although every Irish citizen is allowed to make a complaint to the European Court of Human Rights [online: www.echr.coe.int/], complaints must not be general ones regarding a state's law. Indeed, citizens must prove that one – or more – of the fundamental human rights the Irish state should guarantee has been violated and that therefore the Government failed in safeguarding its citizens' rights. Thus complaint may be about the Irish state itself or a government body (the Gardaí, the Health Service Executive, the Prison Service, etc.), while the European Court of Human Rights will not deal with complaints brought about other people or private companies.

²²¹ See Chart “European Court of Human Rights, Ireland v. the United Kingdom”.

European Court of Human Rights: main cases involving Ireland

<u>1982</u>	<u>Dudgeon v United Kingdom</u> <ul style="list-style-type: none"> Article 8, Right to Private and Family Life In earlier European Court cases, laws prohibiting homosexuality were considered justified by the part of Article 8 that protects health and morals, but this case changed things and, for the first time, homosexuality was considered to fall within the scope of private life. This case decriminalised homosexuality in the UK.
<u>1988</u>	<u>Norris v Ireland</u> <ul style="list-style-type: none"> Article 8, Right to Private and Family Life D. Norris took a case against Ireland – similar to that taken by J. Dudgeon against the United Kingdom – and eventually won and a similar legislation was introduced in Ireland.
<u>1992</u> ²²²	<u>Open Door and Well Women v Ireland</u> <ul style="list-style-type: none"> Article 10, Freedom of Expression The European Court found a violation of Article 10 when the Irish Supreme Court brought an injunction against Open Door Counselling Ltd and the Dublin Well Women Centre.
<u>2002</u>	<u>DG v Ireland</u> <ul style="list-style-type: none"> Article 5, Right to Liberty and Security Since a high-support secure educational facility for 16-18 year olds was not available in Ireland, the Irish High Court allowed that DG could be detained in St Patrick's Institution for Young Offenders. The European Court found that this type of detention was not lawful for the purpose of educational supervision and found a violation of DG's Article 5 rights.
<u>2014</u>	<u>O'Keeffe v Ireland</u> <ul style="list-style-type: none"> Article 3, Prohibition of Torture The European Court found a violation of Article 3 in respect of a woman who was sexually abused in a national school when she was a child. It was found that Ireland failed in its positive obligations.

Source: www.ihrec.ie; own reworked version.²²³

Finally, fundamental human rights are granted to Irish citizens by means of the Irish Human Rights and Equality Commission,²²⁴ which is Ireland's national human rights and equality institution – hence recognised by the United Nations – and Ireland's National Equality Body in terms of European Union law. The Irish Human Rights and Equality Commission is an independent²²⁵ public body which was established by means of the Irish

²²² The cases previously described originated from sentences both deriving from state appeal or being proposed by European Commissioner for Human Rights. On the other hand, the following cases concern individual appeals following the entry into force of Protocol XI within the ECHR (1994).

²²³ Human Rights Explained, Irish Human Rights and Equality Commission [online: www.ihrec.ie]

²²⁴ Irish Human Rights and Equality Commission (IHREC), [online: www.ihrec.ie]

²²⁵ The work of the Irish Human Rights and Equality Commission is independently defined by the Commission's fifteen members, who were chosen by the Irish President Michael D. Higgins, in 2014.

Human Rights and Equality Commission Act 2014²²⁶ in order to promote and protect human rights and equality in the Republic of Ireland and shape a common sense of respect for fundamental human rights, promoting equality and intercultural understanding, and strongly avoiding any kind of discrimination.

Main functions of the Irish Human Rights and Equality Commission

- Review of the adequacy and effectiveness of law, policy and practice in the State concerning human rights and equality;
- Review legislation and policy concerning human rights and equality;
- Making recommendations to Government concerning human rights and equality;
- Consulting national and international bodies as regards human rights issues;
- Offering expertise in human rights law to the Irish Courts, thus acting as *amicus curiae* before the High Court, Court of Appeal and Supreme Court;
- Conducting inquiries as regards human rights and equality issues in Ireland;
- Promoting understanding and awareness of human rights and equality;
- Granting legal assistance to individuals who suffered from human rights violation and thus look for vindication by means of:
 1. Providing legal advice;
 2. Providing legal representation before the Courts;
 3. Providing other ways of practical assistance;
- Initiating legal proceedings as concerns issues related to the human rights and equality.

Source: <https://www.ihrec.ie>; own reworked version.²²⁷

On the other hand, the United Kingdom also plays its part on the stage of the protection of fundamental human rights on the island of Ireland, and specifically, the United Kingdom does so by means of the Northern Ireland Human Rights Commission.²²⁸

The Northern Ireland Human Rights Commission was established by the Government of the United Kingdom with due regard to the provisions listed in the Good Friday Agreement.²²⁹

²²⁶ Moreover, the IHREC Act 2014 [online: www.irishstatutebook.ie/] comprises and improves the purposes of the previous Irish Human Rights Commission and the previous Equality Authority.

²²⁷ Functions of the Irish Human Rights and Equality Commission [online: www.ihrec.ie/]

²²⁸ Northern Ireland Human Rights Commission [online: www.nihrc.org/]

Although being funded by UK Government, the Northern Ireland Human Rights Commission is an independent institution operating in line with the UN²³⁰ Paris Principles and aiming at supporting the rebuilding of the Northern Irish society and at promoting the protection of human rights and equality.²³¹ Thus, the Northern Ireland Human Rights Commission's main activities – as well as the national human rights institution in Northern Ireland²³² – comprise a broad range of duties and responsibilities,²³³ which also includes the Northern Ireland Human Rights Commission's contribution to the checking of international human rights treaties in Northern Ireland.

Main functions of the Northern Ireland Human Rights Commission

- Advising Westminster Government as regards legislation and compliance with human rights frameworks;
- Advising the Northern Ireland Executive and Assembly as regards legislation and compliance with human rights frameworks;
- Advising key agencies Assembly as regards legislation and compliance with human rights frameworks;
- Promoting awareness of human rights through education, training and research;
- Monitoring work over international treaties;
- Legal advising work, including taking strategic legal cases;
- Operating within the Joint Committee with the IHREC.

Source: <http://www.nihrc.org>; own reworked version.²³⁴

²²⁹ The Northern Ireland Human Rights Commission – preceded by the Northern Ireland Act 1998 – was officially established in 1999.

²³⁰ The Northern Ireland Human Rights Commission, despite the national dimension within which it operates, is internationally recognised and holds a A status accreditation from the United Nations.

²³¹ The Northern Ireland Human Rights Commission includes a full-time Chief Commissioner and six part-time Commissioners – appointed by the Secretary of State for Northern Ireland – whose role is that of representing the community in Northern Ireland.

²³² The National Human Rights Institution in Northern Ireland [online: www.ennhri.org] is one of the many state-mandated institutions which act independently from national governments and whose legal mandate is that of protecting and promoting human rights at the national level.

²³³ Moreover, the Northern Ireland Human Rights Commission lists its key priorities in its three-year strategic plan (2016-2019), which provides for three main pillars: Pillar One concerns *delivering human rights by means of a set of excellent services to the public*, Pillar Two is related to *human rights and building the future in Northern Ireland*, and finally Pillar Three is about the *social and economic rights in a time of change*.

²³⁴ Functions of the Northern Ireland Human Rights Commission [online: www.nihrc.org]

Finally, the citizens of the whole island of Ireland are granted human rights and fundamental freedoms by means of the Joint Committee NIHRC & IHREC.

Indeed, as provided for by the Good Friday Agreement, the Northern Ireland Human Rights Commission and the Irish Human Rights and Equality Commission are required to meet in a joint committee – alternatively set in Belfast or Dublin – which is meant to be a forum for dealing with human rights issues concerning the whole island and therefore affecting both the Irish and the Northern Irish jurisdictions.

Based on a study of the human rights safeguard signed by both the United Kingdom and the Republic of Ireland, and in line with the European Convention on Human Rights, the Joint Committee gave advice regarding the possibility of drafting a Charter of Rights for the whole Island of Ireland,²³⁵ which in turn had to endorse the commitment of the political parties to the respect of the rights included in the European Convention on Human Rights.

Eventually, the advice was showed to London and Dublin's Governments and to the leaders of the main Irish and Northern Irish political parties: then, the establishment of a common Charter of Rights for the whole Island of Ireland was justified as a commonality of rights existed and was safeguarded in both jurisdictions and an equivalence of human rights protections, if achieved, might have contributed in supporting the peace process in both Irish and Northern Irish jurisdictions.²³⁶

²³⁵ On 27th June 2011, the Northern Ireland Human Rights Commission and the Irish Human Rights and Equality Commission jointly announced the Advice regarding a possible Charter of Rights for the Island of Ireland.

²³⁶ Advice of the Joint Committee on a Charter of Rights for the Island of Ireland, June 2011
[online: www.ihrec.ie/]

European Court of Human Rights Ireland v. the United Kingdom

The Government of Ireland, claiming wide breaches of the European Convention on Human Rights, referred this case to the European Court of Human Rights against the Government of the United Kingdom, making the following the first inter-state case regarding which the European Court of Human Rights gave a judgment. Recently, the Republic of Ireland requested the judgement to be revised by the European Court of Human Rights,²³⁷ as new evidences have recently become available, but such a request was ultimately rejected by the European Court of Human Rights so as to maintain legal certainty,²³⁸ albeit causing disappointment by human rights advocates.

- Applicant Government: Government of Ireland
- Respondent Government: Government of the United Kingdom of Great Britain and Northern Ireland
- Commission: European Commission of Human Rights
- Convention: European Convention for the Protection of Human Rights and Fundamental Freedoms

BACKGROUND

The longest and most violent terrorist campaign happened in either part of the island of Ireland²³⁹ and the attempts made by authorities in Northern Ireland to stop it – extrajudicial powers of arrest, detention and internment – represent the opening scene of the case. Indeed, Northern Ireland is not a homogeneous society, as it comprises two main groups whose antagonism lies both on religion and on social, economic and political differences.

- Protestant and Unionist community²⁴⁰
- Catholic and Nationalist community

EXTRAJUDICIAL MEASURES and OPERATION DEMETRIOS

By 9th August 1971, the riots begun in the late 1960s, involving two main paramilitary forces, notably the IRA and the UVF – respectively supporting Catholics' and Protestants' ideals and beliefs – sizeably intensified. Thus, as the violent protests carried out by the IRA had attained unprecedented proportions, the Northern Ireland Government introduced extrajudicial measures of detention and internment of suspected terrorists, provoking a violent reaction from the Catholic community and the IRA. The extrajudicial powers exercised comprised:

- i. Arrest for interrogation purposes during 48 hours (Regulation 10);
- ii. Arrest and remand in custody (Regulation 11 (1));
- iii. Detention of an arrested person (Regulation 11 (2));
- iv. Internment (Regulation 12 (1)).

²³⁷ A party may request the ECtHR to revise a previous judgment *in the event of the discovery of a fact which might by its very nature have a decisive influence [on the Court]* (Rule 80, Rules of the Court) and which was not known to the Court or the party asking for a revision when the original judgment was delivered.

²³⁸ A revision it is a technical process that allows the Court to revise a judgment when new facts emerge, possibly having a decisive influence on the Court's final decision. However, revising a case may also lead to complete chaos and uncertainty, thus undermining certainty, which indeed is a fundamental aspect of justice.

²³⁹ Up to March 1975 over 1,100 people had been killed, over 11,500 injured and more than £140,000,000 worth of property destroyed during the recent troubles in Northern Ireland.

²⁴⁰ The Protestant and Unionist community comprised one and a half million people, representing two thirds of the whole population.

Moreover, on 9th August 1971, “Operation Demetrious” happened to occur involving the army and police and resulting in the arrest of 452 persons. The latter were led to the regional holding centres – previously established so as to receive the prisoners²⁴¹ – so as to be interrogated by police officers of the Royal Ulster Constabulary (RUC): 104 persons were released soon afterwards, while the remaining were sent on to prison. However, before being lodged in detention, twelve individuals were singled out and taken to unidentified centres to be subject to “interrogation in depth”, a method which in fact included the combined application of five particular techniques:

- i. Wall-standing;
- ii. Hooding;
- iii. Subjection to noise;
- iv. Deprivation of sleep;
- v. Deprivation of food and drink.

Furthermore, in March 1972, in view of the deteriorating circumstances, the Government in London decided that they should assume direct responsibility for the administration of law and order in Northern Ireland if there was to be any hope of political progress and on 30 March 1972 the Northern Ireland (Temporary Provisions) Act 1972, introducing direct rule, came into force.

Shortly after, on 8 August 1973, the Northern Ireland (Emergency Provisions) Act 1973 – repealing the 1922 Special Powers Act, Regulations 10 and 11 (1) and the 1972 Terrorists Order and introducing specific extrajudicial powers – came into force.²⁴²

UK PRELIMINARY QUESTIONS

The United Kingdom Government raised two preliminary questions on the alleged violations of Article 3

- i. The first concerns the violations which they no longer contest
The United Kingdom Government contest neither the breaches of Article 3 as found by the Commission, nor the Court's jurisdiction to examine such breaches.
- ii. The second concerns certain of the violations whose existence they dispute.
The Irish Government invited the Court to hold, unlike the Commission, that violations of Article 3 had occurred in the cases of Ballykinler Regional Holding Centre and St. Genevieve's School, as well as in numerous places in Northern Ireland from 1971 to 1974.

JUDGEMENT

Given such a scenario, on 18th January 1978 the European Court of Human Rights provided for its judgement, declaring that the use by the then UK government of five techniques of interrogation on twelve individuals amounted to inhuman and degrading treatment in breach of Article 3 of the European Convention on Human Rights, but did not rise to the level of torture. Notably, as regard Article 3 the Court held unanimously that i) although certain violations of Article 3 were not contested, a ruling should nevertheless be given thereon; ii) it had jurisdiction to take cognisance of the case; iii) there existed at Palace Barracks in the autumn of 1971 a practice of inhuman treatment, which practice was in breach of Article 3; iv) it is not established that the practice in question continued beyond the autumn of 1971; v) it cannot direct the respondent State to institute criminal or disciplinary proceedings against those members of the security forces who have committed the breaches of Article 3 found by the Court and against those who condoned or tolerated such breaches. Moreover, it held by majority that i) the use of the five techniques constituted a practice of inhuman and degrading treatment, which practice was in breach of Article 3; ii) the said use of the five techniques did not constitute a practice of torture within the meaning of Article 3; iii) no other practice of ill-treatment is established for the unidentified interrogation centres; iv) no practice in breach of Article 3 is established as regards other places.

Source: www.cvce.eu; own reworked version

²⁴¹ Specifically, Magilligan Weekend Training Centre in County Londonderry, Ballykinler Weekend Training Centre in County Down and Girdwood Park Territorial Army Centre in Belfast.

²⁴² Briefly, the extrajudicial powers introduced under the Emergency Provisions Act were: i) arrest and detention for 72 hours, ii) interim custody for 28 days, iii) detention.

Chapter III The troubled devolution of Northern Ireland

In 1998, the Good Friday Agreement was signed in Belfast, being the cornerstone of the modern history of the island of Ireland. The Good Friday Agreement fully examined unresolved issues between the two Irelands, put an end to sectarian conflicts and abolished the discriminatory laws²⁴³ of the North, hence it proved the democratic maturity and the moral sense of both the Republic of Ireland and Northern Ireland.

Historic opportunity for a new beginning,²⁴⁴ the Good Friday Agreement managed to be the essential tool whereby *reconciliation, tolerance, and mutual trust*²⁴⁵ between the two Northern Irish communities and the *protection and vindication of the human rights of all*²⁴⁶ may be achieved. Indeed, besides requiring *exclusively democratic and peaceful means of resolving differences on political issues*,²⁴⁷ the Good Friday Agreement provided for the establishment of several bodies – the Assembly in Northern Ireland, the North/South Ministerial Council and the British-Irish Intergovernmental Conference – which were meant to be *interlocking and interdependent*²⁴⁸ and whose functioning was to be *closely interrelated*,²⁴⁹ thus making the success of one institution relying on the positive result of another body.

Therefore, the Good Friday Agreement not only dealt with social and civil rights, inequalities, discriminatory behaviour and sectarian conflicts, but it also drew the contour lines of a – almost – new Northern Irish government system, by defining its fundamental

²⁴³ Discriminatory laws in Northern Ireland ranged from education, to employment, to housing policies. Notably, as regards the latter – which has historically been a highly segregated field – in 1969, 69% of Protestants and 56% of Catholics lived in separate – and well-defined – streets. Following the outbreaks of violence and riots, and the construction of several high walls to separate rival neighbourhoods, such percentage increased sharply, reaching 99% of Protestants and 75% of Catholics. (Wright Frank, “Northern Ireland: A Comparative Analysis”, Rowman & Littlefield, 1988)

²⁴⁴ Declaration of Support, Good Friday Agreement, 1998 [online: www.dfa.ie]

²⁴⁵ *Ibidem*.

²⁴⁶ *Ibidem*.

²⁴⁷ *Ibidem*.

²⁴⁸ *Ibidem*.

²⁴⁹ *Ibidem*.

institutions, creating new political roles and improving old ones, thus sketching Northern Ireland's new devolution system.

Northern Ireland is in fact one of the four territories constituting the United Kingdom of Great Britain and Northern Ireland and as such it has the power to govern within some devolved policies areas, although it is primarily governed directly by London.

Northern Ireland's degree of autonomy considerably changed throughout the years – so as that of Scotland and Wales – in particular for what concerns the enactment of legislation and taxing powers, especially in Scotland (see the Scotland Act 2016).

However, in 1998 the Good Friday Agreement defined in detail Northern Ireland's position both with regard to the neighbouring Republic of Ireland and within the relationship with its British political motherland, thus describing Northern Ireland's specific status and its capacity – and possibility – to hold home rule.

Currently Northern Ireland stands halfway between the Republic of Ireland and the United Kingdom. Indeed, although officially belonging to the United Kingdom, due to its territorial conformation and to the historical and social common legacy, Northern Ireland is continuously forced to face the Republic of Ireland and to cooperate with the latter in order to solve those issues affecting both the North and the South of the island.

The aim of this chapter is thus that of analysing the inherent nature of Northern Ireland, both as an autonomous region and as part of the United Kingdom, by briefly summarising its history – since ever intertwined with the Irish and the British one – and then examining the policy areas reserved to London and those devolved to the six counties, hence listing the devolved powers and functions entrusted to the Northern Irish Institutions.

1. Northern Ireland Acts, from 1972 to 1998

Northern Ireland was officially created in 1920 by means of the Government of Ireland Act,²⁵⁰ but the roots of its history lie back to the 16th century.

The six counties that currently constitute Northern Ireland were in fact the battlefield where the Irish War of resistance against British colonialist policies and plantations programmes was fought.²⁵¹

²⁵⁰ Government of Ireland Act [10 & 11 Geo. 5. Ch. 67], 1920 [online: www.legislation.gov.uk/]

²⁵¹ See Paragraph 1, Chapter 1.

Riots, violent protests and uprisings followed and revolts reached the climax in 1798 when some Irishmen – inspired by the French Revolution (1789) – attempted to cut every bond that tied Dublin with London, so as to gather together the whole Irish people and to make it independent and close.

As a response London sustained and supported policies aiming at uniting the two nations – the British and the Irish one – so as to prevent potential future revolts and uprisings.

The Act of Union²⁵² was eventually signed in 1800 and entered into force on 1st January 1801, thus establishing the United Kingdom of Great Britain and Ireland which was uniquely ruled by London and comprised the whole entire Irish island together with England, Scotland and Wales.

However, since 1870s the Irish political scenario was shaken by the Irish Home Rule Movement, which included those Irish citizens who believed in and supported Irish Home Rule and – therefore – Ireland's independence from London.²⁵³

Notwithstanding the failure of the first two attempts to reach the independence, at the beginning of the 20th century, Irish Home Rule began to be more realistic and highly probable and indeed, in 1914, once the obstructionism of the House of Lords had been overtaken, the Third Home Rule Bill gained the Royal Assent.

Meanwhile, the idea of dividing the island of Ireland into two main parts – so as to avoid clashes caused by the intrinsic differences existing between the main Northern Irish communities – has been taken into account, but the outbreak of the Second World War made the idea to be abandoned and the implementation of the Third Home Rule Bill to be postponed, and indeed the potential division of the island and the enactment of the Third Home Rule Bill slowly faded away as the War became increasingly intense.

Moreover, in 1916 Irish public opinion suddenly changed as a consequence of the violent British response to the Easter Rising and those who once sustained nationalist beliefs and aimed at Home Rule, were now asking out loud for a unite and independent Ireland.

The Irish Question was firstly officially faced when the Irish Convention – including Irish citizens sustaining various and different political beliefs – was instituted, aiming at being the answer to the unstable political climate that followed the Easter Rising.

However, the actual turning point occurred in 1920, when the Government of Ireland Act²⁵⁴ – also known as the Fourth Home Rule Bill – was signed. Providing for the creation

²⁵² Union with Ireland Act [Regnal. 39 & 40 Geo. 3 Ch. 67], 1800 [online: www.legislation.gov.uk]

²⁵³ See Paragraph 3, Chapter 1.

of Northern and Southern Ireland, the Act proved to be the legislative tool allowing the division of the Irish island into two parts, each of which was intended to be almost self-governing.

According to the Government of Ireland Act, Home Rule institutions were to be established in both parts of the island so as to *provide for a better government for Ireland*,²⁵⁵ but while those new institutions seemed to work properly in Northern Ireland, nothing happened in the Southern part, which was in fact swamped by the Irish War of Independence.

The War of Independence finally ended one year later as an agreement between the British Government and the Irish one had been reached and officially ratified by means of the signing of the Anglo-Irish Treaty (1921),²⁵⁶ whose main provision concerned the establishment of the Irish Free State as a self-governing Dominion belonging to the British Empire. The Treaty also provided the six counties an opt out clause which – as expected – the Northern Irish Parliament eventually exercised, thus officially declaring to be part of the United Kingdom and therefore abandoning the new-born Irish Free State.

“Most Gracious Sovereign, We, your Majesty's most dutiful and loyal subjects, the Senators and Commons of Northern Ireland in Parliament assembled, having learnt of the passing of the Irish Free State Constitution Act 1922, being the Act of Parliament for the ratification of the Articles of Agreement for a Treaty between Great Britain and Ireland, do, by this humble Address, pray your Majesty that the powers of the Parliament and Government of the Irish Free State shall no longer extend to Northern Ireland.”

Address to the King, Houses of Parliament of Northern Ireland, 7th December 1922

The distance between the six Northern counties and the remaining twenty-six Southern ones was sharpened once again in 1925 when a Boundary Commission gathered to

²⁵⁴ Government of Ireland Act [10 & 11 Geo. 5. Ch. 67], 1920 [online: www.legislation.gov.uk/]

²⁵⁵ *Ibidem*.

²⁵⁶ Anglo – Irish Treaty, Final Articles as signed, 1921 [online: www.cain.ulster.ac.uk/]

precisely draw the border between the two parts of the island and thus between the Irish Free State and the United Kingdom of Great Britain and Northern Ireland.²⁵⁷

The Northern Irish institutions established by means of the Government of Ireland Act (1920) kept a high degree of independence up to 1972 when – due to the worsening of riots and violent protests – London Government opted for the suspension of every devolved power and in fact introduced the direct rule by means of the Northern Ireland (Temporary Provisions) Act,²⁵⁸ while the following year the suspended Northern Irish institutions were completely abolished according to the Northern Ireland Constitution Act,²⁵⁹ which gained the royal assent on 18th July 1973.

Main provisions of the Northern Ireland (Temporary Provisions) Act 1972²⁶⁰

Northern Ireland (Temporary Provisions) Act 1972
<ul style="list-style-type: none"> • The Secretary of State for Northern Ireland was to take over the duties of Northern Ireland's Governor, ministers, and heads of government departments.
<ul style="list-style-type: none"> • The Attorney General for England and Wales was to take over the duties of the Attorney General for Northern Ireland.
<ul style="list-style-type: none"> • The Parliament of Northern Ireland was (in effect) indefinitely prorogued, with its legislative powers being made available for exercise by the British Government by Order in Council.

Source: <http://www.legislation.gov.uk>; own reworked version.

The latter Westminster Act had actually been preceded by a referendum asking Northern Irish citizens whether to keep being part of the United Kingdom or to leave it so as to be reunited with the new-born Republic of Ireland and thus establishing a united Ireland.

²⁵⁷ The creation of a Boundary Commission was already contained in the provisions of the Anglo-Irish Treaty (Article 12) and it was meant to be established once Northern Ireland had chosen to exercise the option to opt out from the Irish Free State, but the Boundary Commission officially met for the first time only in 1925. However, notwithstanding the expectations of both “Irelands” the choices the Commission took appeared to be indifferent to the complex – and unstable – composition of the Northern Irish communities and the borders remained almost unchanged.

²⁵⁸ Northern Ireland (Temporary Provisions) Act [Ch. 22], 1972 [online: www.legislation.gov.uk]

²⁵⁹ Northern Ireland Constitution Act [Ch. 36], 1973 [online: www.legislation.gov.uk]

²⁶⁰ Northern Ireland (Temporary Provisions) Act [Ch. 22], 1972 [online: www.legislation.gov.uk]

However, the result of the referendum could not be misunderstood as the 98,9% of those entitled to vote declared to be willing to keep being British citizens.

Eventually, the Northern Ireland Constitution Act (1973) was succeeded by the Northern Ireland Act (1998), which, in turn, followed the Good Friday Agreement.²⁶¹

The Act, approved by the Parliament of the United Kingdom provided for the restoration of a devolved legislation of Northern Ireland, which was to be the Northern Ireland Assembly.

2. Northern Irish and Irish institutions

While England is politically and administratively tied to the central government of the United Kingdom, Scotland, Wales and Northern Ireland are regions endowed with a significant degree of autonomy, which differs one another, yet devoid of sovereign powers. England – for instance – has no devolved powers as it identifies with the institutions of the United Kingdom themselves (i.e. Westminster).

On the contrary, Wales has its own National Assembly, which was instituted in 1998 by the Government of Wales Act,²⁶² which also provided for all the powers then held by the Secretary of State for Wales to be transferred to the new-born Assembly.

As well as Wales, also Scotland and Northern Ireland have specific devolved institutions, respectively a Scottish Parliament²⁶³ and a Scottish Government,²⁶⁴ and the Northern Irish Assembly and Government.

Specifically, Northern Ireland's current legal and administrative system results from the evolution of the one in force when the island was divided into two (Anglo-Irish Treaty, 1921). Indeed the signing of the Good Friday Agreement – and thus that of the Northern

²⁶¹ Good Friday Agreement, 1998 [online: www.dfa.ie]

²⁶² Government of Wales Act [Ch. 38], 1998 [online: www.legislation.gov.uk]

²⁶³ The Scottish Government and the Scottish Parliament were instituted by means of the Scotland Act (1998), which in fact firstly provided for all the powers previously held by the Secretary State for Scotland to be transferred to the new-born Scottish institutions and, secondly, specified which competences were to be reserved to Westminster, thus implicitly listing the matters devolved to Edinburgh. Moreover, the Scotland Act (1998) introduced the figure of the Advocate General for Scotland, whose role included providing London Government with legal advice concerning Scottish laws and devolution issues.

²⁶⁴ Scotland Act [Ch. 46], 1998 [online: www.legislation.gov.uk]

Ireland Act (1998) – was not the mere symbol of the new peace between the two – politically and religiously divided – Northern Irish communities, but it proved to be the legislative tool which allowed to draw the outline and the shape of today's Northern Irish political system.²⁶⁵

Indeed, Strand One of the Good Friday Agreement – which was meant to deal with the establishment of new institutions in Northern Ireland – explicitly provided for a *democratically elected Assembly in Northern Ireland which was capable of exercising executive and legislative authority and subject to safeguards to protect the rights and interests of all sides of the community*.²⁶⁶

Due to its inherent characteristics Northern Ireland's Assembly is considered to be the Parliament of the Six Counties²⁶⁷ but although being the main institutional body and the *prime source of authority in respect of all devolved responsibilities*,²⁶⁸ since its introduction in 1998²⁶⁹ the Northern Irish Assembly had an unstable²⁷⁰ and irregular history.²⁷¹

²⁶⁵ Since 1998, thus since the abolition of Westminster Direct Rule, Northern Ireland managed to keep – almost without interruption – its authority within the judicial and administrative fields.

