



Northern Ireland's legal order after Brexit

C R G MURRAY*

Newcastle University

Correspondence email: colin.murray@newcastle.ac.uk

A CONSTITUTIONAL CHALLENGE

Since the conclusion of the Belfast/Good Friday Agreement 1998,¹ Northern Ireland has maintained a complex multi-level governance order, sustained by an engaged electorate and an active civil society.² That this order has frequently been dysfunctional should hardly be surprising; it was never going to be easy to provide a counterpoint to dominant and simplified accounts of statehood amid the legacy of protracted conflict, but it nonetheless continues to provide the basis for a political order which is not dominated by political violence.³ The challenges inherent in maintaining functional governance in Northern Ireland, generating repeated efforts to fine-tune the post-1998 governance arrangements, should have meant that Northern Ireland was an ongoing priority for policy and law-makers, but the June 2016 referendum on United Kingdom (UK) membership of the European Union (EU) was called with little thought of how Brexit would affect these arrangements.

Northern Ireland has dominated the withdrawal negotiations and the aftermath of the UK's withdrawal from the EU not because a majority of its voters opposed Brexit in the 2016 referendum, but because of the way in which EU law had become intertwined in Northern Ireland's governance arrangements after 1998. The comparison with Scotland is illustrative. In December 2016, before the UK Government entered negotiations over withdrawal from the EU, the Scottish Government was advocating 'differentiated solutions for Scotland' if the UK Government sought looser post-Brexit connections with the EU

* Professor of Law and Democracy, Newcastle University. Paper updated and hyperlinks last accessed on 13 December 2022.

1 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (with annexes) (1998) 2114 UNTS 473.

2 *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, [11] (Lord Bingham).

3 See S de Mars and A O'Donoghue, 'Beyond Matryoshka governance in the 21st century: the curious case of Northern Ireland' in A McHarg, O Doyle and J Murkens, *The Brexit Challenge for Ireland and the United Kingdom: Constitutions Under Pressure* (Cambridge University Press 2021) 64.

than European Economic Area membership.⁴ But it could not draw on a legal source comparable to the 1998 Agreement to justify such differentiation, and it instead relied explicitly on the fact that 'a large majority in Scotland voted to remain' to justify Scotland remaining part of Europe's Single Market.⁵ Whereas the UK Government faced down the Scottish Government's claims,⁶ it increasingly found itself making far-reaching commitments to tailor a Brexit policy which protected all aspects of the 1998 Agreement 'in full'.⁷ For all that there is some 'commonality' in the UK's devolution arrangements,⁸ this distinct basis of Northern Ireland's governance order matters. The negotiation of Brexit had to take account of the 1998 treaty and the referendums which endorsed it,⁹ as well as the complexities of managing the land border and its sensitivities for the peace process (issues highlighted by Arlene Foster and Martin McGuinness in the immediate aftermath of the 2016 vote).¹⁰

The struggles to reconcile Northern Ireland's withdrawal from the EU as part of the UK with the existing commitments made with regard to its constitutional arrangements proved particularly intractable. This was in large part because, going into Brexit, so few policy-makers appreciated the distinct nature of its governance order and, indeed, its potential ungovernability, should simplified conceptions of statehood, national and parliamentary sovereignty be imposed upon it. Others appreciated this governance challenge but found solutions to it unpalatable given their desired outcomes for Brexit. The Withdrawal Agreement's Protocol on Ireland and Northern Ireland¹¹ emerged from protracted negotiations as an attempt to preserve certain elements of EU law which were significant to the arrangements which had developed since 1998, but that fix, by its nature, means that Northern Ireland has left the EU on different terms from the rest of the UK.

In terms of constitutional perspectives, some parties in Northern Ireland, invested in the special constitutional arrangements for the polity in 1998, remain alienated by Brexit's upheaval in those arrangements, whereas others, at best ambivalent to the post-1998

4 Scottish Government, *Scotland's Place in Europe* (2016) 26.

5 Ibid para 1.

6 See M Keating, 'Taking back control? Brexit and the territorial constitution of the United Kingdom' (2022) 29 *Journal of European Public Policy* 491.

7 T May, *Belfast Speech* (20 July 2018).

8 *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [128].

9 C Murray, 'The constitutional significance of the people of Northern Ireland' in McHarg et al (n 3 above) 108, 123.

10 A Foster and M McGuinness to T May (10 August 2016).

11 Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union (30 January 2020).

arrangements, came to regard any distinct arrangements for Northern Ireland as a wedge between it and Great Britain. The operation of the composite governance order that both the UK and the EU have established, moreover, generates distinct challenges. EU law and domestic law continue to interact in wide-ranging areas of Northern Ireland's legal order, and the processes of transposing EU law and managing clashes of norms are only beginning to take shape. These challenges are observable in the new Brexit-implementation phase of litigation before the UK courts and the emergent international legal disputes between the EU and UK. The collection of articles which make up this special edition thus explores the challenges of making this new set of multi-level governance arrangements work for Northern Ireland. Together they unpack the composite arrangements resultant from the deep alignment between Northern Ireland and the EU Single Market under the Withdrawal Agreement and the Protocol's human rights and equality protections.

