

Angela Zollinger

## Challenging Peace

# The Impact of Brexit and the *Northern Ireland Troubles (Legacy and Reconciliation) Bill* on Northern Ireland's Transitional Justice Process

**Abstract:** Scholarship on how the United Kingdom's decision to leave the European Union destabilized Northern Ireland's fragile post-Troubles peace focuses predominantly on the border issue and Protocol negotiations. However, this article explores the possibility that Brexit and its contributing factors – Euroscepticism, English nationalism, sovereignty concerns and empire nostalgia – also impacted Northern Ireland's transitional justice processes by playing a role in the introduction of the widely criticized Northern Ireland Troubles (Legacy and Reconciliation) Bill in May 2022, which was passed into law in September 2023. That Bill foresaw the elimination of centralized judicial transitional justice mechanisms and concentrated power in the hands of the Secretary of State for Northern Ireland. Results from an analysis of UK parliamentary debates combined with evidence from two stakeholder interviews indicate that the Legacy Bill's timing, its contents, and the way in which its introduction was handled by the sponsoring Northern Ireland Office in the UK Government were likely impacted by Brexit and the influence of the hard-Brexit Conservative party faction characterized by its Euroscepticism, English nationalism, and commitment to British sovereignty.

**Keywords:** Brexit, Northern Ireland, reconciliation, transitional justice, Troubles.

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# Introduction

The Northern Ireland conflict (1968–1998, also known as ‘the Troubles’) was caused by a dispute over the legitimacy of British rule in Northern Ireland (NI).<sup>1</sup> Since the end of the widespread violence, transitional justice (TJ) initiatives aimed at promoting post-conflict reconciliation in the deeply divided Northern Irish society have been plentiful. But peace remains fragile. And the United Kingdom’s (UK) vote in 2016 to leave the European Union (EU), colloquially referred to as ‘Brexit’, poses new challenges due to its destabilizing effect on this fragile peace. “Brexit hit Northern Ireland like a meteor from space. No one really saw it coming – or really understood its implications”, said Cochrane.<sup>2</sup> Today, a wide array of academic work discusses how the EU has shaped Northern Ireland’s peace process and what the UK’s exit means for regional peace.<sup>3</sup> The majority of these contributions focus on the reinvigoration of the Irish border issue and the Northern Ireland Protocol (hereafter ‘Protocol’) negotiations.<sup>4</sup> However, this predominant focus seems somewhat narrow and limited. This article explores the possibility that Brexit and its contributing factors – namely the increase of English nationalism, empire nostalgia, Euroscepticism and sovereignty concerns among the British political elite – are also having an impact on Northern Ireland’s TJ mechanisms, and consequentially on reconciliation efforts. In May 2022, the UK Government introduced the Northern Ireland Troubles (Legacy and Reconciliation) Bill (‘the Legacy Bill’) into parliament.<sup>5</sup> It sparked a remarkable wave of criticism from a large variety of national and international stakeholders, raising questions about what the true motivations behind the policy shift it represents are. This article illustrates that the Legacy Bill’s timing, its contents, and the way in which its introduction was handled by the sponsoring Government department, the Northern Ireland Office, were likely impacted by Brexit.

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1 Douglas Woodwell, “The ‘Troubles’ of Northern Ireland: Civil Conflict in an Economically Well-Developed State,” *Understanding Civil War: Evidence and Analysis*, ed. Paul Collier and Nicholas Sambanis (The World Bank: 2005): 167–171.

2 Feargal Cochrane, *Breaking Peace. Brexit and Northern Ireland* (Manchester: Manchester University Press, 2020), 2.

3 See for example Katy Hayward and Mary Murphy, “The EU’s Influence on the Peace Process and Agreement in Northern Ireland in Light of Brexit,” *Ethnopolitics* 17, no. 3 (2018): 276–291; Kieran McEvoy, Anna Bryson and Amanda Kramer, “The Empire strikes back: Brexit, the Irish Peace Process, and the limitations of law” *Fordham International Law Journal* 43, no. 3 (2020): 609–668.

4 See for example John Garry et al. “The future of Northern Ireland: Border anxieties and support for Irish reunification under varieties of UKexit,” *Regional Studies* 55, no. 9 (2021): 1517–1527; Christopher McCrudden, “Introduction,” *The Law and Practice of the Ireland-Northern Ireland Protocol*, ed. Christopher McCrudden (Cambridge: Cambridge University Press, 2022), 1–18; Nikos Skoutaris, “Brexit and transitional justice: Brexit as a challenge to peacebuilding,” *On Brexit. Law, Justices and Injustices*, ed. Tawhida Ahmed and Elaine Fahey (Cheltenham: Edward Elgar Publishing Limited, 2019): 205–221.

5 “Government” with an upper case is used specifically for the executive, whilst “government” with lower case may be used where this is not specified (e.g. citing other authors).

## Methodology

Politics and law are inextricably linked. Legal mechanisms reflect “political decisions at a certain time and in a certain environment, which have assumed a legal form and nature”, and they also have a reverse impact on politics.<sup>6</sup> In the analysis underlying this article, an interdisciplinary approach was therefore adopted.<sup>7</sup> Using a descriptive legal approach, the contents of the Legacy Bill and the changes it envisions to the approach to TJ and reconciliation in Northern Ireland are illustrated. This allows for a discussion of why the Legacy Bill is widely criticized and expected to hinder reconciliation in NI. The results of an Applied Thematic Analysis (a form of inductive qualitative content analysis) of parliamentary debate transcripts on the Legacy Bill from both the House of Commons and the House of Lords are then presented.<sup>8</sup> They reveal multiple indicators that the UK Government’s move to introduce the Legacy Bill was influenced by Brexit. To enrich the findings of the debate analysis, two semi-structured stakeholder interviews were conducted, which corroborated the results of the debate analysis.<sup>9</sup>

## Transitional Justice and Reconciliation

Transitional justice is a lens through which the ways that legacies of violent conflicts are dealt with can be regarded. De Greiff defines TJ as a “set of measures implemented in various countries to deal with the legacies of massive human rights abuses”, such as truth-telling, reparations, memorialization, criminal prosecutions and institutional reforms. His holistic understanding of TJ can be used to analyze both judicial and non-judicial measures as well as top-down or bottom-up initiatives. TJ measures, according to de Greiff, have as one of two final goals the promotion of reconciliation.<sup>10</sup> Aiken’s use of knowledge from the discipline of social psychology to investigate how TJ measures are linked to reconciliation were used to complement De Greiff’s conceptualization. Aiken defines reconciliation as “transforming the relations between rival sides from hostility and resentment to friendly and harmonious relations”.<sup>11</sup> He names three types of strategies necessary for the “social learning” required for post-conflict reconciliation in divided

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6 Miro Cerar, “The Relationship Between Law and Politics,” *Annual Survey of International and Comparative Law* 15, no. 1 (2009): 21.

