REPORT

Northern Ireland and Brexit

An Explanation

Lisa Claire Whitten

THE CONSTITUTION SOCIETY

About the Author

Dr Lisa Claire Whitten is a Research Fellow on the ESRC-funded project 'Governance for a 'place between': the Multi-Level Dynamics of Implementing the Protocol on Ireland/Northern Ireland' based at Queen's University Belfast.

She recently completed her doctoral dissertation on the constitutional implications of Brexit for Northern Ireland and contributes frequently to *Northern Slant*.

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Introduction

In the dramatic unfolding of the United Kingdom (UK)'s withdrawal from the European Union (EU) – 'Brexit'[1] – Northern Ireland has played a starring role. Although, at best, a side note during the UK's referendum campaign on EU membership in 2016, Northern Ireland took centre stage in the complex and multifaceted process of Brexit that followed the 51.9 per cent majority in favour of 'Leave'.

From early on, all parties characterised Northern Ireland as an exceptional case. Prior to triggering Article 50(1) of the Treaty on European Union (TEU)[2] to begin the formal process of UK withdrawal, Northern Ireland was described as a 'unique' UK region (The Executive Office, 2016) whose 'specific interests' and 'particular circumstances' were an 'important priority for the UK' (The Prime Minister, 2016). Once formal notification was given by the UK to the EU, the latter made clear that the 'unique circumstances and challenges' on the island of Ireland (European Commission, 2017a: 14) would be a key negotiating priority. The EU suggested that 'flexible and imaginative solutions' were needed to 'support and protect the achievements, benefits and commitments' of the peace process in Northern Ireland in the context; an aim which the EU deemed 'of paramount importance' (European Council, 2017: 11).

As UK-EU withdrawal negotiations proceeded, it became clear that post-Brexit arrangements for Northern Ireland, and its border with the Republic of Ireland, would be the most difficult issue for UK and EU negotiators to resolve. The situation was not helped by the UK Prime Minister's reliance on 10 Democratic Unionist Party (DUP) MPs for a slim parliamentary majority, particularly during Theresa May's tenure. Political dissent regarding the 'backstop' Protocol on Ireland/Northern Ireland derailed attempts to ratify the UK-EU Withdrawal Agreement concluded in 2018, and, ultimately, ended May's premiership. Arrangements agreed in the revised *Protocol on Ireland/Northern Ireland* ('the Protocol') contained in the UK-EU Withdrawal Agreement (re)negotiated and successfully ratified by Prime Minister Boris Johnson in 2020, substantially differentiate Northern Ireland from the rest of the UK through a novel set of provisions. In Northern Ireland, the Protocol is controversial.

1 Short for '[Great] British + Exit' the neologism 'Brexit' is somewhat of a misnomer insomuch as the term implicitly excludes Northern Ireland. While this linguistic inaccuracy is notable, the term 'Brexit' is used here to refer to the process of the UK's withdrawal from the EU as it has come to be understood in common parlance. For analysis of the development and spread of the term see Fontaine (2017); for a critique of its use see O'Leary (2017).

2 Scholars sometimes refer to Article 50 of 'the Lisbon Treaty' in relevant discussions, however, the Treaty signed in Lisbon on 13 December 2007 amended two previous treaties – the Treaty on European Union and the Treaty establishing the European Community (see *Official Journal*, 2007: C306). New provisions agreed in Lisbon in 2007 were consolidated in the Treaty on the Functioning of the European Union (or TFEU) and the Treaty on European Union (or TEU), both Treaties have equal legal value and are the basis of the contemporary EU's existence and functioning (see TFEU, Article 1(1) and (2)). The secessionist Article 50 provision is contained in the TEU. Unless specifically indicated, when 'the Treaties' is used here it is in reference to both the TEU and TFEU (see *Official Journal*, 2016).

Since the entry into full force of the Protocol on 1 January 2021 at the end of the UK's Transition Period,[3] Northern Ireland has experienced economic, political, and societal disruption as a consequence – directly and indirectly – of its provisions. Implementation of the Protocol, alongside the (minimal) UK-EU Trade and Cooperation Agreement (TCA), has resulted in new barriers to trade between Great Britain and Northern Ireland. This impact – widely referred to as the 'Irish Sea Border' – is perceived by many Unionists and Loyalists in Northern Ireland as a threat to their identity as British citizens and to their security within the UK state. Anger over the Protocol was one of the factors that contributed to the outbreak of rioting and violent disorder in Unionist/Loyalist areas, and in interface areas of Belfast in April 2021 (see Hirst, 2021; Hayward 2021a; Whitten 2021a).

Frustrations about the Protocol have also been the backdrop of a series of leadership changes in the two largest Unionist political parties in Northern Ireland – the Ulster Unionist Party (UUP) and the DUP – with the latter cycling through three leaders in three months amid internal disputes about party policies, including on the Protocol (see Whitten, 2021b). On the economic side, images of empty supermarket shelves in Northern Ireland, that dominated headlines in the first weeks of this year, were indicative of the difficulties traders faced in adjusting to new requirements for goods moving from Great Britain to Northern Ireland under both the Protocol and the UK-EU TCA. While businesses in Northern Ireland have, broadly, adapted to the new arrangements this has come at considerable cost to traders with some of those costs being passed on to consumers (see Tughans & Manufacturing NI, 2021).

Moreover, not all the issues have been resolved. Outstanding difficulties include those that relate to so-called 'grace periods' which delay the full panoply of checks required on certain goods, including medicines, chilled meats, and agri-food products.[4] What will happen when these grace periods end remains a point of disagreement between the EU and the UK. A recently published UK command paper proposed 'freezing' the existing arrangements and pursuing agreement on a 'new balance' to the Protocol (HM Government, 2021: 15). Speaking in response, European Commission Vice-President Maroš Šefčovič committed to 'engage' with the UK's suggestions but stated that the EU 'will not agree to a renegotiation of the Protocol' (2021). In September 2021, the UK government unilaterally extended grace periods for certain checks on parcels, pets, and agri-food goods, 'to provide space for potential further discussions' (Lewis, 2021) with the EU about the Protocol. In October 2021, the EU published proposals to address the 'difficulties that people in Northern Ireland have been experiencing because

3 The Withdrawal Agreement provided for a transition or implementation period to start on the day the Agreement was entered into force and end on 31 December 2020 (WA Article 126), during which time, EU law would continue to apply in the UK unless specifically provided for in the Agreement (WA Article 127(1)). The Joint Committee had the opportunity in July 2020 to agree an extension to the transition period for 1-2 years (WA Article 132(1)) but the UK decided against this. The Withdrawal Agreement also provided that some aspects of the Protocol entered into force on 31 January 2020 when the UK formally left the EU and entered an 11 month transition period, others only entered into force after transition on 1 January 2021. Under Article 185 of the WA, the following applied from the beginning of the transition period: Article 1; the third, fourth and sixth subparagraphs of Article 5(2); the second sentence of Article 5(3); the last sentence of Article 10(2); Article 12(3); Article 13(8); Article 14; Article 15(1) to (4) and (6); Article 19 and the first paragraph of Annex 6. These provisions which applied from the date of formal UK departure relate, primarily, to decisions to be made by the Joint Committee before the end of the transition period. All other provisions of the Protocol only entered into force on 1 January 2021.

4 Grace periods for certain checks required under the Protocol were agreed by the UK-EU Joint Committee in December 2020 (see *Official Journal* 2020, December 17); these have since been extended unilaterally by the UK in March 2021 in respect to controls on chilled meat products (see Melo Araujo, 2021), by UK-EU agreement June 2021 (see European Commission, 2021a), and then again by the UK unilaterally in September 2021 (see Cabinet Office, 2021).

of Brexit' (European Commission, 2021b) – across four 'non-papers' the EU outlined measures related to customs procedures, sanitary and phytosanitary checks, medicines supplies and engagement with Northern Ireland stakeholders (*ibid*). The EU proposals were broadly welcomed by businesses in Northern Ireland (O'Carroll, 2021); however, they did not address the issue of governance arrangements and the continued jurisdiction of the Court of Justice of the European Union (CJEU) in Northern Ireland, brought to the fore by UK Co-Chair of the Joint Committee Lord Frost (see Campbell, 2021). UK-EU talks on their respective proposals are ongoing. At least in the short-term, Northern Ireland therefore appears set to continue its newfound role as a contested linchpin of UK and EU relations.

In view of its recent high profile, the purpose of this paper is to contextualise the 'problem' Northern Ireland posed for UK withdrawal from the EU and to review the 'solution' devised and consider its implications. In pursuit of these dual aims, the paper is divided into two main sections: the first gives an account of Northern Ireland's contested constitutional history, its unique contemporary constitutional structure, and explains how these made its uniquely vulnerable to the outworkings of Brexit; following this, the second section begins with an overview of the problem of Northern Ireland, and its border with the Republic of Ireland, in UK-EU negotiations before going on to analyse the (eventually agreed) *Protocol on Ireland/Northern Ireland* with an outline of some of its implications for the legal orders of both the UK and the EU.

By analysing the Protocol in light of an historical account of Northern Ireland's constitutional history this paper makes clear that Northern Ireland's unique post-Brexit arrangement chimes with a history of constitutional experimentation on the island of Ireland. However, a case is also made that, unlike in previous eras of Northern Irish history, the Protocol's high-profile political status and its central position in UK-EU relations are such that its implementation has repercussions that extend far beyond the now (in)famous borders of Northern Ireland. The conclusion (tentatively) sets out what some of these repercussions might be for Northern Ireland, the island of Ireland, the UK, and the EU.

