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Public law and regulatory supervision in Ireland post-Brexit: Caught between Scylla and Charybdis?

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1. I am delighted to have been invited to speak at the Law Reform Commission of Ireland's Annual Conference, and in particular on the topic of Brexit. I have entitled my talk *"Public law and regulatory supervision in Ireland post-Brexit: Caught between Scylla and Charybdis?"*

2. James Gillray's 1793 cartoon, *Britannia between Scylla and Charybdis*, attempts to capture the dangerous effects of the French Revolution on politics in Britain. William Pitt the Younger, the British Prime Minister at the time, is portrayed as captain of the ship *Constitution*, containing an alarmed Britannia. He has to steer between the rock of democracy (with the liberty cap on its summit) and the whirlpool of arbitrary power (in the shape of an inverted crown), to the distant haven of liberty.

3. We could, of course, imagine Prime Minister May as a latter-day William Pitt facing excruciating choices in steering the British constitution in the stormy seas of Brexit between being too close to Europe, and too close to economic disaster, but my provocation is rather different.

   Ireland's (regulatory) dilemma

4. My argument is that Irish public law and regulation may also face a dilemma, having to steer between two unpalatable choices: either to become increasingly distant from UK regulatory approaches and British public law, or to risk becoming an outlier in European Union regulatory approaches. The Scylla and Charybdis, of course, are the law of the United Kingdom, and the law of the European Union, respectively.

5. *Formally*, of course, little will change regarding either the substance or the procedures of public law in Ireland. The Constitution will continue to operate, ordinary administrative law will continue to underpin and constrain regulatory supervision, EU law will continue to provide both a set of general principles that provide the lens through which administrative law and even, in some respects, the Constitution is interpreted, and regulatory *lex specialis*, often based on EU law, will continue to operate in certain key areas of regulation, such as competition law. None of this architecture is either likely to go away, or undergo an immediate seismic change.

That picture may, however, be somewhat over-optimistic, and the absence of change in the public law superstructure may camouflage seismic changes that are under the radar.

6. At the moment, there are two major sets of external influences on the Irish regulatory system and Irish public law system, namely the influence of UK regulation and public law, and the influence of EU law. I do not pretend to be expert on Irish public law but both these influences appear to operate on at least four interlocking levels: in influencing Ireland's overall socio-economic model (which of course establishes the trajectory of regulation); in influencing the background structure and architecture within which regulation is developed; in influencing the legislative approach to particular areas of regulation; and in influencing the judicial approach to the interpretation of regulatory legislation and the constraints on that legislation.

7. The general problem that arises is that, since 1971, Ireland has not had to choose between UK approaches and EU approaches at any of these levels, and that is likely to change. This will not be an immediate change, or particularly dramatic, but over time it may well be as significant in the way that Irish public law comes to deal with regulation as the enactment of the 1937 Constitution itself, if not more so. That is clearly a controversial claim, and I shall have to defend it, but before doing so, let me identify some features of both Irish and UK public law which I take to be uncontroversial. I'll simply state these features relatively baldly but we can consider each of them more in discussion, if necessary.

Features of UK regulatory system

8. First, in the drafting of *UK* regulatory legislation, the EU has had an increasingly important role to play, and EU law is now significantly entangled in UK public law. This is partly because the UK was a relatively "good" Member State, in the main adopting EU law into UK law, and adapting domestic law to fit the changing approaches coming from Brussels and Luxembourg. In some areas of substantive regulation, such as international trade, consumer protection, energy, data protection, competition, public procurement, pharmaceuticals, state aid, environmental law, discrimination law, EU law dominated UK regulatory approaches.

9. It is uncontroversial, for example, that the impact of EU equality law on the UK has been highly significant. We need only think of the effect of EU law on the development of equal pay in the UK, an influence that began even before the UK joined the (then) EEC in 1972, and then continued with the development of equal pay for work of equal value, leading to substantial litigation and extensive changes in collective bargaining practice. So, too, the expansion of the grounds of discrimination in EU law has had a marked influence in the UK, leading to the incorporation into UK law of a considerably broader range of grounds than had originally dominated UK equality law (race and gender).

