

Devolution Post Brexit: The Perplexity of Multi-Levelled Governance in a Disunited Kingdom*

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Questo contributo intende dimostrare che, con riguardo alla governance territoriale, Brexit sta esercitando un profondo effetto destabilizzante sul sistema costituzionale britannico. Dopo un'analisi dell'approccio generale adottato nella legislazione di recesso del Regno Unito dall'Unione europea, il contributo si sofferma sui c.d. devolution arrangements. La questione del coordinamento dell'attuazione delle politiche, della divergenza delle politiche e della risoluzione delle controversie tra i livelli di governo viene affrontata in relazione all'introduzione di un mercato interno per il Regno Unito, disciplinata dall'Internal Markets Act 2020. Inoltre, l'articolo considera l'impatto della Brexit sull'Irlanda, al nord e al sud. Si fa particolare riferimento all'accordo "Irish Backstop" e al relativo protocollo, nel più ampio contesto dell'accordo di Belfast e della recrudescenza della tensione e della violenza in Irlanda del Nord.

1. Introduction

This article does not seek to focus directly on the current political situation in the UK but rather to linked constitutional and legal issues relating to devolution. Also, this discussion is not presented as an exercise in crystal ball gazing, speculating on the future unfolding of political events. Nevertheless, it is evident that Scottish independence seems a step closer with demands for a second referendum gaining momentum¹

* I would like to thank Professor Andrew Harding and Professor Gordon Anthony for their insightful comments on earlier drafts and Professor Jens Woelk for inviting me to give the keynote address (Trento, Bolzano, Innsbruck) upon which this article is based.

¹ Elections for the Scottish Parliament in May 2021 resulted in strong support for the Scottish Nationalist Party which fell just short of achieving an overall majority in the Scottish Parliament with 64 seats. The Green Party with 8 seats also supports calls for a second independ-

and the status of Northern Ireland is also being increasingly called into question². I hope that this assessment of the impact of Brexit will at least highlight some of the problems which are being confronted from the standpoint of multi-levelled and multi-layered governance.

The paper is divided into three parts. The first (§ 2) sets the scene by outlining the legal methodology of Brexit contained in the UK withdrawal legislation. But our main concern is to focus on the impact of the Brexit process on devolution. The second part (§ 3) evaluates the procedures for the co-ordination of policy implementation in the UK's devolved system of government and law-making in the light of Brexit and the recent launch of an internal market for the UK. The general question here is to assess to what extent an approach designed to create a uniform internal market for the United Kingdom is capable of accommodating the conflicting goals of devolved governments, including significant policy divergence and the desire to maintain alignment with EU law and regulation? The third part (§ 4) of the article seeks to explore the challenges presented by the so called Irish Backstop and related protocol against the wider context of the Belfast Agreement and the current upsurge of tension and violence in Northern Ireland.

2. The Legal Methodology of Brexit

For many advocates of Brexit a prime objective was to achieve the restoration of sovereignty and the elimination of the weight of bureaucratic regulation imposed by Brussels. Since the ECA 1972 community law has prevailed over domestic law. The restoration of sovereignty became conflated with the idea, repeated in sound bites, of 'taking back control' over law-making from EU institutions and removing the jurisdiction of the European Court of Justice. What exactly does this mean against the backdrop of a global economy and a multi-levelled constitution?

ence referendum. See <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-57028315>; S. TIERNEY, *The Scottish Parliamentary Elections and the "Second Referendum" debate*, in *UK Const L Blog*, 10th May 2021.

² See J. CURTICE, *Brexit and Covid play part in shifting attitudes to independence*, *Sunday Times*, January 23, 2021.

2.1 *Brexit, Regulation and Implementation*

The cumulative effect of EU law, for instance transposing EU directives over fifty years into domestic law, has been to regulate activities stretching across many fields (e.g. trading standards, food, pharmaceuticals, agriculture). From a technical legal standpoint the task of eliminating this vast body of law in order to deliver a clean break was not possible in a limited time frame³. In order to maintain stability from the date of withdrawal (end of January 2020) the starting point for the withdrawal legislation was to ensure existing EU law remains valid and enforceable in the UK⁴. In other words, the UK remains subject to a vast body of EU law post Brexit.

Departure from EU regulatory norms may not be desirable given the trading requirements in a global economy. To some extent this situation is likely to continue as there is an external paradox identified by Professor Craig:

[there are]... very significant constraints on the sovereign choices available to the UK Parliament. This flows, in part, from the fact that many trading standards are set at the global level, largely as a result of negotiations between the EU and the USA, and these will continue to apply in a post-Brexit world.⁵

The scope for trade deals with other nations as alternatives to the EU, including the USA, depends upon the universality of trading standards. Nevertheless, the Brexit legislation also allows for the selective repatriation of EU laws by conferring wide delegated powers on the government, thus increasing the power of the *executive* rather than the power of *Parliament*. Parliamentary scrutiny mechanisms have been modified

³ See e.g. European Union (Withdrawal) Act 2018 (EUWA) and the European Union (Withdrawal Agreement) Act 2020. (A series of further transitional bills to be introduced in the 2019-21 Parliamentary session include: Trade Bill, Agriculture Bill, Fisheries Bill, Immigration and Social Security Coordination (EU Withdrawal) Bill, Environment Bill).

⁴ EUWA 2018, ss 2-4 convert EU law to domestic law.

⁵ P. CRAIG, *Brexit and the UK Constitution*, in J. JOWELL, C. O'GINNEIDE (eds), *The Changing Constitution*, Oxford, Oxford University Press, 2019, p. 118.

in accordance with the post-Brexit procedures⁶. In turn, this raises further issues of constitutional accountability to Parliament, as there is only limited opportunity for parliamentary scrutiny by relevant committees of both houses of Parliament⁷ and hardly any opportunity to debate 'made negative' statutory instruments⁸. Moreover, as will be apparent later in our discussion, the lack of robust Westminster parliamentary scrutiny provides support for criticism from the devolved administrations in relation to the migration of former EU law under the withdrawal legislation, with the details set by the Westminster government using delegated powers under the Brexit legislation. Prior to Brexit, EU membership also meant that rulings from the European Court of Justice (CJEU) would be binding on domestic courts within the United Kingdom. The jurisdiction of the CJEU continues to apply in some areas over a transitional period and beyond⁹, but the CJEU will no longer have general jurisdiction over the UK in relation to any acts taking place after 1 January 2021¹⁰.

In terms of the post Brexit relationship between the UK and the EU the policing of EU withdrawal and the final withdrawal agreement is not placed in the hands of the ECJ, rather a Partnership Council (PC) is established as a joint UK-EU body which has been created as part of a new governance framework to oversee the Trade and Cooperation Agreement. Designed to manage the relationship between the UK and the EU and to resolve any disputes. It is co-chaired by a member of the European Commission and a minister from the UK Government. The new legal machinery of Brexit establishes on approval of the deal a three stage process for dispute resolution which does not involve the

⁶ See European Union (Withdrawal Agreement) Act 2020, section 29 and 30 and Schedule 4 amending Section 13 of the European Union (Withdrawal) Act 2018.

⁷ See 'European Union (Withdrawal) Bill: interim report', HL Select Committee on the Constitution, 3rd Report of Session 2017-19, 7 September 2017, HL Paper 19, para 44.

⁸ <https://www.hansardsociety.org.uk/blog/end-of-session-si-debate-sprees-highlights-shortcomings-of-scrutiny-process>. It is pointed out that of 800 SI laid before Parliament motions have been tabled in relation to just 13 and at that the government's command of time under Standing Order No 14 allows Ministers to frustrate the intention of Statutory Instruments Act 1946.

⁹ S. DE MARS, *Brexit next steps: The Court of Justice of the EU and the UK*, House of Commons Library, 7 February 2020. Dispute mechanisms only commence operating after the transition period.

