



# Northern Ireland's post-Brexit governance crisis: what to do when the post-1998 centre cannot hold

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## ABSTRACT

Northern Ireland's post-conflict constitutional order was upended by the Brexit referendum result in 2016. In the aftermath of that vote, both Sinn Féin and the Democratic Unionist Party have collapsed Northern Ireland's power-sharing institutions. Those collapses have differed in the degree to which they were responses to the realities of Brexit, but it suffices to say that the United Kingdom's withdrawal from the European Union (EU) has loomed over these successive crises and that it has proven particularly challenging to make Northern Ireland's constitutional arrangements work without what had been the generally accepted dilution of sovereignty involved in EU membership. The Northern Ireland Protocol, even as amended under the Windsor Framework, has thus far failed to bridge this gap. This article explores the consequent operation of 'indirect' rule over Northern Ireland from Westminster and Whitehall in response to this upheaval. Northern Ireland's institutions have shown themselves to be prone to collapse and difficult to restart, even amid a profound public sector funding crisis which requires urgent attention from elected representatives. This article considers how best to manage Northern Ireland's governance in such circumstances. This involves an assessment of reforms to power-sharing arrangements, the institution of direct rule and enhancements to indirect rule. Notwithstanding the restoration of power sharing in February 2024, the inherent fragility of power sharing has not been addressed, and this article weighs up whether any of these options provides a meaningful solution in place of the shortcomings of indirect rule's sticking-plaster arrangements.

**Keywords:** Northern Ireland Act; Belfast/Good Friday Agreement; Brexit; direct rule; indirect rule; civil service.

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## INTRODUCTION

Northern Ireland's post-1998 governance order has endured two sustained collapses since the start of 2017, amid the fallout from Brexit. The first of these collapses, between 2017 and 2020, was triggered by Sinn Féin's withdrawal from the Northern Ireland Executive as a result of the Renewable Heat Incentive scandal and prolonged by the Democratic Unionist Party's (DUP) ability to exert outsized influence at Westminster as it controlled the balance of the House of Commons after the 2017 United Kingdom (UK) general election. After the DUP lost this influence over the UK Government following Boris Johnson's 2019 general election victory, power sharing was quickly restored under the *New Decade, New Approach* deal,<sup>1</sup> but the need for the Executive to pull together in the emergency response to the Covid pandemic could not disguise the tensions unleashed by Brexit. A system designed to disguise divisions about Northern Ireland's constitutional status under cooperative approaches to quotidian politics buckled when questions of Northern Ireland's status came to dominate public discourse.<sup>2</sup>

The brief interlude of fully operative power sharing which began in January 2020 ended when the DUP instituted a phased withdrawal from the 1998 Agreement's institutions as part of its opposition to the Brexit deal. First, the party withdrew from North–South bodies in September 2021, preventing their operation under Strand Two of the 1998 Agreement. Then it withdrew from the Northern Ireland Executive in February 2022 and refused to re-enter power sharing in the wake of the May 2022 Assembly Elections.<sup>3</sup> These developments provided the backdrop to the UK Government's efforts to secure amendments to the Northern Ireland Protocol.<sup>4</sup> As a result of the DUP boycott, all of Northern Ireland's government departments came to be managed by civil servants without ministerial direction from October 2022, under increasingly restricted budget allocations imposed by Westminster and skeletal guidance from the Northern Ireland Office. This situation persisted until February 2024 notwithstanding the amendment of the Protocol under the Windsor Framework.

The reliance upon these listless 'indirect' rule (or administrative devolution) arrangements when Stormont is not functional amounts

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1 *New Decade, New Approach* (8 January 2020).

2 For an overarching account of the challenges of developing a Brexit deal workable in the Northern Ireland context, see C R G Murray, 'From oven-ready to indigestible: the Protocol on Ireland/Northern Ireland' (2022) 73(S2) Northern Ireland Legal Quarterly 8.

3 See J Tonge, 'Voting into a void? The 2022 Northern Ireland Assembly election' (2022) 93 *The Political Quarterly* 524.