To achieve the aims of the paper in the space available, the accounts given are, necessarily, brief. A constitutional history of Northern Ireland is painted with a broad brush and discussion of the complex and multifaceted process of Brexit is intentionally selective. This being so, what follows ought to be read as an *introduction* to the 'unique' and 'particular' context of Northern Ireland, an *explanation* for its post-Brexit discontents and an invitation to anyone interested in the post-Brexit constitutional development of the UK, to pay special attention to its most exceptional and most 'problematic' region – Northern Ireland.

Northern Ireland: A brief constitutional history and why it matters

By setting out a constitutional history of Northern Ireland, this first section of the paper implicitly makes the case that Northern Ireland's vulnerability in the context of Brexit derives from its unique constitutional arrangements, its evolving constitutional structure, and the contested history from which they developed. What is consistently evident, even in a brief historical account, is that Northern Ireland has been (and remains) a constitutional place apart within the UK. However, the extent and nature of this constitutional particularity has tended to be overlooked and under-analysed in domestic political, legal, and scholarly discourses. This has created what can be termed a 'Northern Ireland blind-spot' in debates about, and narratives of, the UK constitution which, as section two outlines in more detail, proved particularly problematic in the process of UK withdrawal from the EU. But before getting to Brexit, let us first ground this discussion in an account of how contemporary Northern Ireland came to be.

Home Rule, rebellion and compromise: 1801-1920

In 1800 the Acts of Union of Great Britain and Ireland joined two separate polities[5] into one and provided that all legislative power would reside in the Houses of Parliament in Westminster.[6] The resultant governing arrangement continued in relative peace until towards the end of the nineteenth century when dissatisfaction on the island of Ireland inspired a series of constitutionally innovative legislative initiatives – known first as the 'New Departure' and latterly as 'Home Rule' – that sought to establish a new legislature in Dublin to which Westminster would transfer some powers while retaining sovereignty (see Quekett, 1928: 9). The policy was contentious. Debate over the so-called 'Irish Question' and how to answer it dominated parliamentary business for much of the first two decades of the twentieth century. After several failed attempts, the *Government of Ireland Act 1914* made provision for a new devolved Dublin legislature and was passed alongside a *Suspensory Act 1914* to delay its implementation until one year after the end of World War I.[7]

During the debates on Home Rule for Ireland, a supplementary 'Ulster Question' had arisen as a specific point of dispute. With its majority Protestant, Unionist population, and industrial economy, the nine-county, Northern province of Ulster was an outlier in the predominantly Catholic, Nationalist, and economically agrarian island of Ireland (see Quekett, 1928; Lawrence, 1965; Hadfield 1989). There was therefore concern at the prospect of coercing Ulster into a Home Rule governing arrangement that many of its people and, more significantly, its Unionist political representatives, did not want.[8] The 1914 Act did not include differentiated arrangements for Ulster, but during its parliamentary process, the government said that they would 'hold themselves free to make changes [to the 1914 Act] if it becomes clear that special treatment must be provided for the Ulster counties' (*British Cabinet*, 1912 in Mansergh 1936: 219). The means by which the need for 'special treatment' might become evident was, however, unstated – Ulster's Question remained unanswered.

At the same time as legislation to facilitate devolution was debated, defeated, revised, and agreed at Westminster, tensions were growing on the streets of Ireland. There was strong opposition to Home Rule among Unionists in Ulster who would have preferred direct rule to continue. Ten days after the 1914 Act received royal assent, 450,000 men and women in Belfast signed the Ulster Covenant and Declaration

5 Up until 1800, Britain and Ireland had existed as separate states, albeit with a degree of interdependence. The earliest definitive record of a Parliament in Ireland is from 18 June 1264. Ireland had a functioning parliament for over 500 years thereafter, this had various iterations, including: the General Assembly of the Confederation of Kilkenny (1642-1649), the 'Patriot Parliament' (1689-1782) and 'Grattan's Parliament' (1782-1800). For a comprehensive account of the 1689-1800 Irish parliaments see Johnston-Liik (2007).

6 Although often referred to in the singular, three acts were passed to achieve the same purpose: the *Union with Ireland Act 1800* c 67 passed in Westminster; the *Act of Union (Ireland) 1800* c.38 passed in Dublin; and *An Act for the Union of Great Britain and Ireland 1800* which was signed by both parliaments.

7 A *Government of Ireland Bill* was first introduced in 1186 and a second in 1893. The first was rejected by the House of Commons and the second by the House of Lords. By the time the third *Government of Ireland Bill* became law on 18 September 1914, the Lords' power of veto had been removed (by the *Parliament Act 1911*) and World War I had begun.

8 The first legislative initiative for the differentiation of Ulster came in the form of an amendment to the 1914 Act during its parliamentary stages. The Marquis of Crewe and Lord Privy Seal tabled an amendment which would have allowed for a poll to be held in any of the nine counties of Ulster if a tenth of the electorate requested as such with the proposed question – *Are you in favour / are you against the exclusion of your county from the operation of the Government of Ireland Act 1914 for a period of six years?* The amendment was rejected when the Bill returned to the Commons in July 1914 (see Hadfield 1989: 26-7).

in which they pledged to use 'all means which may be found necessary' to defeat the 'conspiracy to set up a Home Rule parliament in Ireland' (available via *Public Records Office Northern Ireland*, 2021). Two years later, an attempted rebellion in Dublin – the 1916 'Easter Rising' – on the part of Irish Nationalists was met with a strong response from the British government. However, despite suppressing the rising militarily, the violence compelled the government to revisit the 'Irish Question'. On 21 May 1916 British Prime Minister Herbert Asquith assigned Lloyd George the task of reaching a settlement between Unionists and Nationalists on the question of Home Rule.

Lloyd George held separate talks with Unionist MPs – Edward Carson and James Craig[9] – and Nationalist MPs – John Redmond, Joseph Devlin, and Thomas Power O'Connor[10] – on a proposal to bring forward the implementation of the 1914 Act except in the six counties of what is now Northern Ireland which would form an 'excluded area' and remain under the direct authority of Westminster (HM Government, 1916: 2).[11] The proposed exclusion was to apply for a set period with the possibility of extension and an inbuilt mechanism for review. It was, however, ambiguously drafted (Hadfield 1989: 30).[12] Disagreement over its intended duration – Nationalists perceiving it to be temporary and Unionists, permanent – led to the breakdown of talks and the erosion of support for a political settlement through existing structures.

The British government's response to the 1916 Rising – in particular the killing of prisoners convicted for their part in the rebellion – had bolstered support for the Nationalist movement in Ireland. After the failure on the part of Irish Parliamentary Party MPs to reach an acceptable compromise in negotiations with Lloyd George, the already growing support for their Republican political rivals – Sinn Féin – further increased. The 1918 general election was a Sinn Féin landslide.[13] The abstentionist party did not, however, take their seats in Westminster but instead, in January 1919, set up a breakaway parliament – Dáil Éireann – and passed a declaration of independence.[14]

A period of guerrilla warfare ensued – known as the War of Independence – between the British Forces and the Irish Republican Army. Legislative attempts to end the conflict were ongoing. In an effort to reconcile the desires of Irish Nationalists and the fears of Ulster Unionists, a revised plan for Home Rule passed in the form of the *Government of Ireland Act 1920*. The 1920 Act differed from its predecessors in one

9 Representing the Irish Unionist Party.

10 Representing the Irish Parliamentary Party.

11 In *Headings of a Settlement as to the Government of Ireland* the 'excluded area' was 'to consist of the six counties of Antrim, Armagh, Down, Fermanagh, Londonderry, and Tyrone, including the parliamentary boroughs of Belfast, Londonderry and Newry' (HM Government 1916: para.2). The same language was later used to define 'Northern Ireland' in the 1920 Government of Ireland Act (s1(1)); this remained the legal definition for Northern Ireland until the 1920 Act was repealed by the *Northern Ireland Act 1998* which offers no replacement definition.

12 The disagreement centred on diverging interpretations of the intended duration and provisions for review. The *Headings for a Settlement* text stated that the 1914 Act would 'remain in force during the continuance of the war and a period of twelve months thereafter' with the proviso that 'if Parliament has not by that time made further and permanent provision for the government of Ireland, the period for which the [Act] is to remain in force is to be extended by Order in Council for such a time as may be necessary in order to enable Parliament to make such a provision' (HM Government, 1916: para.14). The text also suggested that a 'permanent settlement for Ireland' would be considered at an 'Imperial Conference' proposed to be held at the end of WWI (*ibid*: para.15). For Unionists, the provisions were thought to enable an indefinite prolongation of the agreed arrangement – Home Rule excluding six Ulster counties – while for Nationalists, the provisions were thought to confirm the 'exclusion' of what became Northern Ireland as a temporary stopgap to be reviewed soon after the war.

13 Sinn Féin won 73 of the 105 parliamentary constituencies in Ireland.

14 This was a reaffirmation of the declaration of independence made in the 1916 Easter Rising.

crucial respect, instead of one parliament in Ireland there would to be two: the Parliament of Northern Ireland in Belfast and the Parliament of Southern Ireland in Dublin. The 1920 Act also set out the first iteration of 'the consent principle'. Under its terms, the two new parliaments would exist indefinitely unless and until, 'by identical Acts agreed to by an absolute majority of members' in *both* the Northern Ireland Parliament *and* Southern Ireland Parliament they decided to establish a 'Parliament for the whole of Ireland' (1920 Act: s3(1)). Such a requirement for concurrent consent to any change in the constitutional and legislative arrangements for, in particular, Northern Ireland, reassured Unionists in Ulster who, reluctantly, accepted Home Rule on these terms.

