

# Legal Convergence and Divergence on the Island of Ireland

Report of the North-South Legal Mapping Project to the Shared Island Unit



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<b>Executive Summary</b>	<b>3</b>
<b>Introduction</b>	<b>5</b>
<b>Scope of Project</b>	<b>7</b>
<b>Key Trends</b>	<b>9</b>
Overview	9
Legislative versus judicial intervention	9
Importance of legal procedures and practices	10
Relevance of social context	10
Different modes of legal-political engagement	11
Continued relevance of EU law	11
Dearth of cross-reference between jurisdictions	11
<b>Principal Lessons from Each Legal Area</b>	<b>12</b>
Law and religion	12
Citizenship	12
Private law of obligations	13
Administrative law	13
Employment law	14
Health law	14
Land and land use law	15
Human Rights law	15
<b>Future Research</b>	<b>17</b>
<b>Appendix</b>	<b>18</b>
Members of NSL Map	18
Workshop Discussants	18

## Executive Summary

Legal systems, legal knowledge and legal networks have significantly diverged between Ireland and Northern Ireland for a century. Gaps in knowledge and mutual understanding render it difficult for individuals and businesses who live, work, and operate on a cross-border basis to plan their affairs. These gaps also make it difficult to ascertain the possible implications of Irish unification.

The North South Legal Mapping Project (NSLMap) assembles matching legal experts across the two jurisdictions to benchmark and assess divergence and convergence in eight legal areas:

- Law and religion
- Citizenship law
- Administrative law
- Private law of obligations
- Employment law
- Health law
- Land and land use law
- Human rights law

The research identifies that divergence is more prevalent in areas that are primarily governed by legislation rather than by common law. This reflects the open-ended policy choices open to legislators in contrast to the precedent-based decision-making of judges.

In areas more governed by judicial decisions, there are varying levels of alignment between the two jurisdictions. High levels of alignment arise where the courts in Dublin as well as Belfast treat the judgments of English courts as persuasive, rather than because of direct cross-reference between the Irish and Northern Irish courts.

Social context and procedural practices also affect the extent of convergence. On the one hand, where the law responds to different social contexts, different results are to be expected: for instance, the role of religion as a marker of political identity in Northern Ireland. On the other hand, even where substantive law is similar, procedural rules and practices in Northern Ireland may make litigation easier in Northern Ireland than Ireland, in turn expanding the possibilities for legal development.

Lawyers frequently look to legal developments in other jurisdictions to help make arguments and decisions about how their own jurisdiction should develop. But there is remarkably little cross-reference between lawyers, legislators, policymakers, academics, and judges in the two jurisdictions on the island. The legal border in the mind is as significant as the legal border on the ground.

Addressing this lack of cross-jurisdictional awareness is a significant challenge for legal educators, legal researchers, and the funding bodies with the capacity to incentivise different research objectives.

The experience of NSLMap suggests that future general research into legal convergence and divergence on the island would best be undertaken on a topic-by-topic basis. This would allow greater depth and focus. There is a particular need for comparative research on the core questions of public law, ranging over several doctrinal areas, that would be centrally implicated in any process of Irish unification.

## Introduction

Legal systems, legal knowledge and legal networks between Ireland and Northern Ireland have, notwithstanding many points of convergence occasioned by common membership of the EU and the Council of Europe, significantly diverged for a century. Sharing a common starting point in 1922, each jurisdiction on the island has since taken its own path with little reference to the other. The potential divergence was lessened by the common requirement – for nearly 50 years – to follow EU rules as well as the practice – even in Dublin – for courts on the island of Ireland to treat the reasoning of English courts as persuasive in some fields. These points of convergence have not, however, arisen as a result of any attempt by the law in one jurisdiction to take account of the law in the other jurisdiction. The legal border on the island reflects and is reflected in a border in the minds of many – if not most – policy-makers, legislators, lawyers, academics and judges.

As our common EU membership ends (albeit with continuing issues surrounding the effects of the Ireland-Northern Ireland Protocol) and as debates about future North-South and East-West relationships increase, gaps in knowledge and mutual understanding pose significant challenges on our shared island. They render it difficult for individuals and businesses who live and work on a cross-border basis to plan their affairs. They intensify the implications of Brexit. And they obscure the possible implications of Irish unification. The aim of this North South Legal Mapping Project (NSLMap) project has been to begin to bridge that knowledge gap and promote greater mutual understanding.

