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ABSTRACT

This article, which is part of the North–South Legal Mapping Project, considers land law and land use in each jurisdiction on the island of Ireland. The first part provides a sketch of the basic structures of land law, identifying a remarkable level of convergence (or, more accurately, absence of divergence), which is only partially qualified by recent comprehensive land law reform in Ireland, notwithstanding the absence of comparable reforms in Northern Ireland. The second part considers land use, where there is greater

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(and increasing) potential for divergence, particularly in environmental governance. The article sketches and explains core influencing factors that have shaped the evolution of environmental governance on the island to date, before considering how Brexit and subsequent developments impact regulatory alignment across the island. It focuses on the issue of water protection and river basin management, in light of the three transboundary river basins on the island.

INTRODUCTION

There is a remarkable level of convergence in the land laws of each jurisdiction on the island of Ireland; or, perhaps more accurately, a remarkable *absence of divergence*. In both Northern Ireland and Ireland, the structure and conceptual basis of land law has its roots in English common law and the feudal system of landholding as it developed and evolved following the Norman conquest, and as it gradually and eventually supplanted Brehon law.[1] At the time of partition, land law on the island of Ireland was relatively settled, and there was comparatively little need for contemporaneous land law reform (this is particularly striking when contrasted with the substantial land law reforms in England and Wales in the 1920s).[2] More recently, there has been comprehensive land law reform in Ireland,[3] and a proposal for reform in Northern Ireland.[4] Notwithstanding these processes, there remain high levels of complementarity in the basic doctrines and structures of land law in each jurisdiction, which continue to rely expressly on the language and understanding of estates and lesser interests derived from the feudal system. This is not to say that there has been no divergence—it is certainly possible to observe differences on specific matters of doctrine and/or policy—but

[1] V.T.H. Delany, 'English and Irish land law—some contrasts', *American Journal of Comparative Law* 5 (3) (1956), 471–7; Alfred Donaldson, 'The application in Ireland of English and British legislation made before 1801' (unpublished thesis, Queen's University Belfast, 1952). The range of sources needed to chart this development is vast, and the doctrinal story of land law can only be told through the cumulative impacts of English common law and statute law (including enactments passed in Westminster for application only across the island of Ireland), legislation from each jurisdiction on the island, and principles developed through the work of the courts in each jurisdiction, as influenced by English law and indeed the law of other common law jurisdictions: J.C.W. Wylie, *Irish land law* (5th edn, Dublin, 2013), 1.06 ff.

[2] Lorna Fox O'Mahony, 'Something old, something new, something borrowed: land law reform in Northern Ireland', *Conveyancer and Property Lawyer* 75 (5) (2011), 356–79: 357.

[3] Land and Conveyancing Law Reform Act 2009.

[4] Northern Ireland Law Commission Report, *Land law*, NILC 8 (Belfast, 2010).

these divergences can be understood as commensurable thanks to a common basic doctrinal structure. In this sense, land law in each jurisdiction remains closely related to English law, but 'flavoured by some distinctively Irish concepts, judicial developments and legislation'.[5] Any attempt to map land laws on the island needs to be attentive to this common basic structure. The first part of this article seeks to provide a sketch of that structure, considering how it emerged in the years before partition, and illustrating the absence of fundamental divergence that continues to exist, notwithstanding more recent occasions for reform.

The second part of the article moves beyond the underpinning structures of land law to matters of land use, where it seems that there is greater (and increasing) potential for divergence, particularly in the realm of environmental governance. Property rights and environmental governance are closely intertwined. Ownership of land includes the liberty to make use of the land (including the natural resources therein); to restrict access by third parties; to make dispositions of the land; and so on.[6] Therefore, landowners may grow or destroy crops, trees or animals; remove or add to ground or surface waters; fish and hunt; build houses or factories; etc. Such actions may impact significantly on the environment, both positively and negatively. Consequently, environmental governance, which aims to benefit the public interest or deliver public goods, frequently restricts landowners' rights over the use of their land.[7] It also sometimes incentivises positive behaviour, e.g. through providing financial supports to plant and maintain native woodlands.[8] However, the effectiveness of such measures may be affected by the relationship between land law and environmental law (in the hierarchy of laws), the extent of property rights (what they permit and how absolute they are) and the duration of

[5] Fox O'Mahony, 'Something old, something new, something borrowed', 357. Arguably, Northern Irish and Irish land law remain more similar to each other than either is to English land law. However, we must be careful not to overstate the differences between land law on the island of Ireland and in England—Wylie has argued persuasively that fundamental conceptual differences between English and Irish land law are rare, and that 'distinctive' attributes of Irish land law can be understood as matters of detail rather than systematic conceptual difference: J.C.W. Wylie, 'The Irishness of Irish land law', *Northern Ireland Legal Quarterly* 46 (1995), 332.

[6] See A.M. Honoré, 'Ownership', in A.G. Guest (ed.), *Oxford essays in jurisprudence* (1st edn, Oxford, 1961). The content of a fee simple estate is understood to consist in the general duty owed by the rest of the world not to interfere with the owner's control of the land, the existence of which duty preserves a space of freedom for the owner to use the land, control access, dispose of the land, etc. See generally Simon Douglas, 'The content of a freehold', in N. Hopkins (ed.), *Modern studies in property law*, vol. 7 (Oxford, 2013).

[7] See generally J.W. Harris, *Property and justice* (Oxford, 1996), 32–41.

[8] For example, the Native Woodland Conservation Scheme, available at: https://www.gov.ie/en/service/803ef3-native-woodland-conservation-scheme/ (6 March 2023).

these (e.g. short- or long-term tenancies).[9] Therefore, both individual landowners and environmental actors need to be aware of the parameters of both land law per se and environmental law.

When it comes to environmental law and governance, the issue of regulatory alignment or lack thereof is of fundamental importance.[10] First, closer alignment enables individuals such as those who own land straddling the border or environmental actors to identify, understand and engage with the legal regimes more easily. Second, cross-border and all-island cooperation and collaboration are essential for environmental governance,[11] e.g. as reflected in approaches to invasive and alien species.[12] This is due to the nature of the island as a single biogeographic and epidemiological unit, where 'nature doesn't respect borders' or indeed vice versa. Common frameworks (encompassing standards, procedures, objectives or otherwise) or regulatory alignment can facilitate such cooperation and collaboration.[13] Third, environmental protection is flawed across the island—this includes the actual state of the environment and also environmental governance.[14] There is need for improvements across the board in both jurisdictions, but these are by no means guaranteed—with varying political will and resourcing. Depending on the details, some degree of divergence could bring positive changes and even act as a positive example or influence on the other jurisdiction. Consequently, the second part of the article sketches out and helps explain core influencing factors that have shaped the evolution of environmental governance on the

[9] For example, M. Cardwell, 'Results-based agri-environmental scheme design: regulatory implications', draft paper (2021); Bróna McNeill, 'Is the grass always greener? Understanding grazing and cropping rights in Northern Ireland', in Sue Farran et al. (eds), *Modern studies in property law*, vol. 11 (Oxford, 2021); Christopher Rodgers, 'Delivering a better natural environment? The Agriculture Bill and future agri-environment policy', *Environment Law Review* 21 (1) (2019), 31, 45–6.

[10] For example, Katie Murphy and Grace Glasgow, 'North–South coordination in Ireland's international river basin districts', *Biology and Environment: Proceedings of the Royal Irish Academy* 109B (3) (2009), 139–50.

[11] The interdependencies between Northern Ireland and Ireland are particularly strong in respect of environmental governance due to the shared presence on the island and the permeable nature of the environment, as highlighted regarding river basin management (see below) or invasive species. However, similar issues arise between Ireland, Northern Ireland and the UK as a whole, e.g. regarding air pollution or marine pollution. On the general importance of mapping such broader interdependencies, see John Doyle, Cathy Gormley-Heenan and Patrick Griffin, 'Editorial: Introducing ARINS—Analysing and Researching Ireland, North and South', *Irish Studies in International Affairs* 32 (2) (2021), vii–xvii: viii.

[12] For example, 'Joint launch of Invasive Alien Species websites', 16 May 2022, available at: https://biodiversityireland.ie/press-release-joint-launch-of-invasive-alien-species-websites/ (6 March 2023).

[13] See regarding Covid on the island: Mary Dobbs and Andrew Keenan, 'Territorial approaches to a pandemic: a pathway to effective governance?', *Northern Ireland Legal Quarterly* 77 (2) (2022), 202–33.

[14] For example, Ciara Brennan, Mary Dobbs and Viviane Gravey, 'Out of the frying pan, into the fire? Environmental governance vulnerabilities in post-Brexit Northern Ireland', *Environmental Law Review* 21 (2) (2019).

island to date, before considering how Brexit and subsequent developments impact regulatory alignment across the island. It focuses on the issue of water protection and river basin management (RBM), in light of the three transboundary river basins on the island.

Finally, before we turn to the discussions in each part of the article, it is useful also to clarify what we do not propose to cover. Firstly and trivially, it has not been possible in the confines of a mapping paper to consider the complexities of many matters of land law doctrine or environmental governance where there are nuanced convergences or divergences. There is much that we would have liked to discuss in detail, for example, on legislation concerned with residential and business tenancies, on the development of mortgage remedies, on the policy aims behind retaining a limitation-based doctrine of adverse possession, water pollution offences or environmental governance structures. We have instead sought to confine our remarks on the law to its general structure and defining features, in the confidence that the lack of divergence here will facilitate relatively straightforward discussions of more detailed matters of divergence wherever it should occur in the future. Secondly, and perhaps more significantly, in offering an account of the lack of divergence in the structures of land law or environmental law, we certainly do not mean to suggest that land or environmental law or policy on the island has been free of difficulty or of serious social concern—far from it. Countless examples could be drawn to speak of such challenges, from restrictions on land transfers on sectarian grounds to problems of housing allocation and gerrymandering that precipitated, and persisted through, the Troubles in Northern Ireland.[15] However, the discussion here provides a necessary foundation for future consideration of such issues.

THE BASIC STRUCTURE OF LAND LAWS: AN ABSENCE OF DIVERGENCE

There is much that could be and has been written about the history of land law in Ireland. Suffice it to say that Irish land law has a 'complex, hybrid,

[15] See for example L. Moffett, C. Lawther, K. Hearty, A. Godden and R. Hickey, '"No longer neighbours" – the impact of violence on land, housing and redress in the Northern Ireland conflict', Reparations, Responsibility and Victimhood in Transitional Societies project (2020), available at: https://pure.qub.ac.uk/en/publications/no-longer-neighbours-the-impact-of-violence-on-land-housing-and-r (6 March 2023).

and ruptured heritage' shaped by the equally complicated British–Irish relationship.[16] As our focus is on the absence of divergence in the basic structures of land law North and South, we offer only the briefest of sketches of the history prior to 1921. That being said, it is important to remember that the history is one of 'conquest[,] confiscation'[17] and competition over land,[18] with the penal laws all but prohibiting land ownership by Irish Catholics.[19] How the penal laws affected land ownership, and how Irish Catholics sought to circumvent their effects, is still under investigation.[20] Though a more nuanced picture is emerging, the overall effect was to inhibit rather than protect land ownership of Irish Catholics.