²⁶⁶ Good Friday Agreement, Strand One, Article 1, 1998 [online: www.dfa.ie]

²⁶⁷ Since 1921 up to 1972 Northern Irish legislative power – which was partially independent from London – resided in the Parliament of Northern Ireland. However in 1972, the Parliament – characterized by a strong UUP (Ulster Unionist Party) majority – was firstly suspended and then permanently abolished the following year. Nevertheless, a first attempt to restore Northern Irish devolved legislature occurred shortly after when, in 1973, a new government – the Northern Ireland Assembly – was instituted, being based on the principles of non-discrimination and cooperation between the two Northern Irish communities. But, despite the efforts made, the new body eventually ceased to exist that same year, mostly as a consequence of the Ulster Worker's Council strike. Another attempt to introduce a new Northern Irish Assembly in Stormont happened to occur in 1982, but the established institution had minimal competences and it was eventually dissolved in 1986.

²⁶⁸ Good Friday Agreement, Strand One, Article 4, 1998 [online: www.dfa.ie]

²⁶⁹ The first elections of the Northern Irish Assembly occurred on 25th June 1998 and the first meeting happened to be on 1st July 1998. However, the Assembly gained full powers only on 2nd December 1999, when specific legislative and administrative competences were devolved from Westminster to Stormont.

²⁷⁰ Devolution is indeed a process, meant to ensure a certain degree of autonomy to the devolved region, which is substantially flexible, as it may be either revoked or limited in any time.

²⁷¹ Indeed, since its introduction the Northern Irish Assembly has been suspended five times – mainly due to the disagreements between the two main unionist parties (UUP, Ulster Unionist Party and DUP, Democratic Unionist Party) and *Sinn Féin*: 11th February 2000 – 30th May 2000; 10th August 2001 (24h suspension); 22nd

Northern Ireland Assembly – which is a unicameral body comprising ninety members²⁷² – exercises both *full legislative and executive authority in respect of those matters currently within the responsibility of the six Northern Irish Government Department*,²⁷³ meaning that it holds both the responsibility for electing the members of the Northern Ireland Executive²⁷⁴ and the authority to legislate among a set of transferred matters.

Moreover, the Assembly, which operates on a cross-community basis, has the *possibility of taking on responsibility for other matters*²⁷⁵ in addition to those already mentioned in the articles of the Good Friday Agreement.

Actually, the legislative competences of the Northern Irish Assembly are not explicitly cited in Strand One of the Good Friday Agreement, but rather result from a residual list comprising those powers – usually falling within the economic and social field – not exclusively belonging to the British Parliament. The latter, in turn, include both the “Excepted Matters” and the “Reserved” ones. The former include those matters having national importance and thus indefinitely retained by Westminster, while the latter are competences currently belonging to London but allowed to be transferred to Belfast, thus allowing Stormont to legislate in respect of those matters.

September 2001 (24h suspension); 14th October 2002 – 7th May 2007; and from 9th January 2017 to present days.

²⁷² Initially Northern Ireland Assembly was meant to include 108 members *elected by PR(STV) [Proportional Representation – Single Transferable Vote] from existing Westminster constituencies*, however the number of Members of the Legislature Assembly (MLAs) was later reduced to 90, while the electoral system remained unchanged.

²⁷³ Good Friday Agreement, Strand One, Article 3, 1998 [online: www.dfa.ie]

²⁷⁴ At first the First Minister and the Deputy First Minister were to be elected on a cross-community vote but the election system was eventually changed in 2006. Currently, the First Minister and the Deputy First Minister are respectively appointed as the leaders of the main parties of the largest and second largest Assembly designation (i.e. Unionist, Nationalist, Other). However, the Minister of Justice is still named on the basis of a cross-community agreement, while the remaining ministerial positions shall be assigned according to the D’Hondt method.

²⁷⁵ Good Friday Agreement, Strand One, Article 3, 1998 [online: www.dfa.ie]

Transferred Matters	Reserved Matters	Excepted Matters
<ul style="list-style-type: none"> • Health & Social Services • Education • Employment & Skills • Agriculture • Social security • Pensions and child support • Housing • Economic development • Environmental issues, including planning transport • Local government • Culture & Sport • Northern Ireland Civil Service • Equal opportunities • Justice & Policing 	<ul style="list-style-type: none"> • Firearms and explosives • Financial services • Pensions regulation • Broadcasting • Import / Export controls • Navigation & civil aviation • International trade • Financial markets • Telecommunications and postage • The foreshore and seabed • Disqualification from Assembly membership • consumer safety • Intellectual property 	<ul style="list-style-type: none"> • The constitution • Royal succession • International relations • Defence, armed forces • Nationality • Immigration • Asylum • Elections • National security • Nuclear energy • UK-wide taxation • Currency • Conferring of honours • International treaties

Source: <https://www.gov.uk>; own reworked version.

On the other hand, the executive authority *has to be discharged by the First Minister and the Deputy First Minister*,²⁷⁷ whose designation is followed by the appointment of the remaining Ministers – jointly constituting an Executive Committee which guarantees

²⁷⁶ Devolution settlement: Northern Ireland, 2013 [online: www.gov.uk]

²⁷⁷ Good Friday Agreement, Strand One, Article 14, 1998 [online: www.dfa.ie]

power-sharing and inclusivity – whose posts *are allocated to parties on the basis of the D'Hondt system by reference to the number of seats each party has in the Assembly*.²⁷⁸

Once elected, the First Minister and the Deputy First Minister shall deal with Northern Ireland's external relations²⁷⁹ and coordinate the work of the whole Executive Committee, which in turn represents a *forum for the discussion of, and agreement on, issues which cut across the responsibilities of two or more Ministers, for prioritising executive and legislative proposals and for recommending a common position where necessary*.²⁸⁰

However, besides providing for the competences and the constitutive characteristics of the Northern Irish Assembly, the articles of the Good Friday Agreement also stated that the Assembly has *to be subject to safeguards to protect the rights and interests of all sides of the community*²⁸¹ and thus *to ensure that all sections of the community can participate and work together successfully*.²⁸²

Due to unsolved old grievances, in 2016 the Northern Irish Assembly went through a period characterised by misunderstanding and political turmoil, which in fact culminated in the Renewable Heat Incentive Scandal (RHIGate) which involved the then Northern Irish First Minister Arlene Foster (DUP) and caused the resignation of Sinn Féin leader – and Northern Irish Deputy First Minister – Martin McGuinness. As the Northern Irish is a power-sharing government, McGuinness' protest and the resignation made Arlene Foster to be removed as a First Minister and thus – *in primis* – the Executive to collapse and – secondly – the Northern Irish Assembly to be dissolved.

The Assembly is currently suspended as all the attempts to restore the Northern Irish institutions proved to be a failure.

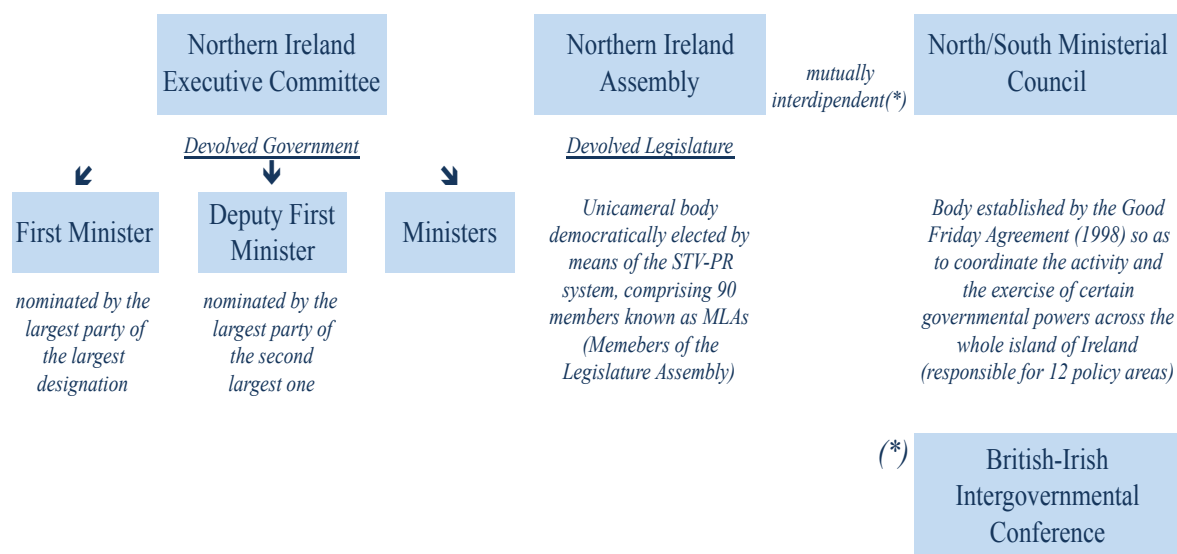
²⁷⁸ Good Friday Agreement, Strand One, Article 16, 1998 [online: www.dfa.ie/]

²⁷⁹ Good Friday Agreement, Strand One, Article 18, 1998 [online: www.dfa.ie/]

²⁸⁰ Good Friday Agreement, Strand One, Article 19, 1998 [online: www.dfa.ie/]

²⁸¹ Good Friday Agreement, Strand One, Article 1, 1998 [online: www.dfa.ie/]

²⁸² Good Friday Agreement, Strand One, Article 5, 1998 [online: www.dfa.ie/]



Source: www.dfa.ie; own reworked version.

Besides being one of the four provinces constituting the United Kingdom of Great Britain and Northern Ireland, the six counties are historically the most developed and industrialized region of the island and represent a contested territory that has always had to face both the British motherland and the neighbouring Republic of Ireland.

The main *trait d'union* between the Northern Irish institutions and the Irish ones is the North/South Ministerial Council, which was provided for by Strand Two of the Good Friday Agreement aiming at developing *consultation, co-operation and action within the island of Ireland on matters of mutual interest within the competence of the Administrations, North and South*.²⁸³

The Council – which is meant to foster the achievement of decisions agreed between the two sides – equally includes representatives from both Northern Ireland, namely the First Minister, the Deputy First Minister and any other relevant Minister, and the republic of Ireland, namely the *Taoiseach*.

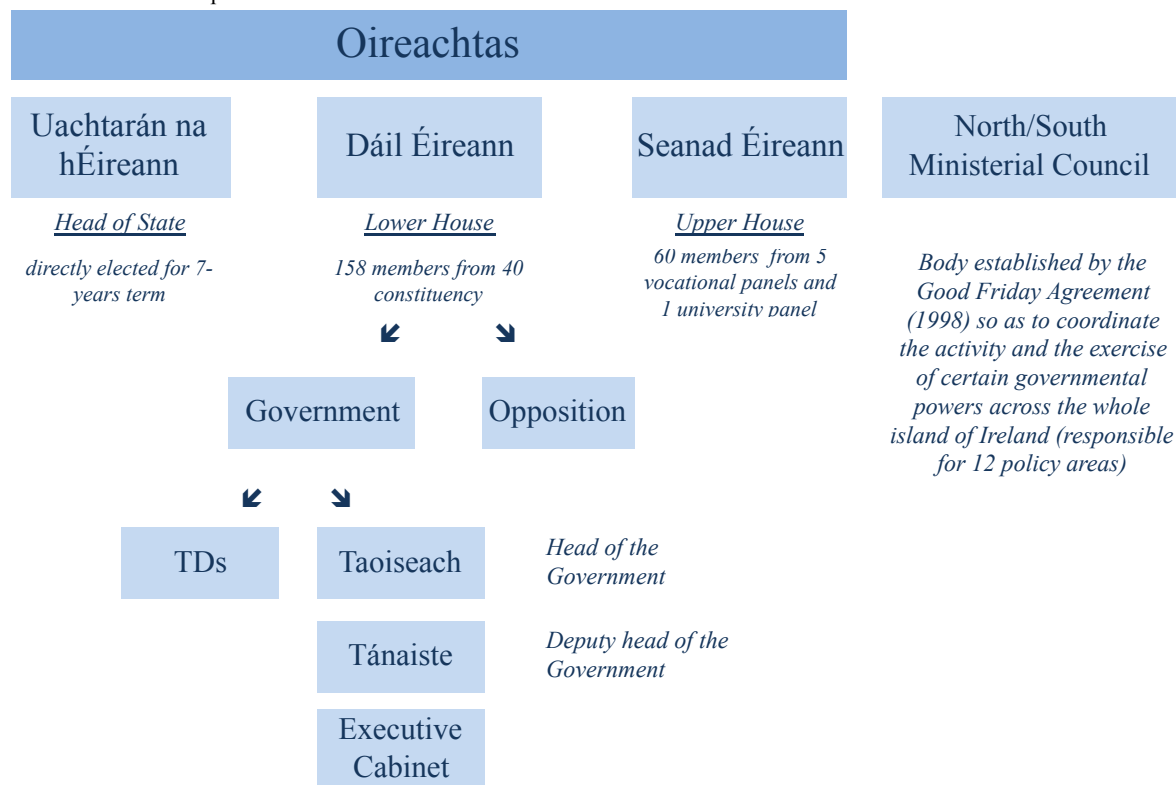
The tight bond existing between the Northern Irish Assembly and the North/South Ministerial Council is embodied as a strong relationship according to which *the North/South Ministerial Council and the Northern Ireland Assembly are mutually inter-dependent*,²⁸⁴ and thus *the one cannot successfully function without the other*.²⁸⁵ Whenever

²⁸³ Good Friday Agreement, Strand Two, Article 1, 1998 [online: www.dfa.ie/]

²⁸⁴ Good Friday Agreement, Strand Two, Article 13, 1998 [online: www.dfa.ie/]

the North/South Ministerial Council proves not to be able to deal with the issues entrusted to it, the British-Irish Intergovernmental Conference – which is meant to *bring together the British and the Irish Governments*²⁸⁶ – is held responsible for all the matters involving both the six counties and the Republic, thus transferring the management of the relationships between North and South Ireland from the Northern Irish devolved institutions to the centralized British ones and aiming at *promoting bilateral cooperation at all levels on all matters of mutual interest within the competence of both Governments*.²⁸⁷

Institutions of the Republic of Ireland²⁸⁸



Source: www.dfa.ie; own reworked version.

²⁸⁵ Good Friday Agreement, Strand Two, Article 13, 1998 [online: www.dfa.ie/]

²⁸⁶ Good Friday Agreement, Strand Three, British-Irish Intergovernmental Conference, Article 2, 1998 [online: www.dfa.ie/]

²⁸⁷ Government of Wales Act [Ch. 38], 1998

²⁸⁸ Institutions of the Republic of Ireland as provided for by the Irish Constitutions (1937) and the Good Friday Agreement (1998)

3. Northern Irish devolved powers

Northern Ireland's peculiar status – consequence of its being part of a fragmented but unitary state²⁸⁹ – results in a wide set of devolved competences and shared issues which range from economic policies, to nationality rights, to civil and social rights.

Among the many responsibilities held by Stormont, one of the most meaningful one is the one concerning financial choices and economic development.

Indeed, public expenditure – due to its inherent relevance and intricacy – is an issue which is partially – but not equally²⁹⁰ – entrusted with the Northern Irish devolved and local institutions and with the British Government.

On the other hand, some specific aspects of the decision-making process over economic issues are London's unique competence (i.e. currency matters), while some others are included among the so-called reserved matters, therefore currently being a Westminster's responsibility but allowed to be dealt with by Stormont (e.g. financial services, pension regulation, import/export controls, international trade, etc.).

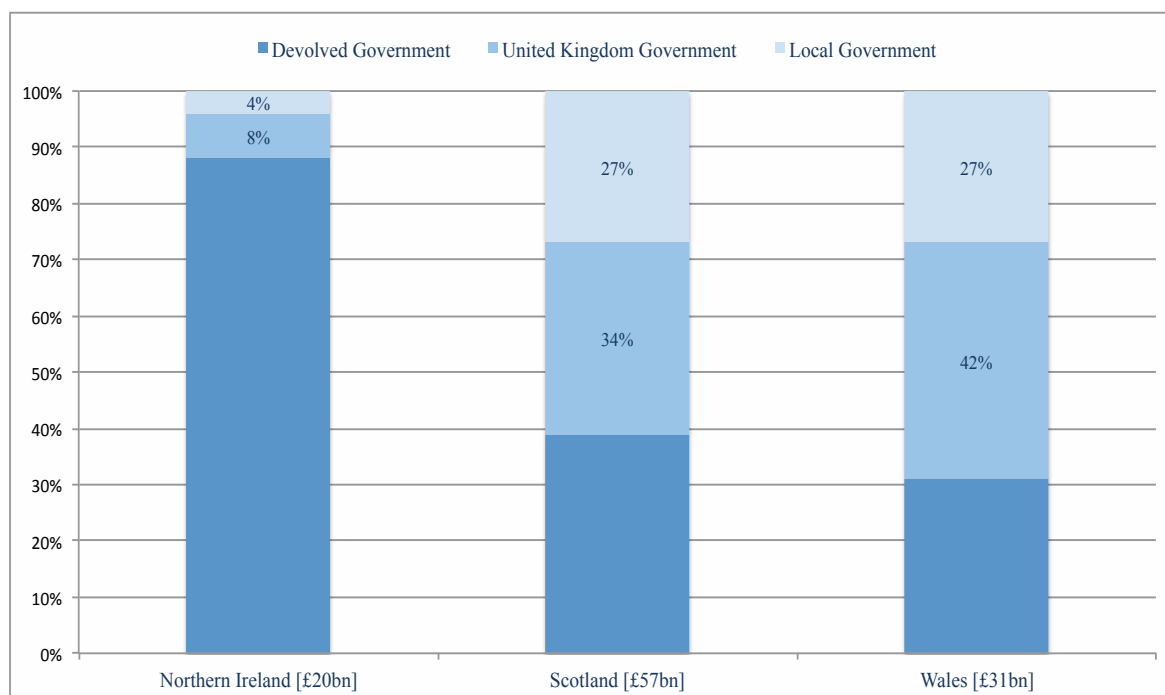
Moreover, during the last few years the possibility of granting greater decentralization – thus enlarging the set of economic competences devolved to the Northern Irish Parliament – has been under discussion more than once as the arguments supporting greater devolution proved to be truthful and effective. The latter indeed include an improvement in the management of the services provided for at the local level, a better allocation of the resources depending on the actual needs of both the people and the territory, and – consequently – lesser waste and greater chance of economic development and growth.²⁹¹

²⁸⁹ Despite being divided into different regions – England, Scotland, Northern Ireland and Wales – the United Kingdom of Great Britain and Northern Ireland is in fact a unitary state and not a federal one. Proofs of the fact that the United Kingdom is a unitary state lie – *in primis* – in the lack of a proper representation of the four states within one of the two Houses of the British Parliament (unlike the USA, where the various federal states are fully represented within the Senate) and – secondly – in England's peculiar status, as it has not its own legislature and devolved executive, thus being in contrast to what happen in Northern Ireland, Scotland and Wales.

²⁹⁰ Indeed, the figure shows the share of current and capital public expenditure on services – split into public expenditure planned by devolvement, local and national government – in Northern Ireland, Scotland, Wales in 2015/2016. (Source: HM Treasury, Public Expenditure Statistical Analysis, 2017)

²⁹¹ See: Schütze Robert & Tierney Stephen, “*United Kingdom and The Federal Idea*”, Hart Publishing, 2018

Share of current and capital public expenditure on services, 2015/16: Northern Ireland, Scotland, Wales.²⁹²



Source: <https://www.gov.uk>; own calculations.

Contrarily to the decisions concerning economic policies, which are shared by Stormont and Westminster, nationality is uniquely – and completely – entrusted with the British Government as it is a relevant issue whose consequences affect not only the local level but also the national one.

However, due to the six counties' position on the border with the Republic of Ireland, in Northern Ireland nationality has a greater – and more complex – relevance compared to England, Scotland and Wales.

Indeed, the Good Friday Agreement (1998) provides for Northern Irish people the right *to identify themselves and be accepted as Irish or British, or both*,²⁹³ thus guaranteeing them the chance to hold both British and Irish citizenship. Belonging to the people of the United Kingdom, Northern Irishmen are thus British citizens but they holding the birthright to be

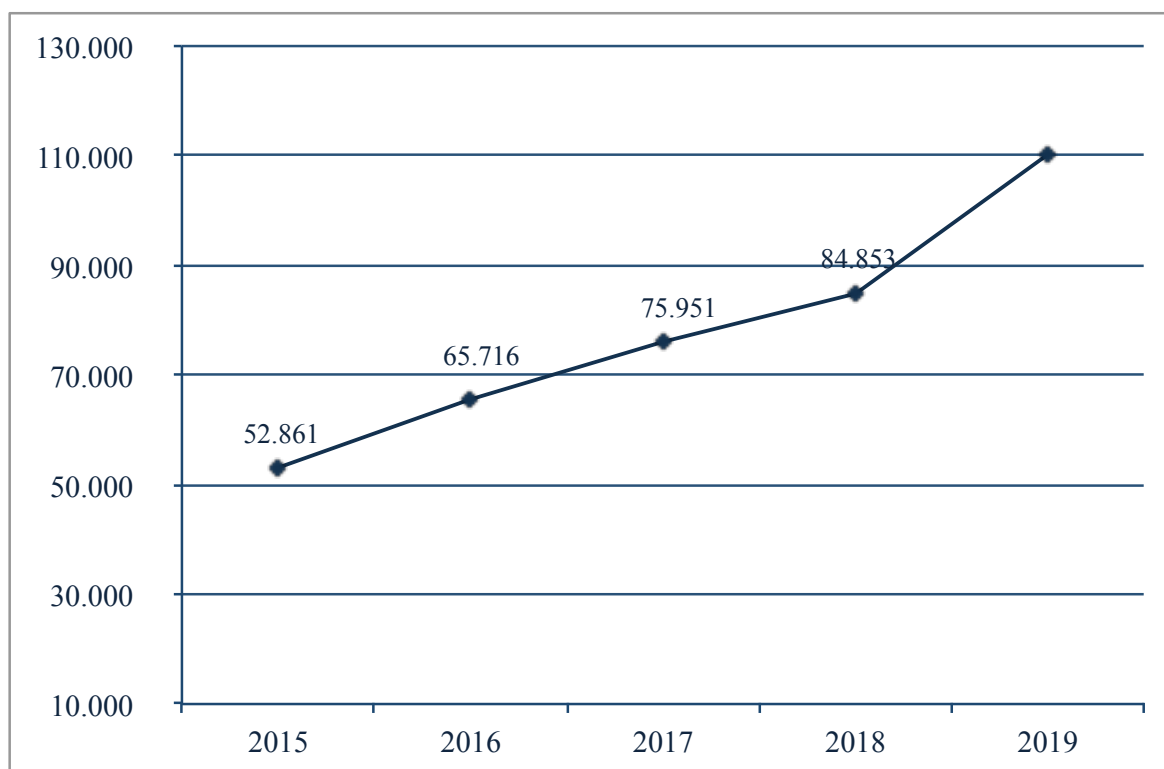
²⁹² HM Treasury, Public Expenditure Statistical Analysis, 2017 [online: www.gov.uk]

²⁹³ “*The participants endorse the commitment made by the British and Irish Governments that, in a new British-Irish Agreement replacing the Anglo- Irish Agreement, they will recognise the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland.*”

Good Friday Agreement, Constitutional Issues, Article 1 (vi), 1998 [online: www.dfa.ie]

recognised as Irish as well²⁹⁴ and indeed currently, more than 80,000 Northern Irish citizens hold Irish passports, supporting an upward trend concerning the overall volume of Irish passports issued since 2016.²⁹⁵

Overall volume of Irish passport held by Northern Irish citizens per year.²⁹⁶



Source: www.irishtimes.com; own calculations.

²⁹⁴ As a consequence of the Good Friday Agreement, the Irish Constitution (1937) had to be amended so as to allow every person born on the island of Ireland to be an Irish citizen regardless the county of birth. Therefore, today's Article 2 of the Irish Constitution explicitly states that: "*It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish Nation. That is also the entitlement of all persons otherwise qualified in accordance with law to be citizens of Ireland. Furthermore, the Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage*".

Article 2, Constitution of Ireland (*Bunreacht na hÉireann*), 1937 [online: www.irishstatutebook.ie]

²⁹⁵ Indeed, due to the positive result of the referendum regarding the withdrawal of the United Kingdom from the European Union (2016), the overall volume of Irish passports issued since June 2016 shows a constant and steep growth.

²⁹⁶ Overall volume of Irish passport held by Northern Irish citizens per year (2015: 52,861; 2016: 65,716; 2017: 75,951; 2018: 84,853; 2019: expected +30%).

Direct consequence of such a peculiar right – which is in fact exclusively reserved to Northern Irish people – is the possibility to bring back together the two territories of the island into a *sovereign united Ireland*.²⁹⁷

The later possibility derives from Northern Irish people's exercise of their right of self-determination, which in turn originates from the discriminations and the sectarian conflicts occurred throughout the last decades of the twentieth century, and which is safeguarded and guaranteed by both the British and the Irish Governments.

Indeed, by signing the Good Friday Agreement, London and Dublin accepted *to recognise the legitimacy of whatever choice freely exercised by a majority of the people of Northern Ireland with regard to its status*²⁹⁸ and declared to be willing *to introduce and support in their respective Parliaments legislation to give effect*²⁹⁹ to the Northern Irish people's wish *to bring about a united Ireland*.³⁰⁰

²⁹⁷ “The participants endorse the commitment made by the British and Irish Governments that, in a new British-Irish Agreement replacing the Anglo- Irish Agreement, they will recognise the legitimacy of whatever choice is freely exercised by a majority of the people of Northern Ireland with regard to its status, whether they prefer to continue to support the Union with Great Britain or a sovereign united Ireland.”

Good Friday Agreement, Constitutional Issues, Article 1 (i), 1998 [online: www.dfa.ie]

²⁹⁸ Good Friday Agreement, Constitutional Issues, Article 1 (i), 1998 [online: www.dfa.ie]

²⁹⁹ “The participants endorse the commitment made by the British and Irish Governments that, in a new British-Irish Agreement replacing the Anglo- Irish Agreement, they will affirm that if, in the future, the people of the island of Ireland exercise their right of self-determination on the basis set out in sections (i) and (ii) above to bring about a united Ireland, it will be a binding obligation on both Governments to introduce and support in their respective Parliaments legislation to give effect to that wish.”

Good Friday Agreement, Constitutional Issues, Article 1 (iv), 1998 [online: www.dfa.ie]

³⁰⁰ Good Friday Agreement, Constitutional Issues, Article 1 (iv), 1998 [online: www.dfa.ie]

Chapter IV United Kingdom European Union withdrawal: Brexit consequences

“The country has just taken part in a giant democratic exercise – perhaps the biggest in our history. Over 33 million people – from England, Scotland, Wales, Northern Ireland and Gibraltar – have all had their say.

We should be proud of the fact that in these islands we trust the people with these big decisions.

We not only have a parliamentary democracy, but on questions about the arrangements for how we are governed, there are times when it is right to ask the people themselves, and that is what we have done.

The British people have voted to leave the European Union, and their will must be respected. [...]

The will of the British people is an instruction that must be delivered. It was not a decision that was taken lightly, not least because so many things were said by so many different organizations about the significance of this decision. So there can be no doubt about the result [...] and we must now prepare for a negotiation with the European Union. This will need to involve the full engagement of the Scottish, Welsh and Northern Ireland governments to ensure that the interests of all parts of our United Kingdom are protected and advanced. [...]

I was absolutely clear about my belief that Britain is stronger, safer and better off inside the European Union, and I made clear the referendum was about this and this alone – not the future of any single politician, including myself.

But the British people have made a very clear decision to take a different path, and as such I think the country requires fresh leadership to take it in this direction. [...]

The British people have made a choice. That not only needs to be respected – but those on the losing side of the argument, myself included, should help to make it work.

Britain is a special country.

We have so many great advantages.

A parliamentary democracy where we resolve great issues about our future

through peaceful debate. A great trading nation, with our science and arts, our engineering and our creativity respected the world over.

And while we are not perfect, I do believe we can be a model of a multiracial, multi-faith democracy, where people can come and make a contribution and rise to the very highest that their talent allows.

Although leaving Europe was not the path I recommended, I am the first to praise our incredible strengths. I have said before that Britain can survive outside the European Union, and indeed that we could find a way. Now the decision has been made to leave, we need to find the best way.

And I will do everything I can to help.

I love this country — and I feel honoured to have served it.

And I will do everything I can in future to help this great country succeed.”