7 This article is based on an analysis completed for the author’s Master’s thesis, written at the Institute for European Global Studies (University of Basel) and submitted on July 3<sup>rd</sup> 2023.

8 Following Udo Kuckartz, “Qualitative Text Analysis: A Systematic Approach,” *Compendium for Early Career Researchers in Mathematics Education*, ed. Gabriele Kaiser and Nora Presmeg (Cham: Springer, 2019); Greg Guest, Kathleen MacQueen and Emily Namey, *Applied Thematic Analysis* (Thousand Oaks: Sage, 2012): 181–197.

9 William Adams, “Conducting Semi-Structured Interviews,” *Handbook of Practical Program Evaluation*, 4th ed., ed. Kathryn Newcomer, Harry Hatry and Joseph Wholey (Hoboken, New Jersey: John Wiley & Sons Inc, 2015), 492–505, 498.

10 Pablo De Greiff, “Theorizing Transitional Justice,” *Transitional Justice*, ed. Melissa Williams, Rosemary Nagy and Jon Elster (New York and London: New York University Press, 2012), 34–40.

11 Nevin Aiken, “Learning to Live Together: Transitional Justice and Intergroup Reconciliation in Northern Ireland,” *The International Journal of Transitional Justice* 4 (2010): 168.

societies. Firstly, *instrumental reconciliation* (the so-called ‘contact hypothesis’) is strengthened through measures which aim to foster cooperative interaction between former rivals.<sup>12</sup> Secondly, *socioemotional reconciliation* can be consolidated when the emotional and perceptual legacies of conflicts, such as feelings of victimization or guilt, are tackled. Efforts to shape a “mutually accepted (or at least mutually tolerable) shared understanding” of the past are seen as desirable.<sup>13</sup> Lastly, *distributive reconciliation* is developed through the reduction of structural and material inequalities and through attempts to lessen inequitable socioeconomic conditions, for example via socioeconomic and legislative reforms as well as monetary compensation. The approach to TJ that arose in NI, and UK Government’s efforts to restructure it through the Legacy Bill can only be assessed against the backdrop of history.

## The Troubles and Northern Ireland’s Transitional Justice Process

From 1968, Northern Ireland experienced three decades of violence, triggered by a dispute over the question whether NI should remain in a union with Great Britain or whether it should be part of a united Ireland. After the partition of the Irish island into Northern Ireland and the Irish Free State in 1921, pro-British Protestant (‘unionist’) leaders in the North alienated the pro-Irish Catholic (‘nationalist’) minority politically, socially and economically.<sup>14</sup> The Catholic community reacted by forming a civil rights movement in the mid-1960’s. When a civil rights march in Derry was brutally dispersed in 1968, violence erupted. What started as riots in the context of civil rights movements escalated into a conflict characterized by “urban guerilla warfare”.<sup>15</sup> The main actors could be grouped into (Catholic) nationalists and ‘republican’ paramilitaries, (Protestant) unionists and ‘loyalist’ paramilitaries, the British government (including its Army) and the Irish government. Over 3.700 people lost their lives and more than 40.000 suffered injuries – considerable numbers for a population of only 1,5 million.<sup>16</sup> The peace talks that had started out secretly via backchannels officially moved to the negotiating table in 1997, with the involved parties ready

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<sup>12</sup> Nevin Aiken, *Identity, Reconciliation and Transitional Justice. Overcoming intractability in divided societies*, (Oxon: Routledge, 2013): 34–37.

<sup>13</sup> Aiken, *Learning to Live Together*, 170–71.

<sup>14</sup> The Troubles were not necessarily a religious dispute, but rather a political dispute in which religion served as an identifier for group affiliation (see Philip Barnes, “Was the Northern Ireland Conflict Religious?” *Journal of Contemporary Religion* 20, no. 1 (2005): 55–69); Dean Pruitt, “Readiness Theory and the Northern Ireland Conflict,” *American Behavioural Scientist* 50, no. 11 (2007): 1521.

<sup>15</sup> Woodwell, *The ‘Troubles’ of Northern Ireland*, 174.

<sup>16</sup> Eamonn O’Kane, *The Northern Ireland Peace Process. From armed conflict to Brexit*, (Manchester: Manchester University Press, 2021): 5–17 and 215–216.

to negotiate the peace agreement, the 1998 Belfast Agreement, which would lay the groundwork for Northern Ireland's TJ process.<sup>17</sup>

The Belfast Agreement (BA, colloquially also known as the Good Friday Agreement), signed on April 10th 1998, dealt with the devolved democratic institutions in Northern Ireland and set up a new consociational power-sharing Northern Ireland Assembly. Furthermore, it initiated a new North/South Ministerial Council and dealt with the East-West relations between Britain and Ireland. The BA also contained measures concerning the safeguarding of rights, decommissioning, security, policing and justice, and prisoners.<sup>18</sup> It was an unbelievable achievement of multi-party talks which succeeded in ending political violence. However, some scholars argue that the BA dodged key issues, such as addressing the conflict's legacy, in order to secure the agreement – often leading to it being labelled “constructively ambiguous”.<sup>19</sup> In addition to the BA, governmental actors have initiated various legal investigations into the past since 1998, such as the highly regarded Bloody Sunday Inquiry which led to a public apology by the British state in 2010 for the actions of its security forces. However, the area where centralized governmental initiatives were most successful in NI is in reducing the structural discrimination of Catholics, for example through housing and employment reforms.<sup>20</sup> The failure to establish a mutually accepted shared understanding of the past continues to hinder wider processes of reconciliation. But in December 2014, the British and Irish governments as well as the Northern Irish Executive concluded the Stormont House Agreement (SHA) which achieved an unusually high level of agreement between the involved parties. Four main elements regarding dealing with the past were agreed to in the SHA: (1) the creation of an Oral History Archive, (2) the establishment of a Historical Investigations Unit, (3) the formation of an Independent Commission for Information Retrieval (ICIR), and (4) the initiation of an Implementation and Reconciliation Group. Emphasis was put on the fact that no-one providing information to the ICIR would receive immunity from prosecution.<sup>21</sup> The SHA was seen as a good way to move forward, but its implementation has been put on the back burner.<sup>22</sup> With the introduction of the Legacy Bill, the UK Government departed significantly from what had been agreed upon.

