

"Brexit and NI Employment Law – a proposal for an NI-specific framework to defend workers' EU rights?"

Paper by Ciaran White

Abstract

One of the many issues that gives rise to concern arising from the 'Brexit' vote is what it will all mean for those labour law rights that have been generated or influenced by EU law. Labour Lawyers recognise freely that EU law has had a considerable influence on the development of UK employment law: prior to 1973 it was still quite common for lawyers to describe the discipline as the 'Law of Master and Servant', reflecting its 19th century Victorian origins. Over that period, a wide range of EU directives setting out employment-related rights and entitlements have been promulgated. These include the Acquired Rights Directive, the Pregnant Workers' Directive, Part-Time and Fixed Term Workers' Directive, the Parental Leave Directive, the Working Time Directive, the Employment Equality and Equal treatment Directives, to name some. Many of these have found their expression in NI law as separate NI enactments. Some examples are the Working Time Regulations (Northern Ireland), Agency Workers Regulations (Northern Ireland) 2011, Part-time Workers etc... Regulations (Northern Ireland) 2002, but the range of NI-specific EU-generated legislation is quite extensive.

What will post-Brexit NI employment law look like and what will happen this 40-year-plus corpus of employment rights? What will be the status of past case law of the Court of Justice, and will future case law be relevant where EU-derived rights are retained? What will happen those rights that have been implemented by way of an UK Act of Parliament, such as the Equal Pay Act, if those Acts are repealed? The Assembly has devolved competence in the field of employment law and so is free to chart its own course, distinct from that of the rest of the UK. Can it be persuaded to retain those existing EU-derived rights already on the statute book and to carve out a declared position in relation to future EU employment law rights notwithstanding the final shape of Brexit, or will workers in NI be left to the mercy of the Assembly or dictated to by Westminster? Could any newly negotiated position arrived at by Assembly Parties in relation to EU law be enshrined within the existing constitutional legislative structure and/or in an amendment to the Good Friday/Belfast Agreement?

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Northern Ireland employment law statutes

Westminster's predominant approach to Northern Ireland employment law over the period since Common Market accession was to enact legislation that was territorially confined to Northern Ireland, keeping the employment law statute book separate and distinct from that applying in the rest of the UK, against the day when there would be devolved government. Because it was always anticipated that employment law would be part of the devolved government's competencies, separating out the NI labour law statutes was intended to make the task of amending them more straightforward and to avoid the difficulties of an NI Assembly having to amend a Westminster statute as it applied to NI, possible and all as this is. Thus, most of the Directives listed above, have found their expression in NI law as separate NI enactments. Some examples are the Working Time Regulations (Northern Ireland), Agency Workers Regulations (Northern Ireland) 2011, Part-time Workers etc... Regulations (Northern Ireland) 2002, Maternity and Parental Leave Regulations (Northern Ireland) 1999 and subsequent amendments, but the range of NI-specific EU-generated legislation is quite extensive.

Post-Brexit employment law landscape

What the post-Brexit employment law landscape will look like will depend on what type of Brexit is achieved: hard or soft, and what type of model is chosen: Norway, Norway-plus, Switzerland, Canadian, or something entirely bespoke. Assume for the moment that the model chosen contains no requirement to observe or implement EU employment law.

In that case, all EU labour law rights enacted into NI law as separate enactments - i.e. as Acts of the Assembly, Orders in Council, Acts of Westminster, or as secondary legislation enacted these instruments - would retain their applicability, save for those made under the European Communities Act 1972, to which I shall return. The direct effect of Directives and Treaty provisions would terminate and there would no longer be a requirement to ensure that domestic law was compatible with EU law. In such a scenario, there would be nothing

to prevent the amendment or repeal of legislation intended or understood to implement EU labour law rights.

Looking at the longer term, Parliamentary Sovereignty directs that the content of the statute book is a matter for Parliament but in NI's case, employment law is devolved. The option would be open to the Assembly to continue to implement EU employment law separately and distinctly from the rest of the UK as long as it was acting within the confines of the devolutionary structure, and again I return to that point later. I leave aside the issue of whether there would be political will to continue on this course, focussing for the moment on legislative competence, though inevitably one runs up to the frontier between legal and political matters.