David Cameron’s Speech After “Brexit” Vote, June 24th 2016³⁰¹

Brexit – as the British former Prime Minister David Cameron pointed out in the immediate aftermath of the referendum regarding the British withdrawal from the European Union – is undoubtedly one of the most challenging processes of western contemporary history.³⁰²

Directly involving the United Kingdom and the institutions of the European Union, Brexit in fact implicitly – but considerably – affects not only England, Scotland, Northern Ireland and Wales, but also the Republic of Ireland, both as a EU-member state and as the only country sharing a land border with the United Kingdom.³⁰³

Indeed, Brexit seems to be the tool whereby the Irish border – a fine line which was once made so thin to be imperceptible, by means of the Good Friday Agreement – will be redrawn, thus being deemed to become the indelible limit line dividing not only the

³⁰¹ Text of the statement delivered by Prime Minister David Cameron after British voters in a referendum elected to leave the European Union, The New York Times, June 24th 2016
[online: www.nytimes.com]

³⁰² David William Donald Cameron served as Prime Minister of the United Kingdom from 2010 to 2016, also being the Leader of the Conservative Party from 2005 to 2016.

³⁰³ Actually, the United Kingdom has more than one land border with Europe. Indeed, beside sharing a land border with the Republic of Ireland, the United Kingdom borders with Spain to the South as Gibraltar, which is a British Overseas Territory – thus belonging to the British territories – is located at the southern tip of the Iberian Peninsula and shares a 1,2km border with Spain.

republic of Ireland and the United Kingdom but also separating a EU-country from one which no longer belongs to the European Union.

This – concluding – chapter will thus briefly deal with the analysis of the evolution of the legal and political choices that led to the referendum held on 23rd June 2016 and its potential consequences on the “two Irelands”.

Indeed, the enquiry will focus on the constitutional consequences of the UK withdrawal from the European Union, on the necessary amendments of the agreements between the Republic of Ireland and Northern Ireland and thus on the structural revisions of Northern Irish institutions, including the new potential agreements concerning the protection of civil rights, the laws’ compliance with the norms of the European Convention of Human Rights (ECHR)³⁰⁴ and the new – compulsory – economic policies.

1. The United Kingdom European Union membership referendum

The withdrawal of the United Kingdom from the European Union is the process – better known as Brexit – that is expected to lead the United Kingdom to lose its status as a EU-member state, in compliance with the provisions of Article 50 of the Treaty on European Union. Resulted from a conflicted relationship and a determined euro-sceptical campaign, the outcome of the referendum regarding the permanence of the United Kingdom within the border of the European Union led to the first actual use of Art. 50 (TEU).

However, the referendum held in 2016 was not the first British attempt to leave the European Community as London already tried to renegotiate UK’s terms of membership in 1974. Just one year after the accession of the United Kingdom to the then European Economic Community the Labour British Government proposed a referendum which was eventually held in 1975, explicitly asking British citizens whether they were willing to remain in the European Community or not.

The negative outcome of the 1975 referendum³⁰⁵ – emblem of the will of the British people – clearly didn’t manage to blow out the pride and the independent feeling of the British

³⁰⁴ European Convention on Human Rights, 1953 [online: www.echr.coe.int]

³⁰⁵ The 1975 referendum explicitly asked British citizens whether they thought the United Kingdom should have stayed in the European Community or not. Given a 64.62% turnout, the 67.23% of British citizens proved to be in favour of the “remain” option, while the remaining 32.77% voted for “leave”.

people and government, which in fact, although accepting to ratify the Single European Act³⁰⁶ and to join the European Exchange Rate Mechanism,³⁰⁷ always tended to opt for different choices compared to those taken by the other member states³⁰⁸ (E.g. refusing to adopt Euro as a single currency in 1999³⁰⁹).

³⁰⁶ Single European Act, Official Journal of European Communities, n° L 169/1, 29th June 1987

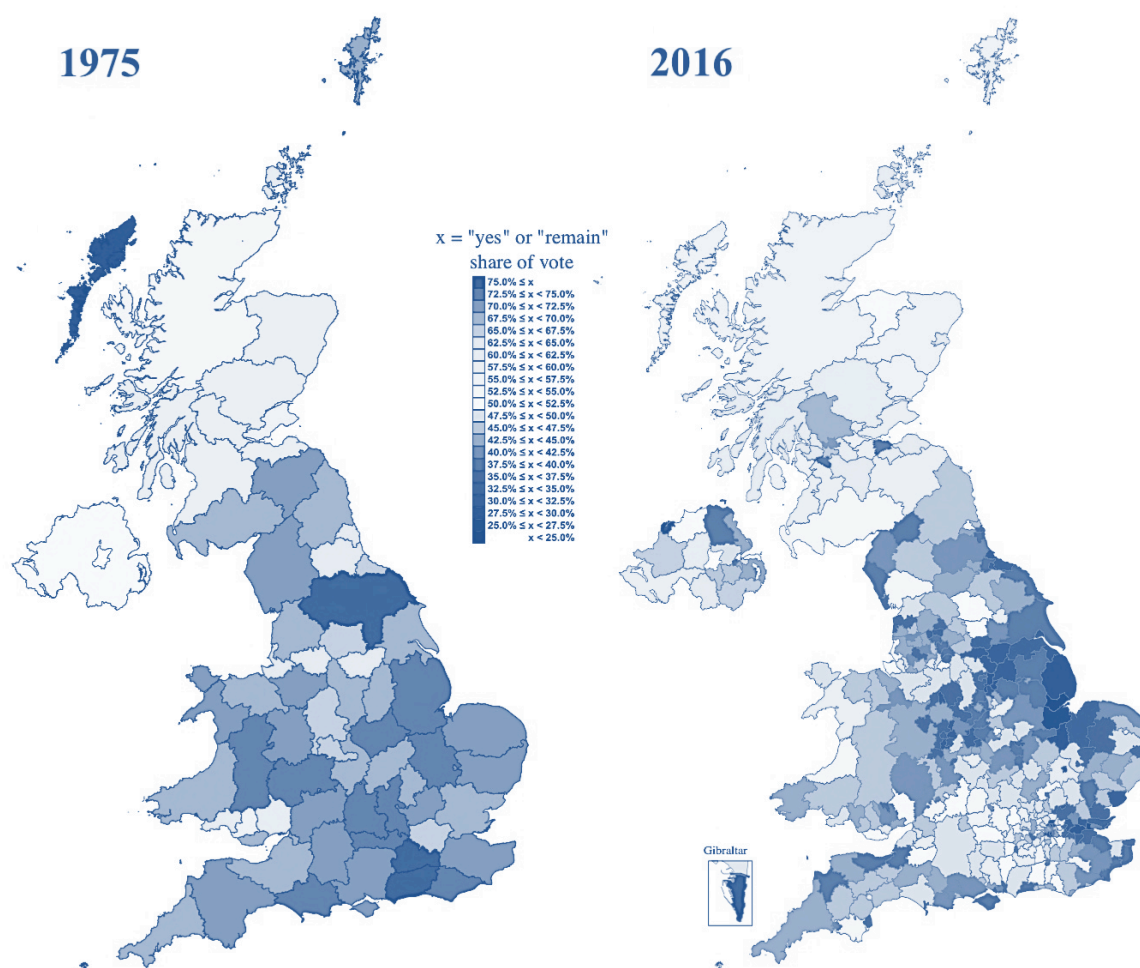
[online: www.eur-lex.europa.eu]

³⁰⁷ The European Economic Community introduced the European Exchange Rate Mechanism (ERM) on 13th March 1979, being part of the European Monetary System (EMS). The European Exchange Rate Mechanism was meant to reduce exchange rate variability so as to eventually achieve monetary stability in Europe. [online: www.ecb.europa.eu]

³⁰⁸ Indeed, the United Kingdom was granted several opt out clauses, concerning different fields. *In primis*, Ireland and the United Kingdom were provided for opt-outs from implementing the Schengen *acquis* – which had been incorporated into EU treaties by means of the treaty of Amsterdam (1997) – albeit still having the chance to opt into joining the Schengen Agreement on a case-by-case basis, unless unanimous consent is given by the other participating states. Secondly, during the negotiations of the Maastricht Treaty (1992), the United Kingdom – then followed by Denmark – secured an opt out so as not to be bound to adopt the euro as a common currency. Thirdly, both the United Kingdom and Poland – albeit not securing a full opt out – managed to hold clarifications regarding how the Charter of Fundamental Rights of the European Union would relate with national law in the two countries. Ultimately, Denmark, Ireland and the United Kingdom held opt-outs from the area of freedom, security and justice. Notably, Ireland and the United Kingdom were granted a flexible opt-out from legislation adopted in the area of freedom, security and justice, thus being allowed to opt-in or out of legislation and legislative initiatives on a case-by-case basis (except on matters related to Schengen). Moreover, with due regard to Protocol 36 of the Lisbon Treaty, the UK might opt out of all the police and criminal justice legislation enforced before the treaty's entry into force. Eventually the United Kingdom exercised the opt-out in 2013, except subsequently opting back into some measures. See: Piris Jean-Claude, “*The Future of Europe: Towards a Two-Speed EU?*”, Cambridge University Press, 2011.

³⁰⁹ Economic and Monetary Union [online: www.ec.europa.eu]

Compared results of the 1975 referendum and those of the 2016 one.



Source: www.commonswikimedia.org

Eventually, in 1993, the main euro-sceptic British political party – the United Kingdom Independence Party (UKIP)³¹⁰ – was established.

Since its formation UKIP gained results which were characterized by a – exponentially – positive trend and indeed the party slowly managed to remove the traditional political parties from the winners' podium, namely being the fourth most-voted party during the 1999 European Parliament Elections, the third most-voted one in 2004 and the first one in 2014.³¹¹

³¹⁰ www.ukip.org [Official website of the United Kingdom Independence Party]

³¹¹ The United Kingdom Independence Party currently has one representative in the House of Lords and two Assembly Members in the National Assembly for Wales, but no UKIP members join the House of Commons, where the electoral system is not a proportional one but based on the rule "first-past-the-post". However, the party's greatest success occurred in the mid-2010s, when it not only managed to have two Members in the UK Parliament, but it succeeded in being UK's largest party in the European Parliament. In

The increased support and the trust placed in the United Kingdom Independence Party and in the ideals it sustained – proved by the overwhelming victory gained in 2014³¹² – surely contributed to the success of the “Leave” campaign held in 2016.

Results of European Parliament Elections in the United Kingdom since 1994 to 2019.

	1994		1999		2004		2009		2014		2019	
	Seats	%	Seats	%	Seats	%	Seats	%	Seats	%	Seats	%
Labour Party	62	42,6% ↑	28	26,3% ↓	19	21,9% ↓	13	15,2% ↓	20	24,4% ↑		14,1% ↓
Conservative	18	26,8% ↓	36	33,5% ↑	27	25,9% ↓	26	27,4% ↑	19	23,1% ↓		8,7% ↓
Liberal Democrat	2	16,1% ↑	10	11,9% ↓	12	14,4% ↑	11	13,3% ↓	1	6,6% ↓		18,6% ↑
Green Party	0	3,0% ↓	2	5,3% ↑	2	5,6% ↑	2	7,8% ↑	3	6,9% ↓		11,1% ↑
SNP	2	3,1% ↑	2	2,5% ↓	2	1,4% ↓	2	2,1% ↑	2	2,4% ↑		3,4% ↑
UKIP	0	1,0% NEW	3	6,5% ↑	12	15,6% ↑	13	16,0% ↑	24	26,6% ↑		3,6% ↓
BREXIT	-	-	-	-	-	-	-	-	-	-	-	31,7% NEW

Source: www.ukpolitical.info; own reworked version.

In 2012, during the first years as UK David Cameron³¹³ originally refused to hold a referendum regarding the renegotiation of UK’s status as a European Union member state.

2006, UKIP approaches suddenly changes as Nigel Farage became the party leader, adopting wider policy platform and capitalising on concerns about rising immigration. Farage’s new attitude ultimately resulted in sizeably outcomes in 2013 Local Elections, 2014 European Parliament Elections and 2015 General Elections. UKIP’s successful results pushed the British Government to the 2016 referendum. Soon afterwards, Farage then stepped down as UKIP leader, and – together with many longstanding members – left the party, joining the new-born Brexit Party, which in turn managed to gain the majority at the European Parliament Elections, having 29 members sitting at the European Parliament.

³¹² During the 2014 European Parliament Elections, UKIP resulted as the British party gaining the majority of votes (4,376,635 votes, 26.6%), thus being in line with the positive trend (+10.6%) which had characterised the party outcomes also in the previous years, and therefore gaining 24 seats at the European Parliament, 11 more than the previous Elections, hence showing a 32.9% increase compared with 2009 European Parliament elections. [online: www.ukpolitical.info;]

³¹³ David William Donald Cameron is a British politician who served as Prime Minister of the United Kingdom from 2010 to 2016. Specifically, his first term as British Prime Minister ended in 2015 but he was surprisingly re-elected on 7th May 2015, with a majority in the Commons. He also served as Leader of the Conservative Party from 2005 to 2016.

However, political pressure and the rise of United Kingdom Independence Party (UKIP) eventually led him to change his mind and in 2013 Prime Minister David Cameron officially declared that – if re-elected – the future conservative Government would have worked in order to re-negotiated UK's EU membership and to allow a referendum.³¹⁴

Eventually – and surprisingly – the Conservative Party won the 2015 General Elections and thus the European Union Referendum Bill was introduced into and passed by the Parliament so as to allow the promised referendum.³¹⁵ However, although he had supported a referendum, Prime Minister David Cameron always declared himself to be in favour of a future scenario where the United Kingdom was part of the European Union,³¹⁶ albeit according to different terms and conditions.³¹⁷

In line with Cameron's ideals and political projects, opinion polls were initially in favour of the "remain" option but, as soon as some of the negotiations failed, support started to drop. The – non-fully positive – outcome of the negotiations³¹⁸ was revealed in February 2016 and soon afterwards a referendum was announced to be held on 23rd June 2016, asking British citizens if the UK *should remain a member of the European Union or leave the European Union*.³¹⁹

³¹⁴ The promise regarding a referendum aimed at renegotiating UK's terms as a EU member state was included into the Conservative Party manifesto for the 2015 General Elections (7th May 2015).

³¹⁵ European Union Referendum Act 2015 [online: www.legislation.gov.uk]

³¹⁶ Negotiations involving the President of the European Council Donald Tusk indeed occurred following the letter former British Prime Minister David Cameron wrote setting out four main areas he considered to be changed, notably: protection for non-euro countries, competitiveness, sovereignty and end of the obligation to a "ever closer union", and benefit restrictions. Most of the British requests were largely welcomed, albeit posing severe problems regarding the respect of EU general principles. Eventually Cameron showed such a successful result, proving to be in favour of the "remain" option.

See: European Council meeting, Conclusions, (EUCO 1/16 - CO EUR 1 - CONCL 1), 19th February 2016 [online: www.consilium.europa.eu]

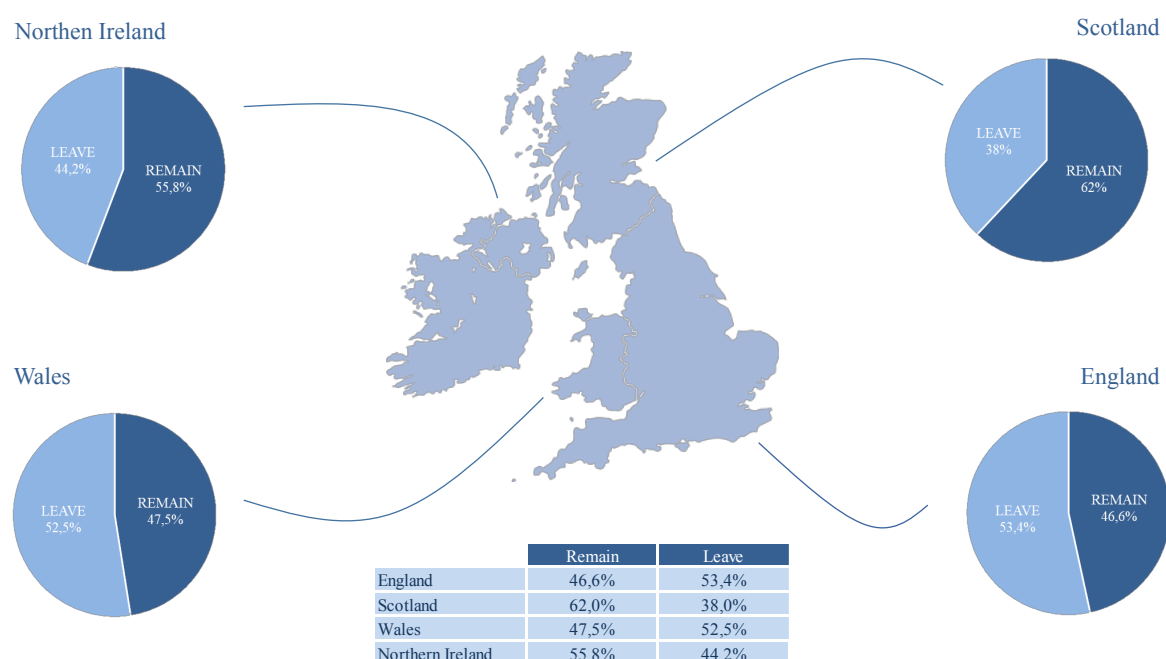
³¹⁷ Specifically, Prime Minister David Cameron wanted to renegotiate four key points: 1) protection of the single market for non-Eurozone countries; 2) reduction of "red tape"; 3) exempting Britain from "ever-closer union"; 4) restricting immigration from the rest of the European Union.

³¹⁸ At the end of the negotiations some goals were achieved, but none of them could be immediately implemented (E.g. Limits to in-work benefits for new EU immigrants were agreed, but before they could be applied, the United Kingdom – as a EU member state – would have to be allowed by the European Commission and then by the European Council.)

³¹⁹ Official question asked to British people with regard to the United Kingdom European Union membership referendum.

What followed was a strong and intense three-months campaign that saw two main opposing groups: on the one side, the “remain” group,³²⁰ mainly represented by “Britain Stronger in Europe”,³²¹ and on the other side, the “leave”, which identified itself into the “Vote Leave” movement.³²² On 23rd June 2016 British people were finally asked to express their wish.³²³ The result – announced on 24th June 2016 – was as surprising as alarming and caused the immediate resignation of British Prime Minister David Cameron,³²⁴ who was then replaced by the conservative Theresa May.³²⁵

Results of the referendum held on 23rd June 2016 throughout the United Kingdom.



Own reworked version.

³²⁰ The official campaign to stay in the European Union was known as Britain Stronger in Europe, but other campaigns supported the “remain” option, including “Conservatives In”, “Labour in for Britain”, “#INtogether” (Liberal Democrats), “Greens for a Better Europe”, “Scientists for EU”, “Environmentalists For Europe”, “Universities for Europe” and “Another Europe is Possible”.

³²¹ www.strongerin.co.uk [Official website of the British Party “Stronger in Europe”]

³²² www.voteleavetakecontrol.org [Official website of the UK Leave campaign]

³²³ “Should the United Kingdom remain a member of the European Union or leave the European Union?”

³²⁴ After the result was announced, Prime Minister David Cameron declared that he would resign by October and in fact he stood down on 13th July 2016, when Theresa May became the new British Prime Minister.

³²⁵ Theresa Mary May is a British politician serving as the Prime Minister of the United Kingdom and Leader of the Conservative Party since 2016. Indeed, in July 2016, after David Cameron resigned, May was elected as Conservative Party Leader, thus becoming Britain's second female Prime Minister after Margaret Thatcher. May also served as Home Secretary from 2010 to 2016.

Nonetheless, the intrinsic meaning of the referendum result proved to be a complex and thoughtful issue, far beyond that regarding the resignation of the Prime Minister.

Indeed, the victory of the “leave” meant that British people were not willing anymore to be part of the European Union and for the first time throughout the long history of the European integration process, Article 50³²⁶ of the Treaty on European Union had to be triggered.³²⁷ According to the provision of Article 50 (TEU), on 27th July 2016 Michel Barnier was appointed as European Chief Negotiator for the United Kingdom Exiting the European Union. Soon afterwards, on 7th December 2016, the UK House of Commons voted 461 to 89 in favour of the plan, proposed by British Prime Minister Theresa May, aiming at triggering Article 50 (TEU) by the end of March 2017. Eventually, almost one year after the fateful referendum and after Theresa May’s notification³²⁸ to the President of the European Council Donald Tusk to invoke Article 50 (TEU), Brexit negotiations began on 19th June 2017.³²⁹

³²⁶ “1) Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements. 2) A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament. 3) The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period. 4) For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it. A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union. 5) If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.”

Article 50, Title VI, Final Provisions, Treaty on European Union

³²⁷ Actually, Article 50 TEU has been recently introduced by means of the Treaty of Lisbon. Nevertheless, EU law academics claim that – albeit implicitly – withdrawal has always been allowed, even without an ad hoc clause and a codified procedure.

³²⁸ On 29th March 2017 British Prime Minister Theresa May officially asked the President of the European Council Donald Tusk to invoke Article 50, so as to be allowed to start a two year process with the UK, as provided for by Article 50 (TEU).

³²⁹ In 2017, conservative support slowly faded away, as shown by the negative result of the early elections called by Prime Minister Theresa May: the Conservative Party indeed lost the majority, thus being forced to

2. Revising the Good Friday Agreement and the Northern Ireland Act

Among the different regions composing the United Kingdom, Northern Ireland – due to its geographical location and because of its history, imbued with sectarian conflicts and socio-political wars – appears to be the main victim of UK's withdrawal from the European Union: hostage of a negotiation it can't participate in, but to which it is inevitably subject to. Mishap partner is the neighbouring Republic of Ireland, which is inextricably bound to the Six Counties by means of a fine line almost 500km-long and – above all – by pages of history written together, and treaty and acts commonly agreed which officially state the existing deep connection between the two Irelands.

In such a scenario, Brexit proves to be what will weaken the relationship between the Six and the Twenty-six Counties, slackening – up to unravelling – the bonds that tie the two together, first and foremost the links provided for by the Good Friday Agreement.

As described in Chapter III, in 1998 – following exceptionally long and heavy negotiations aimed at defining the terms of peace in Northern Ireland – the Good Friday Agreement finally managed to appease those sectarian conflicts that had ravaged Northern Ireland for more than three decades.

Still today, though – although the Good Friday Agreement succeeded in breaking up with a past sprinkled by discriminations and ethno-national divisions – religious, social and political differences represent a typical feature of Northern Irish society. Thus is no coincidence that the distribution of votes given by Northern Irish people regarding the United Kingdom European Union membership referendum – albeit resulted in a general “remain” preference³³⁰ – turned out to be uneven and strongly tied to the political ideals,

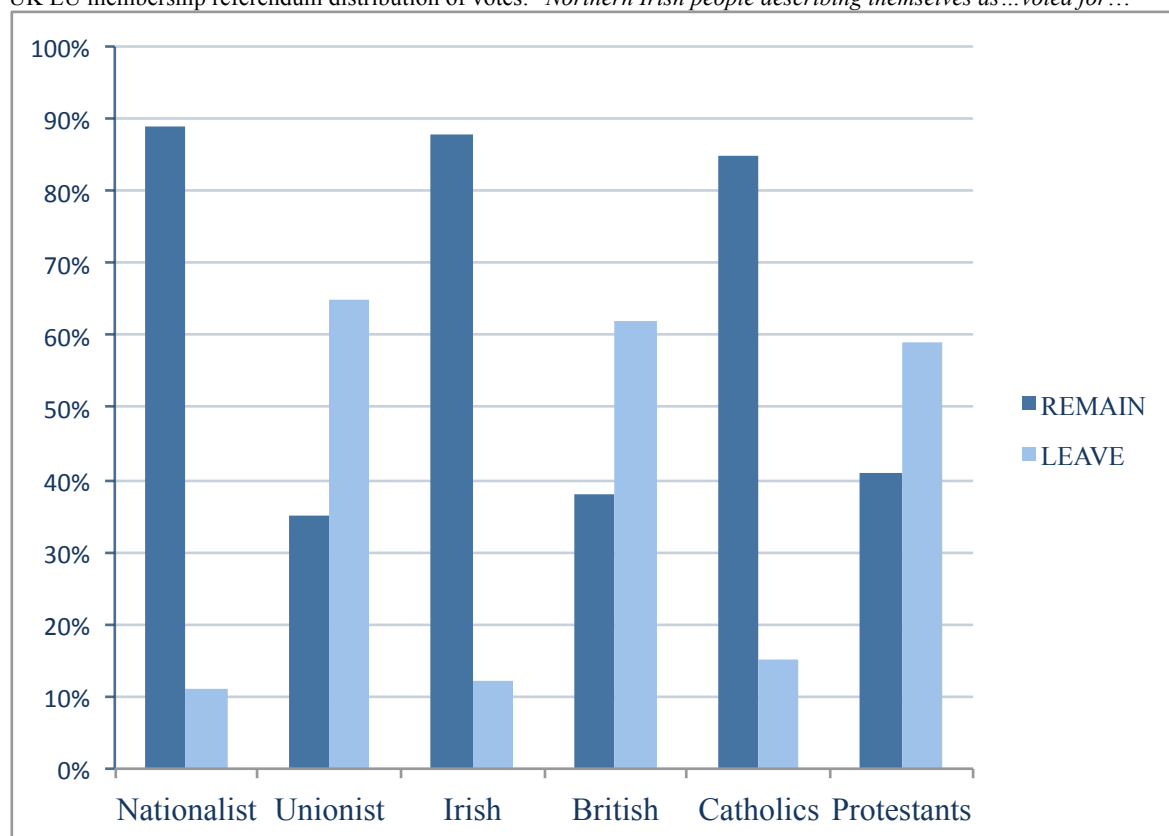
rely on DUP deputies. Eventually, such a choice proved to be a failure as DUP deputies turned to be the ones who – more than anyone else – hindered Brexit negotiations. Moreover, things appeared to be worsened by the fact that *Sinn Féin* members elected within the House of Commons traditionally refused to sit in Parliament.

See: Leyland Peter, *“The Constitution Of The United Kingdom, A Contextual Analysis”*, Hart Publishing, 2016

³³⁰ The results of the United Kingdom European Union membership referendum, which was held on 23rd June 2016, proved to be unevenly distributed throughout the United Kingdom of Great Britain and Northern Ireland. Notwithstanding United Kingdom as a whole voted by 17,410,742 votes (51.9%) to 16,141, 241 (48.1%) to leave the European Union, Northern Ireland, as part of the United Kingdom, voted to remain in the European Union by 440,707 votes (55.7%) to 349,442 (44.3%). However, Northern Irish vote only represent a minimum percentage of the British vote – as Northern Ireland is the smallest part composing the

religious beliefs and national identities of Northern Irish people. The on-going diverse socio-political feelings dividing Northern Ireland were in fact evident in how votes were distributed during the United Kingdom European Union membership referendum in 2016,³³¹ as Irish Catholic Nationalist areas voted strongly to remain in the EU while most of British Protestant Unionist areas – although much more evenly divided – mainly favoured withdrawal.

UK EU membership referendum distribution of votes: “Northern Irish people describing themselves as...voted for...”



Source: www.it.reuters.com; own calculations.

United Kingdom, having a population of 1.8 million people, thus representing the 2.9% of the total British population – namely 2% of the Leave tally and 3% of the Remain side’s support. Moreover, Northern Irish turnout proved to be 9% lower than the UK-wide figure, amounting to just 63%.

³³¹ Although the labels used to identify different social groups within Northern Irish society are overwhelmingly overlapping, it can be said that 89% of those describing themselves as nationalist, 88% of those identifying as Irish and 85% of Catholics voted to remain in the EU. Moreover within this community there is considerable support towards a potential united Ireland, but also acceptance of a devolved government within the United Kingdom – but as a European Union member state.

On the other hand, the opposite community – namely, British Protestant Unionist – showed sizeable sympathy towards the assertion of British sovereignty. Only 35% of those describing themselves as unionist, 38% of those identifying as British and 41% of Protestants indeed voted to remain in the European Union.