What is clear is that there was a large class of tenants in nineteenth-century Ireland. (In)famously, there were some differences in how tenants were treated depending on their location. The pre-famine Devon Commission described the Ulster Custom as a form of 'joint proprietorship in the land'.[21] The Ulster Custom was a form of tenant right that secured the 'three Fs' the Land League would later campaign for: fair rent, fixity of tenure and free sale.[22] Following the various Land Acts of the later nineteenth century, these rights were later secured by other tenants in Ireland (see below), before ultimately being supplanted by ownership of the land itself.

A full survey of the Land Acts is beyond the scope of our article. However, it is important to note that the various Land Acts, including Deasy's Act 1860, induced whiplash with respect to their aims and ideology. Deasy's Act 1860 adhered to free market ideology, while A.J. Balfour described the Land Act of 1881 as socialist.[23] Certainly, economic historians have argued that 'Land reform in Ireland was much more a wealth-redistribution program … than a

[16] Rachael Walsh and Lorna Fox O'Mahony, 'Land law, property ideologies and the British–Irish relationship', *Common Law World Review* 47 (1) (2018), 7, 8.
[17] See William O'Connor Morris, 'Land system of Ireland', *Law Quarterly Review* 3 (2) (1887), 133, 155.
[18] See W.E. Vaughan, *Landlords and tenants in mid-Victorian Ireland* (Oxford, 1994), 75.
[19] W.N. Osborough, 'Catholics, land and the popery acts of Anne', *Studies in Irish legal history* (Dublin, 1999), 213; for a brief update see Kevin Costello, 'The legal history of the penal laws in eighteenth century Ireland', *Irish Jurist* 66 (2021), 219.
[20] See Osborough, 'Catholics, land and the popery acts of Anne'; Costello, 'Legal history of the penal laws in eighteenth century Ireland'.
[21] Devon Report, quoted in W.F. Bailey, 'The Ulster tenant-right custom: its origin, characteristics, and position under the Land Acts', *Journal of The Statistical and Social Inquiry Society of Ireland* 10 (74) (1894), 12, 17. See also Vaughan, *Landlords and tenants in mid-Victorian Ireland*, 87.
[22] For a discussion of the Land League in Ulster see Jonathan Bardon, *A history of Ulster* (Belfast, 1992), 366–73.
[23] Quoted in Clive Dewey, 'Celtic agrarian legislation and the Celtic Revival: historicist implications of Gladstone's Irish and Scottish Land Acts 1870–1886', *Past & Present* 64 (1974), 30.

serious effort to improve the efficiency of agriculture.'[24] Such reforms echo a different approach to the value of landholding in Ireland, one less concerned with productive uses and more with the users themselves.

The goals of the Land Acts shifted from efforts to improve the lot of tenants to encouraging tenant purchase. In terms of tenants' rights, the Landlord and Tenant (Ireland) Act 1870 made the Ulster Custom legal and enforceable,[25] whether it was in Ulster or not.[26] The Land Law (Ireland) Act 1881 was more ambitious and introduced the Ulster Custom on an all-island basis, while also setting up 'a system to determine and enforce fair rents'.[27] As laudable as these efforts were, the more significant changes were effected through tenant purchase.

Provisions to support tenant purchase were seen in the 1870 and 1881 Acts.[28] These provisions were extended via the Purchase of Land (Ireland) Act, also called the Ashbourne Land Act, 1885, the Land Law (Ireland) Act 1887 and the Land Law (Ireland) Act 1896. Arguably the most significant Act for tenant purchase was the Land Purchase (Ireland) Act 1903 or Wyndham Land Act 1903. The 1903 Act was popular with both tenants and landlords given that the former got 'much better terms' while the latter got 'hefty bonuses' if they sold.[29] The Irish Land Act 1909, known as the Birrell Act, substituted stock for the cash payments to landlords.[30]

The First World War interrupted the process of land purchase, but, perhaps counterintuitively, partition had no effect on its continuation.[31] As such, we now turn briefly to examine the post-partition completion of the Land Acts before examining other land law legislation post-1921. There is a need for more comparative work with respect to Irish and Northern Irish experiences with respect to land purchase. V.T.H. Delany wrote about the processes in the 1950s but noted that 'The whole question of automatic transfer in the Republic

[24] Timothy W. Guinnane and Ronald I. Miller, 'The limits to land reform: the Land Acts in Ireland, 1870–1909', *Economic Development and Cultural Change* 45 (3) (1997), 591.
[25] 1870 Act s. 1.
[26] 1870 Act s. 2.
[27] Guinnane and Miller, 'Limits to land reform', 594–5.
[28] 1870 Act ss 44–7; 1881 Act ss 24–6.
[29] Guinnane and Miller, 'Limits to land reform', 596.
[30] 1909 Act s 3; Guinnane and Miller, 'Limits to land reform', 596.
[31] Guinnane and Miller, 'Limits to land reform', 596; see also David Anthony Haggan, 'The Land Purchase Acts: a short survey for the use of students', *Northern Ireland Legal Quarterly* 11 (3) (1955), 207; Arthur Quekett, 'The completion of land purchase in Northern Ireland – Part 1', *Northern Ireland Legal Quarterly* 4 (1) (1940), 26; Arthur Quekett, 'The completion of land purchase in Northern Ireland – Part 2', *Northern Ireland Legal Quarterly* 4 (2) (1940), 67.

of Ireland is so involved with land resettlement legislation, however, that it is more convenient to deal with it under that rubric.'[32] A full comparison is beyond the scope of this article, as is any discussion of land resettlement in Ireland, thus we can offer only a brief overview.

Although land purchase continued after partition, it faced a bumpier journey in Ireland than in Northern Ireland. In Northern Ireland land purchase was a 'reserved matter' but a 'Statutory Rule and Order' created the Land Purchase Commission Northern Ireland in 1923.[33] Two years later, Westminster's Northern Ireland Land Act vested 'all tenanted land' in the Commission,[34] and empowered them to resell the land to the tenant.[35] Twelve years after that, 'its work completed',[36] the Northern Irish Commission was wound up.[37] In addition to changing the nature of land ownership, land purchase in Northern Ireland saw an increase in registered titles, as the Local Registration of Title (Ireland) Act 1891 required that 'freehold land bought out under the Land Purchase Acts' be registered.[38] The Northern Irish system of land registration would itself be substantially reformed via the Land Registration Act (Northern Ireland) 1970, some six years after Ireland had undertaken a similar reform and consolidation of land registration.[39]

Meanwhile, Ireland's Land Act 1923 may have predated the equivalent legislation in Northern Ireland, but the system was slow, which led to further legislation, such as the Land Act 1931, to address the delays.[40] The 1923 Act's wording was simultaneously more and less expansive than that used in Northern Ireland. For example, it only vested tenanted land that was needed for the statutory purposes of relieving congestion and reselling land, but it could also vest untenanted land needed for such purposes.[41] The Act

[32] V.T.H. Delany, 'Irish and Scottish land resettlement legislation', *International and Comparative Law Quarterly* 8 (3) (1959), 299, 312.
[33] Haggan, 'Land Purchase Acts', 212–13. See also Quekett, 'Completion of land purchase in Northern Ireland 2', 68.
[34] Northern Ireland Land Act 1925, c. 34, s. 8.
[35] 1925 Act, s. 12.
[36] Haggan, 'Land Purchase Acts', 213.
[37] Haggan, 'Land Purchase Acts', 213. See also Quekett, 'Completion of land purchase in Northern Ireland 2', 72–4.
[38] Haggan, 'Land Purchase Acts', 214.
[39] Registration of Title Act 1964.
[40] S.J. Brandenburg, 'Progress of land transfers in the Irish Free State', *Journal of Land & Public Utility Economics* 8 (3) (1932), 275–86: 282.
[41] 1923 Act s. 24. But Quekett notes that the NI Commission could purchase untenanted land if needed: Quekett, 'Completion of land purchase in Northern Ireland 2', 71.

also forgave rent arrears.[42] For affected landlords, there were 'payments in lieu of rent' and landlords received the land's purchase price and a 'bonus'.[43]

Land purchase became a political flashpoint in the South, with competing visions of landholding offered by Fianna Fáil and Cumann na nGaedheal.[44] The nub of contention was the extent to which there should be a free market in land.[45] Following its election in 1932, Fianna Fáil set out to reverse some of Cumann na nGaedheal's policies and address issues such as 'landless men' and uneconomic holdings.[46] The Land Act 1933 sought to establish and keep families on the land,[47] but its powers faced challenges in the courts.[48] The amended Land Act 1936 did not fare much better,[49] while the Land Act 1939 was thwarted by the outbreak of war in Europe.[50] Northern Ireland's version of land purchase seemed less controversial, or at least there do not appear to have been the same challenges as in the South.[51] Then again, Northern Ireland's version did not become an ideological battleground.

The Land Purchase Acts were aimed mainly at agricultural land; other forms of tenancy had to wait until the various efforts at leasehold enfranchisement. Wylie's summary of the law in 1980 notes that Ireland was quicker to develop protection for lessees than England was.[52] In Ireland, the key statute was the Landlord and Tenant (Ground Rents) Act 1967, which 'conferred the right of enfranchisement' on tenants in occupation for over 25 years—with some exceptions for flats.[53] Similar legislation followed in Northern Ireland via the Leasehold (Enlargement and Extension) Act 1971, which should have been replaced by the Ground Rents (Northern Ireland) Act 2001, though that act has not been fully commenced. Wylie notes that Northern Ireland differed insofar as the 1971 Act was the first legislative solution to the problem—something

[42] 1923 Act s. 19.
[43] 1923 Act ss 20, 25; the term 'bonus' is taken from Brandenburg, 'Progress of land transfers in the Irish Free State', 275, 279.
[44] Brendan Edgeworth, 'Rural radicalism restrained: the Irish Land Commission and the courts (1933–39)', *Irish Jurist* 42 (2007), 1–28: 1.
[45] Edgeworth, 'Rural radicalism restrained', 9–10.
[46] Edgeworth, 'Rural radicalism restrained', 9–10. For a brief definition and discussion of 'uneconomic holdings' see Delany, 'Irish and Scottish land resettlement legislation', 312–13.
[47] Edgeworth, 'Rural radicalism restrained', 15.
[48] Edgeworth, 'Rural radicalism restrained', 17–22.
[49] Edgeworth, 'Rural radicalism restrained', 22–5.
[50] Edgeworth, 'Rural radicalism restrained', 25–6.
[51] For a summary, see Edgeworth, 'Rural radicalism restrained'. For another summary, from a social policy perspective, see Michelle Norris, *Property, family and the Irish welfare state* (London, 2016), 71–83.
[52] J.C.W. Wylie, 'Leasehold enfranchisement on both sides of the Irish Sea', *Cambrian Law Review* 12 (1981) 75, 77.
[53] Wylie, 'Leasehold enfranchisement on both sides of the Irish Sea', 77.

that set it apart from both England and Ireland.[54] He concludes that the Northern Irish measure was a mix of Ireland's and England's legislation.[55] The Northern Irish Act also had to manage 'pyramid titles', which were more common there.[56]

Ireland then took the step of prohibiting the granting of future long leases for residential houses via the Landlord and Tenant (Ground Rents) Act 1978.[57] Given recent developments in England, this may be one area where Ireland was a step ahead of England.[58] Northern Ireland, via the Ground Rents (Northern Ireland) Act 2001, should have allowed for the compulsory redemption of ground rents for dwelling houses,[59] but the relevant section is yet to be commenced. This is disappointing, but it offers an example of pending convergence. It is far from the only stalled land law reform in Northern Ireland.