¹⁰ See e.g. Withdrawal Agreement, Articles 153, 158, 160, 161.

ECJ. Rather, it establishes consultations to achieve resolution at a diplomatic level. Arbitration is the next stage to allow a matter is referred to an independent arbitration tribunal. Compliance as a last resort allows for the suspension of the Trade and Cooperation agreement. A number of specialised committees operate under the Partnership Council to deal with specific policy areas. Decisions by ministers under these sub-committees will be important: sometimes leading to legislative changes but more often leading to the exercise of delegated powers without direct reference to Parliament and thus raising accountability issues¹¹.

3. *Brexit and Devolution*

Turning to devolution, it is highly significant that many EU laws concern functions devolved as part of (what has been termed) a quasi-federal system of territorial governance¹². The UK government, however, not only had responsibility for negotiating the withdrawal agreement, but also has the power to enact in the Westminster Parliament the legislation needed to implement it. Nevertheless, the claim by some of those advocating Brexit that withdrawal from the European Union would simply take back control with the restoration of sovereign authority is difficult to reconcile with the principles of devolution. This claim applies in a technical sense given the delegated powers to make regulations conferred on the executive under the withdrawal legislation¹³.

It is important to stress at the outset that Brexit modifies a system of multi-levelled and multi-layered governance. In a practical sense, the issue of the implementation of EU law and relations with Europe were key questions at the devolved level of government from the outset, not only because the European Union legislated in many of the same fields over which power has been devolved, for example, economic development, agriculture and fisheries, the environment, training, and enterprise,

¹¹ The shape of future parliamentary scrutiny of UK-EU relations, Fifth Report of Session 2019-21, Committee on the Future Relationship with the European Union, HC 977, 21 January 2021, 8/9.

¹² S. TIERNEY, *Drifting Towards Federalism?*, in R. SCHÜTZE, S. TIERNEY (eds), *The United Kingdom and the Federal Idea*, Oxford, Hart Publishing, 2018, p. 121.

¹³ European Union (Withdrawal) Act 2018, s 8, Sch 7.

but also because Europe was a significant source of regional funding¹⁴. With the arrival of Brexit in January 2020 the question moved from the implementation of EU law to the repatriation of EU law as domestic law in the UK.

3.1 *Policy coordination, Dispute Resolution and the Brexit Experience*

The UK government was ultimately responsible for the implementation of EU law, but these powers were concurrent since the application of EU law within each jurisdiction was made a matter for the devolved executives. The devolution legislation further provided that where Scottish/Northern Irish/Welsh ministers were empowered to use section 2(2) of the European Communities Act 1972 to implement obligations under Community law, a minister of the Crown also retained power to use section 2(2) for the same purpose. This concurrence introduced an element of ambiguity concerning the implementation of compliance with EU law. At an operational level of policy implementation the informal mechanisms promoting co-operation between administrations have comprised a series of concordats. These concordats were first drawn up after 1999 coincidentally with the introduction of devolution, mostly as bi-lateral agreements between the Westminster government and the devolved administrations to facilitate policy coordination¹⁵. In fact, EU policy matters provided an excellent illustration of the practical application of concordats as any such matters were previously resolved by reference to the Concordat on Co-ordination of European Union Policy Issues¹⁶.

The system of concordats and policy implementation is overseen by a Joint Ministerial Committee (JMC)¹⁷ which was conceived as part of a consultative process but also designed to finally resolve disputes between

¹⁴ 'Framework Analysis 2020, Breakdown of areas of EU law that intersect with devolved competence in Scotland, Wales and Northern Ireland', HC September 2020, CCS0920185348 09/20.

¹⁵ D. TORRANCE, *Intergovernmental Relations in the United Kingdom*, House of Commons Library Briefing Paper CPB-8371, 25 March 2021, 5ff.

¹⁶ See Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers and the Northern Ireland Executive Committee, October 2013 (supersedes Command Paper Cm5240, December 2001).

¹⁷ *Ibid.*, 15ff.

administrations¹⁸. The body is chaired by the UK PM and it comprises the first ministers and deputy first ministers of the devolved administrations¹⁹. It was established to meet in plenary session at least once annually²⁰. Further, a protocol was agreed between the administrations to resolve any disputes that might arise²¹. In addition, the Secretary of State for Scotland, Wales and NI respectively was expected to perform an important role in promoting effective working relations between Westminster and the devolved administrations. When no agreement was achieved there might be talks at ministerial or at official level. At the end of the process if there was still no agreement reached the matter would be referred to JMC secretariat for resolution in plenary session²². The Brexit negotiations led to the immediate resuscitation of the Joint Ministerial Committee (European Negotiations) after months of dormancy as it provided a potential way forward. The ad hoc Brexit Committee of the JMC elicited consultation responses from the devolved administrations but was not equipped to handle the political intensity of disputes between administrations prompted by the Brexit process.

The dispute resolution processes have been dominated by the Westminster government which has a unilateral right to prevent proceedings from going ahead. In consequence, the entire process no longer commands the confidence of the devolved governments²³. Unsurprisingly, Brexit has been particularly controversial given the support for remain in Scotland and opposition to the Internal Market initiative in Wales. As will soon be apparent it has resulted in the withholding of legislative consent motions, the introduction of a Scottish continuity bill concerning the repatriation

¹⁸ 'Inter-governmental relations in the United Kingdom' House of Lords, Select Committee on the Constitution, 11th Report of Session 2014-15, HL Paper 146, 12ff.

¹⁹ R. RAWLINGS, *Brexit and the Territorial Constitution*, in *The Constitution Society*, 2017, p. 7.

²⁰ R. RAWLINGS, *Delineating Wales: Constitutional, Legal and Administrative Aspects of National Devolution*, Cardiff, Cardiff University Press, 2003, p. 398.

²¹ Protocol for Avoidance and Resolution of Disputes, 2010. <https://www.gov.uk/government/publications/protocol-for-avoidance-and-resolution-of-disputes-devolved-administrations>.

²² A. TRENCH, *Whiteball and the Process of Legislation After Devolution*, in R. HAZELL, R. RAWLINGS (eds), *Devolution, Law Making and the Constitution*, Imprint Academic, 2005, p. 194ff.

²³ The relationship between the UK and Scottish Governments' *Scottish Affairs Select Committee*, Eighth Report of Session 2017-19, HC 1586, 19.

of EU law and a legal challenge to the effects of UK Internal Market Act²⁴. The subsequent litigation, can be attributed, at least partly, to the ineffectiveness of informal mechanisms for dispute resolution. Professor Rawlings argues that as UK ministers seek to develop innovative market and trading strategies for a post-Brexit world: 'There is an urgent need for multilateral forms of intergovernmental relations which are fit for purpose ...' [and that] '... reform could sensibly include the establishment of a new and more highly-gearred inter-governmental forum'²⁵ In order to promote more effective coordination the Scottish Affairs Select Committee has proposed replacing territorial offices of state at central government level with a single department responsible for managing constitutional affairs and intergovernmental relations at devolved level²⁶.

3.2 *The Legislative Process and the Sewel Convention*

The underlying political friction over the approach to Brexit between the positions of the Conservative government at Westminster and the devolved governments exposes the fragility of the mechanisms for inter-governmental relations. Crucially, this applies to the Sewel convention which deals with legislative overlap. The convention arises when there is a parallel right to legislate between the Westminster Parliament and the devolved legislatures. Sovereignty notionally remains with the Westminster Parliament (each piece of devolution legislation specifies this) but in an attempt to mitigate the homogenising effect of parliamentary sovereignty the Sewel Convention *normally* requires the Westminster to obtain the consent of the devolved legislatures. This is supplied in the form of a legislative consent motion (LCM), before the Westminster government proceeds with any bill applying to Scotland, Wales or Northern Ireland which overlaps with devolved competences/powers

²⁴ *The Counsel General for Wales v the Secretary of State for Business Energy and Industrial Strategy* (2021) seeking declarations relating to the implied repeal of devolved legislative competence. Constitutional legislation recognizing the Welsh Government as a permanent part of the constitutional arrangements of the UK.