Similarly, differences were clear within the political parties' scenario – namely, the Northern Ireland Assembly elected in March 2017.³³² Indeed, both of the Irish nationalist parties – Sinn Féin³³³ and the Social Democratic and Labour Party (SDLP)³³⁴ – proved to be in favour of the “remaining” side, together with Alliance,³³⁵ Independents and the Green Party (NI),³³⁶ while the two traditional unionist parties – the Democratic Unionist Party (DUP)³³⁷ and the Ulster Unionist Party (UUP)³³⁸ – voted for “leave”. The Traditional Unionist Voice (TUV)³³⁹ and People Before Profit,³⁴⁰ in line with the unionist perspective, supported the withdrawal option.³⁴¹

³³² On 2nd March 2017, Northern Irish citizens were asked to vote to elect members (MLAs) of the Northern Ireland Assembly as – by law – the resignation of deputy First Minister Martin McGuinness, in objection to the Renewable Heat Incentive scandal, triggered an election. The 2017 election of the Northern Ireland Assembly was the sixth election since its re-establishment in 1998 and the first to apply a downsizing in the number of the members of the Legislative Assembly (90 versus the previous 108).

³³³ www.sinnfein.ie [Official website of *Sinn Féin* Party]

³³⁴ www.sdlp.ie [Official website of Social Democratic and Labour Party]

³³⁵ www.allianceparty.org [Official website of Alliance Party of Northern Ireland]

³³⁶ www.greenpartyni.org [Official website of Northern Ireland's Green Party]

³³⁷ www.mydup.com [Official website of Democratic Unionist Party]

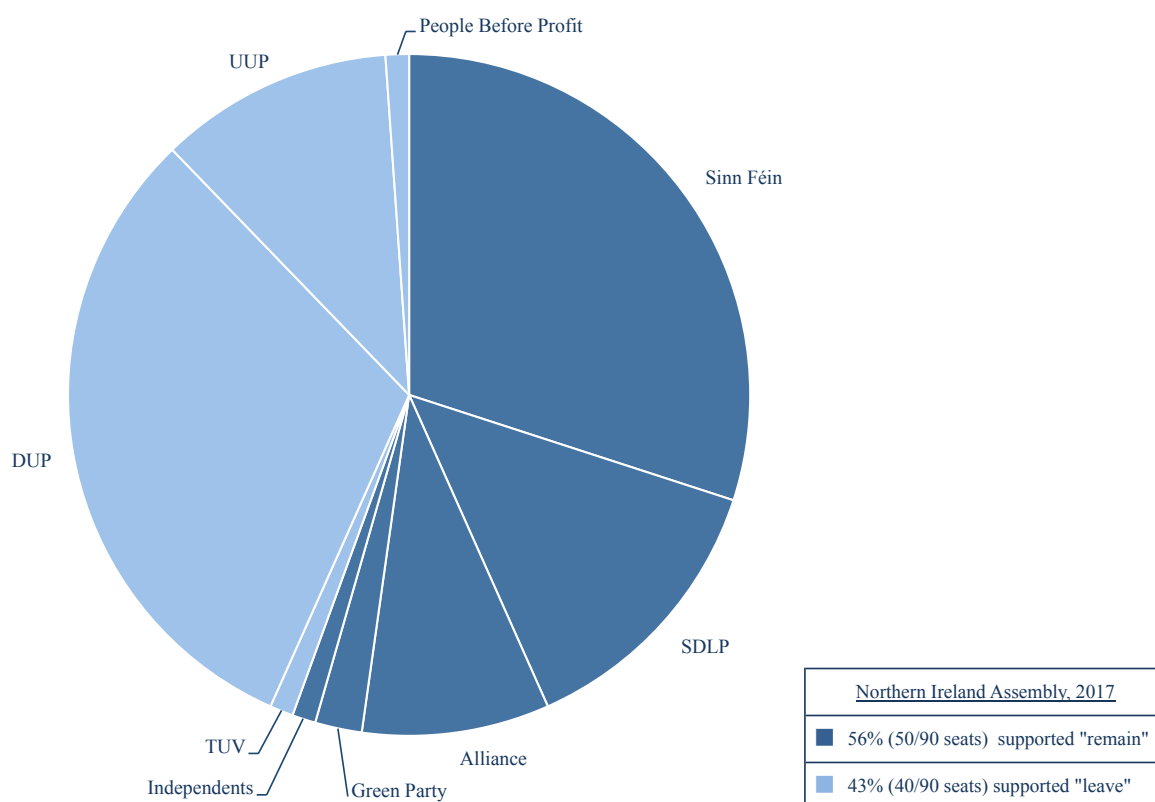
³³⁸ www.uup.org [Official website of Ulster Unionist Party]

³³⁹ www.tuv.org.uk [Official website of Traditional Unionist Voice party]

³⁴⁰ www.pbp.ie [Official website of People Before Profit party]

³⁴¹ Indeed, among the 90-members Northern Ireland Assembly the main parties turned out to have opposing stances in the United Kingdom European Union membership referendum. *Sinn Féin* (27 seats), the Social Democratic and Labour Party (12 seats), Alliance (8 seats), Green Party (2 seats) and Independents (1 seat) opposed European Union withdrawal, consistently with their voters' preferences (86% of *Sinn Féin* voters and 92% of SDLP voters supported the “remain” option). On the other hand, the Democratic Unionist Party (28 seats), the Ulster Unionist Party (10 seats), the Traditional Ulster Voice (1 seat) and People Before Profit (1 seat) proved to be pro-Brexit, although their supporters' preferences were not as clearly marked as the nationalists' ones (70% of DUP and 54% of UUP supporters voted to leave).

Northern Ireland Assembly (2017) distribution of preferences about Brexit.



Source: www.it.reuters.com, own calculations.

However, mostly thanks to the provisions included in the Good Friday Agreement, today Northern Ireland seems to be a six-counties area which is somehow peaceful and united, albeit clear differences still exist, mainly regarding United Kingdom withdrawal from the European Union.

As previously seen,³⁴² the Good Friday Agreement is a bilateral international agreement including two – inextricably tied – treaties: the Multi-Party Agreement, comprising most of the Northern Irish political parties – nationalist and unionist – and the British-Irish Agreement, a deal involving the British and the Irish governments which indeed affirmed *their solemn commitment to support, and where appropriate implement, the provisions of the Multi-Party Agreement.*³⁴³

Signed in 1998, when all the countries involved – United Kingdom (Northern Ireland) and the Republic of Ireland – had already joined the European Communities, the Good Friday Agreement, as a tool aimed at defining the requirements needed in order to assure a

³⁴² See Paragraph 7 Chapter 1.

³⁴³ Good Friday Agreement, British-Irish Agreement, Article 2, 1998 [online: www.dfa.ie/]

peaceful relationship between the parties, could not ignore the relationship between the latter and the European Union.

Indeed, while signing the Good Friday Agreement, the British and the Irish Governments not only wished to *develop still further the unique relationship between their peoples and the close co-operation between their countries as friendly neighbours*³⁴⁴ but also as *partners in the European Union*.³⁴⁵

References regarding the relationship with the European Union – albeit also cited in Strand One³⁴⁶ and Three – are mostly included in Strand Two, which provides for the establishment of a North/South Ministerial Council – aiming at promoting all-island cooperation – which in turn should *consider the European Union dimension of relevant matters, including the implementation of EU policies and programmes and proposals under consideration in the EU framework*.³⁴⁷ Moreover, Strand Two of the Good Friday Agreement also specifies that arrangements have *to be made to ensure that the views of the [North/South] Council are taken into account and represented appropriately at relevant EU meetings*.³⁴⁸

Nonetheless, according to what provided for by the Northern Ireland Act,³⁴⁹ which followed the Good Friday Agreement, Northern Irish institutions – although deeply affected by the choices agreed at the European level, first, and by the consequences of the United Kingdom European Union membership referendum, then – are not allowed to participate in any negotiations regarding UK withdrawal since UK's relationship with the European Union – as well as its conclusion – falls within the set of excepted powers,³⁵⁰ namely those competences fully retained by Westminster. Indeed, no competences have been devolved to the Northern Ireland Assembly in this respect as the provisions of the Northern Ireland Act allowed the Assembly only to pass laws concerning reserved³⁵¹ and

³⁴⁴ Good Friday Agreement, British-Irish Agreement, 1998 [online: www.dfa.ie/]

³⁴⁵ *Ibidem*.

³⁴⁶ Besides comprising two distinct treaties, the Good Friday Agreement is mainly divided into three strands (see Chapter 1 Paragraph 7, summary table p.54). The first regards political agreements to be taken within Northern Irish boundaries; the second concerns the peculiar relationship between Northern Ireland and the Republic of Ireland, while the third covers overseas relationships – namely, British-Irish ones.

³⁴⁷ Good Friday Agreement, Strand 2, Article 17, 1998 [online: www.dfa.ie/]

³⁴⁸ *Ibidem*.

³⁴⁹ Northern Ireland Act, 1998 [online: www.legislation.gov.uk]

³⁵⁰ See Paragraph 2 Chapter 3

³⁵¹ Schedule 2 (Excepted Matters), Northern Ireland Act, 1998 [online: www.legislation.gov.uk]

transferred³⁵² matters. Northern Ireland Assembly is thus unable to legislate over *international relations, including relations with territories outside the United Kingdom, the European Union (and their institutions) and other international organisations*.³⁵³ Furthermore, any chance meant to allow devolved institutions – included the Northern Irish one – to stop the UK Government from declaring its willingness to leave the European Union and thus to trigger Article 50 (TEU) was ruled out (See: UK Supreme Court Case “*Miller and Dos Santos v. Secretary of State for Exiting the European Union*”³⁵⁴).

³⁵² Article 4, Part I, Northern Ireland Act, 1998 [online: www.legislation.gov.uk]

³⁵³ Article 3, Schedule 2 (Excepted Matters), Northern Ireland Act, 1998 [online: www.legislation.gov.uk]

³⁵⁴ Miller Case [online: www.supremecourt.uk]

Soon afterwards Brexit referendum the UK government declared its intention to invoke Article 50 (TEU) so as to withdraw from the European Union, causing misgivings within academics. Notably, three academics (Nick Barber, Dr Tom Hickman and Professor Jeff King) started arguing that an Act of Parliament was necessary in order to allow the British Government to state its willingness to leave the EU. Following such a debate, questions arose regarding the need of an Act of Parliament: the British Government – opposing the three academics’ perspective – rebutted that prerogative powers aiming at enacting the outcome of the referendum were constitutionally proper and consistent with domestic law. Eventually, Gina Miller and other claimants attempted to ask the High Court for judicial review so as to state whether the UK Government was lawfully allowed to declare its willingness to leave the European Union even without a deliberative discussion in Parliament. However, the first answer came from the Secretary of State for Exiting the European Union David Davis, who stated that triggering Article 50 (TEU) fell among royal prerogatives, thus not requiring a deliberative debate in Parliament, but, since such an action would have nullified several Acts of Parliament – Gina Miller contended – the constitutional principle according to which Acts of Parliament could not be changed without the consent of Parliament was likely to be threatened. Ultimately the case was brought before the High Court, resulting in a split decision: eight of the eleven judges eventually proved to be in favour of Gina Miller objection, holding that the UK Government could not trigger notification under article 50 (TEU) as such an action would have removed several Acts of Parliament. The judges thus stressed that, with due regard to the principle of parliamentary sovereignty, only the UK Parliament could remove the rights it previously passed. However, the case subsequently developed into the British Government's appeal from the High Court of England and Wales and two references from Northern Ireland, resulting in a dismissing of the Government’s appeal from the High Court. Notably, the Supreme Court stated by majority that the Parliament was the only institution allowed to authorise a notification under Article 50 (TEU) to be given to the European Commission. Nonetheless, the judges – unanimously – also declared that neither the Sewel Convention, nor the Northern Ireland Act 1998 and the Good Friday Agreement, legally required the consent of the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly to trigger Article 50 (TEU). Once the appeal has been dismissed, the European Union (Notification of Withdrawal) Act 2017 – whose long title is “To Confer power on the Prime Minister

References to the European Union included in the Good Friday Agreement

Strand One, Article 31

“Terms will be agreed between appropriate Assembly representatives and the Government of the United Kingdom to ensure effective co-ordination and input by Ministers to national policy-making, including on EU issues.”

Strand Two, Article 3 (i)

“The [North/South] Council to meet in an appropriate format to consider institutional or cross-sectoral matters (including in relation to the EU) and to resolve disagreement.”

Strand Two, Article 17

“The [North/South] Council to consider the European Union dimension of relevant matters, including the implementation of EU policies and programmes and proposals under consideration in the EU framework. Arrangements to be made to ensure that the views of the Council are taken into account and represented appropriately at relevant EU meetings.”

Strand Two, Annex (point 8)

“Areas for North-South co-operation and implementation may include relevant EU Programmes such as SPPR, INTERREG, Leader II and their successors.”

Strand Three, Article 5

“The British-Irish Council will exchange information, discuss, consult and use best endeavours to reach agreement on co-operation on matters of mutual interest within the competence of the relevant Administrations. Suitable issues for early discussion in the British-Irish Council could include transport links, agricultural issues, environmental issues, cultural issues, health issues, education issues and approaches to EU issues. Suitable arrangements to be made for practical co-operation on agreed policies.”

British-Irish Agreement

“The British and Irish Governments, wishing to develop still further the unique relationship between their peoples and the close co-operation between their countries as friendly neighbours and as partners in the European Union, have agreed as follows [...].”

Source: Good Friday Agreement [online: <https://www.dfa.ie>]; own reworked version

Compelled to play such a marginal role, Northern Ireland will anyway have to face the consequences resulting from the outcome of the United Kingdom European Union membership referendum, which in fact will unquestionably impact upon Northern Irish domestic legislation (Northern Ireland Assembly) as it mainly originates from the

to notify, under Article 50(2) of the Treaty on European Union, the United Kingdom's intention to withdraw from the EU” – was introduced in Parliament by the Secretary of State for Exiting the EU, to be enacted with no amendment shortly after.

See: Young Alison, Elliott Mark & Williams Jack, *“The UK Constitution after Miller: Brexit and Beyond”*, Hart, July 2018

provisions included in the Good Friday Agreement – and in the subsequent Northern Ireland Act 1998 – which seems similarly deemed to be overwhelmed by Brexit tide. Indeed, when the Good Friday Agreement was concluded, the signatory parties assumed that both the Republic of Ireland and the United Kingdom would both keep on being members of the European Union but, should Brexit eventually take place, a revision of the Good Friday Agreement and of the Northern Ireland Act will surely be required, so as to amend and/or delete the references to the European Community included in both the documents,³⁵⁵ since it is uncertain how the required *implementation of EU policies and programmes and proposals under consideration in the EU framework*³⁵⁶ may last as one of the two signatory parties of the Good Friday Agreement – namely the United Kingdom – will no longer be a EU member state. Similarly, questions arose with regard to all those arrangements needed in order *to ensure that the views of the [North/South Ministerial] Council are taken into account and represented appropriately at relevant EU meetings*³⁵⁷ as soon such representation will be provided by the Irish Government alone. However – whatever will be the final amendments of both the Good Friday Agreement³⁵⁸ and the Northern Ireland Act – *continuation of North-South cooperation*³⁵⁹ seems to be the highest priority, as proved by the European Union Withdrawal Act, which explicitly states that no regulations *diminishing any form of North-South cooperation provided for by the Good Friday Agreement*³⁶⁰ or *facilitating border arrangements between Northern Ireland and the Republic of Ireland which feature physical infrastructure, including border posts, or checks and controls, that did not exist before exit day and are not in accordance with an agreement between the United Kingdom and the European Union*³⁶¹ may be passed.

³⁵⁵ See Paragraph 2 Chapter 4 (summary table p.111).

³⁵⁶ Good Friday Agreement, Strand 2, Article 17, 1998 [online: www.dfa.ie/]

³⁵⁷ Good Friday Agreement, Strand 2, Article 17, 1998 [online: www.dfa.ie/]

³⁵⁸ Questions also arose with regard to the approval of the amendments as the *Dáil Éireann* approved the Good Friday Agreement in 1998 and thus any rewriting will require again its consent.

³⁵⁹ Paragraph 10, European Union Withdrawal Bill Act, 2018

³⁶⁰ Paragraph 10, Point 1 (a), European Union Withdrawal Bill Act, 2018

³⁶¹ Paragraph 10, Point 1 (b), European Union Withdrawal Bill Act, 2018

References to the European Union included in the Northern Ireland Act 1998

Part II - Section 6 (1) & (2)(d) – Legislative competence

“A provision of an Act is not law if it is outside the legislative competence of the Assembly. A provision is outside that competence if it is incompatible with EU law.”

Part II - Section 6A³⁶² – Restriction relating to retained EU law

“An Act of the Assembly cannot modify, or confer power by subordinate legislation to modify, retained EU law so far as the modification is of a description specified in regulations made by a Minister of the Crown. But this does not apply to any modification so far as it would, immediately before exit day, have been within the legislative competence of the Assembly [...].”

Part II - Section 7 (1)³⁶³, (2) & (2A)³⁶⁴ – Entrenched enactments

“The European Communities Act 1972, the Human Rights Act 1998, [...] and the European Union (Withdrawal) Act 2018 shall not be modified by an Act of the Assembly or subordinate legislation made, confirmed or approved by a Minister or Northern Ireland department. However, this does not prevent an Act of the Assembly or subordinate legislation modifying section 3(3) or (4) or 11(1) of the European Communities Act 1972. Moreover, the former provision does not prevent an Act of the Assembly or subordinate legislation modifying paragraph 1(11) or (12) or 2(12) or (13) of Schedule 7 to the European Union (Withdrawal) Act 2018, paragraph 21 of Schedule 8 to that Act, or any regulations made under that Act.”

Part II - Section 12 (1)(b) & (3) – Reconsideration where reference made to ECJ.

“This section applies where [...] a reference for a preliminary ruling has been made by the Supreme Court in connection with that reference [...]. In this section “reference for a preliminary ruling” means a reference of a question to the European Court of Justice under Article 267 of the Treaty on the Functioning of the European Union, or Article 150 of the Treaty establishing the European Atomic Energy Community.”

³⁶² Section 6A (1) – (12) has been inserted on 26th June 2018 – for specified purposes – by European Union (Withdrawal) Act 2018 (c. 16). However, on 4th July 2018 another modification – not altering the text – occurred by means of European Union (Withdrawal) Act 2018 (c. 16), in order to insert the power to repeal in Section 6A.

³⁶³ Some words in Section 7(1)(c) have been omitted and substituted on 26th June 2018 by virtue of European Union (Withdrawal) Act 2018 (c. 16), s.25(1)(b), Sch. 3 para. 51(2)(c) (with s. 19, Sch. 8 para. 37).

³⁶⁴ Subsection 7(2A) has been inserted on 26th June 2018 by European Union (Withdrawal) Act 2018 (c. 16), s. 25(1)(b), Sch. 3 para. 51(4) (with s. 19, Sch. 8 para. 37).

References to the European Union included in the Northern Ireland Act 1998

Part III - Section 24³⁶⁵ – EU law, Convention rights etc.

“A Minister or Northern Ireland department has no power to make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act is incompatible with any of the Convention rights, is incompatible with EU law [...]. A Minister or Northern Ireland department has no power to make, confirm or approve any subordinate legislation so far as the legislation modifies retained EU law and the modification is of a description specified in regulations made by a Minister of the Crown. However, this does not apply so far as the modification would be within the legislative competence of the Assembly if it were included in an Act of the Assembly, or to the making of regulations under Schedule 2 or 4 to the European Union (Withdrawal) Act 2018 [...]. Such restriction is in addition to any restriction in section 7 of the European Union (Withdrawal) Act 2018 or elsewhere on the power of a Minister or Northern Ireland department to make, confirm or approve any subordinate legislation so far as the legislation modifies retained EU law [...].”

Part III - Section 27 (1)(a), (1)(b), (2) & (4) – Quotas for purposes of international etc. obligations

“A Minister of the Crown may make an order containing provision such as is specified in subsection (2) where an international obligation or an obligation under [F9EU] law is an obligation to achieve a result defined by reference to a quantity (whether expressed as an amount, proportion or ratio or otherwise), and the quantity relates to the United Kingdom (or to an area including the United Kingdom or to an area consisting of a part of the United Kingdom which is or includes the whole or part of Northern Ireland). The provision referred to is provision for the achievement by a Minister or Northern Ireland department (in the exercise of his or its functions) of so much of the result to be achieved under the international obligation or obligation under EU law as is specified in the order. Moreover, where an order under subsection (1) is in force in relation to an international obligation or an obligation under [F9EU] law, the obligation shall have effect for the purposes of this Act as if it were an obligation to achieve so much of the result to be achieved under the obligation as is specified in the order by the time or times so specified.”

Part IV - Section 36 (7)– Disqualification

“[...] A person is disqualified for membership of the Assembly if he is disqualified for membership of the House of Commons otherwise than under the House of Commons Disqualification Act 1975. However, a person is not disqualified for membership of the Assembly by virtue the mentioned caused, by reason only that he is disqualified under section 3 of the Act of Settlement (certain persons born out of the Kingdom) if he is a citizen of the European Union.”

Part IV - Section 71 (1) – Restrictions on application of rights

“Nothing in section 6(2)(c) or 24(1)(a) shall enable a person to bring any proceedings in a court or tribunal on the ground that any legislation or act is incompatible with the Convention rights, or to rely on any of the Convention rights in any such proceedings, unless he would be a victim for the purposes of article 34 of the Convention if proceedings in respect of the legislation or act were brought in the European Court of Human Rights.”

³⁶⁵ Subsections 24(3) to 24(15) have been inserted on 26th June 2018 by European Union (Withdrawal) Act 2018 (c. 16), s. 25(3)(c), Sch. 3 para. 3(b) (with s. 19, Sch. 8 paras. 37, 41, 42). Moreover on 4th July 2018 another modification – not altering the text – occurred by means of European Union (Withdrawal) Act 2018 (c. 16), ss. 12(9)-(11), 25(4) (with s. 19, Sch. 8 paras. 37, 41); S.I. 2018/808, reg. 3(c), in order to insert the power to repeal in Section 24(3)-(15).

References to the European Union included in the Northern Ireland Act 1998

Part IX - Section 96 (4A)³⁶⁶ – Orders and regulations

“Regulations under section 6A or 24(3) shall be made by statutory instrument, and shall not be made unless a draft has been approved by resolution of each House of Parliament.”

Part IX - Section 96A³⁶⁷ – Explanatory statements in relation to certain regulations

“This section applies where a draft of a statutory instrument containing regulations under section 6A or 24(3) is to be laid before each House of Parliament [...].”

Part IX - Section 98 (1)– Interpretation

“In this Act [...] “EU law” means rights, powers, liabilities, obligations and restrictions created or arising by or under the EU Treaties; and all remedies and procedures provided for by or under those Treaties [...], while “international obligations” means any international obligations of the UK other than obligations to observe and implement EU law or the Convention rights.”

Schedule 2 - Section 3 (c) – Excepted matters

“International relations, including relations with territories outside the United Kingdom, the European Union (and their institutions) and other international organisations and extradition, and international development assistance and cooperation, but not observing and implementing international obligations, obligations under the ECHR and obligations under EU law.”

Schedule 2 - Section 8 – Excepted matters

“Nationality, immigration, including asylum and the status and capacity of persons in the United Kingdom who are not British citizens, free movement of persons within the European Economic Area, issue of travel documents.”

Schedule 2 - Section 12(1) – Excepted matters

“Elections, including the franchise, in respect of the Northern Ireland Assembly, the European Parliament and district councils.”

Schedule 3 - Section 38 – Reserved matters

“Technical standards and requirements in relation to products in pursuance of an obligation under EU law but not standards and requirements in relation to food, agricultural or horticultural produce, fish or fish products, seeds, animal feeding stuffs, fertilisers or pesticides.”

Schedule 10 - Part I (1)(c) – Devolution issues

“In this Schedule “devolution issue” means [...] a question whether a Minister or Northern Ireland department has failed to comply with any of the Convention rights, any obligation under EU law or any order under section 27 so far as relating to such an obligation, or any question arising under this Act about excepted or reserved matters.”

Source: Northern Ireland Act 1998 & European Union (Withdrawal) Act 2018; own reworked version.

³⁶⁶ Subsection 96(4A) has been inserted on 26th June 2018 by European Union (Withdrawal) Act 2018 (c. 16), s. 25(3)(h), Sch. 3 para. 57 (with s. 19, Sch. 8 para. 37).

³⁶⁷ *Ibidem*.

3. The new architecture of Northern Irish devolved powers

Besides deeply affecting the Good Friday Agreement – both as a peace agreement and as the cornerstone of Northern Irish institutions through the Northern Ireland Act (1998) – Brexit directly challenged the UK Government. Indeed, the UK withdrawal will not only challenge the equilibrium among the (possibly ex) EU-28, but also the existing arrangements regarding the devolution of political power to Scotland, Wales and Northern Ireland; the latter resulting from the effort UK made, since its accession to the then European Economic Community, in order to develop a project that was meant to improve and enlarge the set of competences devolved to Scotland, Wales and Northern Ireland.

Such a process resulted in a renewed distribution of British legislative and policy competences, which in fact were devolved from Westminster to Scotland, Wales and Northern Ireland's Governments, mostly – but not only – because those competences were primarily legislated and enforced at the European Union level.³⁶⁸

Northern Irish Devolution: key dates	
1998	The Good Friday Agreement and Northern Ireland Act (1998) were both passed, as the former had been signed in 10 th April 1998 and latter had received the Royal Assent on 19 th November 1998. Together, the two established the Northern Ireland Assembly and its executive, besides setting out the competences devolved to Northern Irish institutions.
2002	On 14 th October the Northern Ireland Assembly was suspended ³⁶⁹ and all its powers were reverted to the UK's Northern Ireland Office, a government department specifically responsible for Northern Irish issues. ³⁷⁰

³⁶⁸ See: Bulmer Simon, Burch Martin, Hogwood Patricia & Scott Andrew, "UK Devolution and the European Union: A Tale of Cooperative Asymmetry?", Publius, 2006 and Bulmer Simon, Burch Martin, Carter Cairiona, Hogwood Patricia, Scott Andrew, "British Devolution and European Policy-Making - Transforming Britain into Multi-Level Governance", General Editor, R.A.W. Rhodes, 2002

³⁶⁹ The suspension of the Northern Ireland Assembly – which lasted until 7th May 2007 - occurred as unionists decided to withdraw from the Northern Ireland Executive following the police raid in *Sinn Féin's* offices at Stormont, which in turn was part of a broader investigations regarding allegations of intelligence gathering on behalf of the IRA by members of the party's support staff. The Northern Ireland Assembly, already suspended on 14th October 2002, was then dissolved on 28th April 2003 as planned, but elections were finally held only on 26th November 2003.

³⁷⁰ The Northern Ireland Office is head by the Secretary of State for Northern Ireland and is based at Stormont House in Belfast, but it also has a secondary headquarter in London. [online: www.gov.uk/]

Northern Irish Devolution: key dates

2006	The St Andrews Agreement, which was meant to restore Northern Ireland Assembly and to establish a new executive, was finally reached on 13 th October 2006. ³⁷¹
2010	The Hillsborough Agreement was signed on 5 th February 2010, thus allowing the devolution of policing and justice powers to the Northern Ireland Executive. Following the Agreement, the Department of Justice ³⁷² was established on 12 th April 2010 as a government department being part of the Northern Ireland Executive.
2017	Following the resignation of deputy First Minister Martin McGuinness, in 2017 elections of the Northern Ireland Assembly were held, resulting in a noteworthy shift ³⁷³ in Northern Irish political preferences as, for the first time since 1921, Unionist parties didn't manage to win a majority of seats. As Sinn Féin repeated that no power-sharing arrangement was likely to occur unless DUP proved to change its approach, the parties were given three weeks to form an administration; failing that, new elections would likely be called. Nevertheless, the deadline was then postponed (27 th March 2017) by the Secretary of State for Northern Ireland James Brokenshire. [...] ³⁷⁴

Source: <https://www.gov.uk>; own reworked version

³⁷¹ The Northern Ireland (St Andrews Agreement) Act 2006 [online: www.legislation.gov.uk] provided for the establishment of a Transitional Assembly which was meant to take part in preparations for the restoration of Northern Irish Government. According to the provisions of the Agreement, a person who was a member of the Northern Ireland Assembly was deemed to be also a member of the Transitional Assembly. The Transitional Assembly first meeting occurred on 24th November 2006, and it was eventually dissolved on 30th January 2007 to give way to the new Northern Ireland Assembly, whose election campaign had just started. Elections were finally held on 7th March 2007, resulting in the partial victory of the Democratic Unionist Party (DUP) and *Sinn Féin*. Representatives of both parties ultimately opted for a power-sharing government, having Ian Paisley (DUP) as First Minister and Martin McGuinness (*Sinn Féin*) as Deputy First Minister. Devolution was restored shortly after the elections by means of Secretary of State restoration order.