10. Second, the direction of influence was not a one-way street, only from Brussels to the UK. The UK significantly influenced the development of the EU in particular areas. It is uncontroversial, for example, that the United Kingdom has had a considerable impact on the development of European Union equality law over the past 40 years. That is not to say that this influence was the only factor shaping EU equality law, or even that it was dominant, but it was certainly *a* significant factor. This influence can be seen in the conceptual and institutional architecture of EU law, such as in the development of indirect discrimination, the acceptance of positive action, the shifting of the burden of proof, and the significant role of equality bodies.

11. Third, the influence of the EU on British public law *adjudication* was also significant. EU law brought significant changes to British public law adjudication between 1971 and 2016: (1) EU law required British courts for the first time to disapply provisions in primary legislation that are incompatible with directly effective EU law; (2) new remedies were developed to ensure full protection of EU law, including damages where there has been a breach of EU law (*Francovich* damages); (3) even where a claimant did not have a directly effective right under EU law, the domestic courts were obliged to adapt normal methods of statutory interpretation by ensuring that national legislation is construed in a manner consistent with it.[1]

12. To these three may be added the following: (4) British courts were required to grapple with a more "principles-led" approach to interpretation, in which broad values were engaged, such as legitimate expectations, protection of fundamental rights, proportionality, equality, precautionary principles; under Article 30, decisions that breach those general principles will be held to have amounted to a misuse of power; doctrines of legitimate expectations and proportionality in the domestic context particularly influenced by EU analogies; and (5) latterly, this approach has been expanded by the requirement to apply the EU Charter of Fundamental Rights in domestic law.

13. But, again, this was not a one-way street. To take just one example, UK influence on the interpretation of EU equality law was significant, profoundly affecting the development of the equality jurisprudence of the Court of Justice of the European Union, not only because much of the early case law of the Court derived from cases referred by UK courts, but also because of the important role that UK judges and advocates general played. The UK influence appears, more broadly, to be on the way to the development of a fusion of civil law and common law approaches to interpretation of mush regulation.

Features of Irish regulatory system

14. Fourth, turning now to Ireland, both in the drafting of *Irish* legislation, and in the interpretation of Irish administrative law, the *UK* has played an important role since independence and particularly since both states joined the European Economic Community in 1971. Ní Mhuirthile, O'Sullivan and Thornton write that Ireland, "frequently [enacts] legislation which draws very liberally from English legislation."[2] There appear to be several reasons for this: the desirability of having similar rules across the entire island of Ireland as well as the practical advantage of having judicial interpretation of language used in those statutes have been cited as reasons to follow the UK approach.

15. Fifth, not surprisingly, therefore, the influence of British judges in the interpretation of transplanted regulatory legislation is also significant. According to research by Byrne and McCutcheon, in 1995, a study showed that 33% of Irish reported decisions referred to English

[1] See De Smith, *Judicial Review*, 1.7 for more details.
[2] Ní Mhuirthile T, O'Sullivan C and Thornton L., (2016) Fundamentals of the Irish Legal System: Law Policy and Politics. Dublin: Round Hall, at 176.

or Scottish cases.[3] A similar study in 2011 showed only a slight reduction in the figure, with 28.3% of reported cases referring to English or Scottish cases.[4]

16. Sixth, both in the drafting of Irish legislation and in the interpretation of Irish administrative law, the EU has an increasing role to play, but to date it is significantly less of an influence overall than UK influence. In Byrne and McCutcheon's 1995 study of Irish reported decisions, whilst 33% referred to English or Scottish cases, only 3.2% referred to decisions of the CJEU. In their 2011 study, whilst 28.3% of reported cases referred to English or Scottish cases only 3.2% of reported cases referred to decisions of the CJEU, although 4.7% of reported cases referred to the European Court of Human Rights. What is striking is that the Irish courts' reliance on decisions from England and Wales can be even be seen in relation to the interpretation of European Directives.