²⁵ R. RAWLINGS, *Brexit and the Territorial Constitution*, in *The Constitution Society*, 2017, p. 7.

²⁶ 'The relationship between the UK and Scottish Governments' Scottish Affairs Select Committee Eighth Report of Session 2017-19, HC 1586 at para 111.

etc.²⁷. Despite the fact that the convention is recognised in statutory form under recent legislation²⁸ the UKSC in the first *Miller* case held that constitutional conventions, including Sewel, are not legally enforceable. In consequence, the consent of the devolved legislatures to any such legislation is not a strict legal requirement which, if withheld, would prevent laws emanating from the Westminster Parliament from being enacted²⁹. Of course, a legally enforceable consent requirement would place a potential veto in the hands of the devolved legislatures, and in so doing, also undermine the sovereignty of the Westminster Parliament. Over the initial phase of devolution (e.g. 1999-2010 Labour was in power at Westminster and in Edinburgh and Cardiff) this convention worked well as part of a consultative process and consent motions were hardly ever refused³⁰. Latterly, it will be apparent (e.g. when discussing the UK Internal Markets bill below) that the disregard of the wishes of the devolved governments signals not only a breakdown of this consultative process, but also it conflicts with the spirit of co-operative working between layers of government. Indirectly, it also encourages the cause of independence because it gives the impression that the views of the Scottish, Welsh and NI electorates can be simply ignored.

3.3 *Legal Dispute Resolution: The Supreme Court and the Legal Continuity Scotland Bill*

These inter-governmental tensions have resulted in litigation (reminding us also of the role of the courts as part of devolution)³¹. The UK Supreme Court case which concerned the *Legal Continuity Scotland Bill*³²

²⁷ See e.g. B. WINETROBE, *A Partnership of Parliaments? Scottish Law Making under the Sewel Convention at Westminster and Holyrood*, in R. HAZELL, R. RAWLINGS (eds), *Devolution, Law Making and the Constitution*, Exeter, Imprint Academic, 2005, p. 39.

²⁸ Scotland Act 2016 and Wales Act 2017.

²⁹ *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, para [149].

³⁰ See C. HIMSWORTH, C. O'NEILL, *Scotland's Constitution: Law and Practice*, London, Bloomsbury Professional, 4th edn, 2021, chapters 5 and 6.

³¹ Devolution Issues may be referred to a court and ultimately now the UK Supreme Court under the Scotland Act 1998, Government of Wales Act 1998 and Northern Ireland Act 1998.

³² *UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill – A Reference by the AG and Advocate General for Scotland* [2018] UK SC 64.

tested previous cooperation reflected in the legislative process to its legal limits³³. In advance of Brexit itself the withdrawal legislation dealt with transferred matters, and made changes to the powers of devolved ministers and of the devolved legislatures. The complexity of the Brexit process, entailing the untangling of the overlapping strands of multi-layered governance, was compounded by political disagreement over the approach to Brexit between the objectives of the Conservative government of PM May at Westminster, and the Scottish and Welsh national parties, as well as other parties represented in Edinburgh and Cardiff³⁴. As a result, there was failure to reach agreement on the amendment to the legislation through the Joint Ministerial Council and during its parliamentary stages at Westminster. The Scottish Parliament refused to grant a (Sewel) legislative consent motion in relation to the UK Withdrawal Bills introduced by the government of Prime Minister May. While the Westminster Parliament was debating the EU Withdrawal Bill, legislation was introduced in the Scottish Parliament (The Legal Continuity Scotland Bill) in order to allow Scottish Ministers to select which parts of EU law to retain in Scotland.

A reference was made by the law officers of the Scottish Parliament acting under section 33 of the Scotland Act 1998 to determine whether it fell within the legislative competence of the SP. The UK Supreme Court decided that the Scottish Parliament had the competence to legislate for the continuity of laws relating to devolved matters in Scotland which were previously the subject of EU law but which would cease to have effect as EU law after the United Kingdom withdrew from the European Union³⁵. The court accepted that any Scottish legislation from the SP would apply to purely Scottish domestic rules of law which at that point would have replaced EU law³⁶. In other words, the SP would have general

³³ For detailed analysis of this case see G. ANTHONY, *Brexit and Devolution*, in S. KADELBACH (ed), *Brexit – And What It Means*, Baden Baden, Nomos, 2019, p. 68ff.

³⁴ The Northern Ireland Assembly remained suspended until January 2020.

³⁵ *UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill – A Reference by the AG and Advocate General for Scotland* [2018] UKSC 64, para [11].

³⁶ Devolution statutes have not been interpreted in a way that requires the consent of the devolved institutions for the lawful revocation of their powers by Parliament. See G. DAVIES, D. WINCOTT, *Unionism in the Courts? A critique of the Act of Union Bill*, PL 2021, Apr, 293-310 at 308.

legal competence over areas of former EU law (This finding is relevant to subsequent Scottish legislation applying in Scotland).

However, under clause 17 of the Scottish Bill, after withdrawal from the European Union the capacity of UK ministers to make *subordinate* legislation would have fallen within the legislative competence of the Scottish Parliament. Such UK-wide subordinate legislation would have had no effect in Scotland unless this subordinate legislation obtained the consent of Scottish ministers, and, in turn, this provision would have prevented subordinate legislation made by a Minister of the Crown (i.e. UK executive) from having effect in Scotland. As a result, it was argued successfully that the clause if enacted imposes a limitation on the legislative role of the UK Parliament.

An alternative interpretation advanced by the Scottish Parliament was that these were simply additional powers, and the UK Parliament would not be prevented from expressly invalidating any subordinate laws made under them. This view was rejected. The UK Supreme Court held that an enactment of the Scottish Parliament which prevented subordinate legislation from the UK Parliament (actually emanating from the UK executive) from having legal effect would limit the powers of the UK Parliament. The effect would be to modify the Scotland Act 1998, section 28(7) which gives the UK Parliament unqualified legislative power in Scotland. The provision under clause 17 not only undermines the sovereignty of the Westminster Parliament by imposing a condition limiting its powers under the Scotland Act 1998, but it also would have clashed with the provisions of the European Union Withdrawal Act 2018 allowing UK ministers to make subordinate legislation for the UK³⁷.

Professor Anthony observes that:

... the devolution case law has settled upon a resolutely non-federal model of sovereignty. While there were aspects ... that drew on the Court's earlier reasoning in *Axa* ... the judgment ultimately rested the Diceyan model of sovereignty that had informed *Miller*³⁸.

³⁷ Section 12(1)(2).

³⁸ G. ANTHONY, *Brexit and Devolution*, in S. KADELBACH (ed), *Brexit – And What It Means*, Baden Baden, Nomos, 2019, p. 75.