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

to a constitutional aberration, although one which has come to be tolerated for Northern Ireland, even as the region finds itself simultaneously in the grip of a public services crisis resultant from deep funding cuts. This article explores the inherent weaknesses in Northern Ireland's post-1998 arrangements which have been exposed by these overlapping crises and why the UK Government has turned to the civil service to manage Northern Ireland's governance gap in these circumstances, before addressing whether there are meaningful routes out of the trap of governance without accountability into which Northern Ireland has repeatedly fallen.

### **THE 1998 AGREEMENT, THE BREXIT SHOCK AND THE PARALYSIS OF POLITICS**

The devolution arrangements established under the Belfast/Good Friday Agreement of 1998 were easy to disrupt as instituted and have remained so notwithstanding subsequent reforms. This is, indeed, inherent given the consociational nature of these arrangements, which rely upon cross-community power sharing within the Executive body and also provided for legislative mechanisms to defend perceived community interests.<sup>5</sup> Following the St Andrews Agreement, the two largest parties within the Stormont Assembly, which have the sole ability to nominate the First Minister and deputy First Minister respectively, can unpend devolution by withdrawing from these offices or refusing to nominate representatives to these offices after an election.<sup>6</sup> Such collapses, under the terms of the Northern Ireland Act 1998, trigger early Assembly elections if the rupture between the major parties cannot be promptly patched up.<sup>7</sup> Notwithstanding the avowed justifications for the repeated institutional collapses which have dogged power sharing, on each occasion the party instituting a collapse has undoubtedly perceived immediate electoral advantage in this course of action.

There have been efforts to limit the impact of such boycotts.<sup>8</sup> The Northern Ireland (Ministers, Elections and Petitions of Concern) Act 2022, entering into force just before the 2022 Assembly election, amended the Northern Ireland Act 1998 to reflect the recognition in

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5 B O'Leary, *A Treatise on Northern Ireland: Volume 3 Consociation and Confederation* (Oxford University Press 2019) 200–201. See also A Lijphart, 'Consociational democracy' (1969) 21 *World Politics* 207.

6 Northern Ireland Act 1998, s 16B(3).

7 *Ibid* s 32(3)–(4).

8 See, for example, the amendments to post-election negotiation periods enacted within the Northern Ireland (Stormont Agreement and Implementation Plan) Act 2016.

*New Decade, New Approach* that the rules for Executive formation needed to be adjusted to ensure that the institutions could 'continue to function throughout periods of political difficulty'.<sup>9</sup> The Act provided that, if the First Minister and deputy First Minister resigned, other ministers could continue to hold office for up to 48 weeks, blunting some of the immediate effect of a withdrawal from the Northern Ireland Executive.<sup>10</sup> This Act also ensured that during a 24-week post-election period ministers would continue to hold office and take decisions within their remit before fresh elections would, in theory, be triggered if a new Executive could not be formed.<sup>11</sup> This extended Executive formation period was intended to prevent what Lord Bingham referred to in the *Robinson* case, which was generated by the earliest rocky spell in post-1998 power sharing, as the risk of a 'persisting vacuum in the conduct of devolved government'.<sup>12</sup> Although legislation on Northern Ireland's governance is frequently rushed through Westminster with unseemly haste, this legislation was not passed until over two years after the *New Decade, New Approach* deal was concluded. Some of this delay was down to the prioritisation of the response to Covid-19 and the management of Brexit. By later 2021, however, the UK Government knew that the DUP boycott was looming, and it made no effort to hurry arrangements into place to tie the DUP's hands. Indeed, ministers in Johnson's Government highlighted the DUP's abandonment of power sharing to generate pressure on the European Union (EU) to come to a new deal over the Protocol,<sup>13</sup> even as they simultaneously made Janus-faced assertions that the DUP should return to power sharing.<sup>14</sup>

The Act's new arrangements provided for a 'cooling-off' period after the heightened tensions of an election campaign, but neither this window, nor the countdown to fresh elections, provided much impetus towards making power sharing work in circumstances in which one of the main parties sees electoral advantage in maintaining a boycott (especially when it can connect a boycott to its stance on Northern Ireland's constitutional status, thereby energising its core electoral support). In such circumstances, fresh elections do not amount to a meaningful threat. The DUP abandoned power sharing

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9 *New Decade* (n 1 above) pt 2, para 14.