This special edition aims to address a particular window in which the UK and EU are attempting to manage their relations post-Brexit, and Northern Ireland finds itself in a governance crisis centred upon the Protocol's operation. The edition therefore builds on a considerable body of scholarship on the fraught negotiation of Northern Ireland's place in the Brexit deal¹² and on the interpretation of the relevant terms of the Withdrawal Agreement.¹³ Although by no means comprehensive, the collection explores a range of different ways in which the Northern Ireland legal order has become increasingly distinct post-Brexit and considers how these developments will continue to influence EU and UK law and policy-making. Thanks are due to all of the contributors to this collection who had to assemble their contributions in the knowledge that this is a subject matter which seems to be constantly in flux or at risk of being completely upended amid the policy shifts of three different UK premierships during the writing process. Special thanks are also due to Mark Flear and Marie Selwood for processing this collection so speedily in an effort to ensure that it was not overtaken by events whilst in production.

12 See K Hayward, *What Do We Know and What Should We Do about the Irish Border?* (Sage 2021); S de Mars, C Murray, A O'Donoghue and B Warwick, *Bordering Two Unions: Northern Ireland and Brexit* (Policy Press 2018) and M Murphy and J Evershed, *A Troubled Constitutional Future: Northern Ireland after Brexit* (Agenda 2022).

13 See the edited collection C McCrudden (ed), *The Law and Practice of the Ireland–Northern Ireland Protocol* (Cambridge University Press 2022); F Fabbrini (ed), *The Law and Politics of Brexit: volume IV The Protocol on Ireland/Northern Ireland* (Oxford University Press 2022); and T Lieflander, M Kellerbauer and E Dimitriu-Segnana (eds), *The UK–EU Withdrawal Agreement: A Commentary* (Oxford University Press 2021).

THE SPECIAL EDITION

There are five substantive contributions to this special edition. In the first, I set the scene for the collection by examining how the Protocol in its current iteration compares to the 'backstop' arrangements designed during Theresa May's premiership. This comparison enables an assessment of how the operationalisation of Brexit would have differed under the backstop, and the article explores whether the UK Government could go about unpicking the backstop as successive administrations have with the Protocol. It also defines the nature of the unfolding challenge of making the Protocol work in practice by exploring the shortcomings of its arrangements, efforts to address them, and the latest crisis point of the Northern Ireland Protocol Bill. This draft legislation saw the UK Government pledge not to reform the Protocol but to upend its arrangements, heedless of the consequences of such an approach for relations with the EU, for the UK economy amid the likelihood of trade retaliation and for the stability of Northern Ireland. The collapse of Liz Truss's administration provides a potential opportunity for UK–EU relations to be reset, but the siren call of a more comprehensive post-Brexit break with the EU continues to exert a powerful hold over large sections of the Conservative Party, limiting Rishi Sunak's room for manoeuvre.

The next article examines a particular set of implementation challenges in depth. Lisa Claire Whitten considers the rules which keep Northern Ireland aligned with the EU Single Market in goods. These rules are nothing if not innovative; the EU has sub-contracted the management of part of its external goods border to a non-member state, and Northern Ireland law must as a result continue to align with a range of EU rules on goods movements and product standards as they develop. The UK Government, for its part, leant into territorial divides within its own constitutional order to adopt these arrangements, thereby twisting the rules for the UK's post-Brexit internal market around Northern Ireland's special place in the Brexit deal. Whitten's article explores what dynamic alignment means in these circumstances, the burdens it places upon law-making for Northern Ireland and whether it can function as intended given the challenges to the legitimacy of EU rules continuing to operate in Northern Ireland law when Northern Ireland has little say over relevant EU law-making.

The Protocol's alignment requirements, however, go beyond rules applicable to goods. As Eleni Frantziou and Sarah Craig highlight, they are if anything more complicated in the context of the Protocol's rights and equality arrangements. Article 2 of the Protocol sets up variable alignment requirements, with Northern Ireland law being required to maintain full alignment with a number of EU equality directives as they develop (and with the possibility of more measures being added

to this list), alongside a broader obligation that there be no post-Brexit diminution of the EU law's protections, as they existed at the end of the transition period, insofar as they can be shown to underpin aspects of the 1998 Agreement's rights and equality commitments. As Frantziou and Craig illustrate, these arrangements do not simply require that law and policy-makers responsible for Northern Ireland track a broad range of EU legislative developments (as with the rules for the Single Market applicable to goods), they also require Northern Ireland law to be responsive to developments in the case law of the Court of Justice of the European Union. Northern Ireland's institutions are again obliged to continue to make select aspects of EU law operate, in full or in part, without the ability to consider how other parts of the UK are adapting to these rule changes.