The 1920 Act received royal assent on 23 December 1920. The new Parliament of Northern Ireland was officially opened by King George V on 22 June 1921 who spoke of his hope that this "may prove to be the first step towards an end of strife" on the island of Ireland (see *BBC News* 2021). Despite regal hopes, strife continued.

After nearly three years of warfare, peace talks resulted in the 'Anglo-Irish Treaty' which was signed on 6 December 1921 by the British and Irish delegations led, respectively, by British Prime Minister Lloyd George and Irish Secretary of State for Foreign Affairs, Arthur Griffith.[15] In the 1921 Treaty the British government recognised the legitimacy of a nascent Irish Free State and granted it Dominion status in the British Empire (1921 Treaty: Sch 1). The status of the six Ulster counties had featured prominently in the negotiations. Irish Nationalists were passionately opposed to any partitioning of the island of Ireland and Lloyd George was sympathetic. The Prime Minister believed 'grave difficulties would be raised for both parts of Ireland if the jurisdiction over the reserved subjects were not conferred upon a common authority' (Lloyd George 1921a) yet, resolved 'that there should be no coercion of Ulster', Lloyd George instead sought 'to persuade Ulster to come into an All-Ireland Parliament' (1921b in *Hansard*); he was not successful.

On Northern Ireland, the provisions of the 1921 Treaty set out a compromise. Article 1 of the Treaty granted 'Ireland' dominion status – the choice of language has since been termed a 'legal fiction' (see Hadfield 1989: 34) because it reflected a belief, on the part of negotiators, that the 1921 Treaty could (or ought to) apply to the whole island of Ireland. Article 12 of the Treaty, however, provided the six counties of Northern Ireland – as defined by the 1920 Act – an opt out of the new arrangements for the governance of 'Ireland' – via an address requesting as much to His Majesty – within one month of its ratification. Two days after the statutory date of ratification, both Houses of the Parliament of Northern Ireland unanimously supported the exercise of the Article 12 opt out, the six counties were thus excluded indefinitely and the (still new) Northern Ireland institutions retained according to the terms of the 1920 Act.

15 Signatories to the 1921 Treaty on the British side were: Prime Minister David Lloyd George, Lord Privy Seal Austen Chamberlain, Lord Chancellor Lord Birkenhead, Secretary of State for the Colonies Winston Churchill, Secretary of State for War Sir Laming Worthington-Evans, Attorney General Sir Gordon Hewart and Chief Secretary for Ireland, Sir Hamar Greenwood; signatories on the Irish side were: Secretary of State for Foreign Affairs Arthur Griffith, Secretary of State for Finance Michael Collins, Secretary of State for Economic Affairs Robert Barton and two other Sinn Féin TDs (MPs), Eamonn Duggan and George Gavan Duffy.

Although not *directly* relevant to the constitutional development of Northern Ireland it is important to recognise just how divisive the 1921 Treaty was in the Irish Free State it created. Between June 1922 and May 1923 an Irish Civil War was fought between 'anti-Treaty' Irish Republican Army forces – who believed the Treaty to be a betrayal of the Irish Republic – and 'pro-Treaty' Provisional government forces who – with the help of weapons supplied by the British government – claimed the victory.[16] From a Northern Ireland perspective, it is worth noting that internecine conflict, just south of its newly formed land border, provided the backdrop to the first few years of its existence.

16 Analysis of the causes, events and consequences of the Irish Civil War is beyond the scope of this paper. For an introduction and overview see Ferriter (2021).

An accidental 'mini-state': 1920-1972

The 1920 Act was not designed to be implemented in Northern Ireland alone. In its original form, the legislation had an all-Island logic. If it had been fully implemented the 1920 Act would have established a Council of Ireland to allow for 'harmonious action…[and] the promotion of mutual intercourse and uniformity' between the two new legislatures, in matters affecting the whole Island with 'a view to the eventual establishment of a Parliament for the whole of Ireland' (1920 Act s2(1)). As outlined above, the 1920 Act also provided a route for the integration of the two legislatures it proposed to create, on the basis of mutual and concurrent parliamentary consent (s3). In hindsight, the all-Island, integrationist design of the 1920 Act sits in tension with the effect of its partial implementation – in Northern Ireland alone – which was to augment partition and enable a novel regional administration to actively pursue divergence from their would-be counterparts in: 'Southern Ireland', then the Irish Free State, then Éire, and later the Republic of Ireland. This tension between the original design and the historical effect of the 1920 Act is worth highlighting because it underlines the extent to which the governing arrangement introduced to Northern Ireland in 1921, arose more from incident than it did from intent.

Under the 1920 Act, the UK government retained supremacy over Northern Ireland (s6) and excepted powers in a stated list of areas that included matters of the Crown, the military and foreign relations (s4).[17] Outside of explicitly excepted matters, the new legislature was given 'power to make laws for the peace, order and good government' of Northern Ireland (*ibid*). In practice, the new bicameral Northern Ireland Parliament and government competencies included education policy, planning, local government, law and order, civil and criminal law, minor taxation, appointment of local magistrates and judges, and in health and social services. Executive powers were located in the Prime Minister for Northern Ireland – leader of the largest (invariably Unionist) party – who presided over a same-party Cabinet.

As originally enacted, the 1920 Act set up electoral systems to safeguard the minority Nationalist/Catholic community in Northern Ireland; these were, however, substantially undermined in the first decade of devolved government. Before the 1920 Act passed in December of that year, local elections had been held across the island of Ireland in January and June under a single-transferable vote (STV), proportionally representative, electoral system; the electoral outcomes yielded notable gains for Nationalist candidates in (what became) Northern Ireland.[18] It followed that one of the first significant actions of the new Unionist Northern Ireland government was to bring in a *Local Government Bill* to change local government elections to 'first-past-the-post' (FPTP) system, thereby securing Unionist majorities at local level. Introduced on 31 May 1922 the bill was unopposed in Stormont

17 The full list of areas under the 1920 Act included: the Crown and related matters (succession and property); the Lord Lieutenant; the making of peace and war; the military; treaties or any relations with foreign states; dignities or honours; treason; foreign trade; submarine cables; wireless telegraphy; arial navigation; lighthouses, buoys or beacons; coinage, legal tender and weights or measures; trademarks, copyright and patent rights (see 1920 Act s4).

18 A PR system of single-transferable vote for Irish local elections had been introduced in 1919 by the *Local Government (Ireland) Act 1919*. In the six counties of would-be Northern Ireland, Ulster Unionists returned 75 seats, Sinn Féin returned 28 seats and Irish Nationalists returned 22 seats. Although Unionists retained a clear majority across the region the strength of support for their Nationalist/Republican rivals unsettled the Unionist political establishment of the day (see *Department of Planning, Housing and Local Government,* 2020).

and completed its passage by 5 July, at which point it was forwarded to the Lord Lieutenant who – under the 1920 Act (s12) – wielded the power to grant or withhold royal assent to any bill passed by the new devolved legislature. Assent to the *Local Government Bill* was, initially, withheld due to British government concerns, and those in the Irish Free State administration, that the proposed change would disenfranchise the Nationalist/Catholic community in Northern Ireland. After several months of (fierce) debate between Belfast, London, and Dublin, royal assent was granted. The Northern Ireland government had threated to resign if what became the *Local Government (Northern Ireland) Act 1923* did not pass (see Buckland 1980; Hopkins 1990) and the British government acquiesced.

Throughout the next 50 years of devolved government, the Lord Lieutenant never again withheld royal assent to a bill passed by the Northern Ireland Parliament, which thus enjoyed considerable autonomy from Westminster. Some years after the 1923 Act, a similar change was made to the system for elections to the Northern Ireland Parliament. Initially, seats in the Northern Ireland Parliament were returned under a proportional representation system (as according to the 1920 Act s14(3)); this changed in 1929 when the Northern Ireland government again exercised powers to alter 'the law relating to elections' (s14(5))[19] by passing the *House of Commons (Method of Voting and Redistribution of Seats) 1929* which changed what was an STV electoral system to FPTP.[20] The effect of these changes to election laws in Northern Ireland soon after its creation was to enable indefinite rule by the Unionist, largely Protestant, majority often at the expense of the Nationalist, largely Catholic, minority. In the words of the first Prime Minister for Northern Ireland, this was 'a Protestant Parliament and Protestant State' (Craig, 1934: 1091-5).

Throughout the 50-year period of its existence, scrutiny of the Unionist Northern Ireland government on the part of Westminster was almost non-existent. This arose from two conventions that developed early in the life of the new legislature. In 1923 the Speaker of the House of Commons ruled with regard to 'those subjects which have been delegated to the Government of Northern Ireland' any 'questions must be asked of Ministers in Northern Ireland, and not in this House [Westminster]' (*Hansard*, 3 May 1923: vol 163, cc1625). Alongside this, by convention, Acts of the Westminster parliament dealing with matters delegated to the Stormont parliament did not extend to Northern Ireland without the express consent of the subordinate legislature.[21]

The extent of powers granted under of the 1920 Act, the early amendments to laws governing local and regional elections, and the conventions that developed in Westminster regarding devolved matters, combined to give the Unionist Northern Ireland government a degree of autonomy unprecedented in the history of UK devolution, before or since. In possession of a Prime Minister, a Cabinet, a Parliament and subject to almost no scrutiny from Westminster, Northern Ireland operated from 1920–72 with

19 Under section 24(5) of the 1920 Act the exercise of powers to amend 'law relating to elections' in either jurisdiction was not possible until three years after the first meeting of the Parliament of Southern or Northern Ireland.