Entanglement

17. As a result of the developments in UK and EU law, Pascal Lamy, the director-general of the World Trade Organisation between 2005 and 2013, recently giving evidence to a United Kingdom Parliamentary committee investigating Brexit, used a striking metaphor to describe these various entanglements. "Brexit" he said, "was like removing an egg from an omelette," with EU law the egg and UK law the omelette. Because of these entanglements of EU and UK law, Ireland did not have an existential choice to make as to which influence (the UK or the EU) should be dominant or more important in Irish public law. That was because both UK law and Irish were on the same trajectory, using very similar tools, having very similar legal and economic interests, and relatively similar administrative structure. Indeed, not only did Ireland not have to choose, the UK indirectly assisted Ireland to adapt its laws to accommodate EU law, in particular by working out strategies to make EU law more "common-law-friendly". In doing so, the UK and Ireland were in some significant respects brought closer together in the regulatory and public law contexts than they had been before 1971.

Underlying problem

18. This may now change. The ever-insightful Fintan O'Toole identified the underlying problem in September 2016: "If being together in the EU brought Ireland and Britain closer, will British exit from the EU drive them apart? It is by no means impossible," he wrote, "that events will unfold in such a way that Ireland will be forced to choose between being within a British sphere of influence and remaining in the EU."[5] My own view is that it is inconceivable that Ireland will leave the EU (at least, I hope so), but the dilemma of choosing British or EU regulatory approaches remains. If the UK is out and Ireland is in, and the UK increasingly diverges from the EU, Ireland will have to choose to sustain Ireland's regulatory and public law entanglement with the UK, or break with that and follow EU regulatory and public law methods.

19. The issue is not whether Ireland will face this dilemma, but how significant a dilemma it will be. Brexit's challenge for regulation and public law in Ireland is difficult to predict with any

[3] Byrne R, McCutcheon P, Bruton C, et al. (2009) Byrne and McCutcheon on the Irish Legal System, 5th ed. Dublin, Ireland: Bloomsbury Professional, at 438.
[4] Byrne, McCutcheon, and Bruton C, et al. (2014) Byrne and McCutcheon on the Irish Legal System, 6th ed. Dublin, Ireland: Bloomsbury Professional, at 516.
[5] Fintan O'Toole: The love-hate relationship between Ireland and Britain, *Irish Times*, Sep 10, 2016.

real precision, because it is not scheduled to come into effect until March 2019, and the exit negotiations continue, but as of today Brexit appears to present at least four major potential challenges for Irish regulators and Irish public law, and each appears to me to be pretty significant.

Differing socio-economic models and globalisation

20. Without the United Kingdom as a member state, the influence of what the French call the Anglo-Saxon socio-economic model may decline. To the extent that Ireland remains within the economic sphere of influence of both the UK and the EU, this divergence between the two may well create problems for an Irish government and Irish regulators, and significant choices may have to be made that will affect regulatory strategies into the future. Change the socio-economic model, and the role of regulation and the free market will change also.

21. One of the elements that may accompany changes in the socio-economic model is a change in the type of globalisation the UK is willing or able to engage with. It is by no means clear that the globally open, relatively free market approach that Ireland has maintained in the EU, now without British support, will continue. The challenge for Ireland is how to deal with a powerful economy on the border of the EU which would be free, theoretically at least, to depart significantly from the EU socio-economic model, whilst Ireland in the EU supports a different model.