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17 Aiken, *Identity, Reconciliation and Transitional Justice*, 59.

18 Belfast Agreement: An Agreement Reached at the Multi-Party Talks on Northern Ireland 1998. Cm 3883. Signed by the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland, 10 April 1998.

19 Kieran McEvoy, Anna Bryson and Amanda Kramer, *The Empire strikes back*, 642.

20 Aiken, *Learning to Live Together*, 173–175.

21 Stormont House Agreement. Reached between the Governments of Britain, Ireland and the five main political parties of Northern Ireland, 23 December 2014.

22 McEvoy et al. “Prosecutions, Imprisonment and the Stormont House Agreement: A Critical Analysis of Proposals on Dealing with the Past in Northern Ireland.” *Dealing with the Past in Northern Ireland* (2020), 6.

The limited effectiveness with which centralized TJ measures tackled truth recovery and intergroup rapprochement led community-based projects to pop up all over NI. Without mentioning these, any account of NI's TJ process remains incomplete. They range from storytelling projects, sometimes combined with archiving work or cross-community dialogue, to projects focusing on the reintegration of former paramilitaries.<sup>23</sup> Although not all community-based initiatives are equally effective, these manifold bottom-up projects have measurably improved intergroup relations in NI. The approach to TJ which has arisen in NI over the past decades can therefore be described as “combining widespread community-based reconciliation initiatives with a more ‘piecemeal’ approach to dealing with the past through interventions by governmental and non-governmental actors”.<sup>24</sup> But how did Brexit impact NI's approach to TJ, and why is the “European dimension” of NI's peace relevant?

## Brexit and the European Dimension of Northern Ireland's Peace

The Leave EU campaign in the lead-up to the Brexit vote was centered around anti-immigration rhetoric and issues of national autonomy, including disdain for the supremacy of European over British laws and complaints over the EU's politics. The economic malaise felt by many parts of the population due to the unequal distribution of the benefits of globalization increased susceptibility for the campaign's populist messages.<sup>25</sup> Multiple scholars have discussed the role that Euroscepticism, English nationalism, empire nostalgia and issues of sovereignty played in the UK's decision to leave the EU.<sup>26</sup> The hardening of English nationalism is rooted in ‘empire nostalgia’, a longing for the British Empire's previous ‘greatness’ which was achieved largely through colonial aspirations. The Leave campaign's vision of a renewed empire evidently inferred *English*

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23 See for example Michelle Anderson, “Community-Based Transitional Justice Via Creation and Consumption of Digitalized Storytelling Archives: A Case Study of Belfast's Prisons Memory Archive,” *International Journal of Transitional Justice* 13 (2019): 30–49; Benjamin Maiangwa and Sean Byrne, “Peacebuilding and Reconciliation through Storytelling in Northern Ireland and the Border Counties of the Republic of Ireland,” *Storytelling, Self, Society* 11, no. 1 (2015): 85–110; Tim Chapman and Hugh Campbell, “Working across frontiers in Northern Ireland. The contribution of community-based restorative justice to security and justice in local communities,” *Restorative Justice in Transitional Settings*, ed. Kerry Clamp (London: Routledge, 2016): 115–132.

24 Aiken, *Learning to Live Together*, 167 and 184; Aiken, *Identity, Reconciliation and Transitional Justice*, 86.

25 Craig Calhoun, “Populism, nationalism and Brexit,” *Brexit. Sociological Responses*, ed. William Outhwaite (London and New York: Anthem Press, 2017), 58–62.

26 See also Agust Arnorsson and Gylfi Zoega, “On the causes of Brexit,” *European Journal of Political Economy* 55 (2018): 301–323; Mary Murphy, “Northern Ireland and Brexit: Where sovereignty and stability collide?” *Journal of Contemporary European Studies* 29, no. 3 (2021): 405–418; Michael Keating, “Between two unions: UK devolution, European integration and Brexit,” *Territory, Politics, Governance* 10, no. 5 (2022): 629–645.

dominance. The Leave campaign also coupled *English* nationalism and empire nostalgia with concerns over sovereignty (its slogan was “take back control”), resulting in “an (unsubstantiated) claim for a unified English/Westminster/governmental sovereignty to the exclusion of other parties”.<sup>27</sup> These dynamics were mirrored within parts of the political elite in the British parliament – important to emphasize, since the parliamentary parties are the main actors in the process of debating, amending, and passing Bills into law in the UK (including the Legacy Bill). Especially within the Conservatives, an intensification of Euroscepticism took place when the hard Brexit faction took over, mostly under Boris Johnson’s leadership between July 2017 and July 2022.<sup>28</sup> On June 23rd 2016, the UK’s population voted by 52 to 48 percent to leave the EU.<sup>29</sup> However, in NI 56 percent of the voters supported remain.<sup>30</sup> Although hardly discussed in the run-up to the vote, ensuring that peace would not be broken as a consequence of a possible hard border reappearing between Ireland – still an EU member state – and NI became central to the arduous negotiations of the Withdrawal Agreement (incl. the Northern Ireland Protocol) which was ratified in January 2020.<sup>31</sup> Empire nostalgia and English nationalism manifested themselves both in Britain’s blind spots when it came to the impact of Brexit on NI – ranging from naivety to conscious dismissal – as well as in the way the Irish island was framed by hardcore Brexiteers as being a nuisance in their quest to “get Brexit done”.<sup>32</sup>

But the European dimension of NI’s peace was established long before Brexit, with the EU’s supportive involvement beginning as early as the late 1970’s. Leaving the EU has potentially far-reaching implications for the areas of rights protections, funding for peace projects and the facilitation of a “habit of cooperation” in Anglo-Irish relations. A variety of EU-underpinned rights, especially those deriving from EU membership and EU law, as well as the right to an effective judicial remedy could be affected.<sup>33</sup> The role of the European Convention on Human Rights (ECHR) – an instrument established by the Council of Europe – is another key element of

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27 Sionaidh Douglas-Scott, “Brexit and the siren-like allure of sovereignty,” *On Brexit. Law, Justices and Injustices*, ed. Tawhida Ahmed and Elaine Fahey (Cheltenham: Edward Elgar Publishing Limited, 2019), 98.