10 Northern Ireland (Ministers, Elections and Petitions of Concern) Act 2022, s 2.

11 *Ibid* s 2.

12 *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, [15].

13 Elizabeth Truss MP, HC Deb, vol 717, col 38 (27 June 2022): 'The Northern Ireland protocol is undermining the function of the agreement and of power sharing.'

14 Conor Burns MP, HC Deb, vol 717, col 850–851 (5 July 2022): 'We will deal with the protocol, as we have been clear to the people of Northern Ireland, but we believe that they deserve a functioning devolved Government straight away.'

in February 2022 in protest over the extent to which the Northern Ireland Protocol's arrangements, particularly with regard to the rules for production and trade in goods, differentiate Northern Ireland from Great Britain. The Protocol also involved Northern Ireland continuing to be subject to significant areas of EU law as they developed, with limited direct input from the region's lawmakers. The DUP presented these arrangements as an existential threat to Northern Ireland's place in the UK. In response to these concerns the Protocol was reformed under the Windsor Framework, agreed between the EU and the UK Government in February 2023. The Framework included provisions for mitigating the level of checks necessary where goods are moving between Great Britain and Northern Ireland and a new system, the 'Stormont Brake', which enabled the Northern Ireland Assembly to raise objections to the application of new EU law measures operable under the terms of annex 2 of the Protocol which have a 'significant impact' within Northern Ireland.<sup>15</sup>

The DUP nonetheless remained dissatisfied. In terms of the Stormont Brake, Jeffrey Donaldson maintained that 'the "brake" is not designed for, and therefore cannot apply, to the EU law which is already in place and for which no consent has been given for its application'.<sup>16</sup> He thus asserts that a democratic deficit still exists in the operation of EU law in Northern Ireland, notwithstanding the fact that the terms of operation of these EU rules was explicitly accepted by the UK Parliament in its agreement of the Brexit deal and the provision in the deal for regular Northern Ireland Assembly votes on the underlying operation of the EU Single Market's goods rules under the Protocol's separate 'Stormont Lock' provisions.<sup>17</sup> In terms of trade rules, DUP grandee Lord Dodds has maintained that '[t]he Windsor Framework renders us worse off in terms of the Irish Sea border and creates greater checks and barriers to trade with the rest of the UK compared to what we have experienced thus far'.<sup>18</sup> The party's leadership might have expected, and not without reason given the chaotic implementation of the Protocol in early 2021, that the introduction of the Windsor Framework would involve major

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15 For an overview of the Windsor Framework, see C R G Murray and N Robb, 'From the Protocol to the Windsor Framework' (2023) 74 *Northern Ireland Legal Quarterly* 395.

16 J Donaldson, 'DUP statement ahead of vote on Windsor Framework' (*MyDUP* 20 March 2023).

17 Withdrawal Agreement (n 4 above), Protocol on Ireland and Northern Ireland, art 18. See C R G Murray and C A G Rice, 'Into the unknown: implementing the Protocol on Ireland/Northern Ireland' (2020) 15 *Journal of Cross Border Studies in Ireland* 17, 25.

18 Lord Dodds, 'Report proves problems have not been settled by Windsor Framework' (*MyDUP* 25 July 2023).

upheavals, helping to justify its stance. The UK Government and the EU had, on this level at least, learned from the earlier debacle and the phased implementation and extended notice periods saw the Windsor Framework start to roll out with little attendant confusion. The first of the rules applicable to goods movements took effect in October 2023. Nonetheless, having convinced its electoral base that these arrangements undermine Northern Ireland's constitutional status, the DUP did not experience significant pressure from its supporters to end its boycott.<sup>19</sup>