Unravelling the detail

A few scenarios can be used to try to imagine what might happen in this Post-Brexit landscape and how certain developments might play out. So, let's imagine the following situations for the purposes of discussion:

1. A new EU directive is promulgated or revisions are made to an existing Directive in the employment field; eg **"proposal for a Directive amending the Posting of Workers Directive, with regard to the principle of subsidiarity, in accordance with Protocol No 2"**;
2. A NI Tribunal or Court is called upon to interpret EU-derived legislation on the basis of the existing corpus of EU law eg **Coleman v Attridge and associative disability discrimination**
3. A new judicial interpretation of existing EU law is tendered by the Court of Justice and an NI Tribunal or Court is required to interpret an EU- inspired provision in light of it eg **a new decision on whether perceived discrimination is outlawed by the existing EU directives, or that casts a gloss on Coleman v Attridge.**

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Even if the existing corpus of EU-influenced employment law is left untouched, what is to be made of revisions to existing EU law? Clearly, in the post-Brexit scenario assumed here there would be no imperative to adopt those revisions. But I suggest that there would be nothing to prevent the NI Assembly from doing so voluntarily. It may be necessary for lawyers – and ultimately the courts before which they appear - to remain aware of those changes, in any event, because the revisions themselves (or the reasons for them) may help the NI legal system better understand the pre-existing, residual EU law. But unless these new EU rules were adopted into NI law or the Assembly/Executive undertook to observe them, there would be greater divergence over time between NI and the EU law.

A NI Tribunal or Court is called upon to interpret EU-derived legislation on the basis of the existing corpus of EU case law e.g. Coleman v Attridge and associative disability discrimination.

Coleman v Attridge determines that a claim for associative disability discrimination can be made where a person is directly ill-treated on the grounds of another person's disability. Associative discrimination does not actually appear on the face of the Directive and certainly is not found in the DDA (though it is included in the Equality Act 2010 that applies in GB). Could one continue to base a claim of associative discrimination on 'Coleman' in the NI Industrial Tribunals? Only, I suggest, if the status of CJEU case law is statutorily protected or preserved. Without more, the Coleman judgement would become a judgement of a court whose decisions used to be binding in NI but no longer are, interpreting a Directive whose content had direct effect in NI but now ceased to apply. It is possible, I suppose, that the NI Courts would adopt the position that such case law continued to be very persuasive of the manner in which one would interpret NI law which was understood to conform to EU law.

A variation on this issue concerns the status of ECJ/CJEU case law that required a re-interpretation of domestic law in order to read it in an EU-compliant manner, but which never actually resulted in a statutory amendment? Does that case law continue to have that effect or is that effect lost once Brexit is achieved, assuming that the UK does not need to act in conformity with EU law?

In some instances, the reasoning and logic of CJEU jurisprudence has been explicitly relied upon in appellate court decisions, for example, [Seldon v Clarkson Wright & Jakes \[2012\] UKSC 16, \[2012\] 3 All E.R. 1301](#). As such, Lewis Silkin suggests that

"Possibly, UK courts would treat the fact they are no longer obliged to apply ECJ judgments as a materially different circumstance justifying a complete departure from previous rulings. It seems more likely, however, that they would continue with many established doctrines (if for no other reason than to preserve legal certainty) - possibly retreating from more extreme decisions which have required words to be read into legislation."

Silkin gives the example of the English Court of Appeal's decision in NHS Leeds v Lerner [2012] IRLR 825 in which the court had to read into the regulations¹ words that allowed a worker to retain entitlement to holiday pay accrued within a year where s/he was unable to take the annual leave owing to sickness. The question would be whether these interpolated words would continue to remain part of the Regulations post-Brexit, or whether the appellate courts would conclude that there was no longer the constitutional imperative to include them and thus they fell away. Silkin suggests that the need to maintain legal certainty might prompt the courts to consider that the words remain and but that "[t]here might be several conflicting lower court decisions until a case comes before the Court of Appeal or Supreme Court and a binding precedent is set."

Similarly, Emma Jane Flannery of Arthur Cox solicitors has identified another CJEU decision with which employers are unhappy, namely the "decision in Lock v British Gas Trading Ltd which held that an employee's holiday pay, which had been calculated solely on his basic

¹ WTR Reg 13(9)

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salary, ought to have included commission payments also. This, in turn, opened the door for thousands of workers, whose total pay is heavily reliant on commission or other supplements such as certain overtime payments, to claim such as part of their holiday pay. This decision and decisions relating to the right to accrue holiday whilst on long term sick leave have left many questions unanswered and increased costs for employers." The EAT's decision rests on a CJEU judgment arising from a reference to that court, which the EAT was, of course, obliged to observe. For the sake of legal certainty the NI tribunals might continue to observe that decision, but the imperative to do so would disappear.