Given the complexity and perhaps sensitivity of such an exercise, it is essential to foreground that NSLMap has no position on the constitutional future of our shared island. The analysis undertaken is relevant irrespective of what constitutional future unfolds. We undertake our work in the spirit of the Belfast-Good Friday Agreement (the 1998 Agreement), which fundamentally reordered relationships within Northern Ireland, between Northern Ireland and Ireland, and between Ireland and the United Kingdom, underpinned by strong human rights commitments.

The present wish of a majority of the people of Northern Ireland is to maintain the Union with the United Kingdom. Whilst fully respecting that wish, Irish unification is also a legitimate constitutional aspiration. Both aspirations are protected under the 1998 Agreement. Whichever is realised, the analysis of NSLMap is relevant. If the border remains, some issues – such as river-basin management – would benefit from legally enabled cross-border co-operation. Those who live, work, or operate commercially on both sides of the border need to know how their legal rights and obligations differ. If unification is contemplated, the identification of legal divergence will help citizens in both jurisdictions form their views on unification, whether for or against. If unification occurs, policymakers will need to know how the law differs between the two jurisdictions.

NSLMap is the first attempt – since a report prepared by Prof KS Boyle and Prof DS Greer on ‘The Legal Systems, North and South’ for the New Ireland Forum in 1983 – to map the

divergences and convergences between multiple areas of law in the two legal jurisdictions on the island of Ireland. It uniquely assembles 'matching' legal experts across the two jurisdictions to benchmark and assess divergence and convergence in legal areas. It opens up an important legal conversation on the island, advancing legal certainty, predictability and knowledge-sharing. It provides answers to highly practical questions as people try to plan their business and personal lives, as well as for policy-makers who seek to manage and respond to legal divergence. In the post-Brexit world, as discussions on the future of Northern Ireland intensify, NSLMap provides a clearer knowledge base for discussions premised on legal convergence or divergence.

Most of the legal experts writing papers considered this the first time North-South comparative work of this nature was being undertaken in their respective fields. The Northern / Irish Feminist Judgments Project showed how the border can be a starting point for productive deliberation and reflection. But when legal analysis grapples with distinct doctrinal areas, the border in the minds has been as significant as the physical border. NSLMap begins to tackle that mental border by bringing together a network of subject-experts who in the future are more likely to take account of the other jurisdiction in their own research and, we hope, collaborate on further exercises of cross-border comparison.

This Report sets out the scope of the project and some key trends drawn from the eight papers, before presenting the most significant findings of each paper. It concludes by identifying the scope for future research. We wish to thank all members of NSLMap for their commitment to the project and insightful analysis, the discussants at each workshop for the provision of penetrating critique, Bróna McNeill and James Rooney who provided invaluable research assistance to the project, and the Trinity Centre for Constitutional Governance and the Senator George J Mitchell Institute for Global Peace, Justice and Security at Queen's University Belfast for supporting the project. We are grateful to the Irish Research Council and the Shared Island Unit in the Department of An Taoiseach for providing the funding that has enabled this research.

## Scope of Project

NSLMap focuses on eight different areas of legal activity:

- Law and religion
- Citizenship law
- Administrative law
- Private law of obligations
- Employment law
- Health law
- Land and land use law
- Human rights law

These areas of legal activity were chosen in order to explore various dimensions of convergence and divergence. NSLMap focuses on how Northern Ireland and Ireland have developed along legally different trajectories, giving rise to contemporary challenges for cross-border commercial and economic activity and environmental protection, and to divergences that could become significant if unification were to become more likely than it appears to be at the time of writing.

If there is no change to the constitutional status of Northern Ireland, however, legal divergence between Ireland and Northern Ireland may also result in significant barriers to such cross-border commercial and economic activity, as well as to family and social life. To plan their affairs and to ensure legal stability in economic relations, businesses, employers, employees, citizens, and non-citizens all need to know if their rights and obligations diverge or function differently on each side of the border. The project explores issues of this type principally in the context of the private law of obligations, health law and land law.