A general lack of divergence

Martin Dixon has observed that land law is 'organic', by which he means to denote it 'as a system that reflect[s] the reality of land use in a social and economic context and not a system built on a necessarily coherent and rational set of principles'.[60] If this is true of common law systems of landholding in general, it is perhaps true of Irish land law in particular: lived experience is embedded in the foundations of the modern law, and the evolution of its doctrines. By 1921, many of the pressing social and political issues in respect of land were being addressed effectively through the land purchase scheme and the general amendments that had been implemented in respect of landlord and tenant law. As we have seen, there was also a well-established system of land registration. The result of all of this was that there was little impetus for substantive land law to change in the years following partition.

[54] Wylie, 'Leasehold enfranchisement on both sides of the Irish Sea', 78.
[55] Wylie, 'Leasehold enfranchisement on both sides of the Irish Sea', 79.
[56] Wylie, 'Leasehold enfranchisement on both sides of the Irish Sea', 79 (pyramid titles were also an issue in Ireland: Wylie, 'Leasehold enfranchisement on both sides of the Irish Sea', 77).
[57] Wylie, 'Leasehold enfranchisement on both sides of the Irish Sea', 81; Landlord and Tenant (Ground Rents) Act 1978 s. 2.
[58] See Sarah Blandy, 'Narratives of property and the limits of legal reform in the English leasehold system and its counterparts in other jurisdictions', in Randy K. Lippert and Stefan Treffers, *Condominium governance and law in global urban context* (Abingdon, 2021), 12. See also Leasehold Reform (Ground Rent) Act 2022 (UK).
[59] Ground Rents (Northern Ireland) Act 2001 s. 2.
[60] M. Dixon, 'The organic nature of land law', in H. Conway and R. Hickey (eds), *Modern studies in property law*, vol. 9 (Oxford, 2017), 5.

An outstanding example of this is found in the absence in each jurisdiction of 'the 1925 legislation' implemented in England and Wales. This was a set of six enactments dealing with fundamental matters of property, and effecting significant change. Some of these changes have never been replicated in the jurisdictions on the island of Ireland; others were not implemented for the better part of a century. So for example, until Ireland's substantial reforms of 2009, there was no equivalent of section 1 of the Law of Property Act (LPA) 1925 limiting legal estates to fees simple absolute and terms of years absolute,[61] nor the express overreaching mechanism of section 2.[62] There is still no equivalent of these provisions in Northern Ireland, despite the commendation of such reform on more than one occasion.[63] Neither jurisdiction has an equivalent to section 36(2) LPA 1925, which renders impermissible the severance of a joint tenancy at common law; nor the related provision in section 34(2), which stipulates that where land is expressed to be conveyed to tenants in common, the conveyance operates as if the land had been conveyed to the grantees as joint tenants. So it remains possible in each jurisdiction on Ireland, for example, to create, hold and convey a legal (as opposed to equitable) tenancy in common. Neither jurisdiction has pursued reform of this point, notwithstanding the occasion to do so. The recorded reasons for this are interesting because they have to do with a view that the unreformed structures work well on the island, particularly in the context of commercial property, in the sense that they are not productive of conveyancing difficulties, and that to interfere with the existing structures would unfairly limit the freedom of co-owners.[64]

A comparable position suggests itself when we consider the matter from the perspective of land registration. In England and Wales, the 1925 legislation aimed to facilitate conveyancing, and the Land Registration Act 1925 sought to support this aim with the introduction of effective compulsory title registration.[65] By this time, Ireland had a well-established Registry of Deeds and title

[61] See Land and Conveyancing Law Reform Act (LCLRA) 2009 s. 11.

[62] See LCLRA 2009 s. 21.

[63] See e.g. L.A. Sheridan, *Survey of the land law of Northern Ireland* (Belfast, 1971); Northern Ireland Law Commission Consultation Paper, *Land law*, NILC 2 (Belfast, 2009), 3.5–3.9. In terms of the proposed reforms in Northern Ireland, the recommendation to reduce the number of estates was eclipsed and made redundant by the proposal to abolish the doctrine of estates: see NILC 8, *Land law*, 3.4.

[64] See e.g. NILC 2, *Land law*, 7.9–7.10, reporting and following the view taken in Law Reform Commission, *Consultation paper on reform and modernisation of land law and conveyancing law*, CP 34_2004 (Dublin, 2004), 6.03.

[65] Charles Harpum, Stuart Bridge and Martin Dixon (eds), *Megarry & Wade: the law of real property* (8th edn, London, 2012), 6-040.

registration practices that were animated by the work of the Land Purchase Acts.[66] While at a superficial level the existence of an established registration scheme meant that there was just no need for legislative intervention, it also indicates a level of satisfaction with the status quo. This same satisfaction with the status quo and with solutions that 'work' on the island perhaps also explains the persistence of the 'distinctive' institutions of Irish land law, such as fee farm grants[67] and conacre.[68] It may also explain particular decisions made within particular doctrinal areas that, while not distinctively 'Irish', nevertheless are rooted in a basic structure that 'works'. For example, in many cases land law in each jurisdiction on the island leans towards protection of existing possession of land in a way that would not necessarily be followed in England and Wales. A small but significant example is provided in the extent to which each jurisdiction has preferred mortgagees to obtain a court order prior to taking possession of mortgaged property. Another is provided by the retention in each jurisdiction of limitation-based adverse possession,[69] such that after twelve years a dispossessed owner's title can no longer sue a possessor squatter, and additionally their title is extinguished such that they are no longer an owner.[70] This substantially diverges from recently reformed adverse possession law in England. There the law relating to limitation no longer applies in the case of registered land, so that the dispossessed registered proprietor's right of recovery of land is never formally time barred. An adverse possessor instead gains a right to make an application to be registered as proprietor after ten years of possession has passed, but the formal owner is given significant and expeditious powers to object to the registration.[71]

Some important divergences

With respect to land law there are currently two significant differences, which may be less relevant in practice than they first appear. The first is that Ireland has constitutional protections for property while Northern Ireland does not; and the second is the changes resulting from Ireland's Land and Conveyancing Law Reform Act 2009.

[66] See Wylie, *Irish land law*, chapters 23 and 24.
[67] Wylie, *Irish land law*, 4.58. Note that in Ireland, s. 12 LCLRA 2009 prohibits the future creation of new fee farm grants at law or in equity.
[68] McNeill, 'Is the grass always greener?'.
[69] Statute of Limitations, 1957, s. 13; Limitation (NI) Order 1989, art. 21.
[70] Statute of Limitations, 1957, s. 24; Limitation (NI) Order 1989, art. 26.
[71] Land Registration Act 2002, ss 96–8, schedule 6.

Constitutional protections

With respect to constitutional protections for property, the story has oscillated between divergence and convergence. The starting point for Northern Ireland is the Government of Ireland Act 1920's explicit protections against property being taken without compensation.[72] In effect this codified and limited the common law presumption that governments do not intend to expropriate without compensation unless that has been made explicit in the relevant statute.[73] The Northern Ireland Act 1962 then abolished the relevant prohibition on taking without compensation.[74] Despite their short life, Northern Irish constitutional protections for property have had and continue to have influence beyond the island of Ireland.[75] In fact one of the key cases decided under section 5(1) of the Government of Ireland Act 1920, *Ulster Transport Authority v James Brown and Sons*,[76] was cited by the Supreme Court of Canada as recently as October 2022.[77]

The Good Friday Agreement (GFA) is silent about property rights, but it does commit the British government to incorporating the European Convention on Human Rights (ECHR) into Northern Irish law.[78] The ECHR contains provisions requiring respect for the home (article 8) as well as protections for property rights (article 1 of protocol 1). As such, property rights protections have arguably returned to Northern Irish law, though perhaps in a lesser form than they once were.

In Ireland, the 1922 constitution of the Irish Free State was silent about property rights. It was not until the 1937 constitution that explicit protections for property rights emerged. In fact, property rights appear three times in the constitution of Ireland: Article 40.3.2 protects property rights from 'unjust attack'; Article 43 recognises the 'natural right … to the private ownership of external goods' but regulates 'the exercise' of that right via 'the principles of social justice' and 'the exigencies of the common good'; and finally, under Article 45, 'the State shall, in particular, direct its policy towards securing …

[72] Government of Ireland Act 1920, s. 5(1).
[73] Rachael Walsh, '*Belfast Corporation v OD Cars* [1959]: setting parameters for restricting use', in Simon Douglas, Robin Hickey and Emma Waring (eds), *Landmark cases in property law* (Oxford, 2015), 227, 228.
[74] Northern Ireland Act 1962, s. 14.
[75] See e.g. Jim Phillips and Jeremy Martin, '*Manitoba Fisheries v The Queen*: the origins of Canada's de facto expropriation doctrine', in Eric Tucker, Bruce Ziff and James Muir (eds), *Property on trial: Canadian cases in context* (Toronto, 2012), 259.
[76] [1953] NI 79.
[77] *Annapolis Group Inc v Halifax Regional Municipality* 2022 SCC 36 (Canada).
[78] The Northern Ireland Peace Agreement (1998), 18.

that the ownership and control of the material resources of the community may be so distributed amongst private individuals and the various classes as best to subserve the common good'. A full examination of how these provisions have been interpreted would be beyond the scope of this article.[79] In addition, Ireland has ratified the ECHR and since the European Convention of Human Rights Act 2003, Irish law has been required to comply with the ECHR subject to the constitution.[80] Consequently, Ireland and Northern Ireland may be closer together than they once were on property rights protections.