3.4 *The Internal Markets Act 2020 and its controversial impact*

In the domain of economics and trade post Brexit, domestic policy is based upon the idea of the UK as an internal market. This reflects a desire to maintain uniformity of standards for such matters as the regulation of goods and services at a national level. Indeed, the principles for a Common Framework were acknowledged by Joint Ministerial Committee (European Negotiations) (JMC(EN))³⁹. These principles include a list of relatively uncontroversial general objectives including: ensuring compliance with international trade obligations; ensuring the UK can negotiate, enter into and implement new trade agreements and international treaties; administering and providing access to justice in cases with a cross-border element; safeguarding the security of the UK. But equally from the standpoint of devolved governance, the objectives are sometimes contradictory and likely to be controversial: for example, enabling the management of common resources and the functioning of the UK internal market while also acknowledging policy divergence. The difficulty in achieving a co-ordinated approach is further exacerbated because the legislation which was eventually enacted, the Internal Markets Act 2020 (UKIM) does not reflect an agreed approach by the UK government and the devolved governments. In a report highly critical of the extraordinary delegated powers which might have been given to the government and the lack of consultation with devolved administrations, the Constitution Committee of the House of Lords stated that ‘The Government must set out the process for consultation with the devolved administrations on the management and adjustment of the internal market arrangements.’⁴⁰ UKIM establishes the post Brexit UK wide trading relationship between England and Scotland, Wales and Northern Ireland⁴¹ but it clashes with the fundamentals of devolution. It was strongly opposed at the level of devolved government and finally enacted by the Westminster parliament

³⁹ Agreed in October 2017. See Frameworks Analysis 2020, Breakdown of areas of EU law that intersect with devolved competence in Scotland, Wales and Northern Ireland, September 2020, 4.

⁴⁰ ‘United Kingdom Internal Market Bill, House of Lords Selected Committee on the Constitution, 17th Report of Session 2019-21, 16 October 2020, HL Paper 151, 10.

⁴¹ The framework for repatriation sets out 18 policy areas where new primary legislation may be required.

without the Scottish and Welsh Parliaments granting legislative consent motions.

Turning to the Act itself, two market access principles (MAPs) are recognised as part of the new regime. The first principle – Mutual Recognition – starts from the premise that – any goods lawfully sold in one part of the UK are automatically acceptable for sale in the others. This is of course subject to regulatory compliance. It is intended to prevent the emergence of trade barriers within the UK. (For example, any laws in Scotland attaching to goods but contravening UK wide market access principles would not apply to goods brought in to Scotland)⁴².

The second principle – Non-discrimination – relates to how any goods are sold – who can sell which goods⁴³. It also regulates transportation, storage and display. UKIM applies *inter alia* to the agricultural sector⁴⁴, the construction sector and to services. Essentially, it is designed to prevent a post Brexit free for all which might prevent trading within the UK. Any regulatory requirements that contravene the MAPs will be invalid under the Act, with the courts as final arbiters in determining disputes that might arise.

An equally controversial aspect of UKIM is that it gives UK ministers at Westminster direct spending powers in the devolved nations over areas of devolved competence. This provision arises because Brexit has brought an end to EU structural funding (ESF)⁴⁵. The way the legislation has been drafted means that the UK Government can exercise unilateral control over the UK replacement to ESF (the Shared Prosperity Fund, or SPF). The effect of Westminster taking such decisions bypasses the devolved administrations in determining devolved spending choices in devolved policy areas. For example, the Scottish Government maintains that it is better placed to make spending allocations reflecting the Scottish Government's consultation responses and the investment needs of

⁴² J. SARGEANT, A. STOJANOVIC, *The United Kingdom Internal Market Act 2020*, Institute for Government, February 2021, p. 14.

⁴³ Non discrimination does not apply to provisions already in force.

⁴⁴ For example, preventing spread of pests and diseases, regulating fertilisers and pesticides.

⁴⁵ Internal Markets Act 2020, Part 6.

Scottish communities and Scottish businesses⁴⁶. There is an obvious political dimension to the criticism attributable to the SNP government in Edinburgh (Scottish government withdrew from the project in March 2019) and the Welsh Government, in that any legal provisions detracting from devolved powers is bound to be opposed by them, but it is the reluctance to consult by the Westminster government under PM Johnson, and the failure to regard the devolution project as a partnership which has exasperated the devolved governments⁴⁷. The approach departs from the EU principle of subsidiarity and assumes that uniformity is required to gain market access. At the same time, the desire for policy divergence by the devolved administrations on devolved matters highlights potential clashes of interests. For instance Kenneth Armstrong explains:

‘For the devolved administrations, the risk is that competition may then put local producers and service providers at an economic disadvantage with the risk that governments feel required to adjust regulatory standards to align with market demands rather than public preferences. Given the size of both the Scottish and Welsh markets relative to the market in England, there has been an evident anxiety that the rules set for the English market could in practice end up being the basis for the sale of goods or provisions of services in Scotland and Wales to the detriment of the exercise of devolved regulatory competence.’⁴⁸

The Westminster government managed to enact UKIM in the face of vigorous opposition from the devolved governments, but it now faces the greater hurdle of establishing the structures for managing the UK internal market and ensuring they function confronted with political as well as practical challenges. At the time of writing the Scottish government is still unwilling to cooperate and the Welsh government has launched a legal challenge to the Act on the grounds it gives UK ministers powers to

⁴⁶ <https://www.gov.scot/publications/brexit-uk-internal-market-act-devolution/pages/6/>

⁴⁷ ‘After Brexit the Internal Markets Act and Devolution’ *Scottish Government*, March 2021, 17.

⁴⁸ K. ARMSTRONG, *Governing With or Without Consent – The United Kingdom Internal Market Act 2020*, UK *Const L Blog*, 18 Dec 2020.

change the devolution statutes⁴⁹. This complexity and underlying conflict of interest signals the importance of establishing a workable protocol in order to cope with regulatory divergence and the necessity for executive co-operation and inter-parliamentary working⁵⁰.

3.5 *The Scottish Approach to Brexit*

Brexit is having an immediate impact on devolution as a substantial body of EU law relates to functions that have been devolved⁵¹. In order for the task of government to proceed a significant degree of consultation and coordination is essential. As noted, the terms of UKIM were viewed as fundamentally incommensurable with the principles of devolution, but by way of contrast, a LCM was granted by the SP for the UK Agriculture bill, enacted as the Agriculture Act 2020. The UK legislation gives the UK Government broad powers to provide support for agriculture, both for an initial agricultural transition period and for the longer term. Some provisions in the legislation dealt with matters within the legislative competence of the Scottish Parliament, as well as altering the executive competence of Scottish Ministers⁵².

Nevertheless, the Scottish Government is intent on pursuing its own repatriation policy, and as a follow up to the Legal Continuity Scotland Bill (not enacted), the SP has passed devolved legislation to this end. The European Union (Continuity) (Scotland) Act 2021 received the Royal Assent on 29 January. The Act aims to ensure that Scotland can continue to align with EU law after 31 December 2020. It seeks to achieve this by: giving Scottish Ministers power to keep devolved laws similar to EU laws; ensuring that Scottish Ministers and public bodies pay attention

⁴⁹ See the *Counsel General for Wales v The Secretary of State for Business, Energy and Industrial Strategy* (applications January 2021 in the High Court of Justice Queen's Bench Division Administrative Court in Wales).

⁵⁰ J. SARGEANT, A. STOJANOVIC, *The United Kingdom Internal Market Act 2020*, Institute for Government, February 2021.

⁵¹ Withdrawal from the European Union deprives the devolved legislatures of their statutory obligation to respect EU law. In turn, this called for modifications to devolution legislation and thus required legislative consent motions.

⁵² See Annual Report of the Rural Economy and Connectivity Committee for 2020/21, Scottish Parliament, SP Paper 1026, 6th Report, 2021 (Session 5), 4.

to environmental principles when they make policies; and by establishing a new organisation to replace the oversight of environmental law provided by the EU. The Act confers wide delegated powers to the Scottish Ministers (i.e. the Executive) to selectively omit anything which has no practical application⁵³ and it has the purpose of maintaining and advancing standards in: environmental protection, animal health and welfare, plant health, equality, non-discrimination and human rights, social protection. Ministers must have regard to the purpose referred to in subsection 1 'maintaining and advancing standards'. The emphasis on regulatory alignment is to pave the way for Scottish independence and the intention to re-join the EU as an independent nation. The extent to which the pursuit of EU regulatory alignment challenges the objectives of UKIM in establishing a uniform domestic market is, as yet, unclear but this initiative further reflects a residual post Brexit tension between Westminster and the devolved governments.