The departure of the UK from the EU formally removes a supranational framework for the management of cross-border environmental challenges, with much weight now being borne by the status of retained EU law in the UK and bilateral UK-Ireland relationships. This issue is explored in the context of land use law, taking river basin management as a pressing example.

Under the 1998 Agreement a complex treaty underpinned by substantial international law and human rights commitments and reinforced by the Ireland-Northern Ireland Protocol to the UK-EU Withdrawal Agreement, both Ireland and the UK are subject to a range of human rights obligations. The project explores the divergences and convergences between the institutional structures and normative frameworks on both sides of the border for the enforcement of human rights.

If Irish unification were to be approved in accordance with the terms of the 1998 Agreement, the management of legal divergence would be a significant challenge for the newly unified state, whatever form that unification might take. NSLMap's legal analysis provides a baseline that would allow policymakers to assess the extent of the challenges that would arise in



pursuing legal convergence, and over what timescale. More specifically, citizenship of and associated political rights in any unified state would pose significant challenges given the commitments in the 1998 Agreement to respect Irish and British identities in any future constitutional future.

The exercise of religious freedom and belief has played a significant role in the political evolution of both jurisdictions and, for better or worse, has had an unstinting association with the cleavages of the conflict in Northern Ireland. Far-reaching legislative and constitutional changes adopted in recent years have reshaped the social and legal conversation about religious belief, practice and influence on public policy and law: an exploration of the interactions between law and the regulation of religion and belief in the two jurisdictions identifies important trends in democratic politics.

The members of NSLMap are a diverse group of academics based on the island of Ireland with relevant jurisdiction-specific expertise in one or more of the topics within the remit of the project. The diversities contained in the group include gender, religion, citizenship, subject-matter expertise, geographical as well as institutional affiliation. We recognise that an even broader range of identity and experience markers would add to the depth and range of experiences reflected in the academic group and hope future work in this space will seek these out to enhance and extend the conversations commenced here. Two or more academics collaborated on each paper, one from Northern Ireland and one from Ireland. Each paper was then discussed at a dedicated workshop, with NSLMap members being joined by two subject-matter experts who provided focused critiques of each paper. The authors of the current report formed a steering group for the project, selecting topics, identifying potential participants, providing feedback to authors, and participating in the dedicated workshops. The revised papers will, subject to peer review, be published in the ARINS series over the next six months.

## Key Trends

### Overview

The experts across all subject-areas agreed that one academic paper could only scratch the surface of legal convergence and divergence between the two jurisdictions. Even a book length treatment of each area of law would struggle to present a comprehensive account of the law in two jurisdictions. Nonetheless, it was possible to focus on areas of particular importance that enabled the identification of broader trends.

### Legislative versus judicial intervention

Divergence is more prevalent where legislatures have intervened than where legal developments have been court-driven. This probably reflects, on the one hand, the conservative orientation of precedent-based decision-making and, on the other hand, the challenges of complex politics driven by voting cycles and the need to respond to pressing challenges across the two jurisdictions. While legislatures make new laws to secure new policy objectives, courts fashion new responses by developing existing legal principles.

Within areas where common law predominates, there are varying patterns of divergence. In this regard, three-way comparisons between Ireland, Northern Ireland, and England and Wales are instructive. (Scotland is a civil law system so comparison is less apposite.)

Within the domain of land ownership, for instance, the law had developed differently in Ireland, prior to 1922, compared to England and Wales, reflecting the different colonial history and consequential differences in the social context and function of land ownership. Post-1922, there remained many similarities between the two jurisdictions on the island, although Ireland's Land and Conveyancing Law Reform Act 2009 has more recently introduced some significant differences.

Similarly in administrative law, the principles of judicial review of administrative action have remained largely the same, although again this is largely due to the way in which the reasoning of the courts in both Belfast and Dublin are influenced – albeit in different ways and to different extents – by judgments delivered in London. Contract law has remained closely aligned between the two jurisdictions, although – NSLMap's survey suggests – this is largely a result of each jurisdiction following the lead of London rather than having regard to each other. In tort law and the common law elements of health law, there are a few respects in which the Irish courts have developed doctrines that are more favourable to plaintiffs than is the case in Northern Ireland, which again largely follows the law in England and Wales.