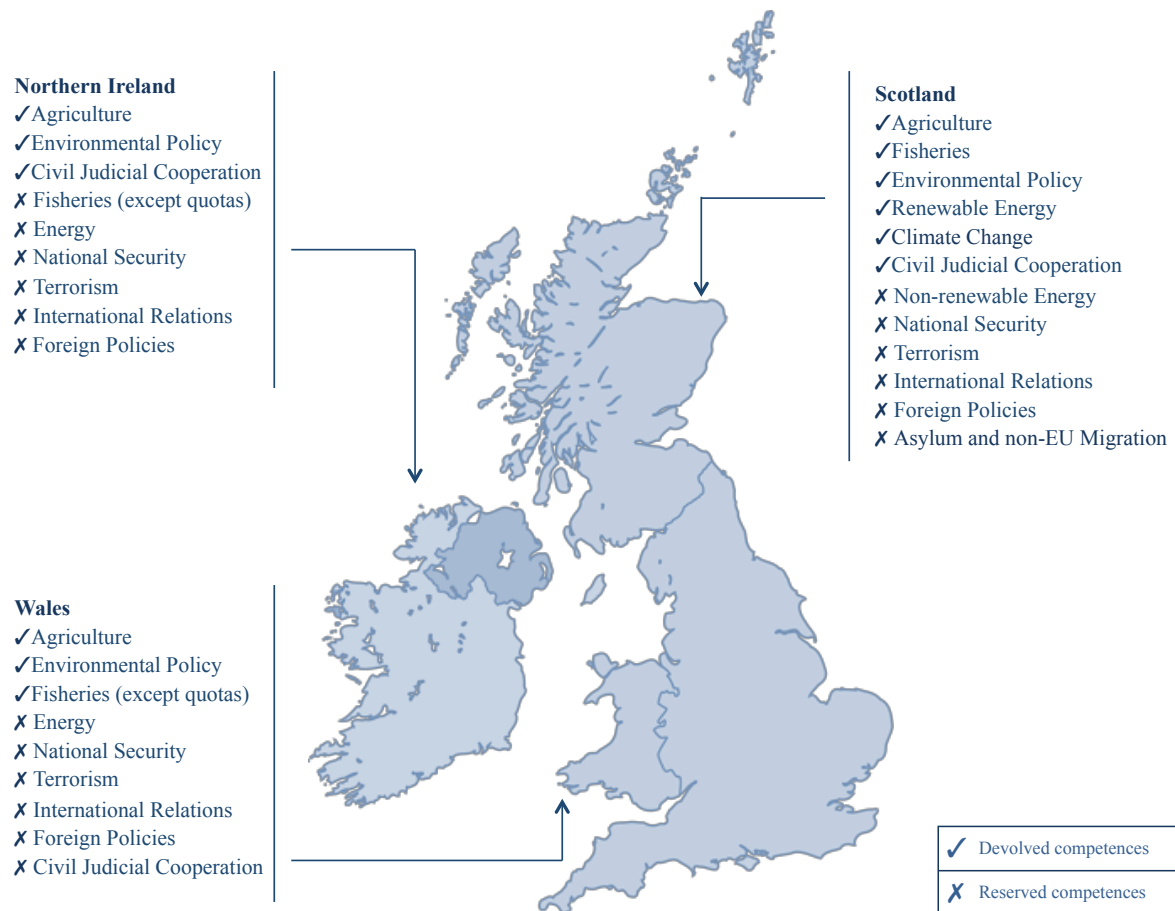
³⁷² www.justice-ni.gov.uk

³⁷³ Indeed, for the first time unionist and nationalist parties gained equal representation in the Assembly (39 members between *Sinn Féin* and the SDLP, 39 members between the DUP, UUP, and TUV).

³⁷⁴ As no coalition agreement was reached, a new deadline (29th June 2017) was then set for power-sharing talks, but it passed again with no resolution. Brokenshire extended the time for talks, but *Sinn Féin* and the DUP remained pessimistic about any quick resolution, and indeed in the autumn the UK Parliament had to pass a budget for the financial year of 2017-18, failing the Northern Irish Assembly to do so. New talks were held but, albeit being attended by Theresa May and Leo Varadkar, collapsed once more, making Northern Ireland reaching 590 days without a fully functioning administration. On 18th October 2018, the Northern Ireland (Executive Formation and Exercise of Functions) Bill was introduced by the Northern Ireland Secretary Bradley – so as to remove the time frame of an Assembly election until 26th March 2019 – and it finally passed as Northern Ireland (Executive Formation and Exercise of Functions) Act 2018, coming into effect on 1st November 2018.

Thus, the British Government will have to agree an arrangement of those EU-related competences currently devolved to the Scottish, Welsh and Northern Irish institutions, with due regard to the various needs and specific interests of the three regions composing the United Kingdom and trying to find the best reallocation of powers so as to manage all those issues regarding devolved competences that will no longer be faced by the European Union. However, this is not as simple as it may seem since – as devolution has evolved – the line between domestic and foreign policy slowly faded away, making the division between the two extremely blurred in a wide range of competences comprising energy, environmental policies, agriculture and trade.

Current external affairs policy areas to be reallocated post-Brexit.



Source: www.chathamhouse.org; own reworked version.

After Brexit, some of the competences currently entrusted to the European Union and the devolved organs will either be entirely left to Scotland, Wales and Northern Ireland's management or will be subject to a sort of re-nationalization, thus directly given to Westminster.

Moreover – as regards devolution issues – the process leading the United Kingdom to exit from the European Union will deeply challenge British foreign policy as, before the European Union membership referendum, Scotland, Wales and Northern Ireland had already attempted to define their own stances on external affairs and the outcome of the referendum seemed to have restored the devolved administrations’ strength, thus making the United Kingdom a divided – divergent – country in EU and third countries’ eyes.

Devolution hence appears to be a dilemma to be solved.

Northern Ireland, being one of the three regions involved in the matter, has firstly been asked to express its will about UK withdrawal from the European Union, but then – despite the answer given – it was excluded³⁷⁵ from any negotiations regarding Brexit, now looking like being an extremely problematic devolution issue having no say³⁷⁶ in UK withdrawal. Northern Irish interests – together with the Scottish and Welsh ones – albeit taken into account by means of a new Joint Ministerial Committee,³⁷⁷ will eventually be strained through Westminster, therefore being potentially modified in order to firstly please national interests.

Nevertheless – due to the likely negative economic effects and because of the political feelings increasing to any strengthening of the border cutting the island into two – the devolved Irish Government and the British one both seem to wish a sort of “special status” for the Northern Irish jurisdiction. Indeed, albeit not possessing any formal powers concerning the prevention of the triggering of Article 50 (TEU), the Northern Ireland Assembly is allowed to state which European Union laws should be kept if the latter directly impact on policy areas falling within the ones devolved to the Northern Irish institutions, so as defined by the principle of consent.

³⁷⁵ Moreover, in parliamentary decisions regarding the triggering of Article 50 (TEU) – and Brexit-related issues – Northern Ireland will only be given the eighteen votes belonging to its MPs who sit in British Parliament (albeit the four *Sinn Féin* members refuse to take their seats), hence implicitly allowing the British Parliament to take decisions over Brexit regardless Northern Irish consent, as confirmed by the High Court in Belfast in its ruling in October 2016 and upheld by the UK Supreme Court in January 2017.

³⁷⁶ Indeed, Northern Ireland’s Secretary of State will not participate in the Brexit Cabinet Committee unless explicitly required.

³⁷⁷ Although the Joint Ministerial Committee is the main tool tying the devolved administrations and the British Government, a new Joint Ministerial Committee on EU negotiations has also been established, so as to provide the devolved executives with more focused involvement.

Legislative consent is in fact a cornerstone of the architecture of territorial constitutional arrangements of the United Kingdom aiming at safeguarding and preserving the autonomy of the three devolved regions and their institutions.

The three devolution statutes indeed state that some specific competences are fully devolved to Scottish, Welsh and Northern Irish institutions, being the latter constitutionally and routinely responsible for such policy areas. However – having a pivotal position – the UK Parliament, in the light of the principle of parliamentary sovereignty, still holds the right to legislate in devolved areas, as provided for by the Sewel Convention.³⁷⁸ The Legislative Consent Convention³⁷⁹ – being a UK Parliament self-denying ordinance³⁸⁰ – meant to safeguard the devolved legislatures' constitutional spheres of responsibility – confines Westminster's law-making powers, not allowing it to normally legislate with regard to devolved matters unless consent has been provided for by the devolved legislatures.

Nevertheless, British Parliament's legislative power is not deemed to be weakened as it still *retains authority to legislate on any issue, devolved or not*.³⁸¹

On the other hand though, the British Government *will proceed in accordance with the convention*,³⁸² overseeing that the agreement of the devolved legislatures has been achieved.³⁸³

³⁷⁸ The name of the Convention originates from Lord Sewel, the Scottish Minister who firstly declared to *expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish parliament* [Lord Sewel, HL Deb 21 July 1998 Vol 592 c791], thus defining the primary terms of the future Convention.

³⁷⁹ The Sewel Convention is also known as "Legislative Consent Convention".

³⁸⁰ Moreover, the Sewel Convention is defined as a UK constitutional convention which is not legally enforceable in the courts.

³⁸¹ Paragraph 14, Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee [online: www.gov.uk].

So as to respect the constitutional terms suggested by Lord Sewel, a Memorandum of Understanding was indeed agreed between the British Government and the devolved institutions shortly after the establishment of the three devolution settlements. However, the Memorandum of Understanding – and Supplementary Agreements – has been revised more than once since it was first introduced in 1998.

³⁸² Paragraph 14, Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee [online: www.gov.uk].

Given the principle of legislative consent, the British Parliament should³⁸⁴ wait for Northern Irish approval³⁸⁵ so as to proceed deciding whether devolved policy areas currently being a EU competence should be fully devolved or recentralized, unless it opts for ignoring the Sewel Convention hence dooming itself to triggering heavy legal battles with the three devolved administrations on the one hand, and to facing a potential sizeable pressure between England, Scotland, Wales and Northern Ireland on the other hand.³⁸⁶ Thus, as regards Northern Ireland, legislative consent for repealing EU law will only be required in case of specific policy areas of primary legislation over which Northern Ireland Assembly has full competence.

UK Government's opinion regarding the need of legislative consent for each clause of the EU (Withdrawal) Act.

Legislative consent by clause	
<u>Clause 1</u> <i>Repeal of the European Communities Act 1972</i>	YES
<u>Clause 2 & Schedule 1</u> <i>Saving for EU-derived domestic legislation & Further provision about exceptions to savings and incorporation</i>	YES
<u>Clause 3</u> <i>Incorporation of direct EU legislation</i>	YES
<u>Clause 4</u> <i>Saving for rights etc. under section 2(1) of the ECA</i>	YES
<u>Clause 5</u> <i>Exceptions to savings and incorporation</i>	NO
<u>Clause 6</u> <i>Interpretation of retained EU law</i>	NO

³⁸³ However, *the devolved administrations will be responsible for seeking such agreement as may be required for this purpose on an approach from the UK Government.*

Paragraph 14, Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee [online: www.gov.uk].

³⁸⁴ However – albeit fundamental – the principle of legislative consent is a non-legal constitutional constraint, namely it is not a binding norm.

³⁸⁵ As well as for the Scottish and the Welsh ones.

³⁸⁶ Nevertheless, the British parliament didn't have to respect the Sewel Convention when triggering Article 50 (TEU) as – as declared by the House of Lords Select Committee on the Constitution – such circumstance was not “normal” within the meaning of the Convention.

Legislative consent by clause	
<u>Clause 7</u> <i>Status of retained EU law</i>	NO
<u>Clause 8</u> <i>Dealing with deficiencies arising from withdrawal</i>	YES
<u>Clause 9</u> <i>Implementing the withdrawal agreement</i>	NO
<u>Clause 10 & Schedule 2</u> <i>Continuation of North-South co-operation and the prevention of new border arrangements & Corresponding powers involving devolved authorities</i>	YES
<u>Clause 11 & Schedule 3</u> <i>Powers involving devolved authorities corresponding to sec. 8 and 9 & Further amendments of devolution legislation and reporting requirement</i>	YES
<u>Clause 12 & Schedule 4</u> <i>Retaining EU restrictions in devolution legislation etc. & Powers in connection with fees and charges</i>	YES
<u>Clause 13 & Schedule 5</u> <i>Parliamentary approval of the outcome of negotiations with the EU & Publication and rules of evidence</i>	NO
<u>Clause 14 & Schedule 6</u> <i>Financial provision & Instruments which are exempt EU instruments</i>	NO
<u>Clause 15</u> <i>Publication and rules of evidence</i>	NO
<u>Clause 16 & Schedule 7</u> <i>Maintenance of environmental principles etc. & Regulations</i>	YES
<u>Clause 17 & Schedule 8-9</u> <i>Family unity for those seeking asylum or other protection in Europe & Consequential, transitional, transitory and saving provision & Additional repeals</i>	NO
<u>Clause 18</u> <i>Customs arrangement as part of the framework for the future relationship</i>	NO
<u>Clause 19</u> <i>Future interaction with the law and agencies of the EU</i>	NO

Source: Annex A of the UK Government Explanatory Notes to the Bill; own reworked version.

So far, British Government's legislative proposal concerning EU law issues has been included in the so-called "Great Repeal Bill".³⁸⁷ The latter is meant to revoke the European Communities Act (1972) which allowed the United Kingdom to join the then European

³⁸⁷ The Bill's designation was then changed into European Union Withdrawal Bill, which was eventually approved in 2018, thus becoming European Union Withdrawal Bill Act.

Economic Community (EEC) and guaranteed EEC – now EU – law supremacy over domestic norms.

Given the presence of the border³⁸⁸ and the commercial interdependence between the Six Counties and the Republic of Ireland, Northern Irish scenario appears to be extremely complex and challenging.

Being the status of the border the primary concern, further matters worrying Northern Irish – and somehow Irish – executive comprise *retaining as far as possible the ease with which [Northern Ireland] currently trade with EU member states*,³⁸⁹ *retaining access to labour*,³⁹⁰ ensuring energy supply, safeguarding the agri-food sector and managing funding for farming and infrastructure.

The British Government firstly suggested to entrust the whole set of returning EU competence to Westminster,³⁹¹ so as to allow the British Parliament to establish a UK-wide legal framework substituting the European one. However, such a proposal was eventually fully amended in order to allow devolved institutions to oversee those policy areas where EU and devolved legislative competence used to overlap.³⁹²

Eventually, the British Government published a detailed analysis setting out *each of the 160 areas of EU law that intersect with devolved competence*.³⁹³

³⁸⁸ See Paragraph 7 Chapter 1.

³⁸⁹ Letter written – following the outcome of the United Kingdom European Union membership referendum – by Northern Ireland’s First Minister Arlene Foster and deputy First Minister Martin McGuinness to the British Prime Minister Theresa May. (August 2016)

³⁹⁰ *Ibidem*.

³⁹¹ Section 11, European Union (Withdrawal) Act 2018 (c. 16)

³⁹² Nevertheless, British Ministers are still allowed to pass regulations aiming at “freezing” the devolved governments power to modify laws in some specific areas.

³⁹³ Revised Frameworks Analysis, Cabinet Office, 2019 [online: www.assets.publishing.service.gov.uk]

Main policy areas where no further action to create a common framework is required.

Responsible	Area of EU Law	Additional Information
BEIS	Consumer law including protection and enforcement	A body of law providing rights and protections for consumers consisting of principles-based, enforcement and sector-specific legislation, including Unfair Contract Terms (93/13/EC), Consumer Rights (2011/83/EC), [...].
BEIS	Carbon capture and storage	*Directive 2009/31/EC on the geological storage of CO ₂ establishes a legal framework for the environmentally safe geological storage of CO ₂ to contribute to combating climate change.
BEIS	Elements of employment law	Employment law is not an exclusive EU competence but there are a number of directives concerning individual and collective rights implemented in UK law, including the Working Time Directive 2003/88/EC and Pregnant Workers Directive 1992/85/EEC.
BEIS	Environmental law concerning energy industries	*EU legislation contains rules and environmental standards relevant to offshore oil and gas exploration and production, offshore gas unloading and storage, and offshore carbon dioxide storage activities.
BEIS	Heat metering and billing information	Energy Efficiency Directive 2012/27/EU sets duties for heat suppliers in respect of installing and maintaining heat metering devices and billing, minimum requirements for billing information, and determination of cost effectiveness and technical feasibility.
BEIS	High efficiency cogeneration / Combined Heat and Power (CHP)	*Measures that promote the use of high-efficiency cogeneration (Combined Heat and Power) in order to increase the energy efficiency and improve the security of supply of energy (Energy Efficiency Directive 2012/27/EU).
BEIS	Internal energy market / Third Energy Package	Package of legislation on the development of the internal energy market, particularly cross-border trading.
BEIS	Onshore hydrocarbons licensing	Directive 94/22/EEC sets the conditions for tendering and determining applications for hydrocarbon licenses and imposes restrictions on the terms which may be included in licences and their extension.
BEIS	Renewable Energy Directive	* The Renewable Energy Directive (2009/28/EC) places a 15% renewable energy target, and a 10% renewable energy sub target for the transport sector on the UK.
BEIS	Transport of dangerous goods and transportable pressure equipment	Regulation establishes a common regime for all aspects of the transport of radiological (Class 7) dangerous goods, by road, rail, and inland waterway subject to some national derogations.
DfT	Airport charges	Relating to Directive 2009/12/EC on airport charges.
DfT	Maritime Employment and Social Rights	Directives and Regulations relating to employment, social rights and health and safety for seafarers on ships. These rules cover, inter alia, coordination of social security systems, and the minimum safety and health requirements for improved medical treatment on board vessels.
DfT	Trans European Transport Network	* The EU Regulation establishes the trans European transport network, it includes maps of the core and comprehensive networks and sets specific standards to be implemented by 2030 and 2050 respectively.
DHSC	Implementation of cross-border healthcare rights to treatment and reimbursement	* Directive 2011/24/EU codified a series of case law. It sets out the conditions under which a patient may travel to another EU country to receive medical care and reimbursement.
DWP	Elements of EU social security coordination	* This is an area of shared EU competence for devolved benefits. The EU Social Security Coordination Regulations require Member States to ensure that citizens who exercise their right to free movement are not disadvantaged.
DWP	Private cross border pensions	EU legislation on the operation of the EEA internal market in financial services allows occupational pension schemes based in one country to operate (have members) in another.

Source: www.assets.publishing.service.gov.uk own reworked version.

Main policy areas where common rules will be needed, hopefully through a non-legislative common framework agreement (e.g. concordat)

Responsible	Area of EU Law	Additional Information
BEIS	Company law	These Directives and Regulations cover aspects of the life cycle of a company, including company formation, capital & disclosure requirements, cross border mergers, shareholders rights, accounting and reporting, and audit.
BEIS	Specified quantities and packaged goods legislation	EU law sets the rules for quantity control, quantity labelling and specified quantities for packaged goods.
DfT	Access for non-UK hauliers and passenger transport operations, plus combined transport	Regulations 1072/2009 (for goods vehicles), 1073/2009 (for road passenger transport), and Directive EC 1992/106/EC Directive for Combined Transport (including access). All these rules involve access arrangements for non-UK vehicles and may be affected international agreements.
DfT	Operator licensing (roads)	Regulation (1071/2009) establishing common rules for the licensing of commercial goods and passenger transport operators.
DHSC	Medicine prices	Directive 89/105/EEC relating to the transparency of measures regulating the pricing of medicinal products for human use and their inclusion in national health insurance systems.
GEO	Equal treatment legislation ³	* It bans discrimination and harassment in employment on the following grounds: sex, race, age, disability, sexual orientation and religion or belief. It also bans discrimination in the provision of services on grounds of sex and race. It also requires the existence of an equalities monitoring body, such as EHRC.
HSE	Civil use of explosives	Directives setting out the permissions required to transfer, track and trace civil explosives (2008/43/EC) and rules on the product safety and market surveillance of these (2014/28/EU).
HO	Police and criminal justice cooperation - practical cooperation - European Judicial Network	Council Decision 2008/976/JHA on the European Judicial Network aims to facilitate judicial cooperation by establishing a network of Contact Points in Member States who are experts in matters such as Mutual Legal Assistance. [...]
HO	Police and criminal justice cooperation - practical cooperation - Joint Action on Organised Crime	Joint Action 97/827/JHA establishes a peer-evaluation mechanism that enables Member States to evaluate each other on the application and implementation of instruments designed to combat international organised crime.
HO	Police and criminal justice cooperation - practical cooperation - mutual legal assistance	* The Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (EU MLAC) encourages and facilitates mutual assistance between the judicial, police and customs authorities of Member States on criminal matters.
HO	Regulatory systems - firearms - deactivation standards and techniques	* Regulation 2015/2403/EU establishing common guidelines on deactivation standards and techniques for ensuring that deactivated firearms are rendered irreversibly inoperable.
HO	Regulatory systems - firearms - control on acquisition and possession of weapons	* Directive 91/477/EEC, as amended by Directives 2008/51/EC and EU/2017/853, on the control of the acquisition and possession of weapons, setting out certain minimum standards for the circulation of firearms within the EU.
MoJ	Civil judicial co-operation - legal aid in cross border cases	The Legal Aid Directive (2002/8) establishes common minimum rules for the grant of legal aid in cross-border disputes.
MoJ	Mutual recognition of criminal court judgments measures and cross border cooperation	Mutual Recognition of Financial Penalties (MRFP) (2005/214) provides for Member States to recognise and enforce financial penalties (of over 70 euros) issued by judicial or administrative authorities of another Member State, in which the person required to pay the fine is normally resident or has property or income. [...]

Source: www.assets.publishing.service.gov.uk; own reworked version.

Main policy areas where future legislation may be needed to implement the common rules.

Responsible	Area of EU Law	Additional Information
BEIS	Implementation of EU Emissions Trading System (EU ETS)	Directive 2003/87/EC establishes the European Union Emissions Trading System for greenhouse gases. The Scheme sets a maximum volume of gas that can be emitted by all participating installations and aircrafts. These operators then monitor, verify and report their emissions, and must surrender allowances equivalent to their emissions annually.
DEFRA	Agricultural support	* Policies and Regulations under the EU Common Agricultural Policy covering Pillar 1 (income and market support); Pillar 2 (rural growth, agri-environment, agricultural productivity grants or services and organic conversion and maintenance grants); and cross-cutting issues, including cross compliance, finance & controls.
DEFRA	Fisheries management & support	* Policies and Regulations relating to rules relating to the sustainability of fisheries (quotas), access to waters, conservation measures, enforcement and financial support.

Source: www.assets.publishing.service.gov.uk; own reworked version.

Main policy areas that the UK Government believes are reserved, but are subject to ongoing discussion with the devolved administrations

Responsible	Area of EU Law	Additional Information
BEIS	Elements of product safety and standards relating to explosive atmospheres	ATEX covers equipment and protective systems intended for use in explosive atmospheres, safety devices and components for such equipment.
BEIS	State Aid	Articles 107 - 109 of TFEU and associated Treaty articles, Regulations and EU legislation prohibit State aid by Member States and create a framework for assessing compatibility of aid with the internal market, investigating and making complaints about allegedly unlawful aid and creating exemptions for certain categories of aid.
DEFRA	Food Geographical Indications (Protected Food Names)	Geographical Indications (GIs) are a form of intellectual property protection. Under the EU schemes, producers can apply to protect regionally distinct or traditional agri-food products. Once registered, these products are protected throughout the EU against imitation or misuse of their names.
HO	Data sharing - Eurodac	Regulation 603/2013/EU established Eurodac - an EU database containing fingerprints of illegal entrants and asylum applicants. Its primary purpose is to support the effective application of the Dublin Convention by helping to determine which EU Member State is responsible for examining an asylum application.

Source: www.assets.publishing.service.gov.uk; own reworked version.³⁹⁴

³⁹⁴ In the summary charts the term “Responsible” means “Responsible UK Government Department”; the following terms respectively refers to: BEIS – Department for Business, Energy & Industrial Strategy; DfT – Department for Transport; DHSC – Department of Health and Social Care; DWP – Department for Work and Pensions; GEO – Government Equalities Office; HSE – Health and Safety Executive; HO – Home Office; MoJ – Ministry of Justice; and DEFRA – Department for Environment, Food & Rural Affairs.

4. Reigniting conflicts along the Northern Irish border

Most of the discussion about Brexit's influence on the island of Ireland has been concentrated on economic issues – agriculture, fisheries and trade – and on strictly legal matters, but human rights and equality provisions are also at risk, and the latter may be somehow synthetized in – and symbolized by – the Northern Irish border problem, a fine line that the Good Friday Agreement managed to erase in 1998. Such Agreement has been deeply threatened by Brexit that, requiring the deletion of the whole set of references to the European Union within the Good Friday Agreement,³⁹⁵ disturbed the balance and the precarious peace which had been achieved on 10th April 1998.

Indeed, the Good Friday Agreement was indeed implemented both in the British and in the Irish territories *on an all-island and cross-border basis*,³⁹⁶ aiming at a *fresh start*³⁹⁷ including the *achievement of reconciliation, tolerance and mutual trust, and [at] the protection and vindication of the human rights of all*³⁹⁸ thanks to the joint activity of the British and the Irish Governments *as friendly neighbours and as partner in the European Union*.³⁹⁹ The fading of the Northern Irish border represented a truly historic Anglo-Irish success – both on the socio-political and on the economic level – which is now seriously threatened by UK leaving the European Union as after Brexit the border will no longer be a

³⁹⁵ As the Good Friday Agreement is an international treaty which has been implemented in the signatory countries by means of two referendums (both held on 22nd May 1999), a reworking may be challenged but there seems to be no legal room for such a challenge.

³⁹⁶ Good Friday Agreement, Strand 2 (1), 1998 [online: www.dfa.ie/]

³⁹⁷ Good Friday Agreement, Declaration of Support (2), 1998 [online: www.dfa.ie/]

³⁹⁸ *Ibidem*.

³⁹⁹ Good Friday Agreement, Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland, 1998 [online: www.dfa.ie/]

mere frontier since it will also be a further dividing line⁴⁰⁰ between *the European Union and the rest of the world*:⁴⁰¹ *Europe's new west wall*.⁴⁰²

On both sides of the border Irish and Northern Irish police dread future – probable – checkpoints since they may turn both into a target for militant groups opposing the peace treaty,⁴⁰³ or into the triggering of protests and disorders led by Northern Irish inhabitants as today *nobody wants to countenance the thought of any checkpoints coming back*.⁴⁰⁴

Indeed – besides heavy economic consequences and immigration problems – the main Northern Irish fear originates from the potential re-establishment of a hard border leading to a protest escalation which – similarly to fifty years ago – may give rise to violence and chaos, thus erasing the effort made to achieve the peace in 1998.

Moreover, Irish and Northern Irish economies are strictly interconnected and as such directly threatened by Brexit and by the comeback of border checks, the re-establishment of whom would lead the island back to the decades preceding 1992,⁴⁰⁵ when checks and custom controls over goods crossing the Northern Irish border was everyday (Irish and Northern Irish) routine.

The return of tariffs and custom controls thus seems to be unavoidable,⁴⁰⁶ although the British Government stated that a Northern Irish tariff-free trade is a negotiating priority which however should be approved by the remaining EU-27.⁴⁰⁷

⁴⁰⁰ From the most northerly Swedish fjord down to the Black Sea, there are 120 official crossings of the European Union's border. Marking the boundary of Europe's single market, customs union and the Schengen Area, crossings are marked by large constructions, obstructed with traffic barricades and delimited by fencing and compounds for customs checks. Analogously, the Irish Border, which is slightly 500km long, includes 208 official road crossings - mainly on country roads – thus almost doubling the whole set of crossing points along EU's East border and therefore being one of the most porous land border in Europe.

⁴⁰¹ As the Republic of Ireland doesn't seem likely to leave the European Union, Brexit would mean that the UK's only land border – besides Gibraltar – will be an external border from the European perspective.