4. The Multi-Layered Irish backstop question

4.1 Brexit and the Belfast Agreement

The upsurge in violence in April 2021 (8 consecutive days of sectarian riots in Belfast directed at the police) demonstrated the fragility of the political situation but more in depth analysis reveals the layer of complexity of territorial governance in Northern Ireland. First taking account of the context, there is an underlying historical enmity between distinct communities going back many centuries, one predominantly protestant and pro-union and the other predominantly Roman Catholic and sympathetic to Irish Nationalism. The Peace Wall in Belfast between the Shankil Road and Falls Road council estates stands as an emblem of the separation of polarised communities. The foundation of the Republic and the partition of Ireland to form six counties remaining part of the United Kingdom was an imperfect solution, leaving as it did a sizeable pro-nationalist minority in the North. In the early 1970s the Stormont system of devolution collapsed, direct rule was imposed, in the face of a campaign of organised violence by the Provisional IRA that spread to the

⁵³ See Section 2.

mainland and this prompted tit for tat reprisals carried out by para military protestant groups. The ‘Troubles’ accounted for more than 3000 lives⁵⁴. NI as a whole voted in favour of remain in 2016 which reflects the fact that there was significant cross community support for the EU. The UK withdrawal from the EU presents a potential threat to the Belfast (Good Friday) Agreement 1998. The characteristics of NI devolution were meticulously fashioned following detailed negotiations to form a complex settlement ending three decades of armed struggle. (As we shall see) the settlement was finely balanced to allow for the respective aspirations of the main protagonists which are diametrically opposed, certainly in terms of overall objectives. The entire system is based upon ‘consociational’ power sharing⁵⁵. This means that, for example, the First Minister and Deputy First Minister, as representatives of the unionist and nationalist communities respectively, are co-equals and required to act jointly while, at the same time, the formation of the remainder of the government is also based on power sharing between the main parties. In NI certain types of legislation and decisions which touch on contested areas require cross-community support (with safeguards in place etc).

UK withdrawal from the EU inevitably impacts on the relationship between the United Kingdom and the Republic of Ireland as guarantors of the agreement. The acceptance of devolution in Northern Ireland was founded upon supra-national institutional arrangements involving the Republic of Ireland⁵⁶ which assumed the common EU membership of the United Kingdom and the Republic of Ireland. The arrangements were designed as a special form of multi-levelled and multi-layered governance.

⁵⁴ Reconciliation is an ongoing process. See ‘Addressing the Legacy of Northern Ireland’s Past: the Government’s New Proposals’ *Northern Ireland Affairs Committee, Third Report of Session 2019-21*, 21 October 2020, HC 329.

⁵⁵ Members of the Assembly register a designation of identity as nationalist, unionist or other. Elections then take place on a cross community basis under the d’Hondt formula with a distribution of posts from the offices of First Minister and Deputy First Minister to further ministerial other appointments. A requirement of parallel consent prevents either unionists or nationalists from forcing through legislation/decisions which require cross community support. See B. DICKSON, *Devolution in Northern Ireland*, in J. JOWELL, C. O’CINEIDE (eds), *The Changing Constitution*, Oxford University Press, 9th edn, 2020.

⁵⁶ The Belfast (Good Friday) Agreement was subsequently enacted as the Northern Ireland Act 1998.

In consequence, any Brexit arrangements obviously had the potential to undermine this aspect of the Belfast Agreement and the terms of the Northern Ireland Act 1998 itself, which is, in effect, a constitution for Northern Ireland. The North/South Ministerial Council representing the government of the Republic of Ireland and the government of Northern Ireland at ministerial level was established to develop co-operation on a cross border all-island basis⁵⁷. As Professor Christopher McCrudden explains: ‘The North/South Ministerial Council and the Northern Ireland Assembly were (and are still) mutually dependent; one cannot successfully function without the other’⁵⁸. The object according to the Belfast Agreement was to develop consultation, cooperation and action within the island of Ireland on matters of mutual interest within the competence of the administrations. This included some input by Northern Ireland Ministers to national policy making in the domain of EU law and policy; the consideration of the EU dimension to the North/South Council; and approaches to EU issues in the British/Irish Council; it also includes cross-border policing and criminal justice co-operation. The British Irish Council (BIC) on the other hand, as a supra national body embracing Ireland and the UK comprises members of the Irish and Westminster governments but also consists of political representatives from the Scottish Parliament, Welsh Parliament, Northern Ireland Assembly, Channel Isles and Isle of Man. The BIC considers broader mutual interests between the UK as a whole and Ireland⁵⁹. The re-launch of power sharing in January 2020 and the smooth implementation of the NI protocol as part of the post Brexit agreement was tied into the active functioning of the North South Ministerial Council and the British Irish Council.

⁵⁷ Northern Ireland Act 1998, section 52.

⁵⁸ C. MCCRUDDEN, *Northern Ireland and the British Constitution since the Belfast Agreement*, in J. JOWELL, D. OLIVER (eds), *The Changing Constitution*, Oxford, Oxford University Press, 6th edn, 2007, p. 241.

⁵⁹ Northern Ireland Act 1998, section 52. See <https://www.britishirishcouncil.org/about-council>. The British Irish Council also established under the Good Friday Agreement and NIA 1998 is intended “to promote the harmonious and mutually beneficial development of the totality of relationships among the peoples of these islands”. The BIC operates as a forum for a range of sectors including indigenous, minority and lesser used languages.

4.2 *Open borders and Reciprocal Rights to Citizenship*

The absence of any controls relating to free movement of peoples and goods is one of the cornerstones of the entire European project and it has of course been potentially undermined by Brexit. The EU principle applied in regard to the land border Northern Ireland shares with the Republic of Ireland. However, the Belfast Agreement although formulated as a settlement for NI, also stands alongside the unique historical relationship between the United Kingdom and the Republic of Ireland. This includes a paradoxical legacy recognised by both nations notwithstanding any previous hostility that might have existed. Irish citizens are treated as settled in the UK for immigration purposes and so do not need to obtain indefinite leave to remain, nor do they need a permanent residence in order to naturalise as British citizens. British citizens wishing to naturalise as Irish citizens are also treated differently from other migrants for the purpose of proving residence. No permission to reside is required to remain in Ireland⁶⁰ as their residence in Ireland is deemed legal⁶¹. The Common Travel Area under the backstop protocol does not provide any unfettered rights to travel to the rest of the EU for UK citizens resident in NI (unless of course NI UK citizens apply to become citizens of the Republic)⁶².

Moreover, as a result of the historic ties with Ireland citizens of the Republic of Ireland who are resident in the UK are eligible to register for, and vote in all UK elections. The Irish Constitution was amended in 1983 to encompass UK citizens as having voting rights at Irish elections. This applies to all eligible voters normally resident in Ireland⁶³. There are other levels of residual close association including sporting representation. For

⁶⁰ CAJ Briefing Note on Irish citizens not born in NI, obtaining British citizenship and British passport through residence in NI.

⁶¹ A person resident in Northern Ireland and therefore on the 'Island of Ireland' but not within the Irish State is only eligible to naturalise as an Irish citizen if they are married to or in a civil partnership with an Irish citizen or can prove 'Irish associations.

⁶² Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, presented to Parliament pursuant to Section 1 of the European Union (Withdrawal) Act (No 2) 2019 and Section 13 of the European Union (Withdrawal) Act 2019.

⁶³ O. DOYLE, *The Constitution of Ireland: A Contextual Analysis*, Oxford, Hart Publishing, 2018, p. 28.

example, in rugby and cricket Ireland competes as a single nation while in soccer competitions Ireland and Northern Ireland compete separately. In sum, for all those living in Ireland the *de facto* elimination of any physical border between the North and South was not only a pivotal element in the 1998 Belfast Agreement but the removal of any barrier was underpinned by the idea of EU citizenship across the island of Ireland, with all that implied in relation to freedom of movement and of trade (see final section)⁶⁴.