Where statutory decisions are in issue, divergence has been greater. As we have seen, divergences in areas of land law have mostly been prompted by Ireland's Land and

Conveyancing Law Reform Act 2009. In citizenship law, although each jurisdiction has since, in response to common perceived externalities, restricted the *ius soli* entitlement to citizenship, there have been marked divergences with Ireland opting for very broad criteria for access to citizenship in the 1950s. As in so much else, Brexit may lead to further practical divergence, with Irish (but not British) citizens continuing to benefit from EU citizenship. Divergence on citizenship law is of particular importance in the context of possible unification given the obligations in the 1998 Agreement for the entity holding sovereign power over Northern Ireland to respect political equality between different national identities.

### Importance of legal procedures and practices

In some areas while the substantive law remains very similar, procedural rules and institutional methods can lead the two legal systems to operate very differently in practice. Administrative law is a case in point. Due to a range of measures – costs rules, standing requirements, possibilities for litigation funding, the differing approaches of bodies such as the Northern Ireland Human Rights Commission and the Irish Human Rights and Equality Commission – access to the courts is much more easily attainable in Northern Ireland. As a result, one sees many big political questions being litigated through the courts there in a way that, while prevalent in the latter half of the 20th century in Ireland, has rarely happened in more recent decades. Examples include cases relating to aspects of the 1998 Agreement and, more recently, Brexit (*Alister, Miller, McCord*), as well as contentious social-moral issues such as equality and free speech, abortion, same-sex marriage (*Asher's Bakery, NIHRC litigation, Family Planning Association of Northern Ireland v Minister for Health, SPUC, The Christian Institute's Application for Judicial Review*). This undercuts characterisation of Ireland's constitution as more *legal* than the UK's political constitution (at least as it operates in Northern Ireland).

### Relevance of social context

In some areas, the law has responded to very different social settings. Religion is a case in point. Both jurisdictions have been deferential to the religious practices of mainstream Christian denominations. But in Northern Ireland, religion has been a marker of ethnic and political identity. This saw the early emergence of religion as a prohibited ground of discrimination in the employment context (Northern Ireland 1970s; Ireland 1998). But the religious-ethnic-political divide has given religion a continued salience in the North as the legal system in the South has increasingly secularised.

### Different modes of legal-political engagement

There are markedly different modes of legal-political engagement in the two jurisdictions. In Northern Ireland, litigation continues to be an important political tool for those advocating or resisting social change – whether from a progressive or conservative perspective – but it has often fallen to the Westminster Parliament to enact change. In Ireland, there has been an increasing tendency for popular social change movements to find expression through legislation and constitutional referendums, on issues such as divorce, abortion and same-sex marriage, with the courts playing a lesser role. To some extent this reflects the issues of public controversy in question, where constitutional amendment by referendum was necessary to achieve change. However, it also reflects the Irish courts having become markedly less activist in recent decades. While there have been cases with political objectives and implications, they play a less significant role than they did in the 1960s-1980s and than they currently appear to play in Northern Ireland. These trends may change, but they may also come to be embedded as the received wisdom of how political change is to be advanced, contributing to further divergence between the jurisdictions.

### Continued relevance of EU law

Almost 50 years of EU law has left an indelible mark on both legal systems. As a result, in areas such as environmental law and employment protection, there remains substantial convergence between the two jurisdictions. That said, the UK's departure from the EU raises the possibility of significant regulatory divergence, whether through deliberate decision or drift. This is of particular concern in areas such as river basin management, where the legal measures in place – on both sides of the border – may not be adequate to allow for the sort of integrated planning of river basins that is required, and human rights protections, where the hostility to European-derived and enforced rights has contributed to proposals to weaken or remove ECHR-derived protections, in addition to those deriving originally from the EU.

### Dearth of cross-reference between jurisdictions

There is remarkably little cross-reference between the two legal systems. This is reflected in a dearth of cross-jurisdictional citations in judicial decision and academic commentaries. The project identified some areas where lawyers in Northern Ireland would have good reason to cite Irish cases (because they are on-point and could be useful to their clients) with no legal impediment to doing so (cross-jurisdictional citation between common law jurisdictions is uncontroversial) but the citations do not occur. This lack of cross-jurisdictional awareness raises questions for legal education on both sides of the border, in terms of equipping future lawyers with the requisite knowledge, skills, and sense of appropriate reference points.