Wholesale reform

Beyond the question of constitutional protections, land law in Ireland has recently undergone 'revolutionary' reform[81] via the Registration of Deeds and Title Act 2006 and the Land and Conveyancing Law Reform Act (LCLRA) 2009. The resultant changes are 'so substantial and far reaching' that Wylie (a consultant and legislative draftsman of the reform bill) recorded a temptation to tear up his seminal standard text and start again, before persevering on the ground that pre-2009 law was still required to be understood.[82] The 2009 Act repealed well over 100 pre- and post-1922 statutes.[83] Perhaps its most striking change was the abolition of feudal tenure.[84] This abolition was one part ideological, one part practical, but also somewhat partial. Put simply, tenure is how a person holds their land and, historically, referred to the various feudal services a tenant owed their lord. Under feudalism all land was, ultimately, held of the Crown and in modern England that idea still holds. The explanatory memorandum for the 2009 Act, however, observed that the concept of tenure was incompatible with the constitutional relationship between citizens and the state.[85]

As apparently dramatic as the abolition of feudal tenure seems, there are two points to note. First, feudal tenure's practical significance is relatively

[79] For in-depth analysis of how the constitutional provisions on property have been interpreted, see Rachael Walsh, *Property rights and social justice* (Cambridge, 2021), especially 77–106.
[80] European Convention on Human Rights Act 2003, preamble.
[81] Wylie, *Irish land law*, 4th edn, preface.
[82] Wylie, *Irish land law*, 4th edn, preface.
[83] Land and Conveyancing Law Reform Act 2009, sch. 2.
[84] Land and Conveyancing Law Reform Act 2009, s. 9(2). This provision does not relate to leasehold, since by section 3 Deasy's Act the source of the landlord–tenant relationship lies in contract and not in feudal holding; rather it aims to square freehold ownership with the constitutional understanding that land is held of the state.
[85] Land and Conveyancing Law Reform Act 2009 explanatory memorandum, 3; Deirdre Ní Annracháin, 'Legal responses to a history of feudal tenure in Ireland', *University College Dublin Law Review* 11 (2011), 25, 29.

small. In England, for example, the main relevance of tenure is the potential for escheat, where the land reverts to the Crown for lack of heirs.[86] Both Ireland and Northern Ireland had already abolished escheat prior to Ireland's 2009 reforms. Northern Ireland did so under the Administration of Estates Act (NI) 1955,[87] which replaced escheat with provision for the Crown to take by way of bona vacantia in default of intestate succession.[88] Ireland followed suit ten years later via the Succession Act 1965.[89] Thus, the differences between escheat and the statutory provisions across the island of Ireland are arguably more conceptual than practical.

The second point is that while the 2009 Act provides a new statutory concept of 'ownership of land', this concept retains the terminology of estates to explain the nature and extent of ownership.[90] The doctrine of tenure and the doctrine of estates tend to go hand in hand, but the 2009 Act's explanatory memorandum felt that estates were too central to the Irish property system to abolish them.[91] Thus, while the abolition of tenure might seem to lead to an absolutist conception of ownership, the continuation of estates suggests that ownership remains 'a parcel of rights'.[92] Furthermore, given that the 2009 Act continues to allow for the fee simple determinable,[93] this might raise questions about how far the Act manages to secure the free alienation of land that the abolition of feudal tenure promises. As such, the 2009 abolition of feudal tenure is arguably only partial.

That being said, the 2009 Act did limit the type of estates available. Section 11 provides definitions of the available estates: 'a "freehold estate" means a fee simple in possession', defined to include certain modified fees and fees subject to minor interests (e.g. a right of residence that is not exclusive); a 'leasehold estate' means 'the estate which arises when a tenancy is created'. No other estates are capable of being created or disposed of at law. With some important qualifications, this brings law in Ireland in line with the approach

[86] Graeme Watt, 'A defence of estates and feudal tenure', *Northern Ireland Legal Quarterly* 66 (2015), 243, 246–7.
[87] Administration of Estates Act 1955 (NI), s. 1(5).
[88] Administration of Estates Act 1955 (NI), s.16. In Ireland, a comparable outcome was arguably achieved by the state's designation as ultimate intestate successor: Succession Act 1965, s. 73(1). See Watt, 'A defence of estates and feudal tenure', 246.
[89] Succession Act 1965, s. 73(1).
[90] LCLRA 2009, ss 9(1), 9(3)(b), 10.
[91] Ní Annracháin, 'Legal responses to a history of feudal tenure in Ireland', 28; Land and Conveyancing Law Reform Act 2009, explanatory memorandum 3.
[92] Ní Annracháin, 'Legal responses to a history of feudal tenure in Ireland', 28; see Land and Conveyancing Law Reform Act 2009, explanatory memorandum 3.
[93] LCLRA 2002, s. 11(2)(a).

taken in England and Wales,[94] and has some complementary headline implications—e.g. that freehold estates for life must take effect in equity as equitable interests.[95] LCLRA also makes provision for overreaching equitable interests. Additionally, the 2009 Act prohibits the future creation (whether at law or equity) of fee farm grants, fees tail and leases for lives.[96]

The same year that Ireland revamped its land law, the newly created Northern Ireland Law Commission (NILC) began consultations on a reform of Northern Irish land law.[97] The final report appeared the following year,[98] but its recommendations have not been adopted. The NILC's draft bill proposed abolishing feudal tenure in a clear echo of the reforms in Ireland.[99] It also proposed abolishing fees tail.[100] Indeed, on their face, the proposed reforms in Northern Ireland would go further and abolish the doctrine of estates.[101] The significance of the latter proposition is tempered on its own terms by the draft bill's reference to the language of estates to define its idea of land ownership,[102] and we imagine, particularly in view of its retention in Ireland, that the concept of an estate would continue to frame lawyerly (even if not lay) understandings of property. Nevertheless, the NILC reforms, if enacted, would provide a statutory concept of ownership comparable to the reforms achieved by LCLRA 2009, and to this extent such proposed changes represent another example of pending convergence (or a trend towards an absence of divergence), though other aspects of the proposals were perhaps more influenced by English reforms than by those in Ireland (for example, in the recommendation for legislative measures to deal with disputes arising in respect of party structures).[103]

In the meantime, this would seem to leave interesting North–South–East–West comparisons (even without considering the position of Scotland).[104]

[94] Law of Property Act 1925, s. 1.
[95] LCLRA 2009, s. 11(6).
[96] LCLRA 2009, ss 12–14.
[97] Northern Ireland Law Commission, NILC 2; Fox O'Mahony, 'Something old, something new, something borrowed', 356.
[98] Ibid; Northern Ireland Law Commission, Report: Land Law (NILC 8), (Belfast: TSO, 2010).
[99] Fox O'Mahony, 'Something old, something new, something borrowed', 360.
[100] Fox O'Mahony, 'Something old, something new, something borrowed', 361.
[101] Draft Land Law Reform Bill Northern Ireland (2010), 141, s1, in Northern Ireland Law Commission Report, *Land law*, NILC 8, 146.
[102] Draft Land Law Reform Bill Northern Ireland (2010), in Northern Ireland Law Commission Report, *Land law*, NILC 8, 147.
[103] *Land law*, NILC 8, 4.40–4.46. See generally Fox O'Mahony, 'Something old, something new, something borrowed'.
[104] Scotland abolished feudal tenure following the Abolition of Feudal Tenure etc. (Scotland) Act 2000.

Currently all land in Northern Ireland is held of the Crown, and there is no equivalent of England's section 1 of the Law of Property Act 1925, so no bar, for example, to the creation or disposition of a life estate at law; whereas in Ireland the concept of tenure has been abolished, and only fees simple and leasehold estates can be created or disposed of at law. In the latter sense Ireland finds itself closer to England than to Northern Ireland, even though Ireland has abolished feudal tenure. On the other hand, care should be taken not to overstate the significance of these reforms. Fox O'Mahony argued that the remnants of the feudal system bore less practical significance in Northern Ireland than in England, noting that even in England the Law Commission has more than once considered the abolition of feudal tenure.[105] Wylie considers the general reform of tenure to be 'conceptual or symbolic'.[106] An animating principle of reform in each jurisdiction is alignment with public understanding of land ownership,[107] and the reforms (and proposed reforms) of feudal tenure can be understood as an attempt to render the current operating principles of land law in language more accessible to the non-lawyer.

The NILC's draft bill would have also consolidated the law on adverse possession in Northern Ireland. Fox O'Mahony notes that the NILC was concerned with 'local solutions' when it came to adverse possession,[108] and as such did not suggest dramatic reforms. That being said, Northern Irish practice differs in at least one key respect. Both Ireland and England follow the rule in *Tichborne v Weir*,[109] which holds that a successful claim of adverse possession results in a 'new' title rather than a parliamentary conveyance of title. In Northern Ireland, however, the actual practice functions as a parliamentary conveyance,[110] and, as such, Northern Irish practice differs even if the law remains neutral on its face. Adverse possession remains one area of land law that was unreformed by the 2009 Act in Ireland.[111] It would be advisable that any reforms to the doctrine of adverse possession happen in tandem for the two jurisdictions given the existence of land that straddles the border.

[105] Fox O'Mahony, 'Something old, something new, something borrowed', 361–3.
[106] Wylie, *Irish land law*, 5th edn, 2.74.
[107] *Land law*, NILC 8, para. 2.4; Wylie, *Irish land law*, 5th edn, 1.79.
[108] Fox O'Mahony, 'Something old, something new, something borrowed', 372.
[109] *Tichborne v Weir* (1892) 67 LT 735; for Ireland, see John Wylie, 'Adverse possession – still an ailing concept?', *Irish Jurist* 58 (2017), 1–26: 20–2.
[110] See Fox O'Mahony, 'Something old, something new, something borrowed', 376.
[111] For why, see Wylie, 'Adverse possession', 4.

LAND USE: A SHIFT FROM SHARED ENVIRONMENTAL GROUNDINGS/TREADING NEW PATHS?

The previous part of this article reflected on the relationship of individuals with land and the structures of land law across the island. While there are two separate jurisdictions with some very contrasting approaches within the legal systems, there are considerably more similarities in land law than differences—reflecting some commonalities in culture, history and external influences. We now turn to examine land use, and specifically the development of environmental governance across the island. Whereas land law reforms arguably move to align with public understanding, while environmental law reforms seek to promote public interest by regulating public behaviour (including by affecting public attitudes and understanding), external factors are nonetheless a significant force in shaping environmental governance across the island.

The aim here is to consider how Brexit and subsequent developments are affecting or will affect regulatory alignment and divergence in environmental governance on the island[112]—specifically in the area of RBM. This will assist landowners and other key stakeholders, including those beyond border areas, in understanding whether developments in the other jurisdiction need to be considered still, due to knock-on effects. It also is a fundamental question for the effectiveness of environmental protection on the island—through fixing minimum standards and enabling effective cooperation and even coordination. To do so, this section outlines (a) the factors driving the aligned evolution of environmental law to date, (b) how this has manifested in recent decades in the area of water protection, and (c) the changes arising in the wake of Brexit and its ramifications vis-à-vis environmental governance across the island.

Factors driving aligned evolution

The nature of environmental law is a significant consideration in explaining the influencing forces at work and its evolution across this island. Whether internationally or domestically, environmental law is an area of public law that sees its modern beginnings in the 1970s. Prior to that period, environmental matters were largely governed across this island by a combination of

[112] See generally Mary Dobbs and Viviane Gravey, 'Environment and trade', in Christopher McCrudden (ed.), *The law and practice of the Ireland–Northern Ireland Protocol* (Cambridge, 2022), 245–55, especially at 249–52, available at: https://doi.org/10.1017/9781009109840.021 (6 March 2023).

private law (e.g. nuisance, negligence, trespass, *Rylands v Fletcher*, riparian rights) and individual pieces of legislation addressing siloed aspects such as water pollution or air pollution in towns.[113] In these, both jurisdictions were influenced heavily by England—whether in following judicial precedent or through copy-pasting legislation (or having it extended), as was clearly the case regarding water pollution.[114] Even now, when environmental law is an established area of public law, considerable similarities continue to manifest in the approaches to transposing and implementing EU law, or in the application of the judicial review systems—Northern Ireland, England, Wales and Ireland have significant commonalities in our legal traditions and approaches that lead us automatically to consider what the others have done and potentially replicate these in our own efforts.