As the DUP complained from the sidelines, the Windsor Framework has become operative, bypassing the DUP's stand against it. In the post-Johnson era, Brussels and London have sought to prevent their post-Brexit relationship from continuing to be defined by Northern Ireland as it was during both the Brexit negotiations and the turmoil of 2021–2022. This means that there was no foreseeable possibility of reopening of the deal and no obvious outlet for the DUP's efforts to extract further concessions over its terms. An additional DUP aim, in these circumstances, became the achievement of some measure which alters the extent to which the trade provision of the Act of Union, article VI, has been abridged by the operation of the UK–EU Withdrawal Agreement. This would safeguard, within domestic law, the concept that there will be no fetters on trade between Northern Ireland and Great Britain.<sup>20</sup> The UK Government, however, would ultimately need to have some means of distinguishing which goods qualify as coming from Northern Ireland for the purpose of special arrangements, thereby generating a need for checks. Moreover, any legislative 'guarantee' of access of goods from Northern Ireland which was intended to build upon the 'unfettered access' provision of the UK Internal Market Act 2020 is subject to later amendment or repeal.<sup>21</sup> Given that article VI of the Act of Union has, as the UK Supreme Court has confirmed, been modified in light of Parliament's legislation to give effect to the Protocol, there is no alternate form of statutory protection which cannot be later unpicked or adjusted.<sup>22</sup> The DUP's stated aims were thus irreconcilable with the operation of parliamentary sovereignty.

These constitutional debates over the Protocol's operation became intertwined with claims that its terms disadvantage Northern Ireland relative to Great Britain post-Brexit. A difficulty with analysing such

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19 See K Hayward, 'Northern Ireland: the Protocol and the peril' (2022) 13 *Political Insight* 36.

20 Withdrawal Agreement (n 4 above), Protocol on Ireland and Northern Ireland, art 6.

21 United Kingdom Internal Market Act 2020, s 47(1).

22 *In re Allister* [2023] UKSC 5, [66]–[68] (Lord Stephens)

assertions, however, is that it was hard to adequately compare the special arrangements for Northern Ireland to those applicable to Great Britain post-Brexit. Brexit was always going to generate new trade barriers, but even though the Protocol was only ever partially implemented, the trade disruptions across the Irish Sea stood out because post-Brexit controls on animal and plant products entering Great Britain had yet to be implemented. It is thus impossible to get a full understanding of the Windsor Framework's benefits for Northern Ireland, balanced against the challenges it generates, when such goods continue to flow freely from the EU into all parts of the UK. The implementation of Great Britain's post-Brexit border controls on goods movements from the EU have been repeatedly delayed. They were to come into place in Great Britain in the autumn of 2023, alongside the first of the Windsor Framework changes. These controls, which Northern Ireland will not face, will inevitably bring with them increased costs. The UK Government, however, prioritising its pledges to tackle food price inflation, once again opted to delay the implementation of these controls until early 2024. Only after these new frontier rules, including physical checks, entered full effect would the amended Protocol's benefits for Northern Ireland, in terms of unimpeded flows of EU goods, be able to be properly assessed.

The DUP boycott dragged on into 2024. Indeed, even if the Protocol's benefits were set to become more apparent, having presented the Brexit deal as an existential threat to Northern Ireland's place within the UK, the DUP leadership felt that it had little room to pivot back to power sharing. It has been claimed that the DUP leader, Sir Jeffrey Donaldson, faced a 'Trimble Moment' in the latter half of 2023, when, like David Trimble in 1998, he was confronted with the prospect that acting in the best interests of Northern Ireland might well split his party, with the added piquancy that he had been one of the politicians who abandoned Trimble over the 1998 Agreement.<sup>23</sup> In reality, however, the two moments are very different. Trimble felt the acute pressure of decades of conflict in Northern Ireland. Twenty-five years on, Donaldson did not perceive the same danger of a collapse back into widespread violence, no matter how divided the region remains. The success of the peace process enabled the ongoing political stagnation; the supposed Trimble Moment dragged on for months.

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23 J Webber, 'Jeffrey Donaldson faces his "Trimble moment" in Northern Ireland' *Financial Times* (London 10 August 2023).