4.3 *Unionism and Nationalism: Reconciling Conflicting Agendas?*

From the perspective of a substantial proportion of protestant unionists, accounting for about 46% of NI population, there is general support for fostering closer ties with the United Kingdom but over the last 20 years or so the more moderate Ulster Unionist Party gradually lost out to the Democratic Unionist Party (DUP)⁶⁵. This is a party supporting Brexit which advocates a 'real respect' agenda that seeks to preserve the Ulster-Scots heritage and promote the public expression of Orangeism. As a central part of this creed, the victory over the RC James II at the Battle of the Boyne in 1688 is celebrated through loyalty to the Queen and the Union flag, but also with parades through pro nationalist areas while displaying symbols of Britishness. As (fundamentalist) Free Presbyterians many DUP leaders refuse to endorse human rights norms accepted throughout the remainder of the UK. In particular, the DUP opposes homosexuality, same sex marriage and the legalisation of abortion⁶⁶. It is somewhat ironic that the DUP expresses similar moral positions on the very issues that were protected so controversially in the Republic's Constitution in its original form. The DUP, however, is committed to furthering socio-economic policies to promote jobs, healthcare and infrastructural investment in Northern Ireland. It has also supported an open border. These are the issues where there is a shared policy commitment with Sinn Féin and the SDLP. With the carrot of financial inducements for NI, the DUP was

⁶⁴ K. CAMPBELL, *Sand in the Gearbox: Devolution and Brexit*, *UK Const L Blog*, 5 Sept 2016.

⁶⁵ The relatively extreme Democratic Unionist Party DUP was formed by the Reverend Ian Paisley in 1971 at the height of 'The Troubles'.

⁶⁶ F. DE LONDRA, *The DUP's Worrying Human Rights Record*, in *OxHRH Blog*, 13 June 2017, <http://ohrh.law.ox.ac.uk/the-dups-worrying-human-rights-record>.

prepared to participate in the resumption of power sharing in January 2020. Since then the forced resignation of Arlene Foster as First Minister in April 2021 has led to further uncertainty over NI devolution and the viability of the Back Stop agreement (as discussed below).

On the other hand and in sharp contrast, the nationalist predominantly Roman Catholic community looks to the South and the Republic (the commitment to an Irish Language Act might be viewed as a mirror of Orangeism). Sinn Féin and the SDLP assumed a pro-remain stance during the course of the Brexit debate. From a nationalist/Sinn Féin perspective the right to a referendum to determine whether NI should remain part of the UK was crucial to the settlement. The Belfast Agreement included a binding obligation to give effect to the choice of a majority in Northern Ireland to leave the UK. Any change to the constitutional status of Northern Ireland as set out in the devolution legislation requires the consent of the people of Northern Ireland⁶⁷. Given that Northern Ireland had been created in order to accommodate the will of a majority in a particular region of Ireland to remain in the UK, it is not surprising that the continuance of that majority is regarded as necessary for the status of the Northern Ireland within the Union to be maintained⁶⁸.

The demographic trend in NI indicates that the nationalist community is growing and rapidly becoming a majority. This trend is already reflected in the politics. At the most recent elections in NI for the Assembly in 2017 there was a complex spread of voting preferences between the parties, but for the first time since the launch of devolution in 1998 unionist parties failed to secure a clear majority of seats in the NI assembly⁶⁹. In addition, Brexit provides some encouragement for Irish unification because the referendum result suggests that a significant section of the population of NI appreciate

⁶⁷ Northern Ireland Act 1998, section 1. The UK Supreme Court in the *Miller Case* did not accept that triggering Brexit necessarily affects the legal right to self-determination which underpins the entire agreement. *R (Miller) v SS for Exiting the European Union* [2017] UKSC 5, paras 134 and 135. See also *Re Court of Appeal (NI) In the matter of an application by Raymond McCord* UKSC 2016/0205; See *Ref AG for NI – In the matter of an application by Agnew* UKSC 2016/0201.

⁶⁸ R. McCREA, *Is the United Kingdom a Mini-EU*, in *UK Const L Blog*, 18 July 2016. Section 1(1) of the Northern Ireland Peace Agreement enacted as section 1 of the NIA 1998.

⁶⁹ The hard line unionist DUP with 28 seats and hard line Republican Sinn Féin with 27 seats emerged as the largest parties while the Ulster Unionists 10 seats, Social Democratic and Labour Party 12 seats and Alliance 8 seats were the next largest parties.

the advantages of EU membership across the island of Ireland⁷⁰. At the same time, the possibility of unification appears viable because of the radical transformation of the Irish Republic. The Belfast Agreement led to the repeal of the most controversial aspects of the Irish constitution, including claims to the remainder of Ireland⁷¹. The case for unification has been boosted by the Republic's economic success and relative wealth, the decrease in the hold of the RC church and the abandonment of moral conservatism previously reflected in the constitution. Perhaps of even greater relevance, constitutional amendments have been passed confirming the Republic's transformation to a liberal state. In particular, these have included the recognition of LGBT rights, the introduction of same sex marriages (2015) and the legalisation of abortion (2018) and divorce (2019)⁷².

According to recent polls 43% of the population in the North support unification while there is a majority of 51% in favour of unification in the Republic⁷³. The issues surrounding a referendum on the question of unification have been closely examined from both a legal and practical standpoint⁷⁴. Such a poll within Ireland, North and South, in the foreseeable future as a prelude to reunification is unlikely, not only because it would require a consistent (opinion poll) majority in favour of unification to satisfy the criteria set out in the Belfast Agreement, but also because of the danger of a pro unification vote further undermining the peace settlement by prompting a backlash from militant unionism (riots in April 2021 gave notice of the potential for the escalation of violence)⁷⁵.

⁷⁰ V. BOGDANOR, *Beyond Brexit: Towards a British Constitution*, London, Tauris, 2019, p. 197ff.

⁷¹ The referendum to allow the 19th amendment of the Irish Constitution to abandon the territorial claim to the entire island or Ireland. O. DOYLE, *The Constitution of Ireland: A Contextual Analysis*, Oxford, Hart Publishing, 2018, p. 39.

⁷² Although abortion has been legalised in Northern Ireland NHS funding has not been allocated to facilitate its general availability.

⁷³ L. O'CARROLL, *How could a vote on the unification of Ireland play out?*, *The Guardian*, 3 May 2021.

A BBC Spotlight poll in 2021 indicates 49 per cent of the North's residents favour remaining a part of the UK and 43 per cent supported leaving.

⁷⁴ See 'Working Group on Unification Referendums on the Island of Ireland', Final Report, The Constitution Unit, University College London, May 2021.

⁷⁵ The constitutional framework for a united Ireland would be hotly contested. For example, it could result in a federal or confederal state.

4.4 *Brexit, the Belfast Agreement and Human Rights Protection*

Any assessment of the impact of Brexit on Northern Ireland must take account of the fact that the peace settlement addresses the complex question of Human Rights protection against a backdrop of polarised communities with distinct aspirations. In approaching this problem the NIA established two official bodies, a NI Human Rights Commission and a NI Equality Commission⁷⁶. The NIHRC is placed under a duty to keep under review the adequacy and effectiveness in NI of law and practice relating to the protection of human rights and to advise the Secretary of State and the Executive on measures for the protection of human rights⁷⁷. The NI Chief Commissioner Les Allenby cautions that post-Brexit: «The scope of preserving other existing rights protections through European Union and domestic law will depend on close reading of the rights section of the Belfast Agreement 1998»⁷⁸. While the NI Equality Commission is placed under a duty to promote equality of opportunity, investigate complaints⁷⁹ and ensure compliance with equality schemes applicable to all public authorities⁸⁰. The Equality Commission provides advice to public authorities in NI on equality issues and it monitors the composition of the workforce in terms of the ratio employed from the respective communities⁸¹. The Belfast Agreement is tied into Human Rights protection under the UK Human Rights Act 1998. The effect of the HRA is to incorporate ECHR rights as part of the UK constitution requiring public bodies in the UK to conform with ECHR norms when formulating their policies⁸². Any Brexit agreement had the potential to undermine the functioning of crucial aspects of the processes which have been set in

⁷⁶ Northern Ireland Act 1998, sections 68-77.