In short, assuming that the Brexit agreement has nothing to say on the matter, we cannot be sure what the status of pre-existing ECJ/CJEU case law will be in the post-Brexit era.

A new judicial interpretation of existing EU law is tendered by the Court of Justice and an NI Tribunal or Court is required to interpret an EU- inspired provision in light of it eg a new decision on whether perceived discrimination is outlawed by the existing EU directives, or that casts a gloss on *Coleman v Attridge*.

And then let's take the matter a step further. If there is a future case law gloss or interpretation of the Directive, for example, which takes its cue from 'Coleman' and concludes that perceived discrimination is also outlawed by the Directive, is that decision to be followed in NI? Perceived discrimination (ie discriminating against someone because they are assumed to be disabled, for example) is not dealt with in explicit terms by the Directive or the DDA, just as associative discrimination is not specifically included in the text of either of those enactments. I have stated above that future case law of the CJEU is likely to be treated as persuasive, but in this case what would this actually mean?

Might it be that in order to adopt the persuasive judgment the court or tribunal would have to read words into the existing statute? This is something that is currently done where the necessity arises, and if it is possible, in order to ensure that the domestic law retains compatibility with the European law. Earlier manifestations of this approach – back in 1970s – proved politically controversial at the time but appeared to be the price a Member State had to pay in order to observe the new legal order emanating from the EU. Would that approach have democratic legitimacy or firm constitutional foundations? Expansive interpretation is one thing but reading words into a statute sails close to the wind because it appears a little too like the function of a democratically elected legislature. That is not to say it can't be done, and the common law is littered with examples of causes of action created and developed by the courts, where no such cause of action existed before. But would a NI court decide to follow the jurisprudence of a court whose dominion over NI law had been rejected in a popular UK-wide vote?

Implications for NI Equality Law

Clearly, EU law has had a particular and obvious impact on the equality laws applicable in NI and what would be the 'state of play' post-Brexit? At their recent appearance before the Women and Equalities Committee of the House of Commons, as part of its 'Impact of Brexit on the equalities agenda inquiry', Professors Aileen McColgan and Christine Barnard explained that in the course of its membership of the EU there were times when the UK was to the forefront of setting the pace of change in EU equality law and that equally there were

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times when it was dragged along reluctantly.² That inconsistent pattern is even more evident in relation to equality law matters in Northern Ireland: the Sex Discrimination Order was enacted one year after the equivalent GB statute; it took until 1997 for anti-racism legislation to be enacted for NI notwithstanding that there had been versions of such law applicable in GB since the 1960s; and who can forget the difficulties attending the development of 'fair employment' legislation, notwithstanding that it was always going to play a significant, positive, role in conflict management.

Indeed, it was instructive listening to their presentation how relevant are regional disparities within the development of equality law within the UK. For example, in explaining that there were some areas about which the government was more relaxed, they offered the example of sexual orientation. And so, in England Wales the enactment of same sex marriage legislation and the development of protection from sexual orientation discrimination has proven to be reasonably smooth. Contrast that with the situation in NI where only the use of the petition of concern by the DUP prevents the enactment of equivalent marriage legislation in NI to the Marriage (Same Sex Couples) Act 2013. And recall that the Sex Discrimination (Amendment of Legislation) Regulations 2008, enacted to comply with EU law, were adopted under the European Communities Act 1972, to make life easier for the DUP who appeared to have difficulties with legislation protecting transgender persons, perhaps misunderstanding the remit of the legislation to include sexual orientation.³

And this leads to a particular feature of the NI equality statute book that needs to be monitored: Because the Sexual Orientation Regs 2003 and the Age Regs 2006, for example, are enacted under the EC Act 1972, will they automatically be deemed to be repealed by the repeal of the 1972 Act? Can secondary legislation survive as an orphan if the parent legislation is repealed? Wade and Forsythe are clear that it can not.⁴

"When an Act is repealed, any rules or regulations made under it cease to have effect" [citing as authority *Watson v Winch* [1916] 1 KB 688] "despite the statutory saving clause for things done when the Act was in force" [section 16 of Interpretation Act 1978]. "But where the Act is repealed and replaced, with or without modifications, rules etc... made under it are treated as if made under the new Act so far as that Act gives power to make them." S17, 1978.⁵

This means that the simple repeal of the 1972 Act, without any more detail, would result in the automatic repeal of the following legislative enactments that apply in Northern Ireland, for example:

² 14th September, Room 6 Palace of Westminster. The purpose of the session was 'to consider the impact of Brexit on equality law and related measures in the UK and possible ways in which existing protections might be retained and enhanced under a new relationship with the EU'.