## DIRECT AND INDIRECT RULE

Long before the travails of Brexit, the UK Government became well practised at responding to failures of post-1998 power sharing. When the devolved institutions first buckled under the multiple pressures of the ongoing peace process, including efforts to secure weapons decommissioning and normalise policing, Tony Blair's Government's immediate response was to return to the familiar solution of direct rule, which had operated for much of the Northern Ireland conflict and which involved 'the exercise of all functions of government in Northern Ireland by the UK Government'.<sup>24</sup> The terms of neither the Agreement nor the Northern Ireland Act 1998 envisaged 'a lengthy vacuum of power in Northern Ireland', and a new 'express statutory provision' was therefore necessary.<sup>25</sup> Northern Ireland Office ministers assumed the management of executive functions and Westminster legislated by Order in Council in areas which would ordinarily have been 'transferred' to Stormont's competence under the Northern Ireland Act 2000.<sup>26</sup> For Brendan O'Leary, this unilateral intervention by the UK Government was a breach of the 1998 Agreement, although one excusable in the circumstances of trying to provide some stability as power sharing stuttered.<sup>27</sup> It is worth noting, however, that once the 2002 collapse was acknowledged to be intractable, the UK and Irish Governments concluded an Exchange of Notes to enable Strand Two North–South implementation bodies to continue to operate on the basis of representatives of the Northern Ireland departments attending instead of ministers.<sup>28</sup> This is significant when the operation of Strand Two bodies is ordinarily 'interdependent' with the operation of power sharing under Strand One.<sup>29</sup> The post-1998 arrangements were thus made to accommodate this introduction of direct rule from Westminster and Whitehall, with the Irish Government's acquiescence.

UK governance operates on the basis of a clear divide between the roles of ministers and civil servants. The Cabinet Manual, the document detailing constitutional roles of public actors in the UK, states that the civil service 'supports the government of the day in developing and

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24 D Birrell, *Direct Rule and the Governance of Northern Ireland* (Manchester University Press 2009) 1.

25 *In re Hughes* [2018] NIQB 30, [67] (Girvan LJ).

26 B Hadfield, 'The suspension of devolution in Northern Ireland: new story or old story?' (2003) 9 *European Public Law* 49.

27 O'Leary (n 5 above) 310.

28 Exchange of Notes dated 19 November 2002 Between the Government of Ireland and the Government of the United Kingdom of Great Britain and Northern Ireland concerning certain Decisions of the North/South Ministerial Council and related matters (2002) *Irish Treaty Series* 5, 7.

29 *In re Napier* [2021] NIQB 120, [41] (Scofield J).



implementing its policies, and in delivering public services' and that civil servants 'are accountable to ministers' for their role in the policy and decision-making process of public bodies.<sup>30</sup> As the Civil Service Code further explains, officials must not 'frustrate the implementation of policies once decisions are taken by declining to take, or abstaining from, action which flows from those decisions'.<sup>31</sup> This injunction, however, presupposes that such policy decisions have been taken by an accountable minister. The Northern Ireland Civil Service is not, in light of historical constitutional divisions between Ireland and Great Britain, part of the UK's Home Civil Service, but these principles, and the unique agency of ministers to determine overarching policy which officials implement, apply equally to it.<sup>32</sup> Direct rule addressed these requirements by ensuring ministerial authority for decision making in Northern Ireland, with new Orders in Council subject to debates and votes and ministers obliged to take questions from MPs, even if many of these sessions were poorly attended between 2002 and 2007.<sup>33</sup>

The mere fact that Northern Ireland's power-sharing institutions are not functioning does not, of itself, provide a basis for civil servants to step into the policy-making arena. This became evident in the aftermath of the 2017 collapse of power sharing, when a Conservative Government overburdened by the aftermath of the Brexit referendum simply left the Northern Ireland Civil Service to manage governance in the region after the Assembly election of March of that year. It was hoped that all that Westminster would have to do in these circumstances would be to pass an annual budget and that the civil service would administer departmental functions in accordance with its requirements.<sup>34</sup> But this stance made no allowance for the need of departments to take decisions which would ordinarily need ministerial approval. As the Northern Ireland Court of Appeal accepted in *Buick*, 'the devolved constitutional arrangements elsewhere in the UK do not permit civil servants to act without being accountable to Ministers'.<sup>35</sup> There was no legal basis for a more extensive role in the Northern Ireland context; 'any decision which ... would normally go before the Minister for approval lies beyond the competence of a senior civil servant in the absence of a Minister'.<sup>36</sup> As a result of the *Buick* case,

30 HM Government, *The Cabinet Manual: A Guide to Laws, Conventions and Rules on the Operation of Government* (Stationery Office 2011) 56.