## Principal Lessons from Each Legal Area

### Law and religion

In both jurisdictions, organised religion was a dominant social, political, and cultural force. The most important changes in Ireland included, after decades of highly repressive regulation, relaxations on the availability of contraceptives, and the referendums on divorce, same-sex marriage, and abortion. Similarly, in Northern Ireland, legislative changes were introduced regarding divorce, same-sex marriage, and abortion in which equivalent tensions between religion and law arose. Perhaps paradoxically, what were sometimes seen as 'British' social changes in some of these areas came into Northern Ireland not as the result of Unionists pressing for equivalence with Britain, but as the result of Nationalists seeking equivalence with Ireland over the opposition of Unionist politicians.

In other respects, however, there has been considerable divergence in how each jurisdiction coped with changes in the relationship between law and religion. In Ireland, the dominant narrative in this period has been the working out of a post-Catholic constitutional and legal space, with secularism as a major challenge to religion in the public sphere. The collapse of public support for the Catholic hierarchy in Ireland, accelerated by the revelation of institutionalised child abuse, resulted in a partially successful challenge to the exercise of ecclesiastical power in the context of schools and hospitals. This has not (yet) transpired in Northern Ireland to the same degree.

### Citizenship

Long-term relationships between the UK and Ireland have conditioned special statuses and inter-relationships for citizens in both parts of the island of Ireland. In Ireland from initial expressions of new citizenship found in Article 3 of the Free State Constitution through to the Irish Nationality and Citizenship Acts, there has been an interplay between birth and descent, naturalisation and residence that provides a framework for the development of a relatively distinctive conception of what it is to be an Irish Citizen. In Northern Ireland classic British conceptions of citizenship have mutated into more hybrid or plural conceptions with the 1998 Agreement providing an important landmark in moves towards more protean understandings that might better suit an evolving polity.

All this has been complicated by Brexit. While the Common Travel Area remains, and there are various dispensations for Irish citizens living in the UK and British citizens resident in Ireland, new layers of complexity and uncertainty are emerging. These are entwined with wider political issues, but it appears that many of these essentially practical issues can be resolved (in the Protocol or elsewhere). There are, however, more compelling questions beyond lawyerly fixes. These are accentuated by increased speculation about the constitutional future of Northern Ireland. New evidence about the unwillingness of people on

both sides of the current border to make significant adjustments to allow different understandings of citizenship to take root are not encouraging. Nonetheless these deeper questions about what lies beyond remain to be answered. What are the alternative visions of citizenship that face people on the island of Ireland – north and south? How do they relate to culture and identity, and what is the role of constitutional law in underwriting them?

### Private law of obligations

The private law of obligations is significantly a creation of common law and consists primarily of the law of contract and the law of torts. Given its common origins in English common law, it is not surprising that there was and remains significant convergence between Northern Ireland, Ireland, and England and Wales in these areas of legal practice. That said, however, this high degree of convergence is sometimes assumed to be greater than it is. While it is the case that there are many instances in both jurisdictions where the law is similar if not identical to England, there are also enough differences to caution against assuming the English rule as the default position. On some occasions, north and south have converged with each other, or stayed the same, whilst England and Wales have diverged. In other cases, Northern Ireland, particularly in dealing with Troubles-related issues, forged a path that Ireland (and also England) have not followed, but might profitably do so. Overall, however, the extent of divergence or convergence is unclear because much of the law of obligations in Northern Ireland remains an enigma, either because no relevant case has come before the courts or because figuring out which statutory provisions apply is complex and uncertain. To some extent this is also the case in Ireland where, while there is more case law and legislation is more accessible, the law of England and Wales can still be assumed to carry greater weight than may transpire to be the case when a judicial decision on a particular question is delivered.

### Administrative law

In terms of administrative law, or judicial review of administrative action, there is very substantial core similarity between the two jurisdictions. The grounds of review—the bases on which a legal challenge can be taken to an administrative act or decision—are basically the same, with only a small number of differences between them. Fair procedures, unlawfulness, and reasonableness remain the most important grounds of review, and are similar in their application. This is a result of both their shared origin in the common law of England and Wales, and of a tendency for both jurisdictions to follow, in broad terms, later developments in English administrative law.