³ For details, see CAJ's Submission to DCAL on Irish Language Bill, May 2015, S443.

⁴ Administrative Law, 10th edition, p745.

⁵ It also cites *DPP v Jackson* 1990 88 LGR 876 and *Aitken v South Hams DC* 1995 1 AC 262 as examples where the courts might come to the rescue, though they suggest that the first of these is a strained interpretation.

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- Employment Equality (Age) Regulations (Northern Ireland) 2006, The Employment Equality (Repeal of Retirement Age Provisions) Regulations (Northern Ireland) 2011 and various amending Regulations;
- Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003
- Equal Pay Act 1970 (Amendment) Regulations (Northern Ireland) 2005, Equal Pay (Amendment) Regulations (Northern Ireland) 1996; Equal Pay Act 1970 (Amendment) Regulations (Northern Ireland) 2004
- Working Time Regulations (Northern Ireland) 2016
- Agency Workers Regulations (Northern Ireland) 2011
- Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations (Northern Ireland) 1999
- The Transfer of Undertakings (Protection of Employment) Regulations 2006; The Service Provision Change (Protection of Employment) Regulations (Northern Ireland) 2006; The Transfer of Undertakings and Service Provision Change (Protection of Employment) (Consequential Amendments etc.) Regulations (Northern Ireland) 2007; The Transfer of Undertakings and Service Provision Change (Protection of Employment) (Amendment) Regulations (Northern Ireland) 2011
- The Companies (Cross-Border Mergers) Regulations 2007
- The Posted Workers (Enforcement of Employment Rights) Regulations (Northern Ireland) 2016
- The Parental Leave (EU Directive) (Flexible Working) Regulations (Northern Ireland) 2013

(Admittedly, some of these enactments make minor amendments to existing NI legislation in order to ensure conformity with EU law, but all owe their origin to the 1972 Act).

Therefore, when Parliament comes to repeal the 1972 Act it must include saving provisions for the legislation mentioned above, or they will be automatically repealed. In the ordinary course, there is nothing unusual about repealing a parent Act and replacing it with a new Act under which the original secondary legislation is 'saved'. Indeed, that is the usual course of events. But that is not what will happen in relation to the 1972 Act. It is not to be replaced but repealed. There will be a great irony in the fact that the very Act of Parliament enacted to terminate EU involvement will also contain the mechanism by which certain EU-influenced legislation remains on the statute book. (In fact, in order to make the task manageable, the 'easiest' course of action might be for any such Act to simply continue the legal force of everything made under the 1972 Act, notwithstanding the fact that the Act would be repealing the 1972 Act!)

There is some recognition already that this must be done, if only for pragmatic reasons, in relation to a wide scope of EU-generated law. The view is that Parliament and the devolved legislatures will require time to decide what it intends to keep and what it intends to

discard. This is more than a technical drafting issue or a nerdy statutory interpretation point. There is a danger, unless the matter is carefully handled, that EU-generated legislative content will be repealed by default, and that expensive and time-consuming repairs needed to restore them to the statute book, assuming that the political will is there for them to be restored in the first place.

At the very least, one could anticipate that if the Regulations had to be re-enacted (by the Assembly) that the issue of exemptions for certain religiously-motivated employers would be raised. (In relation to the Sexual Orientation Regulations 2006 - dealing with discrimination in the provision of goods, facilities and services – these were enacted under the 2006 Equality Act by OFMDFM jointly, and so would not 'fall' on the repeal of the 1972 Act.)

More broadly, without the impetus of EU law, can the equality rights agenda in NI be maintained? The 'Single Equality Bill' had already been abandoned by the Executive it appears, judging by a response to an Assembly Question issued by FM and DFM on 9 November 2012. The extension of Age discrimination legislation to the 'GFS' sector was consulted on in 2015 as part of the PfG of the last Assembly but would this development run out of 'steam'? Would the Executive or the Assembly come under pressure to repeal some of the employment-related age discrimination provisions, such as the removal of the compulsory retirement age, which some employers consider create further work for them?