20 The 1929 Act also subdivided nine of the ten multiple-seat constituencies established by the 1920 Act thereby creating 48 single-seat constituencies; the only exception was the Queen's University constituency that stayed STV until it was abolished in 1969. For analysis see Pringle (1980).

21 This was an early form of the constitutional convention now referred to as the 'Sewel Convention'. In 1998 during the passage of the Scotland Bill namesake of the convention, Lord Sewel stated: '…*as happened in Northern Ireland* earlier in the century, we would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters…' (see HL 1998: 791 *added*).

all the trappings of ‘a mini-state’ (Hadfield 1989: 88). Its status was without parallel in the British Commonwealth at the time, being neither a dominion nor a colony, Northern Ireland was an integral part of the United Kingdom yet had a separate legislature and executive that derived from, and operated in accordance with, one codified constitutional text: the 1920 Act.

'Temporary' direct rule: 1972-1998

Government in Northern Ireland continued in a state of relative stability under the terms of the 1920 Act until 1968 (see Lawrence 1965; Hadfield 1992). When a series of civil rights demonstrations, organised that year, led to clashes between largely Catholic/Nationalist demonstrators, largely Protestant/Unionist counterdemonstrators, and the Royal Ulster Constabulary (RUC) police force, the relative stability of Northern Ireland started to breakdown.

In view of violence and unrest that was catalysed by the civil rights movement, the Governor of Northern Ireland commissioned a parliamentary inquiry to look into the causes of the protests and reactions to them. The 'Cameron Commission Report' ('the Report') that followed found that a widespread 'sense of political and social grievance' had been 'long unadmitted' and therefore gone 'un-redressed' by successive governments of Northern Ireland (1969: 6). In its conclusions, the Report highlighted a 'rising sense of continuing injustice' among large sections of the Catholic population in Northern Ireland due to: the inadequacy of housing provision and (at least) perceived misuse of discretionary powers of allocation on the part of (perpetually) Unionist local authorities (para 128-131; 139); discrimination against Catholic/Nationalist individuals in the making of local government appointments (para 128; 138); deliberate manipulation of local government electoral boundaries with the aim of maintaining Unionist majorities (paras 133-137); resentment due to the existence of the partisan and paramilitary Ulster Special Constabulary (the 'B Specials') recruited exclusively from the Protestant/Unionist community (para 145); alongside resentment, particularly in the Catholic/Nationalist community, about the continuance in force of the *Civil Authority (Special Powers) Act 1922* (para 144) that empowered the Minister of Home Affairs to 'take all such steps and issue all such orders as may be necessary for preserving the peace and maintaining order' in Northern Ireland including the (potential) imposition of curfews, use of internment and/or sanction of capital punishments. The findings of the Report, alongside further instances of sporadic civil unrest, led to greater involvement of the UK government in Northern Irish affairs.

On August 14, 1969, British Army troops were deployed to Northern Ireland in an effort to keep the peace, but the security situation continued to deteriorate. In 1970 the Provisional Irish Republican Army (IRA) began a bombing campaign in Belfast. In September 1971 the Reverend Ian Paisley announced the formation of the DUP, and the Ulster Defence Association (UDA) emerged as a coordinating body for several loyalist (paramilitary) bodies. On August 9, 1971, internment without trial was introduced under the Special Powers Act and subsequently used disproportionately against members of the Catholic/Nationalist community (see *Civil Authorities (Special Powers) 1971*).[22] On January 30, 1972, the infamous killing of thirteen people in Derry/Londonderry by the First Parachute Regiment on 'Bloody Sunday' led to widespread disaffection and a campaign of civil disobedience by members of the Catholic/Nationalist community.

Throughout this time, relations between Stormont and Westminster were becoming increasingly strained. To the ire of Northern Ireland's (Unionist) government, talks between British Prime Minister

22 Between August 1971 and December 1975 when internment was practiced 1,981 people were detained without trial, 1,874 of which were from the Catholic/Nationalist community and only 107 from the Protestant/Unionist community.

Edward Heath and Irish Taoiseach Jack Lynch about the situation in Northern Ireland began in February 1972. Talks between British Prime Minister Heath and Northern Ireland Prime Minister Brian Faulkner followed in March 1972. The outcome of the latter was a UK government insistence that all powers for law and order be removed from the Northern Ireland government. Prime Minister Faulkner, and his Cabinet, responded with the threat of collective resignation. On March 24, 1972, a Bill was introduced in Westminster to suspend the Parliament and government of Northern Ireland after Faulkner and his colleagues had been forced to fulfil their threat.

The *Northern Ireland (Temporary Provisions) Act 1972* suspended the Northern Ireland institutions and vested its previously held powers in the newly created office of the Secretary of State for Northern Ireland which would be supported by the, also new, Northern Ireland Commission and Privy Council. As its title indicated, the 1972 Act provisions were not designed to last. In 1973, new arrangements for government were established under the *Northern Ireland Assembly Act 1973* and the *Northern Ireland Constitution Act 1973* (the '1973 Acts') which together abolished the suspended (under the 1972 Act) Parliament, established a new Assembly to be elected by PR, provided for devolved government on the basis of power-sharing between Unionists and Nationalists, and made arrangements for North-South cooperation between the Northern Ireland Executive and the Irish government if/when agreed.

The provisions of the 1973 Acts were controversial. Within a year of their ratification, Unionist opposition to the 'Irish dimension' of the proposed new governing architecture had brought an abrupt end to Northern Ireland's first experiment in power-sharing government.[23] Despite a compromise being reached on the 'Irish dimension' issue at cross-party talks held in Sunningdale, England, in November 1973, grassroots Unionist and Loyalist opposition to the implementation of what became known as the Sunningdale Agreement (implemented in the 1973 Acts) withheld. Following a strong electoral result for Unionist candidates in the February 1974 UK general election, an umbrella Unionist/Loyalist organisation – the Ulster Workers Union – called a general strike in May 1974. The strike lasted two weeks. Food and electricity supplies were badly affected across Northern Ireland, instances of serious violence and bombings took place. On day fourteen of the strike, the resignation of the moderate Unionist leader of the new power-sharing government, Brian Faulkner, sparked a series of resignations which collapsed the Executive and thus, in effect, ended the first iteration of power-sharing devolution in Northern Ireland.

In the wake of the Executive collapse, the UK government brought in a system of 'interim' direct rule under the *Northern Ireland Act 1974*. Section 1 of the 1974 Act made provision for 'temporary' direct rule in an 'interim period' (s1(4)) until the next devolutionary scheme of government for Northern Ireland was agreed at the 'constitutional convention' established under section 2 of the 1974 Act. Elections to the constitutional convention took place in May 1975 but, in the context of escalating violence, its proceedings were marred by political divisions and abstentions. The conventions' summative report, laid before parliament in November 1975, reflected the views and preferences of the powerful United Ulster Unionist Council. The report was rejected by the Secretary of State for Northern Ireland on the grounds that its proposals did not 'command sufficiently widespread acceptance' from all communities

23 For reasons of space, the events between May 1973 and May 1974 are not here covered in detail. For further analysis of the Sunningdale Agreement see Gillespie (1998) for more detail on the Ulster Workers' Strike see Aveyard (2014) and for an account of the relationship between Sunningdale and the 1998 Agreement see Tonge (2000).

in Northern Ireland (Rees in *Hansard* 1976). The constitutional convention was dissolved on March 4, 1976.

As failure to reach consensus for a new form of devolved government became a recurring theme, the 'direct rule' provisions in section 1 of the 1974 Act became the new normal. Under these provisions, legislation for Northern Ireland was passed by Order in Council for all matters previously reserved or transferred under the terms of the 1920 Act. In practice, therefore, under direct rule the majority of laws that applied in Northern Ireland were made in the form of delegated legislation, via a procedure that did not allow for amendment, and which left almost no room for parliamentary scrutiny (see Hadfield 1989: 130-5). Under these direct rule provisions, the power to determine the political direction of new legislation in Northern Ireland was vested in the Secretary of State for Northern Ireland and five junior British government ministers; scrutiny of their powers happened in Westminster, on a limited basis and with almost no input from Northern Irish representatives[24]. This system of direct rule that had been justified by the UK government on the basis of (granted) an exceptional circumstance and with the intention that it would not last yet, thus became the blueprint for the governance of Northern Ireland for more than two decades.

24 There was no Select Committee on Northern Irish Affairs during direct rule; there existed a Northern Ireland (Standing) Committee which could choose to deliberate on any Northern Ireland matter; deliberation was its sole power. Otherwise, Northern Ireland received the same treatment as any other issue of government, being on a rota for Oral Questions supplemented by Written Questions if/when submitted.

Constructive constitutional ambiguity: 1998 to present

On April 10, 1998, the situation in, and circumstances of, Northern Ireland changed. With the signing of the Belfast 'Good Friday' Agreement (hereafter 'the 1998 Agreement), the societal, political, and constitutional development of Northern Ireland entered a new era; one from which it has since progressed in a relatively steady, albeit fragile, manner.