⁴⁰² Brexit Borderlands, The Irish Times [online: www.irishtimes.com]

⁴⁰³ Indeed, a "New IRA" is developing quite quickly in Northern Ireland. [online: www.irishtimes.com]

⁴⁰⁴ McManus, beef farmer from Kinawley, Northern Ireland, Reuters [online: www.it.reuters.com]

⁴⁰⁵ Namely preceding UK and Ireland's accession to the Single European Market, which was officially established on 1st January 1993.

⁴⁰⁶ Physical border checks upon goods do exist on the French-Swiss border and on the Norwegian-Swedish one.

⁴⁰⁷ However, the chances of receiving consent for such a deal, benefiting only the United Kingdom – and partially the Republic of Ireland – are quite remote.

Comparably, also the Republic of Ireland strongly supports a future lack of obstacles to cross-border trade as most of its goods and services are exported to the European Union⁴⁰⁸ and half of the latter head to the United Kingdom, mainly through Northern Ireland. On the other side of the border, the fundamental tariff-free and quota-free commercial relationship between the Six Counties and the Republic has made the latter the largest market for Northern Irish exports and – more broadly – the main way through which Northern Irish goods reach the European Union.

Northern Ireland – being a unique region and *the only part of the United Kingdom which has a land border with an EU member state*⁴⁰⁹ – will thus have to face an uncertain future as it is still not clear whether the British Government will provide sufficient devolved powers so as to entrust trade arrangements to Stormont.

In such a scenario, where *determination not to make the border becoming an impediment to the movement of people, goods*⁴¹⁰ and services seems one of Westminster's priorities, the backstop clause appears as the only choice. Being a position of last resort, the backstop clause aims at avoiding a physical border – and consequent checkpoints – cutting the island into two.

Firstly suggested by the European Union, the original draft of the backstop was meant to keep Northern Ireland within EU's economic boundaries so as to preserve cross-border cooperation and to sustain the economy of the island as a whole. However, such a deal would have no longer drawn EU commercial border on the Irish soil, but down the middle of the Irish Sea since Northern Irish goods would have been subject to strict controls – either when arriving from elsewhere the EU (i.e. other parts of the United Kingdom or third countries) or before leaving towards the EU – so as to check whether they met EU standards, therefore deeply undermining British unity. Because of such a risk, the backstop proposal has been repeatedly rejected.

⁴⁰⁸ See Appendix A.

⁴⁰⁹ Letter written – following the outcome of the United Kingdom European Union membership referendum – by Northern Ireland's First Minister Arlene Foster and deputy First Minister Martin McGuinness to the British Prime Minister Theresa May. (August 2016)

⁴¹⁰ *Ibidem*.

Only recently,⁴¹¹ *aiming at maintaining a soft border so as to allow the United Kingdom to have an independent trade policy*,⁴¹² an “Irish Border Council” has been suggested within the new Brexit Delivery Plan⁴¹³ drafted by Conservative leadership candidate Matt Hancock, which in turn introduced new hints within Brexit negotiations’ scenario:

- 1) A proposal on Comprehensive Free Trade Agreement as the basis of a long term UK-EU relationship;⁴¹⁴
- 2) An Irish Border Council to establish administrative, political and technological solution of the challenge of how to make an independent UK trade policy compatible with avoiding a hard border on the island of Ireland;⁴¹⁵
- 3) A time limit to the backstop to be defined to ensure an endpoint to the whole process.⁴¹⁶

⁴¹¹ Actually, a further draft of the deal including an agreement on backstop had also been backed on 14th November 2018 but it eventually faced the opposition of the UK Parliament, whose consent was required for ratification.

⁴¹² Matt Hancock, Campbell John, “Brexit: Hancock proposes “Irish Border Council” plan”, BBC News, 2nd June 2019

⁴¹³ Letter written on 2nd June 2019 by Matt Hancock to set out his Brexit Delivery Plan to leave the EU by 31st October 2019 should he becomes the leader of the Conservative Party and Prime Minister. [online: www.twitter.com]

⁴¹⁴ *Ibidem.*

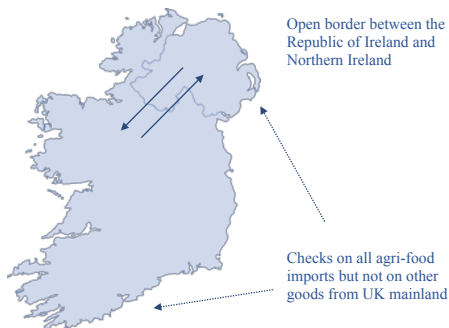
⁴¹⁵ *Ibidem.*

⁴¹⁶ *Ibidem.*

Possible outcomes of the Brexit border conundrum.

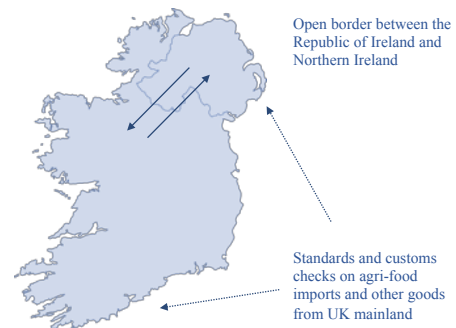
Current system

Entire UK in the EU
custom union



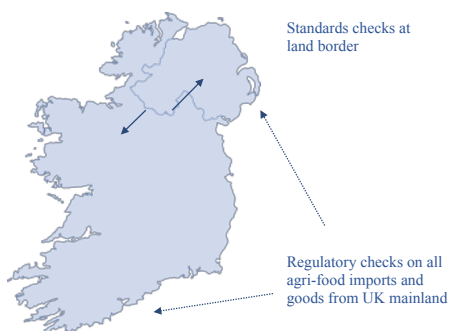
EU backstop for Northern Ireland

Northern Ireland remains in custom
union, the rest of UK does not



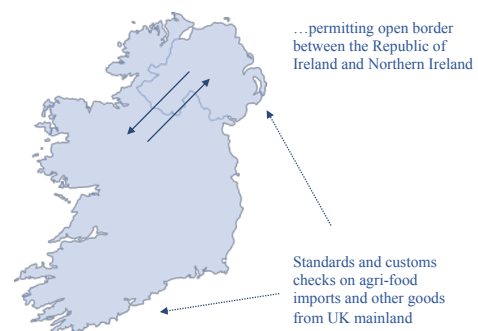
EU – UK customs union only

Entire UK in EU customs
union but not single market



Hybrid UK plan

Entire UK in EU customs union, but only Northern
Ireland stays in single market for goods...



Source: EU Commission, FT research [online: www.ft.com]

Nevertheless, besides impacting British (Northern Irish) commercial agreements, a renewed border would also deeply affect Northern Irish citizens' right to freely move.⁴¹⁷

Not joining the Schengen Agreement,⁴¹⁸ the United Kingdom and the Republic of Ireland used to keep their own immigration rules and border controls.⁴¹⁹ Moreover, the two

⁴¹⁷ More than 30.000 Irish and Northern Irish workers cross the border every day, as they live and work on different sides of the Northern Irish border, while 7% of Northern Ireland's employees comes from the European Economic Area (a percentage which is – within UK's boundaries – is higher only in London) and they would both suffer from border checks and restrictions.

⁴¹⁸ Schengen Agreement, 14th June 1985 [online: www.eur-lex.europa.eu]

⁴¹⁹ Such specific deals between the UK and Ireland were then recognised in protocols to EU treaties, particularly in Article 2 of Protocol n° 20 of the Lisbon Treaty [online: www.eur-lex.europa.eu] which declared that both countries *[might] continue to make arrangements between themselves relating to the movement of persons between their territories.*

countries chose to manage the movement of their citizens including their respective territories⁴²⁰ into a unique open borders area – the Common Travel Area⁴²¹ – thus ensuring Irish and British people the possibility to freely move within the two isles being subject to minimal controls. Such a scenario remained substantially unchanged⁴²² since the creation of the very first Irish state – the Irish Free State (1922) – guaranteeing almost⁴²³ a completely open border resulting, on the one hand, in an improvement of cross-border cooperation and, on the other hand, in a potential menace as the open border may be easily used to illegally travel⁴²⁴ throughout the two islands.

However, exiting the European Union, the United Kingdom puts itself in an uneasy situation, as the open-border policy that has been implemented for decades might have to be redrawn in order to ensure security along the borders and to oversee the issue of illegal immigration.⁴²⁵

Currently, immigration is an excepted matter, namely fully managed by Westminster and questions arise regarding a potential devolution of such competence. This would in fact make UK's immigration policies becoming Great Britain's immigration policies, thus allowing, on the one hand, the probable maintenance of a soft border within the Irish island and, on the other hand, placing Northern Ireland within a more Irish context.⁴²⁶

Nevertheless, so far *no border post, no installation, nothing*⁴²⁷ has been established but the memory of the Troubles is still bright inmost of Northern Irish and Irish citizens, who fear that it all may start again as *something innocuous like a customs post and it ends up being*

⁴²⁰ British Overseas Territories are not included in the Common Travel Area.

⁴²¹ Common Travel Area [online: www.assets.publishing.service.gov.uk]

⁴²² Border controls were actually restored during World War Two.

⁴²³ Albeit being an almost completely open border, airlines and ferry operators still require photo ID, while passengers are always required to show their passports at airports where immigration officers can't tell that they've come from within the Common Travel Area.

⁴²⁴ Illegal immigration is currently managed by "Operation Gull", in which immigration officers check passengers on routes between Northern Ireland and the island of Great Britain, so as to balance the lack of checks on unauthorised travel across the north/south border.

⁴²⁵ Indeed, lacking the control of movement across the border, EU immigrants searching for UK work may enter the UK across the border unchallenged.

⁴²⁶ Such a scenario would in fact be very welcomed by nationalists but might concern some unionists.

⁴²⁷ Dr Donnacha Ó Beacháin, Associate Professor at the School of Law and Government, Dublin City University (DCU).

*a fortified border.*⁴²⁸ Social contrasts and new sectarian conflicts are in fact a serious post-Brexit threat as by leaving the European Union the United Kingdom somehow betrayed the peace promise with Northern Irish nationalists, thus giving militant groups (e.g. the “new” IRA) a new reason to fight and protest.⁴²⁹

Car bombing, Derry (NI), 19th January 2019



Source: www.theguardian.com

While heavily working with the Irish Government and the Northern Irish Executive to *minimise administrative burdens, and to find a practical solution that keeps the border as seamless and frictionless as possible, recognising the unique economic, social and political context of the land border between Northern Ireland and Ireland*,⁴³⁰ the British Government still have to face another challenging issue involving its *closest neighbours*⁴³¹ and regarding – again – Northern Irish citizens.

⁴²⁸ Dr Donnacha Ó Beacháin, Associate Professor at the School of Law and Government, Dublin City University (DCU).

⁴²⁹ A car bomb exploded outside a courthouse on 19th January 2019. No one was injured, but the van transformed into a white-orange flame sounded like something Derry’s citizens haven’t heard for quite a while. The New IRA, a dissident republican group, was the main line of inquiry, and police in Northern Ireland eventually arrested four men in connection with it.

⁴³⁰ Brexit White Paper, “*The Future Relationship between the United Kingdom and the European Union, Department for Exiting the European Union*”, 12th July 2018 [online: www.gov.uk]

⁴³¹ *Ibidem*.

The two countries are indeed *intertwined through [their] shared history, culture and geography, and through [their] shared commitment to the Good Friday Agreement*,⁴³² hence the two countries both desire *to protect [the] reciprocal treatment of each other's national*,⁴³³ including people's citizenship rights, *once the UK has left the EU*.⁴³⁴

Indeed currently the British and the Irish Governments accept and *recognise the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship*,⁴³⁵ as provided for by the Good Friday Agreement but, although the Agreement also states that such a status would not be affected by *any future change in the status of Northern Ireland*,⁴³⁶ as Brexit has occurred it is unclear whether Northern Irish citizens will keep the right to choose not only to be Irish or British, but also to be EU-citizens or not.⁴³⁷

Nevertheless, albeit *Irish citizens in Northern Ireland will no longer live in a [EU] member state*,⁴³⁸ they seem to be allowed to *continue [enjoying] their rights as Union citizens under the Treaties*⁴³⁹ but they will *benefit no more from UK's participation in EU programmes, policies and activities*.⁴⁴⁰

Nonetheless, despite such promises, during the five months following the outcome of the United Kingdom European Union membership referendum (2016), Northern Irish applications for an Irish passport faced a 63% increase compared to the same period in 2015, proving that 24.849 Northern Irish inhabitants chose to be Irish and thus preferred to keep being EU-citizens.

⁴³² Brexit White Paper, "*The Future Relationship between the United Kingdom and the European Union*", Department for Exiting the European Union", 12th July 2018 [online: www.gov.uk]

⁴³³ *Ibidem*.

⁴³⁴ *Ibidem*.

⁴³⁵ Good Friday Agreement, Constitutional Issues (1)(vi), 1998 [online: www.dfa.ie/]

⁴³⁶ *Ibidem*.

⁴³⁷ Rules regarding European elections are determined by the Irish government, declaring that to vote for – and to stand in – European elections *Irish citizens have to be ordinarily resident in Ireland*. On the other side, the European Commission reaffirmed that – as promised – *no diminution of rights should apply to both British and Irish nationals in Northern Ireland*, meaning that the question of whether people in Northern Ireland could vote in European Parliament elections is mainly entrusted with Dublin.

⁴³⁸ EU Commission, 22nd June 2018 [online: www.europa.eu]

⁴³⁹ *Ibidem*.

⁴⁴⁰ *Ibidem*.

5. Concerns about the future protection of human rights

Among the four parts constituting the United Kingdom, Northern Ireland is the one having a unique constitutional and cultural status, *as it is a place that straddles multiple identities: Irish, British, Northern Irish, European*.⁴⁴¹

Although frequently perceived as a place apart, Northern Ireland is currently the heart of Brexit question as it represents a stumbling block to British withdrawal negotiations, starting from the multifaceted issue of the border up to the constitutional settlement that underpins the condition of peace Northern Irish and Irish citizens enjoyed for twenty years. In today's Northern Irish happy reality, *frontier living is not only possible but an utterly quotidian matter for thousands of people*,⁴⁴² an everyday routine⁴⁴³ which is nevertheless threatened by UK leaving the European Union. Indeed, Northern Irish fragile peace and the varied set of human rights enjoyed by Northern Irish citizens – sometimes overlapping as originating both from the Good Friday Agreement, British Acts of Parliament (which in turn may be influenced by EU law), the European Convention on Human Rights and the European Charter of Fundamental Rights – seem likely to be deeply affected by Brexit. Both being an international treaty and the cornerstone off Northern Irish peace process, the Good Friday Agreement was meant to get the *historic opportunity*⁴⁴⁴ for facing the Troubles' deep *legacy of suffering*⁴⁴⁵ and hence reacting to it, thus *[protecting] and [vindicating] the human rights of all*,⁴⁴⁶ notably being them:⁴⁴⁷

⁴⁴¹ Prof. Fiona de Londras, “The Impact of Brexit on Human Rights”, Annual Human Rights Lecture Law Society of Ireland, 15th May 2018

⁴⁴² *Ibidem*.

⁴⁴³ *Hundreds of children live in one jurisdictions and school in another, families live and work across the border, healthcare is accessed across the frontier. There may be differences in speed limits, currency and police uniform but the everyday ability to negotiate these differences is absolutely fundamental to our ability to live a life of peaceful coexistence on this island.* Prof. Fiona de Londras, “The Impact of Brexit on Human Rights”, Annual Human Rights Lecture Law Society of Ireland, 15th May 2018

⁴⁴⁴ Declaration of Support (1), Good Friday Agreement, 1998 [online: www.dfa.ie/]

⁴⁴⁵ Declaration of Support (2), Good Friday Agreement, 1998 [online: www.dfa.ie/]

⁴⁴⁶ *Ibidem*.

⁴⁴⁷ “The parties affirm their commitment to the mutual respect, the civil rights and the religious liberties of everyone in the community [...]” Human Rights (1), Rights, Safeguards and Equality of Opportunity, Strand III, Good Friday Agreement, 1998 [online: www.dfa.ie/]

- Right of free political thought;
- Right to freedom and expression of religion;
- Right to pursue democratically national and political aspirations;
- Right to seek constitutional change by peaceful and legitimate means;
- Right to freely choose one's place of residence;
- Right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity;
- Right to freedom from sectarian harassment;
- Right of women to full and equal political participation.

Human rights are in fact so fundamentally important within the Good Friday Agreement that they are also underpinned by means of direct references to the European Convention on Human Rights.⁴⁴⁸ *Being a tool, an instrument of upholding fundamental rights and freedoms*⁴⁴⁹ – albeit originating from the Council of Europe⁴⁵⁰ and not from the European Union – The European Convention of Human Rights has to be incorporated into EU member states' national law because of a political obligation⁴⁵¹ which however will no longer apply in the United Kingdom. In such a scenario *if [the British Government] [wanted] to reform human rights law* – maybe aiming at substituting the Human Rights Act (1998)⁴⁵² with a British Bill of Rights – *it [wasn't] the European Union [it] should*

⁴⁴⁸ Strand I (5)(b), Good Friday Agreement, 1998 [online: www.dfa.ie/]

Strand I (5)(c), Good Friday Agreement, 1998 [online: www.dfa.ie/]

Strand I (11), Good Friday Agreement, 1998 [online: www.dfa.ie/]

Strand I (26)(b), Good Friday Agreement, 1998 [online: www.dfa.ie/]

Strand III, Human Rights (2), Good Friday Agreement, 1998 [online: www.dfa.ie/]

Strand III, Human Rights (4), Good Friday Agreement, 1998 [online: www.dfa.ie/]

Strand III, Human Rights (9), Good Friday Agreement, 1998 [online: www.dfa.ie/]

⁴⁴⁹ George Hamilton, PSNI Chief Constable, 7th September 2016

⁴⁵⁰ www.coe.int [Official website of the Council of Europe]

⁴⁵¹ Article 6 (2), Title I, Treaty on European Union [online: www.eur-lex.europa.eu]

⁴⁵² Before the Human Rights Act (1998), British courts were not bound by European Convention on Human Rights judgments, but they could choose to consider them. Entering into force, the Human Rights Act (1998)

leave but the *European Convention on Human Rights*⁴⁵³ and the jurisdiction of its courts.⁴⁵⁴ Were that to happen, Good Friday Agreement's provisions might be seriously weakened and notably a broad set of rights - including both rights originating from the European Convention of Human Rights and those specific rights held by Irish (EU) citizens in Northern Ireland – may be undermined by UK leaving the European Union as it would no longer be compelled to respect the European Convention on Human Rights.⁴⁵⁵

- EU-underpinned rights, including those explicitly mentioned in the Good Friday Agreement (e.g. equality rights);
- Fundamental rights directly originating from EU membership, including the four fundamental freedoms and the right not to be discriminated;
- Labour and employment rights originating from EU law, including those rights flowing from the Working Time Directive;
- Irish (EU) citizens' rights living in Northern Ireland;
- Non-Irish EU citizens' rights living in Northern Ireland.⁴⁵⁶

Indeed, given its peculiar geography and its unique history, human rights may be more severely affected in Northern Ireland⁴⁵⁷ than in any other part of the United Kingdom.

allowed Northern Irish courts to strike down decisions by Stormont and gave citizens a line of sight of Strasbourg.

⁴⁵³ An exit mechanism from the European Convention on Human Rights is indeed include in Article 58 of the Convention: “1) *A High Contracting Party may denounce the present Convention only after the expiry of five years from the date on which it became a party to it and after six months’ notice contained in a notification addressed to the Secretary General of the Council of Europe, who shall inform the other High Contracting Parties.* 2) *Such a denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective.* 3) *Any High Contracting Party, which shall cease to be a member of the Council of Europe, shall cease to be a Party to this Convention under the same conditions.* 4) *The Convention may be denounced in accordance with the provisions of the preceding paragraphs in respect of any territory to which it has been declared to extend under the terms of Article 56.*” [online: www.echr.coe.int]

⁴⁵⁴ Theresa May, then Home Secretary, April 2016

⁴⁵⁵ The labels of the following list are overwhelmingly overlapping.

⁴⁵⁶ Professor Chris McCrudden & Professor William W. Cook, “Good Friday Agreement, Brexit, and Rights”, Royal Irish Academy & British Academy. [online: www.thebritishacademy.ac.uk]

⁴⁵⁷ E.g. Being the only part of the United Kingdom sharing a land border with the European Union, free movement rights will be surely subject to change.

Moreover, UK withdrawal from the European Union will sizeably impact on the available remedies for the enforcement of rights in Northern Ireland, which indeed will potentially turn to be less far-reaching,⁴⁵⁸ as these remedies in fact comprise the possibility to allow national courts to set aside British law which is contrary to EU law.

Currently, given EU law supremacy over the national one – human rights’ protection can’t be reduced below EU standards but, as UK will leave the European Union, making Northern Ireland a non-EU territory, common North/South safeguarding will potentially be no longer guaranteed,⁴⁵⁹ although required by the Good Friday Agreement.⁴⁶⁰

Possibly causing a remodelling of Northern Irish devolution arrangements and erasing UK’s commitment to implement the European Convention of Human Rights, Brexit may considerably weaken those mechanism currently ensuring British citizens the protection of their rights.⁴⁶¹ Indeed, in the Manifesto⁴⁶² (2014) of the Conservative Party – which indeed proved to be the main supporter of UK withdrawal – contained proposal both concerning the possible replacing of the Human Rights Act (1998) with a UK Bill of Rights⁴⁶³ and

⁴⁵⁸ E.g. As regards equality law, remedies provided for by EU law are possibly more far-reaching than the remedies offered by both the human Rights Act (1998) and domestic anti discrimination law.

Professor Chris McCrudden & Professor William W. Cook, “Good Friday Agreement, Brexit, and Rights”, Royal Irish Academy & British Academy. [online: www.thebritishacademy.ac.uk]

⁴⁵⁹ Northern Irish citizens would have right to compensation only under UK law, but that right could be reduced or limited or removed by UK legislation.

Professor Chris McCrudden & Professor William W. Cook, “Good Friday Agreement, Brexit, and Rights”, Royal Irish Academy & British Academy. [online: www.thebritishacademy.ac.uk]

⁴⁶⁰ Strand III, Human Rights (9), Good Friday Agreement, 1998 [online: www.dfa.ie/]

⁴⁶¹ Currently – depending on the right violated – British citizens may invoke both the Court of Justice of the European Union – EU’s highest legal authority, which is indeed aimed at interpreting and enforcing the rules of the single market and at settling disputes between member countries over issues like free movement and trade – and the European Court of Human Rights (ECHR), which is indeed the one which has often upset British politicians.

⁴⁶² www.conservatives.com [Official website of British Conservative Party]

⁴⁶³ Indeed, the Conservative Manifesto for 2015 General Elections not only included a possible referendum of UK’s EU membership, but also the hypothesis of repealing. Notably the latter has always been a declared aim of the Conservative Party, whose position regarding the Human Rights Act (1998) in 2010 Manifesto was in fact even more evident than its will to leave the European Union and – although the idea has been put aside for a while – in 2014 the Conservative Party explicitly proposed to substitute the Human Rights Act (1998) with a UK Bill of Rights so as to “free” British judges from taking into account the decision of the European Court of Human Rights (ECtHR), which in fact British newspapers and conservative political circles used to define as “just another foreign court” which was *usurping the role of both Parliament and*

UK's withdrawal⁴⁶⁴ from the European Convention of Human Rights.⁴⁶⁵ Nevertheless such a proposal has been – temporarily – put aside and the future relationship between the United Kingdom and the European Convention of Human Rights seems likely to keep being, *while the Union and its Member States will remain bound by the Charter of Fundamental Rights of the European Union, which reaffirms the rights as they result in particular from the ECHR*.⁴⁶⁶ Nonetheless, the European Convention of Human Rights and EU law are clearly not the first – chronologically speaking – sources of protection of human rights as sets of rights have been included in British constitutional law since the XIII century (Magna Charta 1215, Habeas Corpus Act 1679, Bill of Rights 1689) and were developed throughout UK's history, albeit they have been included into enforceable human rights laws only recently (i.e. Human Rights Act, 1998).

Maybe due to such a long human rights' British history, UK's Government still states that leaving both the European Union and the European Convention of Human Rights will not result in a weakening of UK's mechanism of rights protection. In order to avoid a drop in UK's rights safeguard, the British Government suggested to introduce a general retention clause⁴⁶⁷ whereby three main categories of rights – notably EU and EU-derived ones – would have been retained into British law.⁴⁶⁸

- Domestic legislation, previously adopted, that gives effect to EU law;
- EU law that is directly applicable;

British Courts to determine and to apply British law. See: Fiona de Londras, "The New Sovereignism: What it means for human rights law in the UK", LSE Brexit Blog, 24th October 2017

⁴⁶⁴ Thus making the United Kingdom as the only nation in continental Europe not being compelled to respect the European Convention on Human Rights (apart from Belarus).

⁴⁶⁵ Many of the opinions stated against both the European Union and the European Convention on Human Rights prove Fiona de Londras' "*new sovereignism*" argument, which is based on the firm belief that states should only engage and comply with international courts as and when they want to.

⁴⁶⁶ Part I (I)(7), Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom, General Secretariat of the Council of the European Union, Brussels, 22nd November 2018. [online: www.consilium.europa.eu]

⁴⁶⁷ The general retention clause proposed by the British Government was quite similar to the one included in in Article 73 of the Constitution of the Irish Free State (1922) and in Articles 48-50 of *Bunreacht na hÉireann* (1937).

⁴⁶⁸ Fiona de Londras, "The Impact of Brexit on Human Rights", Annual Human Rights Lecture Law Society of Ireland, 15th May 2018

- Rights arising under EU treaties and directives that are directly effective and which have previously been recognised.⁴⁶⁹

Nonetheless – albeit the protection of EU-derived human rights seems to be a priority – following Brexit not all rights-protecting European law will be kept as *the Charter of Fundamental Rights [will] not [be] part of the domestic law after exit day*,⁴⁷⁰ meaning that the European Charter of Fundamental Rights will not be retained.

Such a choice originates from British Government's firm belief that relevant rights will be safeguarded by means of retained law and that the Charter of Fundamental Rights is somehow unnecessary and redundant as it doesn't even introduce new rights but just acknowledges rights that are already listed within EU law. Moreover, opting for not retaining the Charter of Fundamental Rights will result in a lower standard of rights safeguard, as less efficient remedies for violations of rights will be provided for. Indeed, British Government's views are only partly true as the Charter of Fundamental Rights in fact led to the creation of new rights and to the evolution of understanding of others, besides dealing with the protection of a specific set of rights not having equivalent protection in other parts of British or European human rights law.⁴⁷¹ Moreover, the fundamental nature of Charter rights result in the possible invalidation of laws by the courts – including domestic legislation – if a violation of rights has been proved, while no similar mechanism is provided for within British constitutional law.⁴⁷²

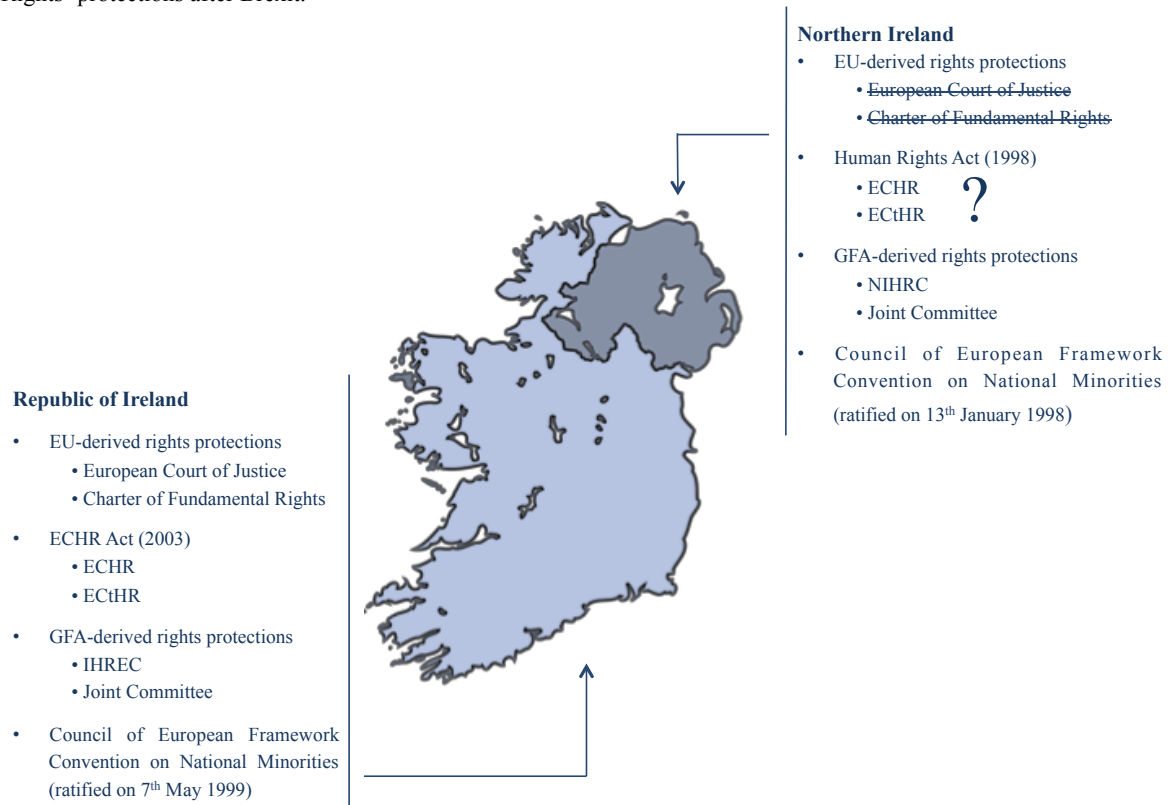
⁴⁶⁹ However, question arose concerning whether such retained laws will be primary or secondary legislation. Notably, doubts also regard retained laws' future as they may be soon amended or repealed as clause 7 of the United Kingdom EU Withdrawal Bill originally proposed to allowed for ministers to amend retained legislation where they considered it appropriate to prevent, remedy or mitigate any ineffectiveness or deficiency in retained law.