28 Richard Hayton, “Brexit and party change: The Conservatives and Labour at Westminster,” *International Political Science Review* 43, no. 3 (2022): 350; Ruike Xu and Yulin Lu, “Intra-party dissent over Brexit in the British Conservative Party,” *British Politics* 17, no. 3 (2022): 274–297, 294.

29 Anne Applebaum, “Britain After Brexit. A Transformed Political Landscape,” *Journal of Democracy* 28, no. 1 (2017): 53–58, 53.

30 McEvoy, Bryson and Kramer, *The Empire strikes back*, 637–638.

31 Christopher McCrudden, *Introduction*, 8–11.

32 McEvoy, Bryson and Kramer, *The Empire strikes back*, 616–620 and 625–626.

33 Christopher McCrudden, “The Good Friday Agreement, Brexit, and Rights”, *A Royal Irish Academy - British Academy Brexit Briefing* (2017): 5.

the European dimension discussed.<sup>34</sup> The ECHR and the importance of direct access to courts and remedies for convention breaches were explicitly included in the BA.<sup>35</sup> Through its judgements, the European Court for Human Rights (ECtHR) provides important oversight of the handling of Troubles-related legacy cases in UK courts. Now Brexit has removed the UK's implicit obligation to remain a member of the ECHR as an EU state and discussions about a possible withdrawal have already sparked.<sup>36</sup> When it comes to financial support, the EU remained committed after Brexit to continuing funding for peace programs. And while for now, the UK has agreed to participate in funding those programs, scholars' warnings that financial contributions could compete for UK budget funds for areas such as health and education still stand.<sup>37</sup> Maybe most importantly though, the EU is seen to have been central in facilitating a "habit of cooperation" in Anglo-Irish relations – two countries with a historically contentious relationship – during the peace process through regular exchanges.<sup>38</sup> European integration promoted the bridging of Britain's and Ireland's political differences.<sup>39</sup> Now Brexit has profoundly damaged the political and diplomatic Anglo-Irish relationship and called into question the British government's commitment to reconciliation.<sup>40</sup> How this destabilization of the European dimension of Northern Ireland's peace also had an impact on the introduction of the Legacy Bill is demonstrated in the following sections.

## Northern Ireland Troubles (Legacy and Reconciliation) Bill

The Legacy Bill was introduced to the House of Commons for parliamentary scrutiny by its sponsoring ministerial department, the Northern Ireland Office (NIO), during Boris Johnson's premiership in May 2022.<sup>41</sup> It envisions significant changes to NI's approach to dealing with the past.

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34 Michael Keating, *Between two unions*, 636; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), Council of Europe, 1950.

35 McEvoy et al., "Model Bill Team Initial Response to Northern Ireland Troubles (Legacy and Reconciliation) Bill", *Dealing with the Past in Northern Ireland (2022)*, 6.

36 McCrudden, *The Good Friday Agreement, Brexit, and Rights*, 3 and 7–8.

37 European Commission, "Northern Ireland: PEACE PLUS programme will support peace and prosperity across Northern Ireland and the border counties of Ireland," 13 July 2022; Northern Ireland Office, "UK announces majority contribution to PEACE PLUS funding," 4 September 2021.

38 McEvoy, Bryson and Kramer, *The Empire strikes back*, 630–37.

39 Katy Hayward and Mary Murphy, *The EU's Influence on the Peace Process*, 4.

40 Mary Murphy, *Northern Ireland and Brexit*, 413.

41 As bills move through legislative stages they are amended. This analysis worked with the Bill as introduced in the HoL after passing through the HoC: "Northern Ireland Troubles (Legacy and Reconciliation) Bill 2022. (HL Bill 37). Session 2022–23."

Concerning judicial TJ measures, the Legacy Bill provides for the establishment of an Independent Commission for Reconciliation and Information Recovery (ICRIR). Among other things, the ICRIR's functions include the carrying out of reviews into Troubles-related deaths or other harmful conduct, as well as determining whether to grant persons immunity from prosecution for Troubles-related offences. However, requests for such reviews will not be permissible after the end of the fifth year of the ICRIR's operations, equalling a *de facto* amnesty for Troubles-related offences after that period. Scholars have noted there is a "conspicuously low threshold" for immunity.<sup>42</sup> Additionally, the Legacy Bill stipulates that requests shall not be granted to any person of whom a public prosecution for a Troubles-related offence is underway, or who has already been convicted. It has been pointed out that these provisions seem to be designed to facilitate immunity requests by state actors: between 25.000 and 30.000 members of paramilitaries have convictions precluding them from applying, while criminal proceedings for state actors have been modest in numbers.<sup>43</sup> Furthermore, the Legacy Bill essentially prohibits all Troubles-related judicial activity (criminal investigations, criminal enforcement action and civil proceedings) except for processes taking part within the framework of the ICRIR's functions. The only way in which new criminal enforcement actions will still be permitted is when the ICRIR refers a case of a person without immunity to a prosecutor. The Bill also prohibits the continuation and initiation of nearly all coroner's inquests into Troubles-related deaths as well as police complaints made to the Police Ombudsman for NI for Troubles-related incidents. Therefore, the Legacy Bill radically restricts victims' access to judicial means to search for truth and accountability. Eradicating judicial means hinders the fight against impunity and the provision of justice which are required to achieve socioemotional reconciliation. This also puts into question compliance with Protocol Article 2 (no diminution of rights guaranteed in the 1998 BA) as well as with the ECHR.<sup>44</sup> Material by bodies such as the Joint Committee on Human Rights and the Northern Ireland Human Rights Commission reflect this.<sup>45</sup> So, although earlier ECtHR judgements had already identified issues with the UK's past handling of NI legacy cases, the Legacy Bill risks further aggravating failures to be ECHR-compliant, instead of implementing promised measures to remedy shortcomings.