The 1998 Agreement has two parts – a political agreement, agreed between and signed by political parties in Northern Ireland (the 'Multi-Party Agreement' (MPA)), and an international treaty between the governments of the United Kingdom and Ireland (the 'British-Irish Agreement' (BIA)), who act as 'guarantors' to the substance of the Multi-Party Agreement. Underpinning the 1998 Agreement are a series of statements regarding the constitutional status of Northern Ireland, affirmed by all parties and which are set out in the opening sections of the Multi-Party Agreement and the British-Irish Agreement. Signatories recognise 'the present wish of the majority of the people of Northern Ireland' is to remain in the UK (MPA, *Constitutional Issues*, 1(iii); BIA, Article 1(iii)) but, if that wish changes, 'it is for the people of the island of Ireland alone…to exercise their right of self-determination on the basis of consent… to bring about a united Ireland' (MPA, *Constitutional Issues* 1(ii); BIA Article1(ii)). The two guarantor governments agreed: to exercise any sovereign power held at any time in respect to Northern Ireland with 'rigorous impartiality' (BIA Article 1(v)); to recognise the birthright of people in Northern Ireland 'to identify themselves and be accepted as Irish or British, or both' regardless of the constitutional status of Northern Ireland (BIA Article 1(vi)); and to introduce legislation necessary to recognise the constitutional status of Northern Ireland in the event of any future change in that status. These commitments are normally referred to collectively as the 'principle of consent'.

Based on the principle of consent, the 1998 Agreement set out an innovative, multi-levelled system for government in Northern Ireland in the three strands of the Multi-Party Agreement. Strand One provided for the creation of new democratic institutions – the Northern Ireland Assembly and the Northern Ireland Executive – to which powers were devolved on the basis of a consociational system for power-sharing between Nationalists and Unionists, underpinned by rights-based guarantees.[25] Strand Two provided an all-island or North-South dimension through the North South Ministerial Council (NSMC) and North/South Implementation Bodies that enable cooperation between the Irish government and the Northern Ireland Executive. Strand Three provided an intergovernmental or East-West dimension through the creation of the British-Irish Council (BIC), designed to facilitate relations between Ireland, the UK, and its regions; and the bilateral, British-Irish Intergovernmental Conference (BIIC) to preserve and strengthen relations between the governments of the neighbouring states.

In the British-Irish Agreement, the two governments 'affirm[ed] their solemn commitment to support, and where appropriate implement, the provisions of the Multi-Party Agreement' (BIA, Article 2). As such, and according to the terms of the 1998 Agreement, the Irish government proposed an amendment to remove the territorial claim to Northern Ireland still contained in the Constitution of Ireland at the

25 For a detailed account of the structure of the Agreement and its post-1998 development, see O'Leary (2019).

time; this was subsequently approved by referendum.[26] Concurrently, the principal content of the Multi-Party Agreement was transposed into UK law via the *Northern Ireland Act 1998* (hereafter 'the 1998 Act'). The explicit purpose of the 1998 Act is 'to make provision for the government of Northern Ireland' (*Long Title*); it remains the primary statutory source of the Northern Ireland constitution. The 1998 Act was judicially recognised to be 'in effect a constitution' for Northern Ireland, the content of which 'must be construed against the background of …the principles laid down by the Belfast Agreement for a new start' (in *Robinson*, 2002: 11; 25). In view of the explicit aim of the 1998 Act and in keeping with the judicial recognition it has received, the substance of the contemporary Northern Ireland constitution can be said to reside in the legal provisions and political principles dually enshrined in the 1998 Act and the 1998 Agreement, including the commitments and affirmations made by Ireland and the UK in the British-Irish Agreement.

While much more could be said about the constitutional history of Northern Ireland and the development of institutions established under the 1998 Agreement and 1998 Act, the detail set out thus far provides a sufficient foundation from which to consider why the constitutional history and architecture of Northern Ireland became so important, and so problematic, in the process of the UK's withdrawal from the EU.

26 The 1937 Constitution stated: 'The national territory consists of the whole island of Ireland, its islands and the territorial seas'. After the 1998 Agreement, the text was amended to recognise 'It is the entitlement and birth-right of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish nation…' (Article 2) and that while 'It is the firm will of the Irish nation, in harmony and friendship, to unite all the people who share the territory of the island of Ireland … a united Ireland shall be brought about only by peaceful means with the consent of a majority of the people, democratically expressed, in both jurisdictions in the island' (Article 3(1)). Under Article 47(1) of the Constitution, amendments can only be made if 'approved by the people' via referenda; following a 94.4 per cent vote in favour of doing so on 22 May 1998, the 19th Amendment to Constitution was made on 3 June 1998 to accept the BIA and the amendments to Articles 2 and 3 outlined.

Why is the constitutional history of Northern Ireland important?

The origin and substance of the contemporary Northern Ireland constitution are important to this discussion for two reasons: first, because they are distinctive and, second, because this fact has tended to be overlooked in reigning narratives about, and understandings of, the UK constitution. Northern Ireland's constitution, and the history from which it developed, set it apart as constitutionally unique in the UK and internationally. According to conventional understandings, the essence of the uncodified UK constitution is its on-going capacity to adapt to political change without overt rupture (Bell, 2014: 2). The adaptability of the uncodified UK constitution is claimed as continuity, flexibility is its defining feature and the cornerstone of its constitutional legitimacy (*ibid*: 8). The predominance of this understanding of the UK constitution has meant that the reigning narrative of constitutional history in the UK is one of gradual change, the slow accumulation and evolution of constitutional precedent. The constitutional history of Northern Ireland contradicts this.

Constitutional rupture is often required to enable the signing of peace agreements. Consensus is predicated on breaking with a past that was unacceptable to at least one involved party and a commitment by all parties to some newly formed constitutional architecture (*ibid*: 10). The political and legal process that led to the 1998 Agreement and its subsequent translation into law typified the kind of constitutional rupture expected in peace negotiations. It marked a 'constitutional moment' for Northern Ireland (Harvey, 2012). The process conforms to the idea of a constitutional moment (see Ackerman 1993; 1998) in that its ratification required collective agreement of the citizenry – North and South of the land border – to principles beyond those of normal politics and, thereby, engaged a higher form of law associated with nationally existential questions. Northern Ireland's constitutional moment of 1998 thus augmented a novel approach to constitutional development in the UK. In contrast to the traditional 'pragmatic empiricist' approach of British constitutionalism that relies on precedent to guide gradual constitutional development, the 1998 Agreement is 'ideological' meaning it relies on normative principles agreed by specific parties at specific times to guide constitutional development (McCrudden, 2004: 198). Notwithstanding the importance of Northern Ireland's constitutional moment in 1998 and the widespread heralding of this as a political victory that introduced a new era for Northern Ireland (Blair, 2010; Obama, 2013), the creative significance of the 1998 Agreement in the context of UK constitutional development is consistently overlooked.

Attempts to fit the 1998 Agreement (and 1998 Act) into the 'straight-jacket of devolutionary thinking' are common (Campbell et al, 2003: 319). These characterisations fail to capture the complexity of its provisions for multi-levelled governance and use of innovative law that exceeds the boundaries of a conventional definition of devolution. The provisions for North-South and East-West co-operation, established under Strand Two and Strand Three of the 1998 Agreement, introduced (quasi)confederal and inter-governmental requirements for governance in Northern Ireland with facilitating institutions whose existence is underpinned by international law (O'Leary, 1998: 3; Anthony, 2017: 4). In addition, employing *sui generis* international law, under the 'principle of consent' the 1998 Agreement contains a unique, open-ended provision for a potential change in the future sovereignty of Northern Ireland if agreed by democratic means (Donohue, 2016; Campbell *et al*, 2003), and incorporates an exceptionally malleable concept of nationality by enabling those born in Northern Ireland to choose

British citizenship, Irish citizenship, or both. In its three-stranded, multi-layered structure, and the uniquely fluid definition of nation and statehood, the 1998 Agreement embodies 'constructive ambiguity' regarding the constitutional future of Northern Ireland and the national identities of its citizenry (Bell and Cavanaugh, 1999; Mitchell, 2009). In this respect, the peace agreement did not solve the constitutional conflict in Northern Ireland but enabled it to be 'managed differently' (Phinnemore and Hayward, 2017: 22) through an imaginative set of cross-community, cross-border and intergovernmental institutions and a universal commitment in Northern Ireland to democratic means.

Despite the 1998 Agreement's innovative content, descriptions of Northern Ireland as a 'devolved administration' and the 1998 Agreement as a 'devolutionary settlement' are predominant (see UK government, 2018a). Scholars of UK constitutional history have tended to subsume Northern Ireland into a devolutionary model to which, they posit, the UK 'clearly adheres' (Elliott, 2015: 40; Norton, 2014). These reductionist depictions of the UK, and by proxy Northern Ireland, are often made possible by the minimal analysis generally given to the constitutional character and history of Northern Ireland in UK-wide analyses (Campbell et al, 2003). Northern Ireland has frequently been portrayed as 'oddly detached' or a 'place apart' (King, 2009: ix) without much justification as to how, why or the manner in which this might be true.

In the context of Brexit, this tendency to misrepresent or underplay the significance of Northern Ireland's constitutional history and the exceptional, innovative, and multi-layered nature of Northern Ireland's post-1998 constitution, proved troublesome. This is because, the centrality of Northern Ireland in the Brexit process was premised on a legacy of successive UK governments, parliamentarians, and constitutional scholars overlooking its contested constitutional history and the constructively ambiguous constitutional architecture of post-1998 Northern Ireland in UK-wide analyses. As the next section explains, when faced with the prospect of withdrawing from the EU 'in accordance with [the UK's] own constitutional requirements' (Article 50 TEU, *Official Journal*, 2016: 68), the propensity in some quarters to 'blindspot' Northern Ireland's constitutional uniqueness created difficulties because the innovative (yet often overlooked) provisions of the 1998 Agreement (and 1998 Act) proved not to sit comfortably with the type of 'hard Brexit' pursued by the UK government.