31 HM Government, *The Civil Service Code* (16 March 2015).

32 NI Department of Finance, 'The Northern Ireland Civil Service Code of Ethics' (2023) paras 2 and 13.

33 Birrell (n 24 above) 43–45.

34 A Evans, 'Northern Ireland, 2017–2020: an experiment in indirect rule' [2021] Public Law 472, 473–474.

35 *In re Buick* [2018] NICA 26, [62] (Treacy LJ).

36 *Ibid* [56] (Morgan LCJ and Stephens LJ).

the Northern Ireland (Executive Formation and Exercise of Functions) Act 2018 was enacted, with section 3(1) providing that the

absence of Northern Ireland Ministers does not prevent a senior officer of a Northern Ireland department from exercising a function of the department during the period for forming an Executive if the officer is satisfied that it is in the public interest to exercise the function during that period.

The Constitution Committee, reviewing the legislation, adopted an 'only in Northern Ireland' stance in relation to this provision:

We accept, reluctantly, that an exceptional response is justified to protect the people of Northern Ireland from a potentially significant damaging impact on the provision of services. We emphasise that in any other circumstances provisions such as these which challenge established constitutional principles would not be acceptable.<sup>37</sup>

The statute thus amounted to an abject admission of the profound weakness of Northern Ireland's governance order. In order to circumvent further legal challenges, these new powers were made retroactively applicable to any civil service activity since the March 2017 Assembly election. A tincture of ministerial involvement was provided by the Secretary of State issuing a framework of guidelines for the use of these new powers. Under this new dispensation the governance of Northern Ireland could be kept ticking over, but civil servants remained reluctant to take any far-reaching actions without ministerial authority. After *Buick*, moreover, this legislation provided no meaningful cover for civil servants to act in the context of 'cross-cutting' decisions which in ordinary circumstances would need the approval of the Northern Ireland Executive as a Committee, not merely of the individual minister.<sup>38</sup>

Indirect rule between 2017 and 2020 was therefore a deeply problematic arrangement which, the courts concluded, did 'not provide good governance for Northern Ireland'.<sup>39</sup> It nonetheless held three singular advantages for the UK Government over the alternative of direct rule at the time. First, the operation of direct rule on a basis of 'rigorous impartiality' was not a practical possibility when the Conservative Government relied on the votes of the DUP for its parliamentary majority. Second, Conservative ministers baulked at the prospect of the increased consultation obligations with Dublin over public policy affecting Northern Ireland which would accompany

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37 Constitution Committee, *Northern Ireland Bill* (2018) HL 211, para 24.

38 *Buick* (n 35 above) [58] (Morgan LCJ and Stephens LJ). See Northern Ireland Act 1998, s 20 and s 28A. See also A Deb, 'The legacy of Buick: Northern Ireland's chaotic constitutional crucible' (2019) 23 *Edinburgh Law Review* 259.

39 *In re JR80* [2019] NICA 58, [109] (Stephens LJ).

direct rule. This was a function of the pivotal role of the DUP in the House of Commons between June 2017 and December 2019 and of fraught UK–Ireland relations in the context of Brexit. Third, indirect rule minimised the degree to which Westminster had to give over time to transacting business which would ordinarily have been transferred to Stormont. Even so, multiple budgets and extraordinary legislative extensions to the timeframe for Executive formation did become necessary as indirect rule dragged on, and campaigns to liberalise Northern Ireland's abortion laws and provide for same-sex marriage broke onto the Westminster agenda in 2019 as the Conservative Party's hold over the House of Commons became ever more tenuous.<sup>40</sup>