Clearly, some distinctions did and do exist—see for example the discussions surrounding tort by Hackett and Hamill,[115] the Northern Ireland Environment Agency (and its predecessors) not being an independent agency or the variations in rights of way—but the historical approaches and foundations prior to the wide development of environmental law and policy were largely aligned.

Crucially, Ireland and the UK (and thereby Northern Ireland) joined the EEC (now the EU) in 1973, just as environmental law was starting to take off. The timing, combined with core EU doctrines such as direct effect, supremacy and loyalty, ensured that the EU's approach to environmental law helped shape and guide the central components of environmental law across the two islands—including common standards, governance mechanisms and procedures.[116] This accelerated following the 1986 Single European Act's establishment of EU (shared) competence in environmental matters and constitutionalisation of environmental objectives and principles, which enabled the development of more widespread and ambitious environmental policy and laws[117]—something that continues today, reflected in the European Green Deal. Of note, the roles of the European Commission and the Court of Justice

[113] For example, S.J. Bell, 'United Kingdom', in Emma Lees and Jorge E. Viñuales (eds), *Oxford handbook of comparative environmental law* (Oxford, 2009); Suzanne Kingston, 'Regulating Ireland's environment in 2016: hierarchy, networks and values', *Irish Jurist* 56 (2016), 42–65.

[114] For example, the Rivers Pollution and Prevention Act 1876 and 1891 applied in both jurisdictions, until 1972 in Northern Ireland and 1977 in Ireland.

[115] Paper on file with authors.

[116] For example, Richard Boyle, Joanna O'Riordan, Fergal O'Leary and Laura Shannon, *Using an experimental governance lens to examine governance of the River Basin Management Plan for Ireland 2018–2021*, EPA Research Report 373 (Johnstown Castle, 2021)

[117] Suzanne Kingston, Veerle Heyvaert and Aleksandra Čavoški, *European environmental law* (Cambridge, 2016), 1–22.

of the European Union in purposively interpreting and enforcing EU environmental law have been crucial to enhancing its effectiveness and ensuring a degree of harmonisation.[118] This is not a piecemeal effort, but wide-scale—'on average, 80 per cent of all national environmental law is now derived from EU law',[119] including on the island of Ireland.

This is not to claim full uniformity or harmonisation. The area remains one of shared competence, governed by the principles of subsidiarity and proportionality, reflected in the frequent use of directives and the member states' considerable flexibility in implementation and enforcement or in applying higher levels of protection. Furthermore, Ireland and Northern Ireland are repeat offenders in terms of breaching EU environmental law[120]—something exacerbated in Northern Ireland by the Troubles and political complexities (including political structures, petition of concern and the somewhat regular collapse of the executive) and in Ireland by the Celtic Tiger and subsequent economic recession. For both, competing interests have frequently taken priority.[121]

It is also not to claim that all domestic environmental law, policy or action is derived from the EU (or England). Important counter-examples exist, e.g. the plastic bag levies,[122] Tidy Towns[123]/Best Kept[124] competitions and the All-Ireland Pollinator Plan,[125] which demonstrate the potential for positive initiatives, cross-border influences and cooperation. However, these tend to be individual instances and cannot compare to the EU's overall contribution to date. Further, individual policy initiatives may lead to divergence if they fail to influence the other jurisdiction. In contrast, EU membership provides common frameworks that also enable and sometimes even require cross-border cooperation between states—not just with the EU as a whole.

[118] Kingston et al., *European environmental law*, 67–68, 184–199.
[119] Kingston et al., *European environmental law*, 11.
[120] For example, Brian Jack, 'Environmental law in Northern Ireland', in Stephen McKay and Michael Murray, *Planning law and practice in Northern Ireland* (Abingdon, 2017).
[121] For example, S. Turner, 'Modernising the regulation of water pollution in Northern Ireland. Part one: The stimulus for reform & the principle of pollution prevention', *Northern Ireland Legal Quarterly* 51 (1) (2000), 65–97.
[122] Revenue, 'Plastic bag environmental levy', available at: https://www.revenue.ie/en/companies-and-charities/plastic-bag-environmental-levy/index.aspx (6 March 2023); NI Direct, 'Carrier bag levy', available at: https://www.nidirect.gov.uk/articles/carrier-bag-levy (6 March 2023).
[123] Tidy Towns, 'History', available at: https://www.tidytowns.ie/about-us/history/ (6 March 2023).
[124] Northern Ireland Amenity Council, 'About Best Kept Awards', available at: https://bestkeptawardsni.com/about/ (6 March 2023).
[125] National Biodiversity Data Centre, 'All-Ireland Pollinator Plan', available at: https://pollinators.ie (6 March 2023).

Common frameworks

This shared evolution and relative alignment are exemplified in the area of water protection and the regulatory approach within the Water Framework Directive (WFD),[126] implemented in Northern Ireland by the Water Environment (Water Framework Directive) Regulations (Northern Ireland 2017) (as amended) and in Ireland by the European Communities (Water Policy) Regulations 2003 (as amended) and a range of other instruments.[127] The WFD 'aims to promote common approaches, standards and measures for water management on a systematic and comparable basis throughout the EU'.[128] It provides a general 'framework for the protection of inland surface waters, transitional waters, coastal waters and groundwater'.[129] Its purposes are multifaceted and include reduction and elimination of pollution, provision of good-quality water and protection more generally of water—including to comply with international obligations.[130] To this end, Article 4 includes environmental objectives that impose specific obligations on member states,[131] but with some narrow limiters/exemptions[132] and also some derogations (see below).

Of particular relevance for us is that the WFD requires and facilitates an RBM approach, whether this involves a purely domestic or transboundary river basin. In doing so, it builds on the Water Convention,[133] in both its scope

[126] Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, [2000] OJ L327/1. It is supplemented by the Marine Framework Directive: Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy, [2008] OJ L164/19.

[127] Other regulations, orders, etc. are relevant and complement these ones, e.g. groundwater. Further, they are complemented by existing laws such as the Local Government (Water Pollution) Act 1977, which includes a licensing regime for sewage and also general water pollution offences. For example, Tony McNally, 'Overview of the EU Water Framework Directive and its implementation in Ireland', *Biology and Environment: Proceedings of the Royal Irish Academy* 109B (3) (2009), 131–8.

[128] Murphy and Glasgow, 'North–South coordination in Ireland's international river basin districts', 139.

[129] Article 1. It is complemented by the Marine Strategy Framework Directive, which operates in tandem with it. Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy [2008] OJ L164/19.

[130] Article 1, WFD.

[131] These vary and relate to surface water, groundwater and protected sites.

[132] For example, Article 4(7) provides that member states will not be in breach where they meet cumulative criteria including that all practical steps to mitigate adverse impacts have been taken. This contrasts with earlier approaches seen, for instance, in the original Council Directive 76/160/EEC of 8 December 1975 concerning the Quality of Bathing Water, where a strict liability approach was applied to member states.

[133] The Water Convention (Convention on the Protection and Use of Transboundary Watercourses and International Lakes) 1992.

and the obligations entailed. The RBM approach is outlined initially in Article 3 and then developed across the Directive, i.e. it is 'administratively organised on a hydrological rather than a political scale'.[134] This includes obligations to identify river basins and assign them to individual river basin districts (RBDs)[135] and to create RBM plans, create programmes of measures, register a list of protected sites, etc. For instance, member states 'shall ensure' that steps to achieve Article 4's environmental objectives and programme of measures 'are coordinated for the whole of the river basin district'.[136] Further, the WFD expressly addresses the issue of transboundary river basins and the need to assign these to 'international river basin districts' where they involve territory of more than one member state,[137] with joint obligations to 'together ensure … coordination' for the whole RBD. This is in part facilitated through obligations to share RBM plans with any relevant member states within three months of publication. However, of note, member states are obliged to cooperate with each other to ensure coordination according to RBDs, but only to 'endeavour to establish appropriate coordination with the relevant non-Member States'—when the non-member state may not be under a corresponding obligation. This is of considerable significance for the island of Ireland, where there are three international river basins overlapping the border between Ireland and Northern Ireland.[138] Reflecting this, within the transposing legislation in both jurisdictions, there are corresponding obligations to coordinate with the relevant competent authorities in Ireland/Northern Ireland regarding these international river basins.[139] Prior to the WFD, some coordination and cooperative strategies existed, e.g. regarding pollution incidents, but these tended to be more informal, less structured and more piecemeal.[140]

[134] Kingston et al., *European environmental law*, 343.
[135] Article 3.
[136] Article 3(4)
[137] Article 3(3).
[138] For example, Regulation 4 of Northern Ireland's Water Environment (Water Framework Directive) Regulations (NI) 2017. Murphy and Glasgow, 'North–South coordination in Ireland's international river basin districts', 139.
[139] For example, Regulation 26 of NI's Water Environment Regulations 2017. As per the Explanatory Note to the Irish Regulations, they 'require all public authorities to take measures appropriate to their functions to promote or achieve implementation of the Directive / Regulations, to co-ordinate, co-operate and liaise with other authorities including authorities in Northern Ireland for this purpose and to encourage the active involvement of all interested parties.'
[140] Murphy and Glasgow, 'North–South coordination in Ireland's international river basin districts', 141.

The Directive further provides for an analysis of RBD characteristics, review of human activity impacts on the status of surface waters and groundwater and an economic analysis of water use, to be reviewed and updated on a regular basis.[141] While each member state will undertake this individually, it is to be in accordance with technical specifications laid out in Annexes II and III.[142] Member states must also establish programmes for the monitoring of surface water status, groundwater status and protected areas—and similarly, such monitoring must be in accordance with requirements of Annex V and the Directive also provides for 'technical specifications and standardised methods for analysis and monitoring of water status'[143] in order to achieve coherence.[144] Thus between these specifications and methods, along with the EU-wide definitions in Article 2, there is a common language and system for measuring, evaluating and comparing water status—something that underpins the possibility for coordinated efforts and cooperation. The Directive also provides for reviews and developments by EU institutions under, in particular, Articles 16, 17, 18 and 19—all adding to the foundations of a shared EU framework across member states.

It is worth noting that, reflecting the Aarhus Convention, Article 14 of the WFD provides for the 'active involvement of all interested parties' and imposes obligations regarding publication of information and consultation.[145] This is not expressly limited to the member state's own population or local NGOs, for instance, but could in principle include actors based in a neighbouring state that shares an international river basin. However, the Northern Ireland implementing regulations focus on consulting bodies, groups and individuals based in Northern Ireland, rather than in relevant sections of Ireland also. Nonetheless, the regulations provide some flexibility via a catch-all provision[146] and also regarding 'such persons as appear to the Department' to have interests regarding water environment protection or flood management promotion or who represent business interests depending on the environment.[147] While these must be related to the river basin or parts thereof situated in Northern Ireland, considering the transboundary effects there may be some leeway here.