Northern Ireland and Brexit

The problem, the solution and the implications

Northern Ireland was uniquely exposed to the outworkings of the UK's decision to withdraw from the EU. Foremost, as the only region of the UK to share a land border with another EU Member State, Northern Ireland would be the most visible canvas for any change in UK-EU relations. Relatedly, it was also the most economically exposed part of the UK due primarily to the scale and scope of cross-border economic cooperation on the island of Ireland (see Brownlow and Budd, 2019) as well as: its reliance on the 'uniquely vulnerable' agri-food sector (see The Executive Office 2016a); its position as a net-recipient of EU regional development funding; and the importance of dedicated EU PEACE funding (see Hayward and Murphy, 2018; MacFlynn, 2016; Oxford Economics, 2016).

However, even more fundamental than its geography and economy, Northern Ireland was uniquely vulnerable because of the crucial facilitative role that joint EU membership of the UK and Ireland had played on its path to peace. Since the accession of the UK and Ireland to the European Communities in 1973, and particularly after the signing of the 1998 Agreement, the EU's shared legal, economic, and political framework had been the 'essential context' for Northern Ireland's still-in-process peace (Phinnemore and Hayward, 2017: 7; see also Hayward and Murphy, 2018; Murphy, 2019). Indeed, shared EU frameworks had made the legally innovative North-South and East-West dynamics of the 1998 Agreement feasible; which also made Northern Ireland the region of the UK whose legal and judicial structure was most clearly premised on an assumption of continued EU membership (see McCrudden, 2017; Anthony, 2017). Taking these factors together, in view of its geographic position, its economic structure, and its political and legal order, Northern Ireland was, by some margin, the most vulnerable part of the UK in the face of Brexit. Every facet of this vulnerability can be traced back to, and ought to be understood in light of, Northern Ireland's unique constitutional arrangements, the contested constitutional history from which they arose, and the tendency amongst many political actors on the UK stage to overlook or underplay the same.

Building on the historical content set out in the previous section, what follows here is an explanation of the problematic role Northern Ireland played in UK-EU withdrawal negotiations, a high-level analysis of the solution devised to solve Brexit's Northern Ireland problem – namely, the Protocol on Ireland/Northern Ireland – and an initial exploration of its legal and constitutional implications for both the EU and the UK.

The problem of Northern Ireland in UK-EU withdrawal negotiations

Northern Ireland was a stumbling block to consensus in UK-EU withdrawal negotiations. Attempts to reach an agreement repeatedly fell down because of the two sides' different perspectives on the 'problem' of Northern Ireland and how to 'solve' it. From early in UK-EU negotiations, issues surrounding the border on the island of Ireland were defined differently by the two negotiating parties. On the UK side, the problem to be addressed in withdrawal negotiations was narrowly understood as mitigating a need for any physical checks or controls on goods crossing the winding 500km borderline demarcating the boundary of the UK nation. This UK framing of the problem was in keeping with an ideal of national sovereignty and narratives of border control that had underpinned the Leave campaign. Its result was a UK government negotiating position that sought 'technical solutions' to achieve a 'goods border' on the island of Ireland 'that is as seamless and frictionless as possible' (HM Government, 2017a: 5; 34). This narrow UK understanding of the border problem sits uncomfortably with the 1998 Agreement (and 1998 Act) which had required the removal of physical border infrastructure (SEC (2)(ii)) but, more importantly, had envisaged a holistic transformation of 'the totality of relationships' (S2(1)) North-South and East-West through the interdependent multileveled government framework it established, and which diminished the significance of physical borderlines. The UK's proposal to address 'the full spectrum of North-South and East-West cooperation' in a 'bold and ambitious Free Trade Agreement' in future relationship negotiations (HM Government 2017b: 65) therefore relied on splitting the task of protecting the 1998 Agreement across two sets of negotiations and agreements.[27]

On the EU side, by contrast, avoiding physical checks or controls on the land border was understood as just one aspect presented by the 'unique circumstances' on the island of Ireland that would require 'flexible and imaginative solutions…*including* with the aim of avoiding a hard border' (European Council 2017: 11 *added*).[28] While underlining a need to avoid a physical hardening of the land border, the EU also emphasised 'the very specific and interwoven political, economic, security, societal and agricultural frameworks on the island of Ireland' (European Commission, 2017b: 1) and the need to protect North-

27 On 14 May 2017, Secretary of State for Exiting the EU, David Davis described 'the most difficult bit' of the EU proposal for the sequencing of negotiations as 'Northern Ireland…how on earth do you resolve the border, the issue of the border with Northern Ireland and the Republic of Ireland, unless you know what our general border policy is, what the customs agreement is, what the free trade agreement is, whether you need to charge tariffs or not? You can't decide one without the other. It's wholly illogical…so that'll be the row of the summer.' (in Mance, 2017).

28 The UK government position paper on Northern Ireland and Ireland framed the need to avoid a hard border as concerning only 'the movement of goods' (HM Government 2017b: 3) and erroneously cited the European Council invitation for "flexible and imaginative solutions" (European Council 2017: 1) as linked only to 'border arrangements' (HM Government 2017b: 3) when the EU position was in fact a more open-ended commitment to address the 'unique circumstance on the island of Ireland' through 'flexible and imaginative solutions…including with the aim of avoiding a hard border' (European Council 2017: 11). The Irish government framing of the border issue aligned with that of the EU by underlining the importance of avoiding any 'reintroduction of a visible, "hard" border on the island of Ireland' but also highlighting the 'critical risks for key sectors that operate on all-island basis' (2017: 20).

South cooperation 'across all the relevant sectors' (*ibid*: 3) in the withdrawal negotiations.[29]

In the first phase of negotiations, the EU position in respect to protecting the 1998 Agreement 'in all its parts' in the withdrawal agreement prevailed. An apparent change in the UK position on the matter can be at least partly attributed to the findings of a joint exercise to map existing North-South cooperation and determine the extent to which this relied on EU legal or policy frameworks or the 1998 Agreement. Completed in 2017, the UK government refused to publish the full details of the mapping exercise until, in 2019, these were obtained by the House of Commons European Union Select Committee following a freedom of information request (see O'Carroll and Rankin 2019).[30] In total, 142 areas of North-South cooperation had been identified, 54 of which were classified as 'directly underpinned by or linked' to EU legal or policy frameworks, 42 as 'partially underpinned by or linked' and 46 as 'not underpinned or linked to' EU legal or policy frameworks. The mapping exercise had therefore revealed, first, that North-South cooperation on the island of Ireland had expanded significantly from the 12 areas of possible cooperation identified in the 1998 Agreement (S2, Annex) and, second, that this expansion had been facilitated by joint UK and Irish EU membership. The findings of the mapping exercise thus underlined the vulnerability of a majority of areas of existing North-South cross-border cooperation on the island of Ireland to the consequences of UK withdrawal from the EU.

Findings from the North-South mapping exercise were reflected in the *Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union* (the 'Joint Report'), that provided a basis for the European Council decision to move to the next phase of negotiations and in which the concept of a 'backstop' was born. In the text, the UK, under May's premiership, held to its preference to address the 'substantial challenges' (*Joint Report*, 2017: 47) posed to the maintenance and development of North-South cooperation 'through the overall EU-UK relationship' (*ibid*: 49) but committed in the interim to 'maintain full alignment with those rules of the Internal Market and Customs Union which, now or in future, support North-South cooperation, the all-island economy and the protection of the 1998 Agreement' (*ibid*: 43; 49, added). The inclusive language regarding future cooperation and the all-island economy amounted to a UK commitment to dynamic alignment of the kind required to facilitate ongoing cooperation on the island of Ireland. If implemented, this would have allowed for the continuation of post-1998 all-island integration, as envisaged by the EU, rather than simply mitigating the need for physical checks on goods at the border, as originally envisaged by the UK government.

29 Different UK and EU conceptualisations of the border problem reflect different approaches to and understandings of sovereignty in international relations. The traditional, state-centric UK ideal conceives of sovereignty as indivisible and nationally bound by clearly demarcated boundaries of inclusion and exclusion (see Whittaker 2017). By contrast, the EU ideal conceives of sovereignty as more diffuse, shared across national boundaries that are, less sharp lines division and more sites of integration and cooperation (see Komorova and Hayward, 2019). The multi-levelled governing framework provided for in the 1998 Agreement aligns much more closely with the latter, EU perspective on sovereignty, borders, and interdependence (see Campbell *et al* 2003).

30 A 'Technical Explanatory Note' on the North-South mapping exercise was published in December 2018, it provided a list of 'the range of formal and informal cooperation' but acknowledged that this was 'not exhaustive' and further areas 'may not have been captured' by the exercise (UK Government, 2018b: 16). Areas of identified cooperation were categorised as those 'not at all underpinned by EU policy or legal frameworks' those 'partially underpinned by EU legal and policy frameworks' and those 'directly underpinned by EU legal and policy frameworks' (*ibid*: 17). This tripartite categorisation was reflected in the more detailed 'Scoping' document published later; neither provided a more comprehensive definition as to the criteria or thresholds used to determine which category any given area of cooperation fell into.

The 'Backstop' Protocol upheld the UK commitment to dynamic alignment, in accordance with paragraph 49 of the Joint Report. Importantly however, its provisions were designed as a minimal framework to operate alongside the 'bold and ambitious' FTA that the May government were intending to agree (HM Government 2017b: 65). The 'Backstop' Protocol therefore reflected a compromise between the respective UK and EU starting positions in regard to the nature of the border problem – it reflected an EU understanding of a need to protect North-South cooperation, broadly understood, yet also provided for the UK's preferred strategy of doing so primarily through the future relationship agreement. Notwithstanding the fact that the 'Backstop' Protocol was designed to 'maintain the necessary conditions for continued North-South cooperation' (Article 1(3)), it was only meant to do so 'unless and until' (Article 1(4)) the UK and EU concluded an agreement to supersede it 'in whole or in part' using 'best endeavours' (Article 2(1)).