Location, extent and legitimacy of power and authority

22. UK voters were encouraged "to take back control" in the Brexit referendum, and this fed a vague but powerful narrative of "sovereignty". Four aspects of current discussions in and around the idea of sovereignty that affect regulation. First, discussions of sovereignty may focus on the *locus* of power and authority in a particular polity. Does power and authority reside in the executive, or the legislature, or both of these at different times on different issues? Second, discussions of sovereignty may focus on the *extent* of the power and authority that resides in whatever body or bodies exercise power and authority. Third, discussions of sovereignty may focus on the justification for the exercise of *legitimate* power and authority in the polity. And, fourth, each of these issues (locus, extent, and legitimacy) can be considered from a *legal* perspective or a broadly *political* perspective.

23. Brexit may mean the introduction of changes in the UK regulation across all these dimensions. The locus of power may come to differ; the extent of the powers and authority may differ; what constitutes the exercise of legitimate power may differ. The extent to which these issues are considered as primarily political or legal may differ. If they do, then the background constitutional, administrative, and political architecture within which regulation operates may well become significantly different in the UK and the EU.

24. Joe Tomlinson and Liza Lovdahl Gormsen provide a good discussion of the potential effects of Brexit on the administrative architecture of regulation in the UK post Brexit. They note that "Brexit—whatever form any final 'agreement' takes —will entail administrative branch reform that is likely to be wide-ranging and fast-paced. Reform is inevitable as not only legal powers

but also the administrative organisational structures which make those powers effective will require re-calibration of some kind."[6] They continue:

> "Such a move would have the consequence of UK administration taking significant responsibility back from the EU. Whatever the details are, Brexit makes administrative reform effectively inevitable irrespective of the outcome of the negotiating process. The major reason for this is that there are many powers and functions, presently held and carried out by EU agencies, which the UK will likely have to assume responsibility for at the national level. The UK could, for instance, assume exclusive power in those areas it has shared competence with the EU, such as social policy, environmental policy, consumer protection, chemicals regulation, medicine evaluation, and energy."[7]

If the UK does diverge significantly in these respects, Ireland will have to choose which approach to adopt, and cannot safely rely on emulating British regulatory models.

Diverging regulation of specific areas

25. In addition to changes in administrative architecture, the UK is also likely to shift its approach to the content of substantive regulation in particular subject areas over time. We can expect changes in consumer protection, employment, state aid, procurement, discrimination, competition. This is not certain, for reasons to be considered in a moment, but it is likely.

26. Let's take the example of consumer law. Cliona Kelly of UCD in her recently published article suggested that although consumer law reform in Ireland has to a significant degree mirrored developments in the UK, there is likely to be significant regulatory divergence in the future, with the European Union having more of an impact on future reforms in Ireland and the UK potentially heading in a different direction.[8] "If in the future the Westminster Parliament is free to repeal or replace existing consumer rules of European origin and courts are not bound to interpret remaining rules in a manner consistent with the decisions of the Court of Justice of the European Union (CJEU)," she writes, "there is likely to be an increasing chasm between consumer law in Ireland and the UK."

27. What is particularly interesting about her article, is her analysis of *why* that divergence is likely to happen. She identifies several reasons, all of which are of potential significance beyond consumer regulation: the language and concepts used, the way in which the law is structured, and the way in which the law is to be interpreted: "The increasing impact of the EU,", she writes, "and in particular of the civil law tradition within the Union, might affect not merely the substance of the right in question, but also the architecture of statutes and categorization of … rights, the language and conceptual tools used, and how rights are interpreted by the courts."

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[6] Joe Tomlinson and Liza Lovdahl Gormsen, "Stumbling Towards the UK's New Administrative Settlement: A Study of Competition Law Enforcement After Brexit, *Cambridge Yearbook of European Legal Studies*, 1 at 2.

[7] Ibid, at 5.

[8] Cliona Kelly, "*Consumer reform in Ireland and the UK: Regulatory divergence before, after and without Brexit,* 47(1) Common law World Review (2018) 53-76.