[141] Article 5.
[142] Article 5(1).
[143] Article 8(3).
[144] Recital 49.
[145] Article 14.
[146] Regulation 26(6)(i) includes 'such other persons as the Department considers appropriate'.
[147] Regulation 26(6)(h).

The WFD is supplemented by a range of other directives, e.g. the Urban Waste Water Treatment (UWWT) Directive,[148] the Sewage Sludge Directive[149] and the Nitrates Directive,[150] which are central in the ambition of seeking to tackle and prevent excessive nutrients in water (eutrophication).[151] This is because human waste, animal waste and the related issue of fertilisation of land are key sources of nutrients that are intentionally or accidentally added to water. The Nitrates Directive is of especial relevance to this island due to the proportion of agricultural land, the nature of farming (mostly based on livestock) and the high levels of nitrate pollution from agriculture.[152] Within each, one finds targeted measures addressing specific types of water, vulnerable zones or sources of pollution—helping to ensure the overall standards and to regulate pollution. These help highlight the significance of the content of the water regime, even as the WFD then provides the overarching framework and ensures that a landscape approach is adopted more generally. They are also complemented by the Common Agricultural Policy (CAP), with its agri-environmental schemes and cross-compliance with links to statutory mandatory requirements (SMRs) and good agricultural and environmental conditions (GAECs) that include ones on water protection.[153] This creates a very complex web of laws, with individual water bodies (and actors) being subject to many simultaneously and also needing to pay attention to the CJEU's purposive interpretations in the field.[154]

Implementation of the WFD's RBM approach is also (in principle) supported by the GFA's inclusion of the environment as one of its six areas of cooperation for the North South Ministerial Council (NSMC). Additionally, the Loughs Agency—a cross-border implementation body—addresses various relevant aspects for transboundary waterbodies. However, it must be highlighted that the NSMC cannot function when the Northern Ireland executive

[148] Council Directive 91/271/EEC of 21 May 1991 concerning urban waste-water treatment [1991] OJ L135/40.
[149] Council Directive 86/278/EEC of 12 June 1986 on the protection of the environment, and in particular of the soil, when sewage sludge is used in agriculture [1986] OJ L 181/6.
[150] Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources [1991] OJ L375/1.
[151] The UWWT and Nitrates Directives are expressly noted in Article 10(2) of the WFD as setting down 'best environmental practices' for addressing 'diffuse impacts'.
[152] For example, Adrienne Attorp, 'Agricultural pollution and waterways on the island of Ireland: towards effective policy solutions', *Water* 14 (4) (2022), 528.
[153] The CAP has been undergoing major reforms, which include changes to the cross-compliance system, but the SMRs and GAECs will continue to function generally within the CAP.
[154] For example, Case 258/00 *European Commission v France* [2002] ECR I-5959; and Case 280/02 *European Commission v France* [2004] ECR I-8573.

is not *in situ*. Further, the Loughs Agency primarily focuses on issues regarding fisheries, transport and tourism—with only secondary focus points on environmental protection, even though it gathers and shares data with the relevant bodies North and South. And finally, the GFA does not contain detailed standards, procedures or tools for environmental governance—it complements but does not replicate or equate to the WFD.

Thus, the WFD, supported by complementary Directives and the GFA, provides both a framework for environmental protection within each individual jurisdiction and a framework for cooperation and collaboration across the island. This is reflected in Northern Ireland's and Ireland's implementation of the WFD, e.g. in the development of RBM plans that refer to the other jurisdiction, the engagement by core bodies with each other, and the simple similarity between the policy and law in each jurisdiction.

Differing implementation?

The WFD has been largely transposed and implemented across both jurisdictions on the island of Ireland.[155] Considerable cooperation and coordination in implementing the WFD on the island of Ireland arose from a very early stage, with key mechanisms including the North–South WFD Coordination Group (including members from the relevant departments and competent authorities in both jurisdictions) and even a joint consultation for the first RBM plans. Murphy and Glasgow outline the extensive joint and parallel steps taken across the island to help identify and evaluate the river basins, thereby influencing the design of RBM plans and programmes of measures.[156] Thus, for the first RBM plans, due to the 'close cooperation' between the relevant authorities, 'all the water environments in Ireland plus those shared with Northern Ireland were assessed in unison'.[157] Due to a range of external factors, the timeline for developing the second RBM plans was out of sync, but 'coordination still occurred in terms of the implementation of the plans'.[158] This reflects the obligations for cooperation and coordination, as well as that 'both jurisdictions carry full responsibility for ensuring implementation of

[155] McNally, 'Overview of the EU Water Framework Directive and its implementation in Ireland'.
[156] Murphy and Glasgow, 'North–South coordination in Ireland's international river basin districts'. See also McNally, 'Overview of the EU Water Framework Directive and its implementation in Ireland'.
[157] Department of Housing, Local Government and Heritage, Draft River Basin Management Plan for Ireland 2022–2027 ('Draft plan'), p. 19, available at: https://www.gov.ie/en/consultation/2bda0-public-consultation-on-the-draft-river-basin-management-plan-for-ireland-2022-2027/ (10 May 2023).
[158] Draft plan, p. 19.

all measures in their national territory, including any part of an international River Basin District that lies within their national territory'.[159]

However, the WFD by no means guaranteed full alignment or uniformity. Beyond the perpetual option of a member state aiming for a higher level of protection and the degree of flexibility provided in implementing Directives (linked to the nature of shared competence), the more common issues arise regarding the lack of full implementation and enforcement[160]—whether provided for by the WFD (and related Directives) or in breach thereof. A couple of examples clearly highlight this issue. In considering these, it is important to recollect that the WFD contains environmental objectives and these are to be achieved primarily through creating RBM plans and associated 'programmes of measures'.

First, the member states must transpose the relevant provisions of the WFD. This appears a straightforward obligation, but member states have flexibility in transposition—including by copy–pasting or gold-plating. They also do not transpose all provisions, for example the preambles, provisions directed at EU institutions or provisions regarding deadlines for transposition. In the case of the WFD, one of the key debates that arose across the EU was the nature of the obligations in Article 4 regarding the WFD's objectives. Although member states are bound by them anyway,[161] one issue flagged by the European Commission was that indirect incorporation of this Article was insufficient[162] and its content needed to be incorporated within domestic law—something that Ireland had undertaken initially,[163] but Northern Ireland (along with England and many member states) failed to do until 2017.[164]

Second, those Article 4 objectives are not as absolute as they first appear. They include some that apply immediately (e.g. prevent deterioration of

[159] Draft plan, p. 19.

[160] William Howarth, 'Aspirations and realities under the Water Framework Directive: proceduralisation, participation and practicalities', *Journal of Environmental Law* 21 (3) (2009), 391–417.

[161] Case C-461/13, *Bund für Umwelt und Naturschutz Deutschland eV v Bundesrepublik Deutschland* [2015] ECR I-433.

[162] European Commission, 'Commission Staff Working Document – Accompanying document to the Communication from the Commission to the European Parliament and the Council – "Towards Sustainable Water Management in the European Union" – First stage in the implementation of the Water Framework Directive 2000/60/EC [COM (2007) 128 final]", SEC (2007) 363.

[163] Although not within the core WFD implementing Regulations, the objectives are found within the Groundwater.

[164] Water Environment (Water Framework Directive) Regulations (Northern Ireland) 2017. These addressed the shortcomings in the Water Environment (Water Framework Directive) Regulations (Northern Ireland) 2003, including regarding the objectives.

surface water) and some that have deadlines, i.e. good surface and groundwater status must be achieved by 2015, but subject to the subsequent paragraphs within Article 4. That same Article then provides for some limited exemptions, excuses and extensions. The last is of particular significance. Member states may have extensions beyond 2015, for up to effectively twelve years, i.e. to 2027, where certain criteria are met that relate to practical and financial challenges in meeting the obligations. While there are multiple criteria, this provision enables for the effective watering down of the directive and its quasi-harmonising effects and adds considerable delays to its full implementation.

Third, Article 11 imposes an obligation on member states to create a programme of measures. However, it effectively only comes into force twelve years after the Directive was created and, while a wide range of mandatory 'basic measures' are outlined, they remain quite overarching and also member states can create 'supplementary measures' to help achieve the WFD objectives—something that has proved necessary for both Ireland and Northern Ireland in each review to date.[165] Consequently, while some types of measures are mandatory across member states, others are likely but not guaranteed and may be quite distinct in nature.

Fourth is the issue of abstraction of groundwater. This is flagged in Article 4, as one of the objectives for groundwater is to 'ensure a balance between abstraction and recharge of groundwater' and 'good status' here includes elements focused on its quantity. However, the obligations remain unclear, until one examines Article 11's basic measures. These include a requirement for controls over abstraction, including a register and prior authorisation. In Northern Ireland, the first RBM plan identified water levels and flow as a significant issue needing supplementary measures, leading to the Water Abstraction and Impoundment (Licensing) Regulations (NI) 2006. However, despite the obligations in the WFD, issues having arisen regarding water supplies,[166] and having the second highest bulk water abstraction in Europe per inhabitant,[167] Ireland has not yet fully implemented these obligations—with

[165] For example, the RBM plan for Neagh Bann RBD had 25 new measures put in place in 2015 – NIEA, *Neagh Bann River Basin Management Plan Summary* (Belfast, 2015); and regarding Ireland: European Commission, Second River Basin Management Plans – Member State: Ireland, Commission Staff Working documents, SWD(2021) 250 final, available at: https://circabc.europa.eu/ui/group/1c566741-ee2f-41e7-a915-7bd88bae7c03/library/dc59ca80-577d-4052-a856-696250affcb9 (10 May 2023).

[166] Besides occasional water restrictions during dry periods, see for instance: https://ec.europa.eu/environment/water/water-framework/pdf/4th_report/country/IE.pdf

[167] Irish Water, *Irish Water business plan: transforming water services in Ireland to 2021*, p. 7, available at: https://www.water.ie/docs/Irish-Water-Business-Plan.pdf (6 March 2023).

some information being gathered, including more recently for a register of significant water abstractions,[168] but no licensing system yet in operation.[169] Instead, Ireland's laws on abstraction remain based in old English land law focused on the landowner's rights—inadequately reflecting scientific understanding, environmental pressures and EU obligations.[170] This currently remains the case in practice,[171] despite new legislation enacted (but not yet commenced) by Ireland in December 2022.[172]

Finally, there is the significant issue of diffuse pollution, specifically nitrate pollution. This merits a thesis of its own, but, in brief, it is a much more challenging issue to regulate than discharges from point sources. For instance, a river may have excessive levels of nitrates (e.g. leading to eutrophication and potentially fish kills), but the source may include a combination of human sewage and run-off from slurry on numerous farms along a river—how does one identify this and prevent it from occurring? While the WFD, UWWT and Nitrates Directives all impose controls, indicate standards and highlight potential options (e.g. potential for prior regulation under Article 11 of the WFD), there is flexibility in how this is to be achieved and derogations are available—arguably this flexibility is necessary in light of the nature of diffuse pollution, but it undermines any harmonising effects and also has yet to prove effective on this island.