Several noteworthy differences exist, however, all stemming to some extent from the difference between the constitutional orders of the two jurisdictions. First, the salience of this area, politically, is greater in Northern Ireland by virtue of the absence of a comprehensive

written constitution and thus the lack of ‘constitutional review’ of the type that is seen in Ireland. Secondly, and relatedly, there has been a partial constitutionalisation of certain administrative law concepts in Ireland, such as natural justice and fair procedures, though this has not produced very significant differences in practice. Thirdly, Northern Ireland followed England and Wales in having more intense scrutiny of administrative actions when human rights were at stake, with proportionality as a widely available ground of review. This type of scrutiny has not been a feature of Irish administrative law, which was slow to embrace this change, and did so in only a partial way. Again, this may be a function of constitutional rights being more robustly protected through ‘constitutional review’ in Ireland.

### Employment law

Employment law in the two jurisdictions shares some common foundations in contract law and the implication of terms into employment contracts, and in tort law to deal with injury in the workplace. Circumstances led to some divergent developments: the Fair Employment (Northern Ireland) Act 1976 tried to eliminate workplace discrimination on religious and political grounds in Northern Ireland, with later legal developments introducing more rigorous monitoring and limited affirmative action to address imbalances. There were no legal measures in Ireland of an equivalent degree of intensity. EU law’s increasing relevance in aspects of employment law brought about some convergence between the jurisdictions, with similar substantive equality norms taking hold in each. Brexit may now bring the possibility of future divergence, though the Protocol seeks to ensure that EU anti-discriminations norms in relation to employment will be retained in Northern Ireland’s post-Brexit legal order. Similar human rights commitments outside of EU law may have the effect of continuing other rights-based alignments in employment law, such as access to justice and, indirectly, the right to work.

### Health law

As a new field of academic study, health law presents novel aspects both in Ireland and Northern Ireland. Health law comprises a complex interaction of different branches of both public and private law. It is not a unified body of law in either jurisdiction. Health law in both jurisdictions intersects with criminal law, tort law, broad common law principles and constitutional law. In Ireland constitutional interpretation has significantly shaped the development of the field in a distinct way. The complexity of legal issues that criss-cross the field, led the project to focus on specific areas including abortion, capacity, and clinical negligence to illustrate convergences and divergences. These issues were helpful to identify that in some areas – for example, clinical negligence – the law in practice was virtually identical across England and Wales, Northern Ireland, and Ireland, but other areas are markedly different, such as the regulation of abortion and capacity. Overarching structural differences

mark the first notable difference between the jurisdictions (health as a devolved matter in Northern Ireland, functioning largely outside the market through health trusts, and conversely in Ireland a central body, the HSE, having the primary regulatory responsibility). Notable differences include the role of religious patronage in Ireland, and its significantly reduced importance in Northern Ireland, and the outside role played by private purchased health in Ireland as compared to Northern Ireland. Perceptions of health provision in Ireland (permanent crisis) and deep attachment to the NHS in Northern Ireland mark an important divergence in public perceptions and value to health regulation and institutions.

### Land and land use law

Prior to 1922, land law on the island of Ireland developed differently from that in England and Wales, despite both having common law systems. This reflected the colonial context and relatedly the different social function of land ownership on the two islands. For much of the following 100 years, there remained significant similarities between the land law in the two jurisdictions. The Land and Conveyancing Law Reform Act 2009 (Ireland), however, abolished feudal tenure, replacing it with a new statutory concept of ownership of land, which retains the terminology of estates to explain the nature and extent of ownership. With some important qualifications, this brings law in Ireland in line with the approach taken in England and Wales but is at variance with the law in Northern Ireland.