This context is important because those provisions that related directly to maintaining conditions for North-South cooperation in the 'Backstop' Protocol (Articles 6(2); 7-13) on an insurance policy basis, are almost identical to those set out in the Protocol (Articles 5-11), despite the latter being agreed on a fundamentally different premise regarding its longevity and comprehensiveness. While it is possible for any subsequent UK-EU agreement to supersede the Protocol in whole or in part (under Article 13(8)) there is no 'best endeavour' requirement for the parties to do so. Furthermore, concluding an agreement that would bring the UK closer to the EU and thereby mitigate frictions caused by the combination of the Protocol and the (minimal) TCA is *not* an intention of the Johnson government. This scenario has significant implications for the 'East-West' dynamic of Northern Ireland governance – both for Great Britain-Northern Ireland relations and for relations between Ireland and the UK. This is, again, because the implicit premise of the 'Backstop' Protocol was that a future UK–EU relationship would be close, meaning that any East-West frictions would be minimal; but this is not, of course, what happened.

The solution(s) for Northern Ireland in the UK-EU withdrawal negotiations

Throughout UK-EU withdrawal negotiations, disagreements over arrangements for Northern Ireland centred on (and derived from) the irreconcilability of the UK government's negotiating objectives that proposed to leave the EU Single Market and Customs Union, avoid a hard border on the island of Ireland and/or any new trade barriers within the UK internal market,[31] while also respecting the EU's 'red line' of protecting the legal integrity of its Single Market and Customs Union.[32] As already indicated, these objectives could not all be achieved.

The 'solution' of Prime Minister May was to compromise on the nature of the UK's departure from the Single Market and Customs Union. Under the Withdrawal Agreement negotiated by May, in the absence of a future UK-EU relationship that avoided any need to harden the border on the island of Ireland, Northern Ireland would remain aligned to EU Single Market regulations necessary to allow the continuation of North-South cooperation and frictionless trade in goods between Ireland and Northern Ireland. Following from this, and to mitigate the need for new checks or controls on goods moving 'East-West' between Great Britain and Northern Ireland, the whole of the UK would, under May's Withdrawal Agreement, remain in a customs union with the EU *unless and until* the 'red line' negotiating objective of avoiding a hard land border could be met by alternative arrangements. As stated, this 'backstop' approach was premised on the pursuit of a 'deep and special' future UK-EU trading partnership which would, in theory, minimise the legal significance of any UK-wide alignment deriving from the 'unique circumstances' of Northern Ireland (HM Government, 2017b: 43), thereby also mitigating any potential GB-NI disruption resulting from the NI-only aspects of the 'Backstop' Protocol. The 'backstop' solution was unpopular among parliamentarians who three-times rejected May's Withdrawal Agreement. The Prime Minister's inability to get this agreement passed in the UK parliament, eventually, forced her to resign.

May's successor, Prime Minister Boris Johnson agreed to a different 'solution' this time foregoing the previous commitment to avoid any new barriers to trade within the UK single market. The revised *Protocol on Ireland/Northern Ireland* avoided a hard border on the island of Ireland by applying the EU Customs Code and EU Single Market regulations necessary for the free movement of goods between Northern Ireland and Ireland (and so the EU). With the UK outside a customs union with the EU and Great Britain eschewing regulatory alignment with the EU single market *acquis*, new customs procedures and regulatory checks and controls on goods moving between Great Britain and Northern Ireland would be necessary, alongside the possibility of tariffs needing to be collected. Despite opposition in Northern Ireland to the Prime Minister's 'wonderful' new deal (Johnson, 2019),

31 In its *UK's exit from and partnership with the EU* white paper, the government said it would 'not be seeking membership of the Single Market' but would 'seek a new customs arrangement with the EU' (HM government 2017a: 8; 8.1). In its later *Northern Ireland and Ireland: position paper* the government also stated its intention to '[avoid] a return to a hard border…in Northern Ireland' yet 'prevent the creation of new barriers to doing business within the UK, including between Northern Ireland and Great Britain' (HM Government 2017b: 41; 45).

32 The European Council guidelines for negotiations underlined the importance of 'preserving the integrity of the EU Single Market' emphasised the 'indivisible' four freedoms and the need to 'preserve its autonomy as regards decision-making' and the role of the CJEU (2017 :1).

the Withdrawal Agreement was supported by a majority of MPs following a landslide Conservative victory for Johnson in the December 2019 general election. Notwithstanding Johnson's assertion that the revised Withdrawal Agreement required 'no frictions at all' on trade between Great Britain and Northern Ireland trade, as both sides acknowledged, implementing the Protocol would necessitate, new 'checks between Northern Ireland and Great Britain' (von der Leyen in Connelly, 2020) or 'additional process[es]' on 'east-west' trade (Cabinet Office, 2020: para 17(3)). In this respect, the Protocol reinforces an idea of Northern Ireland as a 'place apart', now in a post-Brexit UK.

The implications of the *Protocol on Ireland/Northern Ireland* for the EU and UK

The provisions of the *Protocol on Ireland/Northern Ireland* are without precedent. Under its terms, Northern Ireland is *de jure* inside the UK customs territory (Article 4) but *de facto* under the EU customs code (Article 5). Northern Ireland remains in dynamic regulatory alignment with the EU Single Market in respect to goods (Article 5 and 13) while also, theoretically, retaining 'unfettered access' (Article 6) to the UK internal market. Irish citizens living in Northern Ireland are guaranteed 'no diminution' of their rights as EU citizens (Article 2) despite being outside the EU territory and Northern Ireland is still a recipient of dedicated EU PEACE and INTERREG funding (*Preamble*). In addition, EU laws governing wholesale electricity markets (Article 9) and state aid (Article 10) continue to apply in Northern Ireland, and the Protocol in its entirety is to be implemented in such a way as to 'maintain the necessary conditions' for North-South cooperation between the two jurisdictions on the island of Ireland (Article 11) that, previously, relied on shared EU law frameworks.

The arrangements for implementation and oversight of the Protocol are also significant. Although now a Third Country in EU-law terms, the UK is responsible for ensuring that those aspects of the EU *aquis* made applicable to and in Northern Ireland under the Protocol are enforced with the Court of Justice of the European Union (CJEU) retaining jurisdiction for these purposes (Article 12). The UK-EU Joint Committee, established under Article 164 of the UK-EU Withdrawal Agreement, is responsible for overseeing the implementation of the Protocol and has power to make binding decisions by mutual agreement in certain areas; the work of the Joint Committee in this respect is supported by a Specialised Committee on Ireland and Northern Ireland (Article 14) and a Joint Consultative Working Group (Article 15), both set up under the Protocol.

A final provision of the Protocol warrants specific mention: Article 18 of the Protocol provides for a 'democratic consent process' whereby members of the Northern Ireland Assembly are to be granted an opportunity to consent to the continued application of aspects of the Protocol relating to trade (Articles 5 to 10). The first vote of this kind will take place in 2024. If a majority in the Assembly vote in favour of continuation, another consent vote is to be held at four-year (with simple majority) or eight-year (with cross-community majority) intervals thereafter. If a majority in the Assembly vote against continued application of Articles 5 to 10 of the Protocol, the UK-EU Joint Committee are tasked with making recommendations on consequential 'necessary measures' (Article 18) and those Articles will cease to apply after a period of two years. There is currently little clarity regarding what measures may, or may not, be deemed 'necessary' by the UK and EU acting jointly.

It should be underlined that the provisions of the Protocol forge new paths in the legal and constitutional typographies of its two architects. For the EU, these novel arrangements breach the 'indivisibility' of the Four Freedoms and create a new (risky) frontier in the EU Single Market and EU external relations. For the UK, implementing the Protocol introduces a new category of law, challenges constitutional precedent, and pushes the boundaries of domestic territorial differentiation to new extremes. While an exhaustive analysis of the Protocol's legal implications is beyond the scope of this paper, some key points ought to be made.

From an EU perspective, the selectivity of the Protocol is important. By prohibiting barriers to trade in goods between Northern Ireland and the EU (see Article 5(5) and Article 7(1)) the Protocol avoids the need for new checks or controls on the land border on the island of Ireland, thereby achieving a shared aim of both negotiating parties. However, to do so, the Protocol splits the Four Freedoms of the EU's Single Market – free movement of EU goods will continue, but services, people and capital have ended. Such a splitting is notable in principle but, from an EU perspective, how it operates in practice is more important. Operationalising a body of EU law – regulations relating to trade in goods – that have been designed to work in tandem with the wider legal schema of the EU Single Market would be a challenging prospect even in fair political weather. When combined with the novel arrangements for implementation, whereby applicable EU law is to be enforced by third country UK officials in a post-conflict society that relies on mandatory power-sharing government, and the task begins to look perilous indeed. While smooth and effective operation of the Protocol is conceivable, a cursory look at its substantive provisions, and arrangements for oversight, make it vividly clear that its UK and EU creators presumed a level of trust between themselves that does not, at present, exist. So long as that trust is absent, it is possible (arguably probable) that the Protocol will be interpreted as a threat to the EU Single Market by its Member States. This is not good news for those pursuing economic and political stability in Northern Ireland.

Two further EU risks are worth noting. First, it is problematic, from an EU perspective, that much of the substantive discussion about the practical and procedural implications of the continued applicability of the EU customs code and regulatory regime in Northern Ireland have been overshadowed by, or postponed because of, ongoing disagreements with the UK. Second, the 'democratic consent mechanism' in the Protocol makes it likely that political contestation about the Protocol will recur every 4 or 8 years – this poses a reputational risk to the EU which has, through the Protocol, established itself as a 'protector' (Article 1(3)) of the 1998 Agreement and, by proxy, Northern Ireland's still-in-process peace.