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42 McEvoy et al., *Model Bill Team Initial Response*, 16.

43 McEvoy et al., *Model Bill Team Initial Response*, 13–17.

44 Northern Ireland Human Rights Commission, "Advice on NI Troubles (Legacy and Reconciliation) Bill," 2022: 50.

45 Joint Committee on Human Rights, House of Lords/House of Commons, "Legislative Scrutiny: Northern Ireland Troubles (Legacy and Reconciliation) Bill," HC 311/HL Paper 79. Sixth Report of Session 2022-23, 2022; Northern Ireland Human Rights Commission, "Supplementary Briefing: UK Government's Proposed Amendments to NI Troubles (Legacy and Reconciliation) Bill," 2023.

Regarding non-judicial TJ measures, the Legacy Bill includes the aim of supporting the creation of oral history records, memorialisation and academic research. It is the Secretary of State for Northern Ireland (SOSNI, a UK Government senior minister position) who allocates resources and appoints the designated persons to do this work. Scholars have noted, however, that placing research programmes under the control of the SOSNI raises concerns about the independence of the work and causes doubts about whether such efforts will be seen as credible and legitimate by the public. The strong emphasis put on centralizing decision-making on large parts of the official TJ process in the Legacy Bill is striking. The SOSNI is given extensive powers to influence the workings of the ICRIR as well as the delegated persons responsible for the non-judicial mechanisms in the Legacy Bill. This is criticized by scholars who have reservations about how this power could be instrumentalized to hide unlawful conduct by state actors.<sup>46</sup> When speaking about centralization of governmental control in the UK, discussions on devolution are seldom far off. Multiple sources attest to the fact that this Bill does not respect current devolution settlements with NI and Scotland.<sup>47</sup> Yet not only the overriding of devolution settlements is notable, but also a more “Westminster-internal” concentration of power: A Committee in the House of Lords tasked with providing oversight on whether new bills inappropriately delegate legislative powers objected to certain powers in the Legacy Bill being transferred to the SOSNI without parliamentary scrutiny. The NIO chose not to amend the Bill in these regards.<sup>48</sup> Unsurprisingly, the Bill sparked a large wave of criticism from all political parties in NI, victims’ organizations and other actors such as the Council of Europe’s Commissioner for Human Rights or the United Nations.<sup>49</sup>

## Qualitative Analysis of UK Parliamentary Debates

Given the widespread opposition to and the expected negative impacts of the Legacy Bill on Northern Ireland’s (centralized) TJ process, the question to answer remains: Did Brexit play a role in the move by the UK Government to introduce and push for a bill which is expected to disrupt

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<sup>46</sup> McEvoy et al., *Model Bill Team Initial Response*, 8 and 15.

<sup>47</sup> Scottish Government, “Legislative Consent Memorandum. Northern Ireland Troubles (Legacy and Reconciliation) Bill,” LCM-S6-27. Session 6. Scottish Parliamentary Corporate Body, 20 October 2022; Select Committee on the Constitution, “5th Report of Session 2022-23. Northern Ireland Troubles (Legacy and Reconciliation) Bill. HL Paper 70,” 2022; Northern Ireland Office, “Government Response: Report of the Constitution Committee Northern Ireland Troubles (Legacy and Reconciliation) Bill,” 21 February 2023.

<sup>48</sup> Delegated Powers and Regulatory Reform Committee, “9th Report of Session 2022-23. House of Lords Delegated Powers and Regulatory Reform Committee. HL Paper 55,” 2022; Delegated Powers and Regulatory Reform Committee, “20th Report of Session 2022-23. House of Lords Delegated Powers and Regulatory Reform Committee. HL Paper 113,” 2022.

<sup>49</sup> Council of Europe, “Rule 9 Submission by the Council of Europe Commissioner for Human Rights. Comm-DH(2022)22,” 31 August 2022; OHCHR, “UK: Flawed Northern Ireland ‘Troubles’ Bill flagrantly contravenes rights obligations, say UN experts 2022,” 15 December 2022.

reconciliation efforts in Northern Ireland? To answer this question, taking a closer look at parliamentary debates in both UK parliamentary chambers proves useful.<sup>50</sup>

The most vocal support for the Legacy Bill came from some (but not all) members of the (then) governing Conservative party, while opposition was strong in all other parties. The issue of the treatment of veterans of the British Army and the Royal Ulster Constabulary (the largely Protestant police force in NI before police reforms) was particularly salient. Multiple Conservative MPs argued that these veterans had been treated unfairly due to ‘vexatious litigation’ and ‘law-fare’, and that the Bill was necessary to give them certainty they would not be legally pursued for their actions during the Troubles. This ‘veterans narrative’ garnered criticism from other parties. Notably though, even Northern Irish unionists supportive of veterans showed disagreement. Therefore, the veterans narrative being propagated mainly by *English* politicians aligned with the work of scholars who observed a rise of this portrayal of ‘vexatious litigation’ in relation to NI legacy discussions.<sup>51</sup> The related but more overarching discussion of the role of the British state in the Troubles and TJ process more generally was also salient. Here, the fault line most visible was that between those arguing for the need of the British Government to acknowledge its active role in the conflict and those denying (negative) aspects of it. These two issues raised questions regarding a possible implicit influence of Brexit on the Bill: To what extent did Brexit and the associated rise in English nationalism shape these narratives? To what extent were these narratives a factor in the timing of the Legacy Bill’s introduction? Why was the veterans narrative mobilized in support of the Legacy Bill by English Conservative politicians, but not by NI unionists who otherwise also support veterans? Do the differing opinions of the Bill within the Conservative party reflect post-Brexit internal party dynamics?