See: Fiona de Londras, "*The Impact of Brexit on Human Rights*", Annual Human Rights Lecture Law Society of Ireland, 15th May 2018

⁴⁷⁰ Clause 5 (4), United Kingdom EU Withdrawal Bill

⁴⁷¹ See: Fiona de Londras, "*The Impact of Brexit on Human Rights*", Annual Human Rights Lecture Law Society of Ireland, 15th May 2018

⁴⁷² Furthermore, also remedies included in UK law seem significantly weaker compared to the Charter ones, which appear more effective and more powerful, as proved by *Benkharbouche & Anor v Embassy of the Republic of Sudan*. In this case the Supreme Court found that the barring of employment claims by domestic workers in the Sudanese and Libyan embassies under the State Immunity Act 1978 was incompatible with both Article 6 of the ECHR and Article 47 of the Charter of Fundamental Rights – Working Time Regulations. The remedy under the Human Rights Act 1998 for a Convention violation was a declaration of



Own reworked version.

Given such a scenario – not keeping the Charter of Fundamental Rights but preserving UK commitment to the European Convention on Human Rights – what is at stake is the protection of both rights belonging to Irish citizens living in Northern Ireland – who indeed risk becoming second-class EU citizens despite both EU and UK explicitly aimed at *[providing] reciprocal protection for EU and UK citizens [and] [enabling] the effective exercise of rights derived from EU law and based on [their] past life choices*⁴⁷⁴ – and of

incompatibility which leaves the law intact until and unless Parliament amends it, which it is not obliged to do. It also left the claims barred; the Act continued to operate between the parties. The recognised rights violation could lead to nothing more than a declaratory remedy. In contrast, the Charter violation required the law be set aside so that claims under the Working Time Regulations could be considered. The Charter remedy was more effective and more powerful. [EWCA Civ. 33, 5th February 2015]

See: Fiona de Londras, “The Impact of Brexit on Human Rights”, Annual Human Rights Lecture Law Society of Ireland, 15th May 2018

⁴⁷³ Assuming that UK will still be committed to the European Convention on Human Rights, but not retaining EU Charter of Fundamental Rights.

⁴⁷⁴ Citizens’ rights (6), Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's

rights included in the Good Friday Agreement, which however seem intended to be safeguarded in the withdrawal Agreement.

Thus, as long as Northern Ireland's citizens will be allowed to choose whether to be Irish or British – as provided for by the Good Friday Agreement⁴⁷⁵ – they will be doomed to stumble into uncertainty as an *equivalent level of protection of human rights*⁴⁷⁶ both in Ireland and in Northern Ireland will no longer be guaranteed.

orderly withdrawal from the European Union, presented jointly by the negotiators of the European Union and the United Kingdom Government, 8th December 2017 [online: www.ec.europa.eu]

⁴⁷⁵ Constitutional Issues (1)(vi), Good Friday Agreement, 1998 [online: www.dfa.ie/]

⁴⁷⁶ Strand III, Human Rights (9), Good Friday Agreement, 1998 [online: www.dfa.ie/]

Conclusion

*Ever since I first stepped through the door behind me as prime minister.
I have striven to make the United Kingdom a country that works not just for
a privileged few, but for everyone.
And to honour the result of the EU referendum.
Back in 2016, we gave the British people a choice.
Against all predictions, the British people voted to leave the European
Union.
I feel as certain today as I did three years ago that in a democracy, if you
give people a choice you have a duty to implement what they decide.
I have done my best to do that.
I negotiated the terms of our exit and a new relationship with our closest
neighbours that protects jobs, our security and our union.
I have done everything I can to convince MPs to back that deal.
Sadly, I have not been able to do so.
I tried three times.
I believe it was right to persevere, even when the odds against success
seemed high.
But it is now clear to me that it is in the best interests of the country for a
new prime minister to lead that effort.
So I am today announcing that I will resign as leader of the Conservative
and Unionist Party on Friday, 7th June, so that a successor can be chosen
[...] to succeed, he or she will have to find consensus in Parliament where I
have not.
[...] I will shortly leave the job that it has been the honour of my life to hold
– the second female prime minister but certainly not the last.
I do so with no ill will, but with enormous and enduring gratitude to have
had the opportunity to serve the country I love.*

Theresa May's resignation speech, May 24th 2019⁴⁷⁷

⁴⁷⁷ Text of the statement delivered by Prime Minister Theresa May to announce her resignation, The New York Times, May 24th 2019 [online: www.nytimes.com]

Theresa May's resignation⁴⁷⁸ officially launched a process resulting in the designation of British new prime Minister,⁴⁷⁹ and thus setting forth the end of May's three years as British Prime Minister, which indeed followed David Cameron's⁴⁸⁰ six years.

Both the two Tory's leaders hazardously gambled on Brexit. On the one hand, they bet on Brexit as a tool whereby strengthen the Conservative Party, and on the other hand they believed Brexit would have brought prestige and supremacy back to the United Kingdom leaving such a weary, torn European Union, but they lost twice as – since 2010 – the Conservative Party lost almost half of its supporter, and the United Kingdom as a whole – not the European Union – proved to be a torn country, ripped by weaknesses and discards. May's being rather aloof about Brexit let her becoming British Prime Minister, but her deep focus on the unity of the Conservative Party rather than on the future of the United Kingdom outside the European Union proved to be her first mistake. Secondly, she misunderstood the meaning of the referendum: literally taking the outcome of United Kingdom European Union membership referendum, she immediately opted for triggering Article 50 (TEU), not considering the wide range of possibilities concerning United Kingdom's withdrawal.

Ultimately, in 2017 things got out as the result of the early elections called by Prime Minister Theresa May proved to be unfavourable for the Conservative Party, which indeed lost the majority, thus being forced to rely on DUP deputies.⁴⁸¹

Unable to gather together not only the Conservative Party, but the whole British nation, Theresa May is leaving a country at the mercy of doubts, uncertainties and new parties,⁴⁸²

⁴⁷⁸ Theresa May's resignation was announced on Friday 24th May 2019 [online: www.theguardian.com]

⁴⁷⁹ Currently, the number of potential candidates ready to get the chance of becoming both British Prime Minister and Leader of the Conservative Party amounts to (at least) eight: Boris Johnson (40% chance), Dominic Raab (14% chance), Michael Gove (7% chance), Andrea Leadsom (7% chance), Jeremy Hunt (7% chance), Penny Mordaunt (4% chance), Rory Stewart (4% chance) and Sajid Javid (3% chance) [online source: www.reuters.com]. Starting with the most favourite Johnson, up to Home Secretary Javid, all of them support Brexit, albeit advancing different proposals regarding UK's future.

Candidates' official applications must be sent by June 10th, 2019.

⁴⁸⁰ David William Donald Cameron served as Prime Minister of the United Kingdom from 2010 to 2016, also being the Leader of the Conservative Party from 2005 to 2016.

⁴⁸¹ Eventually, also the choice of relying on Northern Irish deputies proved to be a failure as they turned to be the ones who – more than anyone else – hindered Brexit negotiations.

doomed to embark on a new round of negotiations so as to carry out Brexit as EU's position on the non-negotiability of the withdrawal agreement still remains.⁴⁸³

Analogously, on the other side of the Irish Sea, the Irish isle will be profoundly affected by Brexit as it will be divided into two by a border representing a new EU's frontier.

So as to avoid the unsettling of Northern Irish peace process – whose start date is symbolically represented by the signing of the Good Friday Agreement on 10th April 1998 – and to preserve the progress achieved throughout the last twenty years, the European Union suggested the so-called backstop clause, being it a position of last resort meant to prevent the re-establishment of a border – namely, checkpoints and custom duties. However, EU's proposals, including the one concerning the backstop clause, proved to be a failure, as they had to face Unionists and Conservatives' strong opposition.

Nevertheless, United Kingdom EU Withdrawal Bill is not just about the difficult safeguarding of peace along the Northern Irish border, as it will in fact affect much more aspects – political, legal and economic ones – of the Irish isle. Firstly, as Irish economy (North and South) is double-faceted, including both multinational corporations exporting goods and services all over the world, and small enterprises mainly belonging to the agri-food sector and strongly depending on cross-border trade, the re-establishment of the border – meaning custom duties and checks on quality standards – may heavily – and negatively – affect Northern Irish economy and, more broadly, the economic system of the whole island. Secondly, Brexit would turn Ireland into a territory divided between EU and non-EU citizens. Notably, Northern Irish citizens – being free *to identify themselves and be accepted as Irish or British, or both*⁴⁸⁴ – should keep their right to choose their citizenship regardless *any future change in the status of Northern Ireland*,⁴⁸⁵ but doubts arise regarding the rights they will be allowed to enforce after exit day as by leaving the

⁴⁸² The Brexit Party – the British Eurosceptic political party which gained the majority of votes (30,5%) during the 2019 European Parliament Elections – was in fact founded by Nigel Farage only six months ago, on 23rd November 2018.

⁴⁸³ EU Commission President, Jean Claude Juncker's speech following Theresa May's resignation as British Prime Minister.

⁴⁸⁴ Constitutional Issues (1)(vi), Good Friday Agreement, 1998 [online: www.dfa.ie/]

⁴⁸⁵ *Ibidem*.

European Union the United Kingdom will be no more compelled to abide by the European Convention on Human Rights (ECHR) nor the Charter of Fundamental Rights.⁴⁸⁶

Furthermore, concern regard the future rearrangement of devolved powers as currently most of the competences Westminster devolved to Stormont are primarily legislated and enforced at the EU level, thus causing a remarkable overlapping. Whether to entrust such overlapping policy areas with Northern Irish institutions or to re-centralize them is indeed an issue to be solved.

Is therefore clear that Brexit will swamp – and indeed has already started to – not one but both the British Isles deeply tied together by centuries of shared history. The wind of change will overwhelm not only the architecture of the devolution system, the economic relationships and the mechanisms of human rights’ protection, but it will also subvert the political balance held, in primis, within the United Kingdom, and secondly, in the Republic of Ireland, thus possibly reigniting old grievances never dimmed and admitting the hypothesis that *the people of the island of Ireland*⁴⁸⁷ may be willing to soon *exercise their right of self-determination*,⁴⁸⁸ *[bringing] about a united Ireland*.⁴⁸⁹

⁴⁸⁶ However, as regards the former, the British Government came out in favour of keep on following the Convention, while the latter has been included among the – future – non-retained law.

⁴⁸⁷ Constitutional Issues (1)(ii), Good Friday Agreement, 1998 [online: www.dfa.ie/]

⁴⁸⁸ *Ibidem*.

⁴⁸⁹ *Ibidem*.

Appendix A An economic perspective

Belfast, August 2016

It is critical to [Northern Irish] economy that its business, both indigenous and FDI companies, retain their competitiveness and do not incur additional costs. [Northern Ireland] therefore need to retain as far as possible the ease with which it currently trade with EU member states and, also importantly retain access to labour. Policies need to be sufficiently flexible to allow access to unskilled as well as high skilled labour. This applies only to business and the private sector but also to public sector employers who are heavily dependent on EU and other migrant labour. There is also the matter of the many thousands people who commute each way across the border to work on a daily basis.⁴⁹⁰

Everyday some 35,000 people get across the Irish border and thousands of sheep browse both and English grass: by and large, more than 1 million trucks and 12 million cars don't care about custom duties and visas. Brexit, namely United Kingdom withdrawal from the European Union, will reintroduce border checks and will increase the cost of transport, thus affecting negatively the business activities on the border, especially the small enterprises, the ones working in the field of agriculture and foodstuff and those based in Northern Ireland.

⁴⁹⁰ Letter written – following the outcome of the United Kingdom European Union membership referendum – by Northern Ireland's First Minister Arlene Foster and deputy First Minister Martin McGuinness to the British Prime Minister Theresa May. (August 2016)

Data on the border between the Republic of Ireland and Northern Ireland.



Length of the border

499 km (310mi)

Number of crossing points

275

Crossing per months

Trucks	Vans	Cars
177.000	208.000	1.850.000

Source: <https://www.statista.com>; own reworked version

The absence of custom checks⁴⁹¹ fostered trade and business activities, causing an unexpected, sharply economic growth,⁴⁹² which meant an Irish GDP growth rate ranging between 7.8% and 11.5% during the 1990s. Besides Northern Ireland's stability – due to the Good Friday Agreement and thanks to the absence of custom duties on the border – which made Ireland able to provide a stable business environment, many economists ascribed Ireland's growth to a low corporate taxation rate. Nonetheless, some more causes have to be mentioned. Firstly, direct foreign investments – mainly from USA – and increased investments in the education system, physical infrastructure and human resource investments, made Ireland more attractive to high-tech businesses. Secondly, EU membership and Irish provision of Subsidies and investment capital encouraged high-profile companies (Dell, Intel, Microsoft) to locate in Ireland. Thirdly, relatively low wages, government grants and low tax rates also contributed to the Irish economic growth.

⁴⁹¹ Despite the absence of border checks, data concerning cross-border trade are available thanks to statistical surveys conducted by several organizations, which profile their cross-border employees (AIRO-All Island Research Observatory, NIRSA-national Institute for Regional and Spatial Analysis, and the National University of Ireland)

⁴⁹² The unpredicted economic growth made Ireland the “Celtic Tiger”. The term then became the one used to indicate the rapid and sudden Irish economic growth since 1990s until 2001, and from 2003 until 2006: during this span of time the Republic of Ireland registered an economic boom and it shifted from being one of the poorest European countries to one of the richest.

In such a socio-political and economic scenario, during the 1990s most of agricultural enterprises were established along the frontier and today their products cross the border more than once so as to complete the various stages of processing.

By leaving the European Union, the United Kingdom – and therefore Northern Ireland – will leave as well the common market and the custom union, meaning that border controls on the Irish line will be reintroduced: costs of transport will be higher, bureaucracy more complex and different norms will rule the two neighbouring countries.

The idea proposed more than once by the British Government was that of a *de facto* custom union, namely a temporary customs agreement preserving the *status quo* for a period of one year⁴⁹³.

The main point was that of avoiding the restoration of severe border controls, apparently thanks to a – more or less welcomed – “backstop” clause ensuring the maintenance of the *status quo* in case of no agreement. Still, the two arguing factions – United Kingdom and European Union – were far from reaching an agreement: according to EU the only acceptable proposal was (and still is) that of making Northern Ireland stay aligned with its trade rules, and thus remaining in the European single market and custom union, so that new border checks wouldn’t have been needed. On the other side, London, aiming at maintaining the entirety of the nation, proposed to keep the country as a whole in the European common market for a limited time after 2020⁴⁹⁴.

However, the European Union strongly opposed the idea on which lied the backstop proposal – that of a “bridge”⁴⁹⁵ – since it could only be applied to Northern Ireland and not to the entire United Kingdom. Indeed, a TCA⁴⁹⁶ that comprehend the United Kingdom as a whole, would become a backdoor to EU privileges without the obligations. Moreover, such a temporary *de facto* custom union would constrain UK when striking new free trade deals with non-EU countries, causing discontent of those who voted for “leave”.

⁴⁹³ The temporary custom agreement will cease to apply one year after the 21 months already planned as from March 30th 2019. After that span of time, namely December 2021, United Kingdom will definitely leave both the European common market and the customs union.

⁴⁹⁴ In 2020, in fact, the planned transition period of United Kingdom from European Union will end.

⁴⁹⁵ The “bridge” is the term senior officials use to indicate the Temporary Customs Agreement (TCA), which is in fact the core of the backstop proposal for avoiding severe border checks between the Republic of Ireland and Northern Ireland.

⁴⁹⁶ TCA stands for Temporary Customs Agreement, namely a British temporary custom union within EU proposed by London government in order to elude the restoration of a “hard” border in Northern Ireland.

Besides EU and Brexiters, the backstop was not even appreciated by the DUP⁴⁹⁷, since the TCA would mean new EU regulations. UK expressed its willing to accept extra checks on goods trade between the Six Counties and the rest of the country, on the contrary, the Conservative's Parliamentary allies did not express their support to such behaviour since it would undermine Northern Irish economy and import/export activities not only towards Ireland and the EU, but also within nation boundaries, as EU extra checks would weaken Northern-Irish trade relationships even with England, Scotland and Wales.

The Irish backstop thus became the main stumbling block in the negotiations of UK withdrawal treaty as – apart from trade over the Irish border – some more challenging “backstop” issues still need to be solved. Firstly, the bill UK has to pay for Brexit, which amounts at some £39 billion; secondly, the new rules defining the rights of EU citizens living in UK and the immigration regime; and thirdly, the acceptance of a 21-months period of transition after March 2019.

Nevertheless Prime Minister Theresa May⁴⁹⁸ promised that no hard border would have been rebuilt and suggested two options: a custom partnership between UK and EU and, failing this, a number of specific agreements in order to avoid custom duties and to mitigate the taxation on import/export goods.

Despite the effort, Brexit talks reached an *impasse*⁴⁹⁹: until now no deal has been agreed and as a consequence, the current scenario is that of an uncertain future in precarious balance between a “hard” Brexit and “soft” one.

Today Ireland is the 28th largest export economy in the world and it registers a positive trade balance. Its top export destinations are USA, Belgium-Luxembourg and UK⁵⁰⁰, while its top import ones are UK, USA and Germany⁵⁰¹. Irish trade across the border, namely

⁴⁹⁷ DUP stands for Northern Ireland “Democratic Unionist Party”, namely the ones that did not tolerate the idea of new EU rules to be abided by in the field of Northern-Irish agriculture and foodstuff trade. On the other side, London government seemed likely to accept extra checks so as to facilitate the respect of the new EU norms.

⁴⁹⁸ UK Prime Minister Theresa May delivered a speech at Mansion House in London on the Government's vision for Brexit on Friday 2nd March 2018.

⁴⁹⁹ Furthermore, UK Eurosceptic ministers have recently warned Prime Minister Theresa May that they will not sign an agreement according to which UK is abandoned in some sort of *de facto* customs union with the EU, which is, at the same time, temporary and – inconsistently – timeless. As a consequence, Brexit talks went trough a further slowdown.

⁵⁰⁰ Value of goods exported from Ireland: USA (\$41.2B), Belgium – Luxembourg (\$18.1B), UK (\$18B).

⁵⁰¹ Value of good imported to Ireland: UK (\$19B), USA (\$12.3B), Germany (\$7.67B)

with UK, is not simply each side selling goods to one another: it is worth about €65 billion a year and it sustains over 400,000 jobs on both islands, which makes Ireland UK fifth largest export market and its ninth largest source of imports⁵⁰². *Inter alia* Northern Ireland accounts for 14% of all UK goods exports to Ireland and 14% of all UK goods imported from Ireland. Its economy, in fact, largely depends on exports towards Ireland and in general to EU, which, as a trade bloc, has been the destination for the largest proportion of Northern Irish goods exports by value over the 2014 to 2017 period.

In 2016, 30% of Northern Ireland's exports⁵⁰³ reached Ireland. The following year, in 2017, Northern Ireland goods exports registered an increase of 9.3%, as well as imports, which revealed a plus 7.7% on 2016⁵⁰⁴. Overall, Northern Ireland exports to the EU represents 56% of total exports⁵⁰⁵, with Ireland as key export partner. Indeed, in 2017 goods exports to Ireland were equivalent to 31% of total goods exports value⁵⁰⁶ and approximately 56% of the value of goods exported to the EU. Furthermore, import/export trade between the two Irelands is showing a slow but steady growth⁵⁰⁷, involving more and more businesses located along the border. Notably, most cross-border trade - almost three-quarters⁵⁰⁸ - is carried out by small and medium-sized businesses that might have to face a possibly catastrophic impact of Brexit.

⁵⁰² In 2017, UK exports to Ireland were worth £34.0 billion; imports from Ireland were worth £21.8 billion, resulting in a trade surplus of £12.2 billion. Overall, UK exports to Ireland represent 5.5% of all UK exports (UK exports to Ireland represents 12.4% of all UK exports to the EU), while English imports from Ireland represented 3.4% of all UK imports (UK import from Ireland represents 6.4% of all UK imports from the EU).

⁵⁰³ In 2016, Northern Ireland's exports were worth more than £1,7 billion.

⁵⁰⁴ In 2017, Northern Irish goods exports registered an increase of 9.3% on the previous year, rising from £7.83 to £8.55 billion

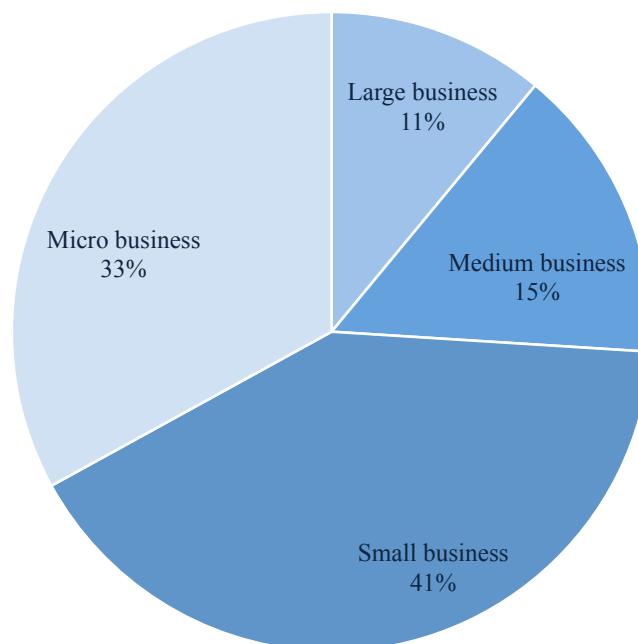
⁵⁰⁵ Northern Ireland exports to the EU are worth £4.81 billion.

⁵⁰⁶ In 2017 Northern Ireland goods exports to the Republic of Ireland were worth £2.7 billion.

⁵⁰⁷ Between 2016 and 2017 trade between Northern Ireland and the Republic of Ireland registered an increase of more than 10%.

⁵⁰⁸ 74% of the trade between Northern Ireland and the Republic of Ireland is carried out by small enterprises, while 11% of the 758,000 Northern Irish export deliveries to Ireland in 2016 are from large businesses. Together, micro and small businesses account for 93% of Northern Ireland's exporters to Ireland, and 46% of the value of its exports there.

Share of export deliveries to Ireland, by business employee size band, Northern Ireland, 2016.



Source: Northern Ireland Statistics and Research Agency (NISRA) data; own calculations.

In such a scenario, hundreds of thousands of pounds of costs could be increased mostly onto the manufacturing businesses, because of the needing of origin certificates, and in this way jeopardizing smaller firms and potentially creating a crisis in the Northern Irish economy⁵⁰⁹.

Nevertheless, according to the OECD, Brexit will be felt more intensely in Ireland than in any other country: in its hypothetical post-Brexit scenario⁵¹⁰, where UK trade relations are governed by the WTO's Most-Favoured Nation Rules, OECD forecasted that UK exports will increase and new duties on goods imported from EU will be imposed by the English country, hence affecting negatively on Anglo-Irish trade.

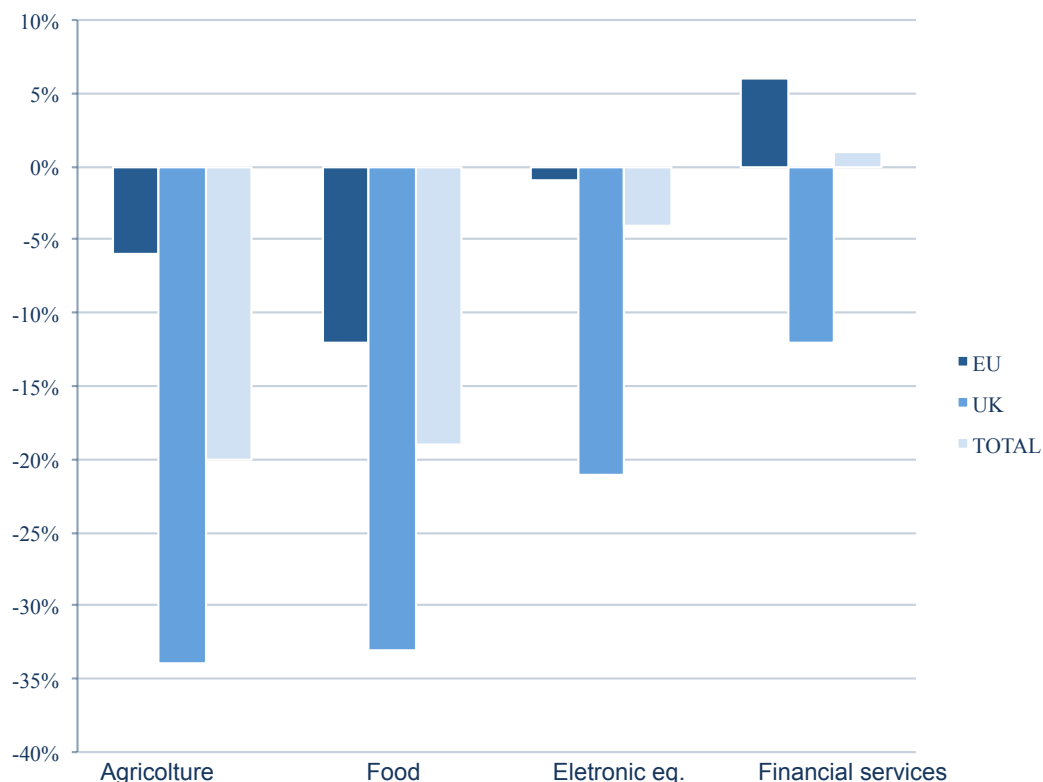
However, a high degree of heterogeneity will characterize Brexit impact over Irish firms and economic sectors, causing the most severe contraction in agriculture and foodstuff exports⁵¹¹, while, notably, financial services exports from Ireland to the EU26 will rise.

⁵⁰⁹ Northern Ireland would sincerely suffer from an economic crisis since its economy is stagnant since a few years and it is currently characterized by the absence of a proper government.

⁵¹⁰ The OECD had simulated the economic effects of an illustrative Brexit scenario over the Republic of Ireland, Northern Ireland and the United Kingdom.

⁵¹¹ According to OECD's esteem, agri-food industries will face a fall in gross exports of around 20%.

Percentage change in gross Irish exports of selected sectors, by destination



Source: OECD Economic Survey – Ireland, 2018; own calculations.

Following the OECD hypothesis, real GDP will fall by around 2,5% in the long run because of uncertainties about Brexit deal and its negative impact on trade⁵¹². However, Irish economy seems deemed to keep on growing over the next two years, albeit at a more sustainable pace, and unemployment rate is likely to fall to around 5,2%. As a consequence, more pressure will be placed on wages and inflation, and prices will increase by over 2% in 2019⁵¹³. Brexit consequences will be clearly felt in UK as well: some 10% increase of the price of goods and services is expected, plus a further 10% increase on export. OECD esteems that English economic growth won't exceed 1.4% in 2018 and 1.3% in 2019, while unemployment is likely to be below 5% and inflation slightly above 2% by the end of 2019. Recently, UK inflation has diminished, but it is still above target, as a result of the sterling's past depreciation, and causing a further weakening of UK domestic demand.