These points help explain in part why, while there have been some improvements across some water bodies (e.g. 13.6 per cent of surface water bodies in Ireland), the state of the water environment across both jurisdictions remains poor and overall, for instance, there has been a 4.4 per cent net decline in surface water quality in Ireland.[173] They also highlight the limitations to

[168] European Union (Water Policy) (Abstractions Registration) Regulations 2018 (S.I. no. 261 of 2018). This applies only where the individual/business extract 25 cubic metres/25,000 litres of water or more per day (even on very rare occasions) for any purpose: https://www.epa.ie/our-services/licensing/freshwater--marine/water-abstraction/ (6 March 2023).

[169] Sustainable Water Network, 'Ireland receives warning from European Commission over lack of water regulation' (3 November 2020), available at: https://swanireland.ie/2020/11/ireland-receives-warning-from-european-commission-over-lack-of-water-regulation/ (6 March 2023). See below regarding the 2022 bill.

[170] Heather Murphy, 'Way down', *Law Society Gazette*, May 2016, 45, available at: https://www.lawsociety.ie/globalassets/documents/gazette/gazette-pdfs/gazette-2016/may-16-gazette.pdf#page=45 (7 March 2023).

[171] E.g. European Commission, 'Water: Commission decides to refer IRELAND to the Court of Justice for failing to correctly transpose Water Framework Directive protecting waters from pollution', 26 January 2023, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_166 (7 April 2023).

[172] Water Environment (Abstractions and Associated Impoundments) Act 2022, available at: https://www.oireachtas.ie/en/bills/bill/2022/87/ (7 March 2023).

[173] Government of Ireland, *Draft River Basin Management Plan for Ireland 2022–2027*, 29, available at: https://assets.gov.ie/199144/7f9320da-ff2e-4a7d-b238-2e179e3bd98a.pdf (7 April 2023).

ensuring alignment in practice. Other issues have included, for instance, the delayed development of RBM plans,[174] domestic governance challenges and institutional fragmentation,[175] different approaches to water charges, and a lack of sufficient detail on the state of water.[176] While the EU Directives provide a common framework, there is considerable flexibility within them (or in breach of them) for the member states to develop their own approaches or fit them within existing structures and systems.

Nonetheless, the bulk of water law aligns on the island and considerable cooperation exists regarding the RBM plans, the management of the three transboundary river basins and especially running along the border. Building on the broader shared history and influence of England over both jurisdictions, the EU helped shape and guide environmental policy and law across the island for 50 years—with generally shared objectives, definitions, core obligations, monitoring criteria, technical measures, funding sources, etc. These provided greater ease of access and understanding to those looking across the border, as well as a firm basis for cooperation and collaboration for those implementing and enforcing that policy.

Brexit and diverging paths in a shared island?

However, context and influences change, with knock-on effects. And while Northern Ireland and Ireland must similarly deal with issues such as climate and biodiversity crises, inflation and the impacts of the war in Ukraine (including regarding energy and fertiliser supplies), several factors are impacting differently on the two jurisdictions. These include elements such as the political instability in Northern Ireland and more generally the UK, individual/citizen action in each jurisdiction and, most obviously and fundamentally, Brexit (and related developments). While the first two of these might operate at any point and have done so previously, the EU no longer provides the counterweight or stabilising force to ensure a considerable degree of alignment—instead Brexit is currently accentuating these factors. As discussed herein, Brexit carries the real potential for increased regulatory divergence and thereby to hinder stakeholder understanding of law/policy in both jurisdictions and also full cooperation and coordinated management

[174] S.H. Antwi, S. Linnane, D. Getty and A. Rolston, 'River basin management planning in the Republic of Ireland: past, present and the future', *Water* 13 (15) (2021), 2074.
[175] Antwi et al., 'River basin management planning in the Republic of Ireland'.
[176] Government of Ireland, *Draft River Basin Management Plan for Ireland*, 22.

of shared natural resources, as in the case of transboundary river basins. This is due to the immediate legal and governance consequences of Brexit for Northern Ireland, as well as the longer term shifts that are enabled.

Brexit first brings a partial rupture in the law from day one. With the UK (including Northern Ireland) leaving the EU, it is no longer bound by EU law and the obligations to transpose, implement and enforce in compliance with the duty of sincere cooperation/loyalty. Even EU-derived law transposed within the legal system had its legal foundations in the legislation that enabled accession to the EU, and these foundations would have been removed when the UK left. This could have potentially led to a cliff-edge scenario, where EU law was simply torn away from UK law even where heavily intermingled, leaving substantive holes and incoherency. The UK responded with a patch job via the EU Withdrawal Act 2018,[177] replacing the legal foundations and providing for transposition and amendments of 'retained EU law', essentially to make it function within UK domestic law. However, not all EU law was transposed, e.g. the TFEU environmental provisions and the EU's international commitments do not carry over including under the Water Convention, which the UK has not ratified.[178]

Further, while the Northern Ireland Protocol and Trade and Cooperation Agreement (TCA) could have imposed obligations, for instance regarding regulatory alignment or environmental objectives, they provide little practical assistance either from an environmental perspective or for stakeholders considering future developments. Although valuable, the Protocol's environmental provisions are minimal (e.g. alien and invasive species is the core EU environmental regime still binding Northern Ireland) and the TCA's provisions on non-regression are of limited use (broad, general and difficult to enforce).[179] Thus, neither the UK as a whole nor Northern Ireland individually is bound under international law by EU water law or general environmental objectives or principles.

The consequence is that Northern Ireland and the actors therein are bound currently by retained EU environmental law, but not by future EU

[177] Brennan et al., 'Out of the frying pan, into the fire?', 97.
[178] UKELA, 'Brexit and environmental law: the UK and international environmental law after Brexit' (2017), 17, available at: https://www.ukela.org/common/Uploaded files/brexit docs/international env law 2017.pdf (6 March 2023).
[179] Dobbs and Gravey, 'Environment and trade'.

environmental law (including updates/revisions)[180] and the potential exists for the retained EU environmental law to be substantially revised or repealed.[181] This has been flagged by the UK's Retained EU Law Bill,[182] which could see retained EU law effectively repealed unless individually saved before 31 December 2023—a sunset clause for all retained EU law.[183] Even if this Bill does not pass, or if it only applies to some retained EU law in Northern Ireland,[184] it flags once more the real potential for retained EU law to be repealed. Further, the UK Environment Act 2021's provisions that were extended to NI include provisions that grant the executive powers to amend retained EU law in the field of water, e.g. powers regarding the monitoring of water.

It could be argued that these powers do not necessitate that changes will occur, but strong indications exist already—in the brief periods where Stormont has had a functioning executive it has published a wide range of strategies and policies for consultation, on the environment, agriculture, green growth, the rural, etc. It has even passed a Climate Change Act (with help/pressure from activists and across the political parties). Further, the minister has published decisions on four financial support schemes for agriculture (with positive and negative environmental implications),[185] is developing a new 'simplified' set of 'farm sustainability standards' in lieu of cross-compliance[186] and has imposed a cap of 15 per cent on the financial penalties for

[180] Bear in mind that the WFD approach is built on monitoring, reviews and updates—e.g. through developing and revising RBM plans. Similarly, the underpinning EU laws, technical approaches, etc. are reviewed and may be amended where necessary. For example, Ireland will have to transpose and implement Directive (EU) 2020/2184 of the European Parliament and of the Council of 16 December 2020 on the quality of water intended for human consumption (recast) [2020] OJ L435/1.

[181] Viviane Gravey and Lisa Whitten, 'The NI Protocol & the environment: the implications for Northern Ireland, Ireland and the UK', Environmental Governance Island of Ireland Network Policy briefs 1/2021 (March 2021), available at: https://www.brexitenvironment.co.uk/download/7559/ (6 March 2023).

[182] Una Kelly, 'NI groups fear vital species and habitats threatened', *RTÉ* (1 November 2022), available at: https://www.rte.ie/news/regional/2022/1101/1332482-habitats-threatened-brexit/ (6 March 2023).

[183] Maria Lee, 'The future of environmental protection: law processes and the Retained EU law (Revocation and Reform) Bill', 29 September 2022, available at: https://www.brexitenvironment.co.uk/2022/09/29/retained-eu-law-revocation-and-reform-bill/ (6 April 2023); Viviane Gravey and Colin T. Reid, 'Retained EU Law Bill and devolution: reigniting tensions in post-Brexit intergovernmental relations', 10 October 2022, available at: https://www.brexitenvironment.co.uk/2022/10/10/reul-bill-devolution/ (6 April 2023).

[184] Jane Clarke, Viviane Gravey and Lisa Claire Whitten, 'Ten questions for the REUL Bill in Northern Ireland', 17 October 2022, available at: https://www.brexitenvironment.co.uk/2022/10/17/ten-questions-for-the-reul-bill-in-northern-ireland/ (6 April 2023).

[185] DAERA, *Future agricultural policy decisions for Northern Ireland* (24 March 2022), available at: https://www.daera-ni.gov.uk/publications/future-agricultural-policy-decisions-northern-ireland (6 March 2023).

[186] DAERA, *Future agricultural policy decisions for Northern Ireland.* This builds on the original consultation proposal to remove seven cross-compliance criteria, including the GAEC regarding groundwater pollution (considered rarely breached but essential for good water quality). Available at: https://www.daera-ni.gov.uk/consultations/consultation-future-agricultural-policy-proposals-northern-ireland (6 March 2023).

repeated negligent cross-compliance breaches.[187] Thus, the water policy in Northern Ireland remains largely the same to date, but the legal and policy context within which it operates has already changed significantly.[188]

This is further affected by the change in the governance relationship—the EU institutions no longer play a role in Northern Ireland water law,[189] whereas they do in Irish water law. This is significant in the continuing implementation and enforcement of existing water law, but also in the future development of water law/policy and related areas—typically with the EU leading to enhanced standards, but not always. For instance, Ireland received derogations from the EU under the Nitrates Directive once more in 2022.[190] However, Ireland has also finally enacted legislation regarding abstraction (information gathering and licensing),[191] as required by the WFD—without the continued enforcement role of the European Commission and the CJEU, it is unlikely that this legislation would exist.[192] This may well be supplemented in future by an EU law on criminal offences for illegal water abstraction, currently being proposed by the European Commission.[193] And this is without even considering the reforms surrounding the European Green Deal, the Biodiversity Strategy or the CAP's continued greening.