28. A similar architectural point is made by Tomlinson and Lovdahl Gormsen in their discussion of the future of competition law in the UK post-Brexit.[9] They note that "… beyond the technicalities of rearranging various powers, there will have to be some—potentially very large—changes in an organisational sense. When viewed from this perspective, Brexit has never presented merely a matter of shifting around the legal powers granted to various administrative agencies." They suggest[10] that "there are three key [administrative] dimensions to [the challenge of Brexit]. The first type of challenge facing administrative bodies after Brexit relates to internal organisation. By this they mean questions of how administrative bodies structure their own procedures, resources, staff, etc. The second type of challenge for administrative agencies relates to external coordination. External coordination challenges are those concerning how the administrative body works with other bodies, both at the EU and UK levels. The third type of challenge relates to substantive legal issues." The consequence of this for Ireland is that, again, it will no longer be possible, if it ever was, to rely on UK administrative structures as suitable for transplantation into an Ireland that has remained in the EU.

29. Turning now to emerging differences arising from the uses of different civil law and common law conceptual approaches, Kelly suggests, "Certain language and concepts permeating European measures … are alien to the common law system, which can struggle to incorporate them within the existing framework." One of the concerns for Ireland, she writes, is that "without the presence of the UK the common law tradition will be under-represented in European negotiations, allowing space for civil law concepts … to have a greater role or for there to be an increased emphasis on [different] remedial regimes …." After March 2019, Ireland will (with Cyprus and possibly Malta) be the only common law jurisdiction in the EU. That has potentially significant effects on the ability of Ireland to ensure an emerging EU regulatory structure that is sufficiently attuned to a common law jurisdiction. Ireland will be deprived of some of the experience that the UK brought to the development of EU regulation in the past, and the EU may diverge from the current UK approach over time. Ireland will no longer have the UK fighting the common law corner.

Judicial interpretation

30. As regards the issue of diverging approaches to judicial interpretation, several issues arise. Brexit is likely to bring significant changes to British public law adjudication after the transition phase. If the Withdrawal Act approach survives, the following will occur: (1) no possibility of disapplying primary provisions incompatible with EU law; (2) no damages remedy for breach of EU law, reverting to the prior unease with awarding damages in public law; (3) reversion to "normal" methods of statutory interpretation (with exception of Human Rights Act 1998); (4) general principles formally abolished, at least in so far as they derive for EU law: equal treatment, solidarity, equality, subsidiarity, proportionality, precautionary principle; not necessarily the case that the UK will ditch these principles but they may diverge in terms of their understanding; (5) no resort to the EU CFR; (6) UK courts able to have regard to CJEU decisions, but not required to follow the court.

[9] "Stumbling Towards the UK's New Administrative Settlement: A Study of Competition Law Enforcement After Brexit, *Cambridge Yearbook of European Legal Studies*, 1 at 2.
[10] Ibid, at 6

31. In contrast, of course, all these will continue to apply in Ireland. The problem will be that these elements of European Union law, as Donson and O'Donovan have put it, "require the Irish courts to adapt traditional review approaches in order to ensure a closer level of scrutiny of a Government decision than would be adopted if a purely domestic cause of action was raised."[11] If this remains the case in Ireland and not in the UK, judicial divergence may well be considerable on the difficult question of what weight to give to the decisions of regulators.

32. Kelly has identified the difficulty this gives rise to for the Irish legal profession (and regulators, I suggest). She writes: "If the UK is no longer bound by the CJEU, while Ireland remains so bound, it may no longer be possible to turn to UK cases for guidance on how to interpret and apply laws which have their origins in the EU. This would be a significant departure for the Irish judiciary and is likely to pose a challenge for lawyers." This is particularly the case because, as we have seen, "there is still a marked tendency to turn to cases from England when interpreting even statutory provisions that emanate from the EU."[12]

Three uncertainties

33. Of course, it is important to keep on reminding ourselves that there is no certainty about any of these developments. But to be forewarned is to be forearmed. There are three major uncertainties, aside from the issue of whether there will be a Withdrawal Agreement: the role of the UK judiciary post-Brexit; the extent and type of future trade agreements concluded by the UK post Brexit; and (inevitably, I'm sorry) Northern Ireland. I can only touch on these three issues briefly.