Nature, including habitats, ecosystems, river basins etc, does not respect jurisdictional boundaries – whether national, county or otherwise. There are three transboundary river basins on the island, which require, on a very practical basis, a river basin or catchment approach. The EU's Water Framework Directive adopts a river basin approach to water pollution and obliges Member States to coordinate their activities in respect of transboundary river basins. The transposing legislation in both Ireland and Northern Ireland implemented this obligation. Environmental protection legislation is not included in the Protocol, raising the possibility of divergence and the loss of shared mechanisms for managing river basins. While legal divergence has not yet occurred, UK law now allows changes in Northern Ireland that would result in water being monitored for different substances, or at different times, or for different purposes on opposite sides of the border

### Human Rights law

Both jurisdictions on the island of Ireland have significantly converged in the human rights norms that apply in these jurisdictions, very largely because Ireland and the UK have ratified a significantly similar set of international human rights conventions, in particular the European



Convention on Human Rights. Both jurisdictions have also taken similar approaches to how such international obligations are used in the national law of each place, with only the ECHR being directly enforceable. So too, to the extent that EU law incorporates human rights protections, common EU membership ensured that the law of both jurisdictions reflected these shared norms. Yet again, the institutions that apply human rights norms are broadly similar, comprising not only the courts but also a similar set of independent equality and human rights agencies with similar investigative and enforcement powers. The inclusion of strong commitments to human rights in the 1998 Agreement not only reflected these shared commitments, but also influenced subsequent convergence.

This assessment is subject to two significant caveats. First, the role that international and European human rights norms play in Northern Ireland is somewhat greater than in Ireland (and, indeed, in the rest of the UK), because of at least two factors: the extensive use of human rights norms in Troubles-related litigation; and the absence of the type of extensive constitutional rights protection in the 1937 Constitution. Second, this extensive convergence is also increasingly under threat, due to developments in the UK of two significant types: first, the effect of a broad Euro-scepticism, and second a growing frustration with judicially enforced limits on executive power. These have not only led to Brexit and the ability of the UK to depart from EU-law derived human rights protections, but also to a growing sense that the ECHR itself can be legitimately attacked and its influence limited. Legislation before Parliament at the time of writing would repeal the Human Rights Act 1998, which incorporated the ECHR into UK (and Northern Ireland) law, and replace it with a weakened Bill of Rights. It remains to be seen to what extent the human rights commitments in the 1998 Agreement, which the Protocol sought to protect, are strong enough to ensure that convergence will continue, or whether divergence increases despite these protections.

## Future Research

NSLMap has begun to identify the extent of legal convergence and divergence between the two jurisdictions on the island of Ireland. This Report, and the papers to be published in the ARINS series, contribute to the state of legal knowledge, making it easier for businesses, government, citizens, and NGOs to plan their affairs on our shared island. Moreover, the project has formed a collaborative network of scholars on both sides of the border, enabling future research collaborations.

The work of NSLMap is necessarily limited, however, both in terms of the areas chosen for analysis and the comprehensiveness of analysis within each area. The central question for future research is the extent to which it is possible or desirable to address those limits. Choices by funding agencies about the sort of research they should incentivise will play a significant role. One challenge faced by the Project has been the lack of common interests and expertise across the different subject-areas. While some members of the network have a core research interest in North-South issues, for most contributors the North-South dimension is seen as an interesting but non-essential addition to their core research activity. Reflecting this, and perhaps unsurprisingly, greater connections have been forged between the northern and southern experts in particular areas, than between the experts working in different areas.

A further challenge faced by the Project has been differing views on the purpose of North-South comparison in the first place. The fact that different states have different laws is not usually, in itself, a reason for comment. The two jurisdictions provide a good academic study of legal divergence, given that 100 years ago they had the same laws. The Shared Island framework provides a rationale and a forum for exploring legal convergence and divergence, but the purposes of such comparisons are both multiple and varied, meaning that the task of comparison may appear almost Sisyphean in character. This compounds the difficulty of collaboration between subject-matter experts in different fields.

Our view is that future research on legal convergence and divergence, in general, will be primarily served by subject-experts in particular fields pursuing research where it appears particularly relevant. The Public Health, Ethics and Law Network, jointly funded by the ESRC and the IRC, already promotes cross-disciplinary research in public health, ethics and law in the UK and Ireland. Similar networks may be possible in other areas; NSLMap – we hope – has fostered the relationships that would contribute to their formation.

There is scope, however, for more focused research on critical legal challenges that would arise in the context of Irish unification. This might deepen the analysis of several of the core public law areas addressed in NSLMap, but it would also need to explore the structural issues posed by the integration of two different state-based legal systems. Without taking any position on the desirability of unification, such a project could constitute an important element in helping to prepare for the possibility of unification referendums on the island of Ireland.

## Appendix

### Members of NSL Map

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