It should, however, not be thought that the EU is the sole source of positive environmental change across this island (or indeed that it is always positive). For instance, as mentioned above, Northern Ireland is developing

[187] DAERA, 'Minister announces changes to the Cross-Compliance penalty regime' (6 October 2022), available at: https://www.daera-ni.gov.uk/news/minister-announces-changes-cross-compliance-penalty-regime (6 March 2023).
[188] The significance of the broader contextual changes including regarding diverging agricultural policy is the subject of various projects, e.g. Adrienne Attorp, 'Control of diffuse agricultural pollution and management of trans-boundary waterways in Ireland and Northern Ireland', available at: https://www.teagasc.ie/media/website/environment/climate-change/water-quality/acp/Post-30_AAttorp-resized.pdf (6 March 2023).
[189] For example, Maria Lee, 'Brexit and environmental protection in the United Kingdom: governance, accountability and law making', *Journal of Energy & Natural Resources Law* 36 (3) (2018), 351–9.
[190] Commission Implementing Decision (EU) 2022/696 of 29 April 2022 granting a derogation requested by Ireland pursuant to Council Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources, [2002] OJ L129/37.
[191] Water Environment (Abstractions and Associated Impoundments) Act 2022, available at: https://www.oireachtas.ie/en/bills/bill/2022/87/ (7 March 2023).
[192] The 2022 Act was enacted in the context of threatened legal action by the EU regarding failure to adequately transpose the Water Framework Directive: with the European Commission referring Ireland to the CJEU in January 2023, noting the need for detailed implementing regulations and that it will take time to achieve full compliance. It is worth noting that Northern Ireland had already legislated for this element and therefore, in this respect, Ireland is playing catch-up with Northern Ireland—but still due to EU membership.
[193] European Commission, 'European Green Deal: Commission proposes to strengthen the protection of the environment through criminal law' (15 December 2021), available at: https://ireland.representation.ec.europa.eu/news-and-events/news/commission-proposes-strengthen-protection-environment-through-criminal-law-2021-12-15_en (7 March 2023).

environmental (and related) strategies currently, alongside implementing the UK Environment Act and the policy statement on environmental principles therein. Although there is much to critique about the Act, it brings renewed focus on environmental principles, may eventually lead to a more expansive approach to such principles and also provides an overarching environmental framework in domestic law that goes beyond where EU environmental law previously functioned. In both jurisdictions, individual action (including litigation and policy design) has led to the development of climate policy and law. And most recently Ireland has continued its approach of citizens' assemblies, by holding one on biodiversity loss—although the focus is on biodiversity loss, this may see overarching changes including potentially constitutionalisation of environmental rights or rights of nature that would have profound effects across environmental regimes.[194] However, although this assembly is linked to the Shared Island Initiative, its focus has been primarily on Ireland and any such constitutional (or other) changes would be limited to this jurisdiction.

Consequently, it seems highly likely that there will be regulatory divergence across the island of Ireland regarding environmental matters generally, including in the area of RBM—despite the practical importance of cross-border and all-island cooperation and collaboration in such fields. Brexit removes the core shared guiding force of the EU that exerted itself in all stages of policy development on both jurisdictions. Some individual (in)actions happened previously and there was scope for variations in approach, but the potential for substantial divergence in environmental matters was limited—especially where such divergence would undermine the overall achievement of the EU's environmental aims. RBM exemplifies this, as not only are member states required to comply with the general content of the regime but they must also cooperate with each other on transboundary river basins. Now, although Ireland must continue to comply and must seek to cooperate with Northern Ireland, there is no external compulsion on the two jurisdictions to actually cooperate with each other. While the current RBM plans indicate a continued effort to cooperate between the relevant agencies, this will become increasingly challenging as changes arise in standards, measurements, reporting practices or otherwise.

[194] George Lee, 'Call to protect biodiversity and nature in Constitution', *RTÉ News* (27 November 2022), available at: https://www.rte.ie/news/ireland/2022/1127/1338574-citizens-assembly/ (7 March 2023). See also Citizens' Assembly, 'Report of the Citizens' Assembly on Biodiversity Loss', March 2023, available at: https://citizensassembly.ie/wp-content/uploads/Report-on-Biodiversity-Loss_mid-res.pdf (6 April 2023).

Having said that, divergence is not a given and positive signs exist. The continuing legislative obligation to coordinate on international RBDs is reflected in the two jurisdictions' draft RBM plans. Thus, Ireland's draft RBM plan includes a commitment to draft a document on shared waters with its counterparts in Northern Ireland 'to ensure cooperation for water bodies that flow into or through both jurisdictions … Considered positive for European sites and their UK equivalent as it will ensure alignment on achieving objectives.'[195] Northern Ireland's draft RBM plan includes a section on 'working together'.[196] Both documents reflect the existing common (no longer technically shared) regulatory frameworks built on the WFD and indirectly the Water Convention. Further, they highlight that key groups remain operational, including the North–South WFD Coordination Group, National Technical Implementation Group, Border Region Operational Committee, NW Water Forum and North–South Rivers and Lakes Group. It would be highly unlikely to see all such groups disbanded, but their functioning could become more complex. The challenge centres on the broader policy, law and governance landscape—if this diverges, it becomes harder for these groups. It would be possible for Northern Ireland and Ireland to mirror each other's developments, especially considering devolution and EU subsidiarity/shared competence. However, considerable political will and effort would be required to match each step and not go out of sync, which is increasingly difficult where, for instance, the Northern Ireland executive is not functioning.

Conclusion on environmental governance/land-use

The commonalities in environmental governance are founded in commonalities of relationship—with each other, with (the rest of) the UK and with the EU. Brexit puts Northern Ireland and Ireland out of sync, whereby external factors no longer operate on the two jurisdictions in the same manner—indeed, there is the potential for pushback in light of the desire to avail of and demonstrate sovereignty, which acts as a catalyst on both internal and external factors and increases the likelihood of divergence. Yet, concurrently,

[195] Natura, *Natura Impact Statement: Draft 3rd River Basin Management Plan* (Dublin, 2021), available at: https://assets.gov.ie/199797/e98a6563-6dd5-4890-a721-046f57e9ad9c.pdf (7 March 2023); Government of Ireland, *Draft River Basin Management Plan for Ireland*, 18.

[196] NIEA, *Draft 3rd cycle River Basin Management Plan: For the North Western, Neagh Bann and North Eastern River Basin Districts (2021–2027)*, available at: https://www.daera-ni.gov.uk/sites/default/files/consultations/daera/Draft%203rd%20cycle%20River%20Basin%20Management%20Plan%20for%20Northern%20Ireland%202021-2027_0.PDF (7 March 2023).

there is a pragmatic recognition that cooperation in environmental matters, including that of water and RBM, is essential—not merely in the GFA provisions or political statements, but also in the continuing drafting of the RBM plans in both jurisdictions.

It is difficult to reconcile these two positions—the seemingly inevitable regulatory divergence and the recognition of the need for all-island cooperation. However, irrespective of Brexit and of EU law, scope exists for all-island frameworks that would help facilitate effective environmental governance and provide greater clarity and certainty for stakeholders, but this would require political commitments and compromise on both sides of the border in order to be meaningful. Central to these, initial steps would require commitments to a continued RBM approach and a shared language and toolkit, e.g. for monitoring.

Finally, the other side of the relationship between land law and land use, including restrictions for environmental purposes, is that the nature of property rights will impact on the implementation and effectiveness of any environmental policies: for instance, regarding the duration and extent of interests, the potential for compulsory purchase orders, the degree of protection of property rights (e.g. at the constitutional level and the existence of limitations), etc. Thus, variations in land law in the two jurisdictions will continue to impact on policies and practices across the island—with reforms having potentially positive or negative knock-on effects on the effectiveness of environmental governance. If land law itself were to diverge, from an environmental perspective this might necessitate variations in approach to environmental policies or require extra steps to facilitate coherent environmental management across the island. A reflexive approach is essential here, identifying and addressing core challenges and needs, including how to minimise and manage regulatory divergences.

CONCLUSION

The question of alignment or divergence within the related areas of land law and environmental governance is of considerable theoretical interest but also practical interest to landowners and tenants, environmentalists and the general public. By understanding the status quo as well as the nature of the influencing factors to date, it is possible to gain insights as to future developments—which in itself then facilitates considerations of how to identify key

issues, challenges and potential pathways. Some divergence in land law and environmental governance is both natural and beneficial—including simply from learning from each other and reflecting the contextual variations in society, land, history, and so on. However, divergence also poses considerable challenges for stakeholders and effective environmental governance—most noticeably for those in close proximity to the border, but also more generally across the island. A careful balance is desirable.

Conceptually and structurally, land law on the island has generally displayed a lack of divergence. This is not to say that land law in the two jurisdictions is identical. There are clear differences today in the legal sources and legal frameworks of land law, particularly following the LCLRA 2009 in Ireland and given the specific constitutional protections for property there. However, Northern Ireland has proposed fairly similar reforms to the 2009 Act and it is reasonable to conclude that some of the proposed reforms will eventually proceed, if hard to predict when they might be enacted. Similarly, both jurisdictions have the ECHR protections for property rights, although the approaches to that Convention differ between the jurisdictions. The devil may be in the detail but, on the whole, the approach to land law is broadly similar across the jurisdictions in Ireland. The nineteenth-century Irish land question was largely answered by the time partition occurred. What is perhaps more interesting, at least moving forward, is that new land and property questions are emerging. In particular, there are increasing questions about the interaction of land law, land use and environmental protections.

Within environmental governance, including water protection, Northern Ireland and Ireland have moved largely in step with each other, influenced by common internal and especially external factors—including via England/the UK, the EU and the GFA. External factors have been of particular importance due to the limited political will, limited resources and patchy governance at times on the island. However, with Brexit, the relationship between Northern Ireland, Ireland and these external factors changes.[197]

[197] It is worth highlighting briefly that this relationship continues to evolve, as exemplified by the Windsor Framework, which was concluded during the editing process. While it is of great significance generally, it has little direct impact on this specific issue. However, it may impact indirectly in two key manners: first, through technically facilitating greater regulatory divergence generally between Northern Ireland and the EU, and second, and in contrast, through improving relationships between the UK and the EU and on this island, thereby improving foundations for cooperation. See for instance Viviane Gravey and Lisa Whitten, 'New governance for dynamic alignment under the Windsor Framework' (March 2023), available at: https://www.brexitenvironment.co.uk/2023/03/08/windsor-governance/ (25 April 2023); Viviane Gravey and Lisa Whitten, 'The Windsor Framework and the environment' (March 2023), available at: https://www.brexitenvironment.co.uk/2023/03/07/the-windsor-framework-and-the-environment/ (25 April 2023).

As time passes, stakeholders will need to pay closer and closer attention to the developments in both jurisdictions to see how divergences emerge and play out—not merely to ensure they can identify and understand the individual legal developments that affect their own activities (e.g. landowners or environmental actors at the border), but also for the law in one jurisdiction to influence positively or negatively the law in the other jurisdiction, or for land law to impact on environmental governance and vice versa. Indeed, as we were drafting this article the citizens' assembly in Ireland recommended a constitutional referendum on enshrining environmental protections (alongside existing ones on property)—this would be a significant development both nationally and globally if the recommendation is followed and the referendum is successful.[198] Thus there is the potential for further divergence but, as this article has illustrated, some of these moments of divergence in land law and land use have been short-lived. We would hope that this would hold true for any future significant divergence in environmental governance.

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[198] Lee, 'Call to protect biodiversity and nature in Constitution'.