During the debates a fair amount of discussion took place on the specific design of the individual TJ mechanisms in the Legacy Bill, as well as their expected implications for the TJ process in NI. There was significant agreement across the political spectrum (apart from those few strongly supportive Conservatives) that the Legacy Bill failed to deliver for victims and that it would take away their hope of receiving closure or justice, while simultaneously giving perpetrators a free pass. It is important to note, however, that there was no consensus on what the ideal TJ mechanisms would look like, and arguments were often rooted in the debate participants’ view on

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50 The House of Commons debate took place on May 24th 2022, while the House of Lords debate took place on November 23rd 2022 (see House of Commons 2022 and House of Lords 2022). Members of the HoC are called MPs, while Members of the HoL are simplified here with “ML”.

51 McEvoy et al., *Prosecutions, Imprisonment and the Stormont House Agreement*, 8; Mark McGovern, “Legacy, Truth and Collusion in the North of Ireland,” *Race & Class* 64, no. 3 (2022): 59–89, 82.

the “hierarchy of victims”.<sup>52</sup> The immunity scheme and the expected *de facto* amnesty got most attention. A majority of debate participants was sceptical that the immunity scheme as it stood would contribute to truth recovery and therefore justify the ending of judicial TJ measures – an argument made by the Northern Ireland Office. On the other hand, the non-judicial TJ measures received comparatively less attention than the ICIR, the immunity scheme and the *de facto* amnesty. But they were also met with universal opposition – either due to concerns over lack of independence from the British Government or due to concerns that they would be instrumentalized by groups furthering an anti-state narrative:

“Commendable as the proposals for an oral history are [...] it is possible that it will also be politicised and enrolled in an ongoing effort to retell the history of the Troubles from an anti-state perspective.” (Lord Godson, Conservative Party, HoL)

Another extensively discussed topic was the issue of compliance with legal obligations. Members of the NIO insisted that the Bill would ensure an ECHR-compliant process. But, as illustrated earlier, there are serious concerns in expert circles about the Legacy Bill’s ability to comply with legal obligations. Such concerns were mirrored among debate participants, including some Conservative members. A contribution by a Labour MP alluded to the fact that adherence to ECHR rules goes against the liking of those Conservatives with sceptical positions on European laws. Therefore, the debate participants themselves had the possibility of factors such as Euroscepticism playing a role in the Legacy Bill’s development on their minds:

“[...] it would be difficult even for the most Panglossian optimist to contest the view that the UK’s reputation for adherence to international law has been degraded by the actions of successive Governments since the Brexit referendum.” (Lord Browne of Ladyton, Labour Party, HoL)

A significant part of the debate also treated issues of independence, with the most frequently raised topic being the powers granted to the SOSNI under the Legacy Bill. It stands to reason that such centralization of power in the hands of Westminster, combined with the intersecting issue of veterans evoked by English Conservatives, exhibits an expression of the rise in English nationalism and sovereignty concerns. But this centralization being universally criticized in both debates – including by some Conservatives – as well as by certain government internal bodies, brings forth questions about possible Brexit-related tensions between State bodies, and within

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<sup>52</sup> Sarah Jankowitz, “The ‘Hierarchy of Victims’ in Northern Ireland: A Framework for Critical Analysis,” *International Journal of Transitional Justice* 12, no. 2 (2018): 216–236.

the Conservative party itself. This would align with scholars' work on party change and intra-party dissent within the Conservative party since Boris Johnson's campaign to "get Brexit done", stating there was a takeover by the hard Brexit faction and key posts in Government were awarded to hardcore Brexiteers.<sup>53</sup>

How the UK Government proceeded in introducing the Legacy Bill, including its motivations, the conditions of parliamentary scrutiny, the timing and the policy shift in contrast to the SHA also garnered attention. This included discussions on how the Government approached public consultation and cooperation with inter/national actors. Many debate participants stated that the goal of furthering reconciliation asserted by the Government was a smokescreen for its actual main motivations. The many statements made to this effect are further indications that the Brexit wing of the Conservatives had a considerable influence on the Bill's introduction:

"The reality is that the Secretary of State has given in to what he perceives to be the demand from his own Back Benchers, but at the expense of the many people who could have been served by a much better Bill. That has to be recognised." (Tony Lloyd, Labour Party, HoC)

The introduction of the Legacy Bill by the UK Government was very often contrasted against what had previously been agreed to in the Stormont House Agreement. The dominant opinion was that the SHA had, contrary to the Legacy Bill, received support from the broadest possible coalition of actors, and it was therefore unacceptable that the UK Government abandoned it. In fact, the issue of unilateral decision-making was one of the most salient. The positions opposing the Government's approach revealed the striking extent to which the Legacy Bill was considered by MPs and MLs to be a bad bill being pushed through with a considerable disregard for democratic due process of law-making. This disregard for opinions from other stakeholders by the Government was of particular importance for this analysis in relation to three issues: (1) devolution, (2) Anglo-Irish relations, and (3) Westminster internal dynamics. On devolution, the general view during the debate was that the UK Government was infringing not only on NI's devolved powers, but also on matters transferred to the Scottish Parliament. This seemed like an expression of the "lack of embeddedness" of inclusion of devolved interests in UK policy-making becoming increasingly apparent since Brexit.<sup>54</sup> Certain MPs and MLs also played at negative attitudes towards "the Northern Ireland question" and NI's standing in the Union – reminiscent of

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<sup>53</sup> Hayton, *Brexit and Party Change*; Xu and Lu, *Intra-party dissent over Brexit*.