EU law as a form of super-constitutional law

As is well known, EU membership requires the UK to ensure that domestic law conforms to EU law, with the consequence that Directives must be enforced domestically. But the influence of EU law is felt not only in relation to the obvious content of those Directives. Even where the subject matter of a Directive does not obviously impact on an aspect of domestic law there may still be EU law issues to be considered. The classic examples of this I suggest are the cases of *Johnston v RUC* [1986] IRLR 263 and *R v Secretary of State for Employment ex parte EOC*.

The former concerned the national security certificate process issued by the NI Secretary of State to prevent a sex discrimination claim by female RUC part-time reservists being determined in the Northern Ireland Industrial Tribunals. Whilst EU law had little or nothing to say about how matters considered to relate to national security should be treated, it did require effective access to courts or tribunals in order to ensure that the content of the Directive could be enforced, a point the EOC(NI) successfully made before the ECJ. And so the SDO was amended in 1988 to bring it into conformity with EU law.

In a similar way, the EOC in GB leveraged the content of EU law to challenge the provision of domestic law that required part-time workers to have been employed for 2 years before availing of unfair dismissal law, whilst full-time workers were only required – at that time – to have worked for one year, as being indirectly discriminatory towards women.

In this sense, EU law has played a valuable role as a type of 'hard' constitutional law more recognisable to lawyers familiar with codified, supreme, constitutions and constitutional judicial review. That form of supra-national appeal to the Court of Justice would,

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presumably, disappear on completion of Brexit, in the sense that the right to refer to the Court of Justice would disappear, one imagines. However, the decision in *ex p EOC* was made not by the Court of Justice in Luxembourg, but the House of Lords in London, which decided that it was capable of deciding the matter without reference to Luxembourg and that it had to conclude as it did. Could such an approach continue to be taken? It could, but the significant difference would be that the Supreme Court would not be required to implement EU law if the repeal of the 1972 Act brings the direct effect of Directives and Treaty provisions to an end. The possibility of requiring domestic law to be measured for its compatibility against EU law would disappear.

But post-Brexit, could one call in aid the judgments of the CJEU in order to highlight an alleged limitation in between domestic law ie that it infringed the right to fair trial (Art 6 ECHR), as in 'Johnston' or was discriminatory (Article 14 ECHR), as in 'ex p EOC'? What then, is to be the currency of the jurisprudence of the Court of Justice, whether past or future jurisprudence, a theme broached previously above? One imagines that the future case-law of the Court of Justice will be considered to be persuasive only, but when lawyers use that term it can hide a multitude. For example, decisions of the Court of Appeal of England and Wales are persuasive only, and not binding, on the Northern Ireland Court of Appeal but woe betide the brave counsel who embarks on the task of persuading the latter not to follow decisions of the former. A decision which is technically persuasive can be pretty close to binding in practical terms, yet in other situations a persuasive decision is merely that.

I have already referenced the example of the Court of Justice's decision in *Coleman v Attridge* above, and speculated that while it might be technically considered to be persuasive, a NI Tribunal might not feel constitutionally empowered to adopt its reasoning when the diminution of the legal status of the decision owed its origins to the rejection of the supremacy of EU law in the Brexit vote? We simply cannot be sure at this point.

A modest proposal for the post-Brexit future

Let me, therefore, offer the following proposal. We know that employment law is a devolved competency so the content of labour law is a matter for the Assembly. And we are all aware that a majority of NI residents voted 'Remain' and all political parties active in NI, other than the DUP, and UKIP, to my knowledge, were pro-Remain.⁶

My suggestion then is that all the pro-Remain political parties pledge themselves to preserve the existing EU-generated employment rights as they are found in the NI labour law statute book. I envisage a campaign in which those political parties publically commit themselves not to amend or repeal any one of a list of legislative enactments that have been adopted in order to comply with EU law. (Where the EU-generated right has been