If the operationalisation of the Protocol thereby presents considerable legal challenges for Northern Ireland's governance order, notwithstanding the political furore surrounding its terms, the Protocol is also the focal point of ongoing tensions between the EU and the UK. Billy Melo Araujo explores the competing legal bases on which the UK Government seeks to justify its unilateral action which would otherwise be in breach of the Protocol's terms and why the doctrine of necessity is seemingly being advanced without reference to article 16, the safeguard clause built into the Protocol. This contribution highlights both the weakness of this approach in terms of the limits to the doctrine of necessity, but also how article 16 cannot supply the basis for measures as far-reaching as the Northern Ireland Protocol Bill. The dubious basis for the UK Government's arguments raises significant issues for the future of the Protocol; even if a negotiated settlement to the current dispute is reached, the arrangements can never stabilise and offer a platform for business in Northern Ireland if the UK and the EU cannot cooperate effectively with regard to its terms.

The final article in the special edition, by Sylvia de Mars and Charlotte O'Brien, illustrates how the Protocol interacts with other elements of the Brexit settlement to affect the lives of people in the community in Northern Ireland after Brexit. The Withdrawal Agreement's arrangements applicable to the thousands of frontier workers on the island of Ireland are not to be found in the Protocol, but they interact with it and aspects of the Trade and Cooperation Agreement to provide a complex, but in important regards incomplete, set of protections. Much of this speaks to the underdeveloped nature of rules regarding frontier workers in EU law. The operation of the rules applicable to Northern Ireland after Brexit therefore shine a light on shortcomings in EU law, and their operation in the years ahead is not simply an introverted effort to make this system work for Northern Ireland, but a process with important lessons for the EU legal order.

THE ROAD AHEAD

This special edition is intended to be a rallying cry rather than some sort of capstone on the debates over the Protocol. It is, indeed, becoming ever more challenging to maintain a general account of how Brexit impacts upon the law of Northern Ireland. In short, as the UK and EU diverge post-Brexit and the Protocol continues to operate, at least in part, Northern Ireland becomes a space where these legal orders overlap and are obliged to interlock. A constitutional experiment is underway as to how such a framework can function in adverse circumstances, with the EU and UK at loggerheads. Not only does a comparatively small polity require considerable and continuing attention from the EU, operating as a continent-spanning supranational body, to make complex arrangements work in practice, these arrangements must work in the face of ongoing opposition from the UK Government and Unionists within Northern Ireland. All of this resultant difficulty with making the Protocol work, however, should nonetheless have been expected. This sort of complex legal arrangement does not arise in circumstances of neat alignment between nationhood and territorial state. The world is not full of free cities, joint sovereignty arrangements or other efforts to depart from or rethink statehood, and where they have existed, they have often been short-lived.¹⁴ The Protocol is likewise a measure which reframes how aspects of statehood apply to a polity riven by competing constitutional aspirations.

In such circumstances, the unsettlement of Northern Ireland's governance arrangements is all too predictable. Such a complex governance order, irrespective of the precise nature of the arrangements which were adopted on Brexit, requires constant attention and no small measure of goodwill to function. The Protocol has, in practice, received little of either. The point has been reached at which the people of Northern Ireland generally know only what they want to know about the Protocol. An opinion survey published in October 2022 as part of the ESRC's Post-Brexit Governance NI project saw that almost three-quarters of respondents consider that they have a 'good understanding' of the Protocol, but it also identified that these respondents are most likely to trust information about the Protocol received from the political parties that they support.¹⁵ When people in Northern Ireland discuss the Protocol they are thus generally filtering it through a prism of the opinions of parties which wish to present it as being destructive of Northern Ireland's place in the UK (with that being understood

14 See Y Blank, 'Localism in the new global legal order' (2006) 47 *Harvard International Law Journal* 263.

15 D Phinmore, K Hayward and L Whitten, 'Testing the Temperature 6: what do voters in Northern Ireland think about the Protocol on Ireland/Northern Ireland?' (Post-Brexit Governance NI, 2022).

simultaneously as a positive and a negative by different parties) and those who regard it as being a necessary set of compromises to protect Northern Ireland's distinct governance arrangements post-1998. In other words, the workings of the Protocol are becoming increasingly divorced from public understandings of it. In those circumstances, radical changes to the Protocol are likely to alienate larger sections of the electorate than they stand to bring on board.

And yet radical changes promising to sweep away the problems with the Protocol dominate the political agenda. The debates which have convulsed UK–EU relations have largely been about the existence or wholesale replacement of the Protocol, with far less attention having been invested in how to improve its functioning in practice. For the EU's part, episodes such as the suggestion of triggering article 16 over vaccine movements and the delays to resolving issues such as the application of steel tariffs to Northern Ireland speak to the difficulties a supranational body faces in terms of maintaining its focus on a small polity. Such focus is, however, undoubtedly required to make the Protocol work. For the UK Government, tirades and legislative forays against the Protocol have become bound up in the struggles of successive Conservative Governments to present how Brexit has changed the governance of the UK in a way that satisfies the project's loudest backers. If it is to function effectively, however, the Protocol must be accepted as an iterative process, not a constitutional end point. Its arrangements must be adaptable and must prioritise the needs of the complex polity they serve. The articles highlight some of the most significant aspects of Northern Ireland's post-Brexit interrelationship with the UK and EU legal orders and attempt to navigate some of the more significant challenges that lie ahead.