⁷⁷ Northern Ireland Act 1998, section 68 and 69.

⁷⁸ «The 2020 Annual Statement: Human Rights in Northern Ireland» *Northern Ireland Human Rights Commission*, December 2020, 7.

⁷⁹ For example, see *Lee v Asbers Baking Company Ltd* [2018] UKSC 49.

⁸⁰ NIA 1998, schedule 9.

⁸¹ Equality Commission for Northern Ireland, Annual Report and Accounts 2019-2020, HC 591, 22.

⁸² See Human Rights Act 1998, section 6.

place for the protection of rights in NI⁸³. However, at a formal level the Backstop Agreement states that: «The United Kingdom shall ensure that no diminution of rights, safeguards or equality of opportunity ... results from its withdrawal from the Union, including in the areas of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 of this protocol»⁸⁴. Nevertheless, departure from the EU removes a layer of rights protection. For example, the constitutional promotion of an *equality guarantee* and *non-discrimination obligation* under the Northern Ireland Act⁸⁵ are underpinned by European ‘equal treatment’ directives⁸⁶.

The failure to reach agreement on a NI Bill of Rights since the Belfast Agreement has been because of a lack of consensus on rights protection in a polarised community⁸⁷. On the one hand, Brexit has created a receptive environment for putting Bill of Rights centre stage again. Such a Bill would provide a legal framework to assist in clarifying social, economic and citizenship rights⁸⁸. This has resulted in an initiative by the NI HRC to renew efforts at drafting a NI Bill of Rights that would include definitions of ‘identity’, ‘citizenship’ and ‘freedom of movement’⁸⁹. On the other hand, the prospects of reaching an agreement remain bleak given the potential conflict over matters ranging from: the equivalence of rights on the island of Ireland and use of the Irish language, to women’s reproductive rights and marriage equality. The crucial point is that the peace process has developed to allow for continuing cross community

⁸³ This point was discussed as one of the arguments in the *Agnew Case*. See *Ref AG for NI – In the matter of an application by Agnew UKSC 2016/0201*.

⁸⁴ <https://www.gov.uk/government/publications/new-protocol-on-irelandnorthern-ireland-and-political-declaration>.

⁸⁵ NIA 1998, ss. 75 and 76.

⁸⁶ Council Directive 2004/113/EC of December 2004, Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006.

⁸⁷ An agreement was reached with NI’s political leaders to tackle outstanding issues and this agreement acknowledges a lack of consensus over a Bill of Rights for NI. See C. McGRATTAN, *The Stormont House Agreement and the New Politics of Storytelling in Northern Ireland*, in *Parliamentary Affairs*, 69, 2016, pp. 928-946.

⁸⁸ A. SMITH, C. HARVEY, *Where Next for a Bill of Rights for Northern Ireland?*, in *UK Const L Blog*, 6th Feb 2019.

⁸⁹ ‘Key Issues for a Bill of Rights’, Briefing Paper 2 March 2020, NIAR 055-20, 3.

engagement and co-operation on sensitive issues relating back to ‘The Troubles’ of a generation previously. For example, the 15 member Commission on Flags, Identity, Culture and Tradition was set up in June 2016 as part of the ‘Fresh Start’ deal. This initiative seeks to reach consensus on contentious issues surrounding flags and emblems of identity. The trend is a continuing one. In order to implement the recommendations of the Flags Commissions report an Office of Identity and Cultural Expression is to be established⁹⁰ and there is the prospect of a Commissioner to recognise, support, protect and enhance the Irish language in NI with a corresponding commissioner for Ulster Scots/British tradition⁹¹.

4.5 Preserving the Belfast Agreement: Backstops, Bureaucracy and Popular Resistance

The so-called ‘Irish backstop’ question was one of the most problematic issues to resolve as part of the Brexit negotiations. The dilemma for negotiators was how to reconcile a desire to maintain an open border between Northern Ireland as part of the UK, and the Irish Republic which would remain a member of the EU. The difficulty was how to preserve this element with an overall (hard) Brexit deal which places the United Kingdom outside the EU’s Customs Union.

Immediately after the 2016 referendum there was general agreement amongst all the main parties in Northern Ireland that there should be no return to a hard border between Northern Ireland and the Republic. However, as negotiations proceeded, the political situation relating to NI became extremely complicated and fraught with difficulty. In brief, first the NI Assembly was suspended from January 2017 for political reasons⁹² absenting the main NI democratic forum and the institutional processes of dispute resolution, including the JMC referred to in the first part of this paper. Second, the 2017 general election failed to deliver a parliamentary majority and a clear Brexit mandate for PM May. The DUP

⁹⁰ See: *Stormont votes for release of completed flags and culture report*, BBC News 22 March 2021.

⁹¹ European Charter for Regional and Minority Languages [ratified by UK in 2001].

⁹² A. EVANS, *Northern Ireland, 2017-2020: an experiment in indirect rule*, in *Public Law*, 2021, pp. 471-480.

(as mentioned above this relatively extreme party representing hard line unionism) found itself in a strong position politically as it had won 10 seats in the Westminster Parliament. This was sufficient to make up a majority for the Conservatives. The DUP entered into a 'confidence and supply' voting agreement with the Conservative government enabling it to continue in government⁹³. The government of PM May, reliant as it was on DUP support, stated that it would not agree to any proposal threatening the constitutional integrity of the UK. Negotiations were based on a 'common rulebook' and resulted in the so called Chequers deal of 2018⁹⁴. Crucially, under PM May there would have been no differentiation between NI and the remainder of the UK in achieving regulatory alignment with the EU after Brexit⁹⁵. Sinn Féin and the SDLP were in favour of granting special status for NI, allowing it to remain in the single market and the customs union. The upshot was that Sinn Féin, the SDLP, and other Ulster parties seeking a softer Brexit were at this juncture left on the fringes of the negotiations. No deal was actually reached under Mrs May.

The revised backstop deal now in place was negotiated by the Johnson government (re-elected in December 2019 with an overall majority) as part of a new Ireland/Northern Ireland protocol⁹⁶. Although the agreement avoided the introduction of a hard border it was reached in spite of strong reservations from Unionist parties, particularly the DUP. This is because NI is treated differently from the remainder of the UK. In order to allow NI businesses to retain unfettered access to the UK market but at the same time protect the EU's single market, a detailed protocol⁹⁷ was agreed between the UK and Europe. In effect, this means that UK authorities apply EU customs rules to goods entering NI (from the rest of the UK). The protocol attached to the agreement is meant to facilitate

⁹³ J. TONGE, *Supplying Confidence or Trouble? The Deal Between the Democratic Unionist Party and the Conservative Party*, in *Political Quarterly*, 88, 2017, p. 414.

⁹⁴ <https://www.instituteforgovernment.org.uk/explainers/irish-backstop>.

⁹⁵ See for example, Hansard, Engagements, Volume 636: debated on 28 February 2018.

⁹⁶ <https://www.instituteforgovernment.org.uk/explainers/brexit-deal-northern-ireland-protocol>.