34. Judicial activism in the UK How far will the vacuums that Brexit creates be filled by alternative developments in Common Law or statute? Will the UK revert to its previous approaches in public law pre-1972 or will it develop alternative approaches through the notion of common law constitutionalism?

35. Future free trade agreements A major complicating factor for the UK has to do with the future trade relationship between the UK, EU states, and non-EU states, such as the United States and China. At the moment, the UK government's stated policy is ultimately to leave the Single Market and the Customs Union, but to negotiate as close an economic and trade relationship with the EU-27 as possible, short of remaining in the Single Market or the Customs Union. Whether this is possible from the perspective of the EU-27 remains to be seen.

36. There are two main reasons why the future economic relation with the EU-27 is critical. If the UK achieves its goal of substantially replicating the benefits of the Single Market without what the UK government regards as its costs (such as free-movement, the role of the CJEU, and contributions to the EU budget), then this is likely to be achievable only on condition that there is maximal regulatory alignment, and this would be likely to include continuing to adhere to Single Market regulations. The EU-27 has indicated that the Commission includes

[11] Fiona Donson and Darren O'Donovan, Law and Public Administration in Ireland (Dublin, Clarus Press, 2015), at 602.

[12] Kelly, "*Consumer reform in Ireland and the UK: Regulatory divergence before, after and without Brexit*, 47(1) Common law World Review (2018) 53 at

environmental and social aspects of the Single Market within this sphere. It cannot be in the interests of the EU-27 to allow a highly deregulated UK access to EU markets.

37. Retention of market access is, therefore, likely to result in retention of important aspects of EU regulatory approaches in all but name. The opposite is also true, of course. The less the UK seeks or is given access to the EU markets, the less likely it is that the EU would require the UK to adhere to regulatory alignment. The contrast between the position of Norway and Canada illustrates the point. Norway, as a member of the EEA, gets substantial market access to the EU and, for example, conforms to the EU gender equality acquis (not the other areas of EU equality law). Canada, with a substantially lesser degree of access, will not have any equivalent regulatory obligations under its trade treaty arrangements with the EU.

38. The second reason why the future economic relations treaty is critical has to do with membership in the Customs Union, or equivalent. One of the reasons why the UK is so keen to leave the Customs Union is because that would mean that the UK would be free to negotiate its own trade agreements with non-EU states, such as China, the United States, and Australia. At the moment, of course, EU member states are not free to negotiate such agreements themselves. The closer the UK comes to remaining in the Customs Union, or a customs relationship of a similar type, the less likely it is that the UK would be able to negotiate its own trade treaties.

39. How far the UK is free to negotiate free trade agreements with non-EU countries will affect how far the UK will be exposed to pressures from non-EU states to reduce *non-tariff* barriers. A non-tariff barrier would include any regulatory practices which have the effect of reducing the ability of one state to conduct open-access trade with another. So, for example, restricting access to the UK market of chlorinated chickens would constitute a non-tariff barrier which the United States would be anxious to remove. Following Brexit, and in the absence of a deep and extensive free trade agreement with the EU, the UK will be under significant pressure to attempt to replace its existing access to EU markets with access to other markets, and will therefore be under pressure to succumb to pressure to reduce non-tariff barriers, potentially leading to heavy deregulation.

40. <u>Northern Ireland</u> So far, we have considered issues arising as regards the East-West relationship. Mostly involving changing nature of GB public law and its indirect effect on Ireland. What about North-South regulatory differences? Different kettle of fish, because some of the public bodies that now operate throughout the island of Ireland, not least those created by the GFA may be subject to different regulatory regimes. Depends on what the Ireland-Northern Ireland Protocol will contain regarding the extent to regulatory convergence, and on the provisions dealing with the protection of rights.