⁵¹² OECD esteem obtained incorporating the trade shock from METRO as well as assumptions relating to changes in exchange rates and sovereign risk premium into the National Institute Global Econometric Model.

⁵¹³ Hypothetic data esteemed by OECD by comparing assumptions relating to economic and monetary into the National Institute Global Econometric Model.

Appendix B A hypothetical united Ireland

Belfast, January 2019

"Now is the time.

*History is unfolding - the next chapter is being written: [...] the responsible thing to do is to play a part in shaping change [...] [and] I want to, again, challenge the government in Dublin to convene a forum to begin the planning for Irish unity."*⁵¹⁴

Northern Irish society is not a united and homogeneous one; quite the opposite, it is historically torn apart by social, political and religious contrasts: on the one hand, the Catholic and Nationalist community – politically represented by Sinn Féin – has traditionally been in favour of a united Ireland; instead, in the other hand, the Protestant and Unionist group, loyal to the British homeland, has always defended the social, legal and economic bonds tying together Northern Ireland and the whole United Kingdom.

Officially established in 1920 by means of the Government of Northern Ireland Act,⁵¹⁵ Northern Ireland was then granted an opt out clause from the Irish Free State – which eventually it exercised – when the Anglo-Irish Treaty was signed in 1921.⁵¹⁶

Nevertheless, the partition of the Irish isle was firstly challenged soon afterwards as the New Irish Constitution (*Bunreacht na hÉireann*) – drafted by will of Anti-Treaty *Fianna Fáil* leader, Éamon de Valera – was introduced in 1937.⁵¹⁷ Indeed, the new Constitution happened to claim lawful authority over the entire island of Ireland,⁵¹⁸ explicitly stating

⁵¹⁴ *Sinn Féin* leader Mary Lou McDonald's speech at "Beyond Brexit" Conference held in Belfast on 26th January 2019.

⁵¹⁵ See: Paragraph 5, Chapter 1

⁵¹⁶ *Ibidem*.

⁵¹⁷ See: Paragraph 7, Chapter 1

⁵¹⁸ "The national territory consists of the whole island of Ireland, its islands and the territorial seas."

Article 2 (first draft – non amended), Irish Constitution (*Bunreacht na hÉireann*), 1937

"Pending the re-integration of the national territory, and without prejudice to the right of the parliament and government established by this constitution to exercise jurisdiction over the whole territory, the laws enacted by the parliament shall have the like area and extent of application as the laws of Saorstát Éireann and the like extra-territorial effect."

that the Irish *national territory [consisted] of the whole island of Ireland*,⁵¹⁹ thus also including the Six Northern Counties.

Clauses aiming at expanding Irish *jurisdiction over the whole [Irish] territory*⁵²⁰ were eventually amended (1998), but proposals concerning a united Ireland kept on existing.

Moreover, since the late 1960s, the conflicting political ideals, the different religious faiths and the opposing feelings of belonging historically coexisting within Northern Ireland gave rise to riots and sectarian conflicts⁵²¹ which – between 1969 and 1975 – resulted in 1,100 killed people, over 11,500 injured and more than a £140,000,000 loss.⁵²²

Ultimately, civil disorders and violence were brought to an end thanks to the Good Friday Agreement,⁵²³ which, besides ending the conflicts, succeeded in managing both unionist and nationalist interests and aims unequivocally recognising that *Northern Ireland in its entirety [was] part of the United Kingdom*,⁵²⁴ but also acknowledging both Catholics' and Republicans' desire for a united Ireland, and Northern Irish people's freedom to choose whether *to identify themselves and be accepted as Irish or British, or both*.⁵²⁵

Irish and Northern Irish provisions concerning territory, citizenship, right to self-determination, etc.

Irish and Northern Irish provisions

Good Friday Agreement, Constitutional Issues (1)(i)

The participants endorse the commitment made by the British and Irish Governments that, in a new British-Irish Agreement replacing the Anglo-Irish Agreement, they will recognise the legitimacy of whatever choice is freely exercised by a majority of the people of Northern Ireland whether they prefer to continue to support the Union with Great Britain or a sovereign united Ireland.

Good Friday Agreement, Constitutional Issues (1)(ii)

[...] they will recognise that it is for the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right of self-determination on the basis of consent, freely and concurrently given, North and South, to bring about a united Ireland, if that is their wish, accepting that this right must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland.

Article 3 (first draft – non amended), Irish Constitution (*Bunreacht na hÉireann*), 1937

⁵¹⁹ Article 2 (first draft – non amended), Irish Constitution (*Bunreacht na hÉireann*), 1937

⁵²⁰ Article 3 (first draft – non amended), Irish Constitution (*Bunreacht na hÉireann*), 1937

⁵²¹ See: Paragraph 7, Chapter 1

⁵²² Judgement of ECtHR, *Ireland v. United Kingdom*, 18th January 1978 [online: www.cvce.eu]

⁵²³ See: Paragraph 7, Chapter 1

⁵²⁴ Good Friday Agreement, Draft Clauses (1.1), 1998 [online: www.dfa.ie]

⁵²⁵ Good Friday Agreement, Constitutional Issues (1)(vi), 1998 [online: www.dfa.ie]

Irish and Northern Irish provisions

Good Friday Agreement, Constitutional Issues (1)(iii)

[...] they will acknowledge that while a substantial section of the people in Northern Ireland share the legitimate wish of a majority of the people of the island of Ireland for a united Ireland, the present wish of a majority of the people of Northern Ireland, freely exercised and legitimate, is to maintain the Union and, accordingly, that Northern Ireland's status as part of the United Kingdom reflects and relies upon that wish; and that it would be wrong to make any change in the status of Northern Ireland save with the consent of a majority of its people.

Good Friday Agreement, Constitutional Issues (1)(iv)

[...] they will affirm that if, in the future, the people of the island of Ireland exercise their right of self-determination on the basis set out in sections (i) and (ii) above to bring about a united Ireland, it will be a binding obligation on both Governments to introduce and support in their respective Parliaments legislation to give effect to that wish;

Good Friday Agreement, Constitutional Issues (1)(v)

[...] they will affirm that whatever choice is freely exercised by a majority of the people of Northern Ireland, the power of the sovereign government with jurisdiction there shall be exercised with rigorous impartiality on behalf of all the people in the diversity of their identities and traditions and shall be founded on the principles of full respect for, and equality of, civil, political, social and cultural rights, of freedom from discrimination for all citizens, and of parity of esteem and of just and equal treatment for the identity, ethos, and aspirations of both communities;

Good Friday Agreement, Constitutional Issues (1)(vi)

[...] they will recognise the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland.

Good Friday Agreement, Draft Clauses (1)

It is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll [...].

Good Friday Agreement, Draft Clauses (2)

But if the wish expressed by a majority in such a poll is that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland, the Secretary of State shall lay before Parliament such proposals to give effect to that wish as may be agreed between Her Majesty's Government in the United Kingdom and the Government of Ireland.

Northern Ireland Act 1998, Part I – Section I (1) – Status of Northern Ireland

It is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purposes of this section in accordance with Schedule 1.

Northern Ireland Act 1998, Part I – Section I (2) – Status of Northern Ireland

But if the wish expressed by a majority in such a poll is that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland, the Secretary of State shall lay before Parliament such proposals to give effect to that wish as may be agreed between Her Majesty's Government in the United Kingdom and the Government of Ireland.

Irish and Northern Irish provisions

Northern Ireland Act 1998, Schedule I (1) – Polls for the purpose of section I

The Secretary of State may by order direct the holding of a poll for the purposes of section 1 on a date specified in the order.

Northern Ireland Act 1998, Schedule I (2) – Polls for the purpose of section I

The Secretary of State shall exercise the power under paragraph 1 if at any time it appears likely to him that a majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland.

Northern Ireland Act 1998, Schedule I (3) – Polls for the purpose of section I

The Secretary of State shall not make an order under paragraph 1 earlier than seven years after the holding of a previous poll under this Schedule.

Northern Ireland Act 1998, Schedule I (4.1.a) & (4.1.b) – Polls for the purpose of section I

An order under this Schedule directing the holding of a poll shall specify a) the persons entitled to vote and b) the question or questions to be asked.

Northern Ireland Act 1998, Schedule I (4.2.a) & (4.2.b) – Polls for the purpose of section I

An order a) may include any other provision about the poll which the Secretary of State thinks expedient (including the creation of criminal offences) and b) may apply (with or without modification) any provision of, or made under, any enactment.

Irish Constitution, Article 2

It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish nation. That is also the entitlement of all persons otherwise qualified in accordance with law to be citizens of Ireland. Furthermore, the Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage.

Irish Constitution, Article 3 (1)

It is the firm will of the Irish Nation, in harmony and friendship, to unite all the people who share the territory of the island of Ireland, in all the diversity of their identities and traditions, recognising that a united Ireland shall be brought about only by peaceful means with the consent of a majority of the people, democratically expressed, in both jurisdictions in the island. Until then, the laws enacted by the Parliament established by this Constitution shall have the like area and extent of application as the laws enacted by the Parliament that existed immediately before the coming into operation of this Constitution.

Sources: Good Friday Agreement, Northern Ireland Act 1998 & Irish Constitution; own reworked version.

By recognising that nationalist and unionist political aspirations [were] equally legitimate,⁵²⁶ the Good Friday Agreement openly sustained cooperation within the Northern Irish boundaries and development of cross-community support, which were indeed both equally fundamental in order to fully restore the peace in Northern Ireland and along the border.

⁵²⁶ Good Friday Agreement, Declaration of Support (5), 1998 [online: www.dfa.ie]

Nevertheless, as Brexit referendum occurred, although resulting in a general Northern Irish vote in favour of the “remain” option,⁵²⁷ old grievances – also proved by the opposing voting preferences (the main unionist parties voted for “leave”, while the nationalist ones expressed their preference for the “remain”) – and desire for unity surfaced once again.

Indeed, while most Unionists were supporting the “leave”, *Sinn Féin* members outlined their concerns regarding the possible re-establishment of a hard border between Northern Ireland and the Republic of Ireland and furthermore tried to set the basis for a new discussion on a united Ireland.⁵²⁸

Meanwhile, the British Government – hocked to oversee the first consequences of the outcome of the referendum – together with Unionist parties tried to hush up those new nationalist pushes, claiming that there was no reasons for Northern Irish citizens to change opinion regarding Northern Ireland’s belonging to the United Kingdom.⁵²⁹

However, despite Unionist and Conservative parties’ reluctance, Northern Irish opinion slightly shifted towards a smaller Unionist support, as evidenced by the outcome of Northern Ireland Assembly Election held on 2nd March 2017 which, albeit still registering a majority voting in favour of the DUP (28%), observed a 1.1% negative swing.⁵³⁰

Given the relatively negative result achieved by the DUP, *Sinn Féin* leader Michelle O’Neil⁵³¹ opted for getting the chance to call a Northern Irish referendum⁵³² on a united

⁵²⁷ See: Paragraph 1, Chapter 4

⁵²⁸ Rowley Tom, "United Ireland: now more likely than ever", The Telegraph, 25th June 2016.

⁵²⁹ “EU referendum: Theresa Villiers rules out *Sinn Féin*’s border poll call”, BBC News, 24th June 2016

⁵³⁰ Source: www.bbc.com

⁵³¹ Michelle Mary O’Neill served as Vice President of *Sinn Féin* since February 2018 and as Leader of *Sinn Féin* in the Northern Ireland Assembly since January 2017.

⁵³² Indeed, the Good Friday Agreement provides for a poll on Northern Ireland independence to be called by the British Governments if most voters prove to back a united Ireland, notably: 1. *The Secretary of State may by order direct the holding of a poll for the purposes of section 1 on a date specified in the order.* 2. *Subject to paragraph 3, the Secretary of State shall exercise the power under paragraph 1 if at any time it appears likely to him that a majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland.* 3. *The Secretary of State shall not make an order under paragraph 1 earlier than seven years after the holding of a previous poll under this Schedule.*

Good Friday Agreement, Draft Clauses – Schedule 1, 1998 [online: www.dfa.ie]

Ireland,⁵³³ thus following Scotland's First Minister Nicola Sturgeon,⁵³⁴ who indeed had analogously asked for a new referendum on Scottish independence.

Nevertheless, Northern Irish Secretary of State James Brokenshire,⁵³⁵ together with Unionists and Conservatives strongly opposed such hypothesis as – besides not appreciating the idea of a future united Ireland – he firmly believed that, *in primis*, being Nationalists didn't necessarily mean to be in favour of a United Ireland, and secondly, that *the conditions for calling a border poll on unification were not remotely satisfied*.⁵³⁶

Meanwhile, on the other side of the border, within the walls of Leinster square the hypothesis of a united Ireland has historically been welcomed. Indeed, shortly after the outcome of Brexit referendum the then *Taoiseach* and *Fine Gael* leader Enda Kenny⁵³⁷ immediately asked Northern Ireland about its position regarding a potential united Ireland, believing that any Brexit deal allowing *Northern Ireland to re-join the European Union should it be reunited with the Republic of Ireland*.⁵³⁸ Likewise, the Irish labour Party supported the idea of a united Ireland.

Ultimately, on the opposite shore of the Irish Sea, Labour leader Jeremy Corbyn⁵³⁹ has traditionally – albeit quietly – backed the hypothesis of having the island of Ireland as a unitary sovereign state.⁵⁴⁰

However, *should the people of Northern Ireland prefer to support a sovereign united Ireland, their choice should be exercised by majority*.⁵⁴¹

⁵³³ "Sinn Féin leader urges Northern Ireland referendum on UK exit", Deutsche Welle, 13th March 2017 [online: www.dw.com]

⁵³⁴ Nicola Ferguson Sturgeon served as the fifth and current First Minister of Scotland and as the leader of the Scottish National Party (SNP) since November 2014, being the first woman to hold either position.

⁵³⁵ James Peter Brokenshire is a British Conservative politician who served as Secretary of State for Northern Ireland (2016–2018), overseeing the Stormont deadlock.

⁵³⁶ "Nationalist and Republican voters do not necessarily want a united Ireland: James Brokenshire", The Irish News, 30th May 2017

⁵³⁷ Enda Kenny served as *Taoiseach* from 2011 to 2017 and as Leader of *Fine Gael* from 2002 to 2017.

⁵³⁸ Boffey Daniel, "Irish leader calls for united Ireland provision in Brexit deal", The Guardian, 23rd February 2017 [online: www.theguardian.com]

⁵³⁹ "Labour leader Jeremy Corbyn defends republicans Troubles meetings", BBC News, 7th September 2015

⁵⁴⁰ The left of the British Labour Party has increasingly provided support for a united Ireland and in the 1980s such support became official policy.

"The New Hope For Britain", Labour Party, 1983

⁵⁴¹ Good Friday Agreement, Constitutional Issues, 1998 [online: www.dfa.ie]

Thus, besides politicians support for either one of the two opinion, it is eventually up to public opinion to play a pivotal role.

Traditionally, since the signing of the Good Friday Agreement, Northern Irish opinion polls clearly showed a majority support of Northern Ireland keeping being part of the United Kingdom, albeit with slightly different approaches.

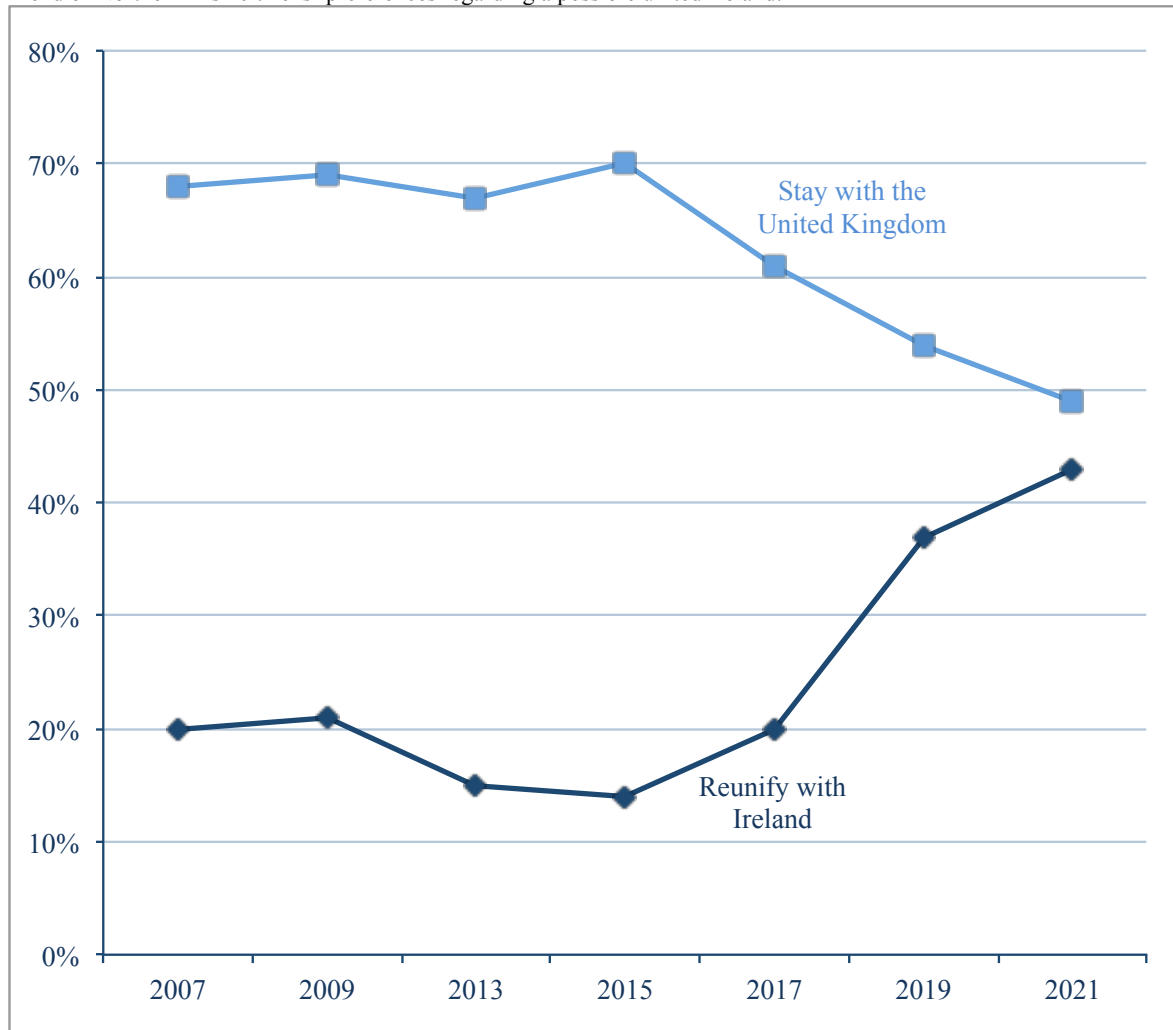
Results of Northern Ireland Life and Times surveys regarding Northern Irish long-term policies.

	Do you think the long-term policy for Northern Ireland should be for it...	%	Catholic	Protestant	No religion
2009	Remain part of the United Kingdom with direct rule	18%	8%	27%	20%
	Remain part of the United Kingdom with devolved government	51%	39%	64%	46%
	Reunify with the rest of Ireland	21%	40%	3%	16%
	Independent state	4%	5%	1%	7%
	Other answer	3%	3%	3%	7%
	Don't know	3%	5%	2%	5%
	Do you think the long-term policy for Northern Ireland should be for it...	%	Catholic	Protestant	No religion
2013	Remain part of the United Kingdom with direct rule	12%	6%	19%	15%
	Remain part of the United Kingdom with devolved government	54%	46%	66%	50%
	Reunify with the rest of Ireland	15%	28%	2%	11%
	Independent state	6%	8%	3%	6%
	Other answer	1%	1%	1%	1%
	Don't know	12%	12%	8%	16%
	Do you think the long-term policy for Northern Ireland should be for it...	%	Catholic	Protestant	No religion
2015	Remain part of the United Kingdom with direct rule	19%	6%	32%	15%
	Remain part of the United Kingdom with devolved government	51%	41%	61%	50%
	Reunify with the rest of Ireland	14%	32%	1%	9%
	Independent state	3%	4%	1%	5%
	Other answer	1%	1%	0%	2%
	Don't know	13%	16%	5%	19%
	Do you think the long-term policy for Northern Ireland should be for it...	%	Catholic	Protestant	No religion
2017	Remain part of the United Kingdom with direct rule	14%	6%	20%	18%
	Remain part of the United Kingdom with devolved government	47%	34%	64%	39%
	Reunify with the rest of Ireland	20%	41%	3%	14%
	Independent state	3%	3%	3%	4%
	Other answer	2%	1%	2%	2%
	Don't know	14%	14%	8%	22%

Source: www.ark.ac.uk; own reworked version.

Nevertheless short afterwards Brexit referendum, Northern Irish support for a reunification and for a Northern Irish referendum gathered larger support, albeit still facing Unionists' opposition, which in turn was partly derived from their firm belief that their own distinct identity would have been overcome within a united Ireland.⁵⁴²

Trend of Northern Irish citizens' preferences regarding a possible united Ireland.



Source: www.ark.ac.uk; own reworked version.

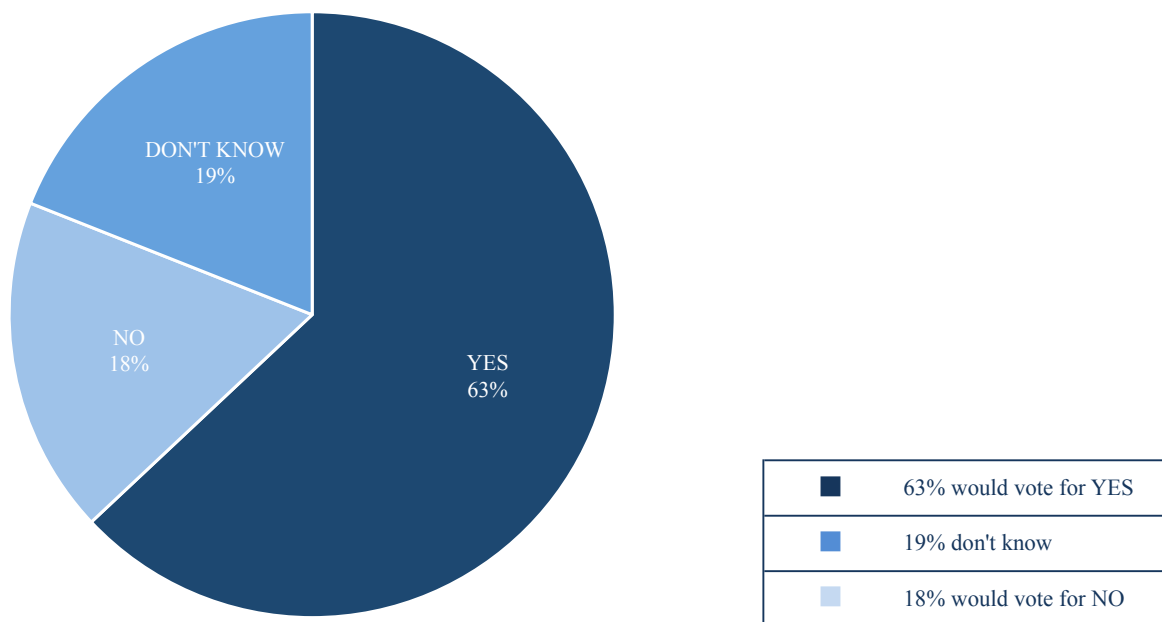
On the other hand, the Republic of Ireland proved to be a society having multifaceted opinions regarding the idea of a united Ireland. Tiny Protestant groups, a few lodges of the Orange Order and – surprisingly – some conservative Catholic writers (e.g. Desmond

⁵⁴² As an evidence of the correctness of their opposition, Unionists showed the negative outcome of such a union, which indeed seemed to be caused first and foremost by the economic cost of the union itself.

Fennell)⁵⁴³ traditionally opposed the hypothesis of reunification, despite supporting the rejection with different reasons, while *Sinn Féin* supporters always proved to be in favour of such a option.

Nevertheless, given the outcome of the referendum on UK EU membership, opinion polls suddenly changed. Remarkably, support for a united Ireland was characterised by a sharply positive trend, reaching, in 2019, 63%⁵⁴⁴ of favourable opinions.

Results of Amárach Research enquiry asking Irish people whether they would like to see a united Ireland in their lifetime.



Source: www.amarach.com; own reworked calculations.

In such a scenario echo the words of *Sinn Féin* leader Mary Lou McDonald. Strongly suggesting the idea of a unite sovereign state, Mrs. McDonald explicitly called for the Irish Government to convene a forum so as to analyse – and possibly plan – the hypothesis of a future united Ireland, stating that *it [would] be irresponsible and arrogant for a Dublin Government to shout down any prospects of a unity referendum*.⁵⁴⁵ Furthermore, committed to the feasibility of her aims and goals, *Sinn Féin* leader more than once described her ideal future unite Ireland, specifying that, should it ever happen, *the*

⁵⁴³ Notably, conservative Catholic writers didn't trust the idea of a united Ireland as it might cause a great increase of protestants living within the same borders, thus threatening *the Catholic nature of the Republic of Ireland*. Fennell Desmond, "Heresy: The Battle of Ideas in Modern Ireland", Blackstaff Press, 1993.

⁵⁴⁴ Opinion poll's result were provided for by Amárach Research and revealed by RTE's Claire Byrne Live on 19th February 2019,

⁵⁴⁵ Mary Lou McDonald's speech during "Beyond Brexit" Conference held in Belfast on 26th January 2019.

*Protestants, loyalist and unionist community [would still be] part of the fabric and diversity of [the Irish] nation, [being] part of the discussion in shaping [a] new Ireland and partners in building a new Ireland.*⁵⁴⁶

Nevertheless, many other politicians still have misgivings regarding a unity referendum as, although sustaining that *a meaningful reconciliation between the peoples of [the Irish] island remains [a] priority*,⁵⁴⁷ they still believe *that the right time for a border poll has not yet come*.⁵⁴⁸

Should it ever happen, Irish unity would mean a sudden change in direction but, should it happen pacifically, it would probably be one of the Good Friday Agreement's greatest success, not so much due to the union itself but because it would be both the proof of the achieved respect of the right of self-determination of the Irish people as whole and the evidence of the triumph of the efforts made in order to promote cross-border cooperation.

Moreover, in the event of a united Ireland the issue of the border would be faced more easily, at least from a legal and economic perspective, although questions may arise regarding the status of the six counties within a new unite sovereign Irish state.

Ultimately, as regards EU membership, being part of the Republic of Ireland, the Six Counties should be allowed to join the European Union – or at least be granted an ease of access⁵⁴⁹ – similarly to what happened in Germany when East Germany was allowed to join both West Germany and the then European Economic Community. However, former *Taoiseach* Enda Kenny's hopes,⁵⁵⁰ were finally confirmed by Brexit Secretary David Davis, who plainly stated that *Northern Ireland would have an automatic route back into the European Union if it were part of a united Ireland*.⁵⁵¹

Thus, should it ever happen, a united Ireland would probably be a EU member state as *the European Council [acknowledged] that, in accordance with international law, the entire territory of such a united Ireland would be part of the European Union*.⁵⁵²

⁵⁴⁶ Mary Lou McDonald's speech during "Beyond Brexit" Conference held in Belfast on 26th January 2019.

⁵⁴⁷ Colum Eastwood's speech at SDLP Conference held in Belfast on 9th April 2018.

⁵⁴⁸ Colum Eastwood's speech at SDLP Conference held in Belfast on 9th April 2018.

⁵⁴⁹ Rankin J., "Europe could allow a united Ireland to join EU after Brexit", The Guardian, 28th April 2017





⁵⁵⁰ Indeed, it was former *Taoiseach* Enda Kenny who suggested the German reunification as a precedent.
















Rankin Jennifer, "Europe could allow a united Ireland to join EU after Brexit", The Guardian, 28th April 2017





⁵⁵¹ "David Davis united Ireland letter shows Northern Ireland has automatic route back to EU: SDLP chief Eastwood", Belfast Telegraph, 28th March 2018.














⁵⁵² Rankin J., "Europe could allow a united Ireland to join EU after Brexit", The Guardian, 28th April 2017


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