⁹⁷ 'The UK's Approach to the Northern Ireland Protocol', *Cabinet Office*, May 2020, CP225.

regulatory alignment but also to enable tariffs to be collected on goods at risk of entering the EU's Single Market⁹⁸. New representative structures are created to assist with co-operation and to smooth over dispute resolution, with a Joint Committee and Joint Consultative Working groups. The problems of implementation arise at ports of entry, rather than at the land border between the Republic and NI. In other words, the ports become the legal boundary between the UK and the EU's customs territories. Tariffs are charged only if goods are destined for Ireland or the EU single market. Crucially however, there is no new customs infrastructure or physical border with the Republic required to ensure compliance⁹⁹. But, there is a major flaw in the agreement, at least from the standpoint of many unionists. This approach also means that NI remains in the EU single market for goods and services and remains subject to EU subsidy rules for trade in goods. At the same time, NI is also considered part of the UK's customs territory allowing it to be included as part of any future UK trade agreement.

Flexible and proportional approaches to implementation were intended to maximise the free flow of trade within the UK customs territory but, it is acknowledged that electronic import declarations and safety and security information have not been put fully in place to meet the legal obligations under the agreement¹⁰⁰. The Brexit arrangements activated in January 2021 as part of the trade deal between the UK and the EU have introduced a bottleneck caused by red tape, interrupting the flow of goods between NI and the remainder of the UK (also incidentally demonstrating the advantages of the maintenance of regulatory alignment between the UK and the EU discussed earlier)¹⁰¹. Many forms need to

⁹⁸ Article 15 of the protocol allows for the setting up of a joint committee (with powers of decision and review) and joint consultative working groups to enable facilitation by the exchange of information and mutual consideration of the issues.

⁹⁹ 'The Protocol on Ireland/Northern Ireland' *House of Lords, European Union Committee*, 9th Report of Session 2019-21, 1 June 2020, HL paper 66. This report sets out the scope of the agreement and its implications in detail.

¹⁰⁰ B. DICKSON, *Devolution in Northern Ireland*, in J. JOWELL, C. O'CONNOR (eds), *The Changing Constitution*, Oxford, Oxford University Press, 9th edn, 2019, p. 264.

¹⁰¹ See UK-EU Trade and Cooperation Agreement, December 2020. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/948093/TCA_SUMMARY_PDF.pdf.

be filled in on paper for every consignment of goods in certain categories. The problem is that NI remains a part of the EU's single market for goods. This means that many goods arriving in NI from the GB are made subject to EU import procedures¹⁰².

The UK's action in extending the grace period for Irish Sea border checks has been justified in press releases by HM's government as being for 'operational reasons'. This procedure includes the difficulty faced by supermarkets having to provide export health certificates for all shipments of animal products between the mainland and Northern Ireland. The unilateral action by the UK in suspending the protocol is contested by the EU and it has resulted in legal action which is on going, but there have also been high level negotiations in 2021 to resolve the situation. It is not clear whether the British government's intervention should be regarded as an extension of the grace period, or an attempt at overriding / undermining the agreement. Certainly, the suspension of the protocol has been spurred on by resistance from Unionist parties opposed to the deal, fanning the flames of discontent. Subsequently, the Westminster Government issued a Command Paper outlining a revised negotiating position on the Backstop in the light of the perceived problems of implementation¹⁰³, and, in subsequent negotiations (late 2021) UK ministers have proposed the streamlining of checks but negotiators have also raised the spectre of triggering Article 16 of the agreement, suspending some of its provisions. Such a development might not only breach the agreement, but also undermine trade relations between Dublin and the EU¹⁰⁴. Practical solutions to the bottleneck in the flow of goods, especially perishable items, will need to be found. Flexibility is called for on all sides. For example, some fixes might be achieved by increasing staffing levels of customs officials at borders and streamlining the procedures, particularly by replacing paper forms with the online processing of information¹⁰⁵.

¹⁰² The problems were flagged up well in advance in Parliament. 'Unfettered Access: Customs Arrangements in Northern Ireland after Brexit' *House of Commons, Northern Ireland Affairs Committee*, First Report of Session 2019-21, HC 161.

¹⁰³ 'Northern Ireland Protocol: the way forward', HM Government, July 2021, CP 502.

¹⁰⁴ The Constitution Unit, Monitor 79/ November 2021, 15.

¹⁰⁵ Subsequent evidence before NI Affairs Committee.

Other problems of application have arisen since Brexit. For instance, there is disagreement over the interpretation of Article 10 of the protocol which deals with government subsidies. Article 10 provides that the UK as a whole should follow EU rules if a UK-wide subsidy could have an impact on trade in goods between NI and the EU. (This was later qualified so that it would only apply if a UK subsidy would have ‘real and foreseeable on impact NI-EU trade.’) Guidance on this issue indicates that it has been interpreted differently by each side i.e. UK government and European Commission¹⁰⁶. In light of the opposition from Unionists sustaining adequate support for the protocol will be challenging since the continuation of the agreed protocol depends on popular cross community consent in NI obtained four years after the transition period¹⁰⁷.

5. Conclusion

To sum up, this article seeks to demonstrate that the constitutional fallout from Brexit involves a complex series of interrelated questions at many levels with far reaching implications, and that these issues will continue to surface for the foreseeable future. Given the underlying political dynamics a grand solution in the form of a new constitutional settlement is not envisaged as the antidote. To correct inherent instability and clarify the uncertainty of pivotal constitutional conventions (e.g. Sewel discussed above) some influential academic commentators now advocate formalising the institutional framework by following a path of constitutional codification¹⁰⁸; another developing view, mindful of secession and the shortcomings of devolution considers whether a form of federal system for the UK would modify the current doctrine of legal sovereignty by offering a clearer delineation of the distribution of

¹⁰⁶ <https://www.instituteforgovernment.org.uk/explainers/northern-ireland-protocol-consent-mechanism>.

¹⁰⁷ Any such provisions to obtain consent might be subject to safeguards such as a commission of concern allowing for a community veto under the NIA. This aspect of the protocol while introducing an important element of democratic consent kicks the shelf life of the deal down the road when the dust has settled on Brexit.

¹⁰⁸ V. BOGDANOR, *Beyond Brexit: Towards a British Constitution*, London, Tauris, 2019.

powers and competences on a territorial basis¹⁰⁹; in the field of rights protection still others recommend the entrenchment of a Bill of Rights for NI, and also for the remainder of the UK, as this would consolidate fundamental rights and freedoms perceived as currently under threat with the loss of a layer of protection provided under the European Charter of Fundamental Rights¹¹⁰. Leaving aside the many technical questions relating to constitutional design prompted by any such initiative (or combination of the above), a constitutional settlement of such a magnitude would require a broad consensus and considerable political momentum behind it (of which there is no sign). Rather, we are left with the familiar British pragmatic approach to individual problems as they arise, with government adopting a combination of legislative solutions and soft law initiatives, and now also relying on the as yet untested dispute resolution machinery set in place by Brexit. I believe the practical problems related to the agreements reached can be successfully addressed in the traditional pragmatic manner but the mega question, namely, the future integrity of the UK itself, will of course depend on the ebb and flow of the political tide in Scotland, Northern Ireland and Wales.

¹⁰⁹ R. SCHÜTZE, S. TIERNEY (eds), *The United Kingdom and the Federal Idea*, Oxford, Hart Publishing, 2018. See introduction and conclusion.

¹¹⁰ C. O'CONNOR, *Human Rights and the UK Constitution*, in J. JOWELL, C. O'CONNOR (eds), *The Changing Constitution*, Oxford, Oxford University Press, 9th edn, 2019, p. 92. P. CRAIG, *Brexit and the UK Constitution*, in J. JOWELL, C. O'CONNOR (eds), *The Changing Constitution*, Oxford, Oxford University Press 9th edn, 2019, p. 110. There is no right of action after Brexit day based on a failure to comply with principles of EU law.