From the UK perspective, the Protocol introduces a new category of law into the UK's dualist legal system. Under the EU (Withdrawal) Act 2018 (s7A) 'all such rights, powers, liabilities, obligations and restrictions' created by or arising under the Withdrawal Agreement are given legal effect in the UK without further enactment. The language of section 7A mirrors that of section 2 of the (repealed) *European Communities Act 1972* that previously gave EU law 'direct effect' in the UK when it was a Member State. Because EU laws that apply under the Protocol are to be read 'as amended or replaced' (Article 13(3)), the 'direct effect' clause in the EU (Withdrawal) Act 2018 acts as a 'conduit pipe' (as per *Miller v Secretary of State for Exiting the EU 2017* [65]) through which new and revised EU laws within the scope of the Protocol are to be added to the UK statute book. Although not always acknowledged by the UK government, the domestic implementation of the Protocol therefore creates a legal link between the UK in respect of Northern Ireland and the continued evolution of the EU's *acquis*. Over time, as the EU Single Market develops and the UK Internal Market (presumably) charts a different course, Northern Ireland is likely to find itself in the difficult position of being pulled in opposite directions by the two 'Unions' it straddles.

The final point in this non-exhaustive analysis concerns 'democratic consent'. Any conventional understanding of the division of competencies between central and devolved government in the UK sits uncomfortably with the Protocol's 'democratic consent mechanism'. Throughout the Brexit process, the UK government(s) have been at pains to stress that international relations in general, and relations with the EU in particular, are not a devolved matter. Indeed, the process has reflected this fact as, for example, all three devolved legislatures refused consent to the EU (*Withdrawal Agreement*) Act 2020, but Prime Minister Johnson 'got Brexit done' regardless. Under the 'democratic consent mechanism' the devolved Northern Ireland Assembly will, however, be given the opportunity to express a view on an 'excepted' matter and the UK government will take action as a result – granted, in concert with the EU and 'taking into account' the obligations of both parties to the 1998 Agreement (Article 18(4)). What this means is that the 'democratic consent mechanism' is, in effect, a reversal of the Legislative Consent Mechanism by which central UK government 'take into account' (but do not always abide) the views of UK devolved administrations. Again, the implementation of the Protocol in this respect will be legally novel. While its departure from UK constitutional precedent is notable, arguably the more pressing repercussion of the 'democratic consent mechanism' is the inherent and recurring uncertainty it creates for the politics and economy of post-Brexit Northern Ireland. For a region with a conflicted past and fragile present, this situation is less than ideal.

Conclusion: Northern Ireland as a new frontier

By grounding analysis of Northern Ireland's prominence in the Brexit process on an account of its constitutional history this discussion makes clear that the novel post-Brexit arrangements, under the Protocol, agreed on behalf of Northern Ireland, chime with its history of constitutional experimentation and exceptionalism. However, taking the long view it also becomes clear that events in Northern Ireland have, frequently, been overlooked or underplayed in UK-wide political debates. With this in mind, the high-profile political status of the Protocol, its status in UK-EU relations, and international legal basis are important because their result is that the implementation of this latest iteration of exceptionalism in Northern Ireland will have political, legal, and constitutional repercussions that extend far beyond its much-discussed borders.

An explicit objective of the *Protocol on Ireland/Northern Ireland* in the revised, ratified Withdrawal Agreement is 'to protect the 1998 Agreement in all its parts' (Article 1(3)). By agreeing an international treaty with this aim, the UK and EU have, in effect, strengthened the legal standing of the 1998 Agreement by setting themselves up as its protector. Furthermore, the Protocol's bespoke provisions for continued Northern Ireland participation in the EU Single Market for goods, premised on continued dynamic regulatory alignment with aspects of the EU *acquis* create, in effect a new and *sui generis* legal relationship between the EU on the one hand and the UK *in respect of Northern Ireland* on the other.

From an EU perspective, its new role in respect of the 1998 Agreement is notably distinctive to that of the existing post-1998 co-guarantor roles of the UK and Ireland governments. Unlike the 1998 Agreement, the Withdrawal Agreement includes a dispute resolution mechanism,[33] means of redress for violations of applicable EU law via the CJEU, [34] establishes bodies to oversee the implementation of

33 Part Six of the Withdrawal Agreement covers institutional and final provisions that includes an agreed process for settlement of disputes and arbitration (Title III). For an overview see Fella (2020).

34 The most important provision in this regard is the Article 4 requirement that the Withdrawal Agreement should have primacy and direct effect in UK law in the same way that EU law had prior to UK withdrawal (and for the duration of the transition period); in EU jurisprudence, direct effect will apply where the Withdrawal Agreement provisions are clear, precise and unconditional (these criteria were established by the CJEU in *Van Gen den Loos v Nederlandse Administatie der Belastingen 1963)*. Article 4 is given effect by section 7A of the *EU (Withdrawal) Act 2018* that gives supremacy to EU law rendered applicable in the UK under the Withdrawal Agreement in a similar way as EU Treaties had supremacy and direct effect under the ECA 1972.

the Protocol and grants these bodies power to amend its terms in accordance with its efficacy.[35] These arrangements for implementation, oversight and enforcement of the Protocol are very different to their equivalent in the 1998 Agreement. Under Article 2 of the 1998 (British-Irish) Agreement, the two governments committed to 'support, and where appropriate implement the provisions of the Multi-Party Agreement' thus establishing them as guarantors. The 1998 Agreement does not, however, include any mechanism for dispute resolution or legal redress between the parties and has relied instead on the political and diplomatic relations of its guarantors as the *modus operandi* for its implementation.[36] There is, therefore, an important contrast between governance mechanisms established by the UK and Ireland under the 1998 Agreement and those established by the UK and EU under the Protocol which is simply worthy of note in concluding this discussion: the former has relied primarily on bilateral diplomacy underpinned by political relationship while the latter establishes a system reliant on multilateral diplomacy underpinned by legal force. The interplay of these two international legal texts, and their governance structures, is still in its early stages – the extent to which they can be complimentary, remains to be seen.

What the new legal link, created by the Protocol, between the EU and the UK *in respect of Northern Ireland* means in practice for Northern Ireland is also not yet wholly clear. So far, the implementation of the novel Protocol has had a worryingly destabilizing impact in the still-fragile political context of Northern Ireland. In part this can be explained by the somewhat paradoxical fact that the Protocol's explicit objective is to 'protect the 1998 Agreement in all its parts' (Article 1(3)), yet its terms still reflect the logic of a minimal framework, 'backstop' insurance policy that was designed to avoid a physical hardening of the border on the island of Ireland by facilitating cross-border trade in goods. Crucially, the intention of the UK government that signed up to the principle of a 'backstop' Protocol during Theresa May's tenure was to allow the full spectrum of current and future North-South *and* East-West cooperation to be addressed through a 'deep and special' UK-EU future relationship agreement. This kind of UK-EU agreement was not, however, pursued by the government under Boris Johnsons' premiership. As such, the implementation of the Protocol alongside the minimal UK-EU Trade and Cooperation Agreement has created very noticeable frictions on the Great Britain–Northern Ireland axis. Unionists and Loyalists in Northern Ireland perceive this 'Irish Sea Border' effect as a threat to their British identity and thus view the Protocol as an illegitimate imposition that (further) differentiates Northern Ireland.

35 Article 12(4) of the Protocol states that EU institutions and bodies shall have the 'powers conferred upon them by Union law' in relation to Article 12(2), Article 5 and Articles 7 to 10 of the Protocol. These cover exchange of information; provisions on customs and movement of goods; technical regulations, VAT and excise law, electricity markets and state aid law as applicable to Northern Ireland. Article 12(4) specifies that CJEU shall have the jurisdiction provided for in EU Treaties in relation to the provisions mentioned with Article 12(5) specifying that EU acts adopted in relation to these provisions will have the same effect in the UK as they would in an EU Member State. In addition, under Article 10(1) EU state aid law applies in the UK 'in respect of measures which affect that trade between Northern Ireland and the Union which is subject to this Protocol'; and Article 13(2) provides that any provisions of the Protocol that refer to EU law shall be interpreted in conformity with the caselaw of the CJEU, Article 13(3) provides that where the Protocol refers to an EU act, this should be understood as referring to any amendments or replacements of that act with Article 13(4) providing for the Joint Committee to take a decision either to incorporate an amended or replaced act or examine other possibilities to maintain the good functioning of the Protocol. If the Joint Committee is unable to reach agreement in respect of Article 13(4) the EU are entitled to take 'appropriate remedial measures'.

36 The process of implementing the 1998 Agreement has had a staccato and iterative quality; lengthy periods of institutional stagnation, most notably between 2002–07 and 2017–20, have been resolved through inter-party talks mediated by the UK and Irish governments in a similar manner to the process that led to the initial agreement. For an account of a detailed overview of the evolution of the 1998 Agreement see Humphreys (2018: 21–56) or Coakley and Todd (2020).

At the time of writing, the outworkings of Brexit in and for Northern Ireland are ongoing. The stability of devolved government is in question due to Unionist politicians' threats to resign if the Protocol is not removed or replaced. Nevertheless, removal of the Protocol looks very unlikely. UK-EU talks on possible amendments to the Protocol are, however, ongoing. The extent to which the outcome of those UK-EU talks can assuage Unionist/Loyalist concerns is an open question. Perhaps only one thing is certain – Northern Ireland's starring role in Brexit-related discussions is far from over.

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