⁶ Moreover, a range of these parties – notably the SDLP, the Alliance, Sinn Féin and Green Parties – are active in the mooted judicial review challenge to the implementation of the *Brexit* referendum, (along with notable individuals or organisations such as Disability Action's Monica Wilson along with CAJ). See *In the matter of an application by Steven Agnew, Colum Eastwood, David Ford, John O'Dowd, Dessie Donnelly, Dawn Purvis, Monica Wilson, the Committee on the Administration of Justice and the Human Rights Consortium for leave to apply for judicial review.*

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transposed by a UK-wide enactment, the parties would pledge themselves to preserve the status quo by enacting NI-specific enactment that would replicate the content of that UK-wide enactment in the event of the repeal of the latter by Westminster.) It would be a type of jointly-made, publicly promulgated, manifesto commitment amounting to a positive step by those political parties. It is a step within their gift to make. It would represent a real and practical effort to protect the interests of the majority in NI who voted 'Remain'. It might, if political parties were unwilling to sign up to an open-ended commitment to never alter those rights, be limited in the first instance to the mandate of this Assembly, with the idea that it would be open for re-negotiation for each subsequent Assembly mandate. I accept that it would be very unlikely to have any legal enforceability but it would represent a proactive and mature response to the uncertainty created for NI by the Brexit vote. No doubt it might also flush out those whose angst about the referendum result is no more than pointless handwringing or opportunistic political posturing and who are not prepared to do anything about it. The campaign would be bested spearheaded, in my view, by the trade unions or perhaps the Northern Ireland Committee of ICTU (NIC-ICTU), and the resultant pledge 'published' across real and virtual media.

Indeed, it would be open to the Assembly to continue to enact legislation implementing EU law. The Northern Ireland Act 1998 whilst excluding 'international relations' from the Executive and the Assembly's competence makes an exception for "observing and implementing international obligations, obligations under the Human Rights Convention and obligations under Community law."⁷ This provides the devolved institutions with the competence to steer a course that continues to implement EU law in Northern Ireland, notwithstanding Brexit.

That would be no guarantee that Westminster wouldn't 'reach in' statutorily and repeal or amend employment legislation with which it was unhappy, or that it would not remove employment law from the fields of devolution nor that it would not enact laws for the entirety of the UK or for NI alone, subject to the constitutional convention about securing the Assembly's consent to legislate on a devolved matter.

Additionally, section 14 (5)(b) Northern Ireland Act 1998, contains a power allowing the Secretary of State to decide to refuse to submit for Royal Assent, a Bill duly passed by the NI Assembly that he considers contains a provision which 'would have an adverse effect on the operation of the single market in goods and services within the United Kingdom'.⁸ It is

⁷ Northern Ireland Act 1998, Schedule 2, para 3.

⁸ There is no direct, Scottish equivalent, the nearest similar provision being section 35, Scotland Act 1998: "If a Bill contains provisions (a) which the Secretary of State has reasonable grounds to believe would be incompatible with any international obligations or the interests of defence or national security, or (b) which make modifications of the law as it applies to reserved matters and which the Secretary of State has reasonable grounds to believe would have an adverse effect on the operation of the law as it applies to reserved matters, he may make an order prohibiting the Presiding Officer from submitting the Bill for Royal Assent." And the nearest Welsh equivalent appears to be section 114, Government of Wales Act 2006: "(1) This section applies if a Bill contains provisions which the Secretary of State has reasonable grounds to believe (a) would have an adverse effect on any matter which is not listed under any of the headings in Part 1 of Schedule 7 (or falls within any of the exceptions specified in that Part of that Schedule), (b) might have a serious adverse impact on water

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difficult to ascertain definitively why this provision appears in this way in the NI devolutionary scheme but we can speculate that it is intended to deny the Assembly the opportunity of advancing the interests of NI at the (apparent) expense of other UK regions. This provision could be utilised to effectively veto any employment legislation that might be perceived as giving NI a competitive advantage, but its use would be politically charged, and open to challenge in judicial review.

Could any newly negotiated position arrived at by Assembly Parties in relation to EU law be enshrined within the existing constitutional legislative structure and/or in an amendment to the Good Friday/Belfast Agreement?