<sup>54</sup> Mary Murphy and Jonathan Evershed, "Contesting sovereignty and borders: Northern Ireland, devolution and the Union," *Territory, Politics, Governance* 10, no. 5 (2022): 672.

scholars describing how NI was perceived of being in the way of “getting Brexit done”.<sup>55</sup> Note the wording chosen in the following contribution:

“Members have cynically used the failure of successive Governments over decades to address this issue as an excuse to now ‘get Northern Ireland done’” (Claire Hanna, Social Democratic and Labour Party, HoC)

The ways in which Anglo-Irish relations were discussed during the debates provided further indications of links to Brexit. After the publication of the Legacy Bill, the Irish Government said that it was “disappointing that the UK Government have chosen to unilaterally introduce legislation”.<sup>56</sup> The sentiment that attempts of cooperation by the UK Government had not been satisfactory was reflected in the debates, although from two differing perspectives: Either Ireland’s role as a valuable partner in the Northern Irish peace and reconciliation process was emphasized, or it was argued (by less supportive Conservative and Democratic Unionist Party members) that Ireland had not been doing its part in handling legacy issues so far and must therefore be included now. Either way, the prevailing opinion was that the Irish Republic should have been included more actively in the UK Government’s approach to the Legacy Bill:

“The Irish Government are supposed to be a partner in the process and in managing the Good Friday Agreement, but have not been part of this phase of the legacy deliberations. They, too, see the Bill as unworkable and as incompatible with article 2 of the convention.” (Stephen Farry, Alliance Party, HoC)

Regarding Westminster-internal dynamics, the analysis showed that ‘the Government’ must be regarded with a more differentiated view, specifically by highlighting the NIO’s role – and even the role of individual members of the NIO. As described above, it was the NIO who was informed by Westminster-internal Committees about their criticism of the Bill and which responded dismissively of this criticism. The NIO – once “the main institutional location” within the UK Government for NI expertise – was increasingly marginalized during the Brexit process, and even more so with the May and Johnson Governments when reshuffles in the department resulted in the fact that no senior politicians with direct NI experience staffed the department.<sup>57</sup>

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55 McEvoy, Bryson and Kramer, *The Empire strikes back*, 620 and 625–26.

56 Irish Department of Foreign Affairs, “Statement by the Minister for Foreign Affairs and Minister for Defence Simon Coveney on the publication of the UK Government’s ‘Northern Ireland Troubles (Legacy and Reconciliation) Bill’,” 18 May 2022.

57 Michael Kenny and Jack Sheldon, “‘A place apart’, or integral to ‘our precious Union’? Understanding the nature and implications of Conservative Party thinking about Northern Ireland, 2010–19,” *Irish Political Studies* 36, no. 2 (2021): 291–317, 301.

That a change had taken part within the NIO, which was affecting relations with NI, was hinted at during the debate:

“[...] I heard at first hand from numerous organisations, when discussing legacy, how frustrated they were that they had better working relationships with the former Secretary of State [...] than they do with the incumbent Secretary of State for Northern Ireland.” (Tonia Antoniazzi, Labour Party, HoC)

To sum up, the analysis of parliamentary debates revealed multiple indicators that the UK Government’s move to introduce the Legacy Bill was influenced by Brexit. Firstly, the veterans narrative was carried mainly by English politicians, pointing to a possible link to the increase in English nationalism since Brexit. Secondly, the lack of compliance with the ECHR and other legal obligations (at least the willingness by parts of the Conservative party to accept it) likely reflected the rise in Euroscepticism and renewed emphasis on English sovereignty. Thirdly, the centralization of power in the hands of the SOSNI which the NIO-sponsored Legacy Bill foresees was widely criticized, even by some Conservatives and other State bodies, pointing to party-internal tensions and the possible impact of post-Brexit reshuffles of NIO staff. Lastly, the unilateral approach adopted by the NIO, including the policy shift after the SHA, the disregard for devolution agreements, the perceived negative attitudes towards NI, as well as non-cooperation with Ireland, demonstrated parallels to scholarly works exploring English nationalism and aspirations for an English sovereignty.

## Insights from Stakeholder Interviews

To corroborate the findings from the parliamentary debate analysis, stakeholder interviews were conducted with Charlie Whelton, Policy and Campaigns Officer at the UK-wide human rights organization Liberty (which takes a neutral stance on Brexit) and Daniel Holder, Director at the Northern Irish human rights organization Committee on the Administration of Justice (CAJ) – two individuals who have engaged extensively with the Legacy Bill. Both interview partners attributed the direct influences on the Legacy Bill to the veterans issue and the Overseas Operations (Service Personnel and Veterans) Act 2021 (OOA), aligning with the results of the debate analysis.<sup>58</sup> The interviewees had slightly differing perceptions of the strength of the link between the OOA, its supporters in the UK Government, Brexit and the Legacy Bill. While Whelton did not initially

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<sup>58</sup> Overseas Operations (Service Personnel and Veterans) Act 2021 (c.32). The law makes “provision about legal proceedings and consideration of derogation from the European Convention on Human Rights in connection with operations of the armed forces outside the British Islands”.

connect the veterans issue to Brexit (although it was not ruled out), Holder saw a clear overlap between the specific group of Conservatives supporting Brexit and those pushing for the Legacy Bill. Holder also voiced his perception that sovereignty issues, political marginalization of NI as well as contempt for international law were a characteristic of the hard Brexit faction of the Conservative party. Therefore, preliminary findings supported the possibility that a link between the hard Brexit faction of the Conservatives, the veterans narrative and the increase in English nationalism exists and it was relevant for the Legacy Bill.<sup>59</sup>

Regarding the Legacy Bill's non-compliance with ECHR, Whelton showed consternation about "just how cavalier" the Bill's advocates were about breaching the ECHR and mentioned statements by then-Prime Minister Rishi Sunak implicitly threatening the UK's departure from it. His perceptions showed a clear parallel to findings of the debate analysis that sovereignty concerns and empire nostalgia especially, but also Euroscepticism, fueled this disregard for ECHR obligations in the Legacy Bill. Holder also touched upon the European dimension. He noted a conflation of European institutions (such as the EU, Council of Europe etc.) since Brexit, prevalent among people in high political office in the UK, and how this may have influenced the Legacy Bill. Additionally, he highlighted the deterioration of Anglo-Irish relations since Brexit which had resulted in diminished regard for the previously existing habit of cooperation that had provided (political) checks and balances:

"Another parallel is the treatment of the Irish Government. The peace process has always been driven by both countries and governments. It has been very much a bilateral process. Both Brexit and the Legacy Bill under the current British Government have essentially ended that." (D. Holder, CAJ, 12.06.2023)

The role of the NIO and whether Brexit-related changes within the department could have influenced the Legacy Bill's introduction and the shift away from the 2014 SHA was another issue the conversations with stakeholders allowed more insights to be gathered on. The interview partners' views on the NIO supported preliminary findings from the debate analysis that this post-Brexit reshuffle shaped its unilateral approach to the Legacy Bill's introduction:

"When Liz Truss became Prime Minister she did a reshuffle and she put into the NIO as