Whilst there would be nothing to prevent the Assembly parties agreeing to maintain the content of EU labour law in present enactments or to prevent them agreeing to implement the content of EU labour law in the future i.e. to mirror changes and developments in EU law, save for the power of the SOS for NI to intervene as explained earlier, what would be the legal mechanism by which that might be enshrined, assuming that there was political agreement to do so? One approach might be a St Andrew's Agreement-type approach, having Westminster enact enabling primary legislation facilitating and enshrining such an agreement. It might not be necessary to adopt that approach and in any event, neither of the two Governments would be keen. An alternative approach would be for Assembly to enact legislation providing for the state of affairs I am suggesting, i.e. the continuance of EU labour law in NI law and perhaps, committing the Executive to enacting the content of future EU labour law developments into NI law. Harvey and Dickson's May 2013 paper⁹ points out that there is already an example of a NI legislative enactment that invokes international law norms, namely the NI Commissioner for Children and Young People (Northern Ireland) Order 2003, which provides that the Commissioner should always 'have regard to' the UN's Convention on the Rights of the Child. Likewise, they point out, when it created the post of Commissioner for Older People in 2011 the Assembly insisted that the person appointed should 'have regard to' the UN's Principles for Older Persons. Indeed, Harvey and Dickson suggested that one option open to the Assembly in terms of enhancing Human Rights protection would be to enact what they termed the 'Human Rights (Miscellaneous) Provisions Act (NI)' to be read in conjunction with the HRA 1998 and 'filling in gaps' in human rights protection not dealt with by the HRA.

Conclusion

To conclude, I simply summarise the detail outlined above.

- Legislative enactments made under the EC Act 1972 will fall unless some saving action is taken at the time.

resources in England, water supply in England or the quality of water in England, (c) would have an adverse effect on the operation of the law as it applies in England, or (d) would be incompatible with any international obligation or the interests of defence or national security. (Underlining added)

⁹ A Discussion Paper: Enhancing the protection of human rights and equality in Northern Ireland: Options for the Way Forward

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- Legislative enactments made in other forms will survive Brexit and so those labour law rights will continue unless they are repealed or otherwise amended. If they are repealed by Westminster, it is open to the Assembly to re-enact them, subject to the ability of the SOS for NI to prevent their reenactment because she concludes that it is detrimental to the single market within the UK. If the labour law rights are found in NI-specific legislation, the consent of the Assembly is required before Westminster chooses to enact any legislation that interferes with them, but the absence of that consent would not affect the validity of any Westminster legislation.
- Without more, post-Brexit, the Treaties and Directives of the EU would have no compelling force in NI labour law. The capacity to leverage EU law as a form of supervening constitutional law would be gone. And the value and applicability of the case law of the CJEU would be questionable and may be too difficult to predict at this remove.

But EU labour law rights only ever provided a minimum floor of rights that a Member State had to observe. There was never any prohibition on enhancing those rights. Nor would there be, it seems to me, any constitutional prohibition on the NI Assembly continuing to observe the content of EU labour law as it applies to NI or even adopting legislation that committed itself to doing so.

The capacity for divergence between the employment law rights in NI and GB has always existed, but, to date, has been subject to the requirement of the UK government to ensure that that the entirety of UK law was in conformity with EU law. The power to diverge, so to speak, rests primarily with the NI Assembly, subject to the limitations of the devolutionary settlement. That power to diverge will expand, assuming that the post-Brexit landscape does not require the UK to adhere to EU law. It is open to the Executive and the Assembly parties to declare what their attitude is to be to EU labour law strictures in the future and to those imposed in the past.

Aside from reflecting the democratically expressed wish of the majority of the people resident and working in NI, such an approach would also (hopefully) preserve the progressive influences that have emanated from Europe through the decades. It is true that some progressive features of UK employment law are not due to the influence of Europe, but it is worth remembering that when the UK and Ireland joined in 1973 both countries still operated a 'marriage bar' and in NI, in particular, the old Stormont Parliament's Department of Manpower Services operated the Safeguarding of Employment Act 1947 by which all persons coming to NI, no matter where they came from or no matter their nationality, were only allowed to work in certain positions – nursing, for example - if they secured permits to do so. The UK's Treaty of Accession allowed for the continuation of this Act by agreement with the Common Market, for 5 years, but the decision was eventually taken in 1977 to abandon it.¹⁰ Like the 'marriage bar', it was outdated. The winds of change sweeping across Europe helped blow them away. That sort of progressive force is worth retaining.

¹⁰ *HC Deb 10 February 1977 vol 925 c799W It lapsed on 31/12/1977/*

'Brexit and Rights: Discussion seminar on the human rights and equality implications of the EU referendum', MAC Belfast, 27th September 2016