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59 The overlap between 'veteran culture' and Brexit supporters, as well as the tensions between post-Brexit English nationalism and allegations of human rights abuses of the British Army are also mentioned, but not developed in detail, in Kevin Hearty, "Misrecognising the victim of state violence: Denial, 'deep' imperialism and defending 'our boys,'" *Crime, Law and Social Change* 73, no. 2 (2020): 217–235; Kevin Hearty, "Closing the ranks: Bondedness, sense of self and moral injury during legacy case prosecutions," *Irish Journal of Sociology* 0 (2022): 1–20.

the Secretary of State Chris Heaton-Harris and as Minister Steve Baker. And these are two of what's known as the 'Brexit Spartans,' the very strong Brexiteers. [...] I don't think that the current make-up of the NIO in terms of the Commons members, I don't think that legacy is a key concern of theirs. I think it is the impact of Brexit." (C. Whelton, Liberty, 19.05.2023)

Hard Brexit supporting ministers were brought on who hold attitudes characterized by aspirations for an English version of sovereignty. This was, as both stakeholders' responses showed, also reflected in the way the Legacy Bill was designed to override devolution agreements. Whelton's responses revealed that he perceived this approach as being deliberate, at least to some extent. When asked whether this unilateral course of action in legislating on devolved matters had occurred previously (a question posed to ensure no pattern unrelated to Brexit was being overlooked), Holder answered that the only two examples of the UK Government so clearly overriding the NI devolution settlement – when it was not only unnecessary to ensure compliance with, but actually countering, international legal obligations – were Brexit and the Legacy Bill. However, both stakeholders mentioned the introduction of several other bills which, in their opinions, demonstrated parallels to the Legacy Bill, such as unilateralism and disregard for international legal obligations. Some of these were criticized so strongly by other actors that the Government had to backpedal. Further research could attempt to map with more detail the dynamics within the opposition's campaign, which factors influenced it and attitudes towards NI – a gap the analysis underlying this article does not address sufficiently. This could be helpful in explaining why other Bills criticized for similar reasons were scrapped, while the Legacy Bill was not. Whelton emphasized that, in his view, the span of legislation brought on by the current UK Government all came down to avoiding accountability. He said he especially saw the 2019 election and Boris Johnson's takeover as Prime Minister as a pivotal moment in time. This showed that Brexit was not simply the singular day of the referendum vote in 2016, or the date of the UK's legal departure from the EU in 2021. Rather, Brexit was both a manifestation and a catalyst of a number of shifts in UK politics.

## Conclusion

The Legacy Bill envisions significant changes to the centralized elements of Northern Ireland's transitional justice approach. Existing judicial TJ mechanisms would essentially be scrapped, thus radically restricting victims' options to search for truth and justice. The only remaining judicial avenue would function through the newly established Independent Commission (ICRIR) which would only run for five years, resulting in a de facto amnesty thereafter. The Legacy Bill

significantly centralizes power over all TJ mechanisms in the Bill in the hands of the Secretary of State for Northern Ireland, resulting in a lack of independence and legitimacy. It further overrides devolution agreements, and there are concerns over compliance with (international) legal obligations such as those deriving from the ECHR, the 1998 Belfast Agreement or the NI Protocol. The Legacy Bill is expected to hinder socioemotional reconciliation, which is fostered through the provision of justice and the promotion of truth. This article described how the Legacy Bill's timing, its contents, and the way in which its introduction was handled by the sponsoring the Northern Ireland Office were likely impacted by Brexit. More specifically, they were affected through the influence of the hard Brexit Conservative party faction characterized by its Euroscepticism, English nationalism, and commitment to British sovereignty. First, the analysis of parliamentary debates revealed that Brexit potentially influenced the following elements of the Legacy Bill: (1) the UK Government's apparent main motivation to issue the Legacy Bill: protecting British veterans, (2) non-compliance with the ECHR, (3) the centralization of power over TJ mechanisms in the hands of the SOSNI and (4) the UK Government's unilateral approach to the Bill's issuance (disregard for devolution agreements, the perceived negative attitudes towards NI, as well as lack of cooperation with the Republic of Ireland). Then, findings from stakeholder interviews corroborated these findings and garnered further evidence that this impact was facilitated by reshuffles in the NIO to include ministers known to be "Brexit Spartans". Although the results garnered here are preliminary, they offer insights on how Brexit has continued to pose challenges to peace and stability in Northern Ireland not just through disputes over the border and protocol negotiations, but also through its impact on law-making in the area of TJ in perhaps more subtle – but not necessarily less meaningful – ways.

In September 2023, a couple of months after the analysis underlying this article was completed, the Legacy Bill passed into law.<sup>60</sup> After that, multiple legal challenges were launched. In December 2023, the Government of Ireland decided to initiate an inter-State case against the UK under the ECHR over the Legacy Act. The first case between the UK and Ireland before the ECtHR since 1971.<sup>61</sup> In February 2024, the High Court in NI handed down a judgment stating – among other things – that the Legacy Act's immunity provisions, as well as its ending of civil actions, are incompatible with the ECHR and article 2 of the NI Protocol (now 'Windsor Framework') on no diminution of rights through the UK's withdrawal from the EU.<sup>62</sup> Maybe most importantly though, the Leader of

60 Northern Ireland Troubles (Legacy and Reconciliation) Act 2023. (c.41).

61 Irish Department of Foreign Affairs, "Statement by the Tánaiste Micheál Martin on the government decision to initiate an inter-State case against the United Kingdom," 20 December 2023.

62 Judiciary NI, "Summary of Judgment – In re Dillon and others – NI Troubles (Legacy and Reconciliation) Act 2023," 28 February 2024.

the Labour Party, Sir Keir Starmer, who took over as the UK's new Prime Minister after the general election in July 2024, pledged to roll back the Legacy Act. In July 2024, Starmer's Government stated it would "begin the process of repealing and replacing the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023" – a promise welcomed by Northern Irish parties and victims' groups.<sup>63</sup>

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<sup>63</sup> Prime Minister's Office, "The King's Speech 2024", 17 July 2024; Belfast Telegraph, "King's Speech: Controversial Legacy Act to be 'repealed and replaced'," 17 July 2024.

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