Notwithstanding these issues, the general usefulness of indirect rule as a governance tool saw it duplicated, under the Northern Ireland (Executive Formation) Act 2022, when power sharing once again collapsed. This legislation was rushed onto the statute books in December 2022, just over a month after the period of caretaker ministries following the May 2022 Assembly elections elapsed. Up until the statutory deadline of 28 October 2022, the Secretary of State for Northern Ireland had insisted that he was subject to a 'legislative requirement' to call fresh elections and that he 'cannot see the space for any emergency legislation'.<sup>41</sup> As noted above, however, the threat of new elections generated little leverage in the circumstances of the ongoing boycott, and the UK Government thus reverted to allowing civil servants 'to take a limited set of decisions when it is in the public interest to do so'.<sup>42</sup> Section 3 of the new legislation thus recapitulated, almost word for word, the power of the civil service to administer public services in Northern Ireland without direct ministerial involvement. Also in keeping with the 2018 Act, section 4 provided for a bridging provision, retrospectively authorising civil service decision making which had taken place between 28 October and the enactment of the new legislation. This intervention was unlikely to have been particularly useful in practice. As with Acts of indemnity, which Dicey had once extolled as an effective means to retrospectively protect agents of the state for actions taken during an emergency,<sup>43</sup> Northern Ireland's civil

40 Northern Ireland (Executive Formation etc) Act 2019. See Evans (n 34 above) 477.

41 Northern Ireland Affairs Committee, 'Oral evidence: work of the Secretary of State for Northern Ireland' (2022) HC 86, Q334 (Chris Heaton-Harris MP).

42 Chris Heaton-Harris MP, HC Deb, vol 723, col 824 (29 November 2022).

43 A Dicey, *An Introduction to the Study of the Constitution* 8th edn (Liberty Fund 1982, first published 1915) 142–145. See also C R G Murray, 'Shifting emergencies from the political to the legal sphere: placing the United Kingdom's derogations from the ECHR in historical context' in M Saul, A Follesdal and G Ulfstein (eds), *The International Human Rights Judiciary and National Parliaments: Europe and Beyond* (Cambridge University Press 2017) 198.

servants did not regard the prospect of forthcoming legislation which would retroactively authorise their actions with any great enthusiasm, especially given Heaton-Harris's earlier pronouncements that no stop-gap legislation would be forthcoming.<sup>44</sup> At best, section 4 provided a basis for authorising urgent decisions which could not be delayed.

This legislation, in sum, highlights how an extensive range of UK constitutional principles works very differently in the Northern Ireland context. The UK Government went through the motions of presenting this return to civil service governance as an unfortunate temporary measure, a 'stopgap' which 'is not intended to be a long-term solution to the issues that Northern Ireland faces'.<sup>45</sup> But as the new Act's extended deadlines for Executive formation were inevitably missed, and with fresh elections as unattractive as ever, the UK Government abandoned the pretence that technocratic governance was a temporary fix. Under the Northern Ireland (Executive Formation and Organ Donation) Act 2023 the next putative deadline for Executive formation was extended until mid-January 2024.<sup>46</sup> Thereafter, in the Northern Ireland (Interim Arrangements) Act 2023, the time limits on civil service administration were removed, enabling indirect rule to continue until 'an Executive is next formed'.<sup>47</sup> The UK Government was thus becoming increasingly adept at pushing Northern Ireland affairs to the margins of Westminster's legislative agenda. The real innovation of this second period of indirect rule was in translating this form of governance from stopgap to Northern Ireland's 'new default alternative to devolution'.<sup>48</sup> But all of these statutory interventions carry a cost. The underlying message of the repeated extensions to the Executive-formation period is that in Northern Ireland legal obligations are very much mutable. This shapes the behaviour of its parties, including the DUP simply ignoring a judicial declaration over the unlawfulness of its withdrawal from North–South bodies.<sup>49</sup>

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44 Civil servants in the Executive Office confirmed that, even after the legislation had passed the Commons, they continued to be guided by the legal limits on their role identified in the *Buick* judgment: R Sheeran, 'Stormont: who is minding the shop without any ministers?' (*BBC News* 3 December 2022).

45 Chris Heaton-Harris MP, HC Deb, vol 723, col 823 (29 November 2022).

46 Northern Ireland (Executive Formation and Organ Donation) Act 2023, s 1(2).

47 Northern Ireland (Interim Arrangements) Act 2023, s 1.

48 A Evans, 'From an experiment to a new normal: indirect rule in Northern Ireland' [2023] Public Law 549, 555.

49 As Scofield J has recognised, in the context of the fragility of constitutional governance in Northern Ireland, 'it is incumbent upon those in political leadership to reflect on the example set when they choose to wilfully ignore clear legal obligations to which they are subject': *Napier* (n 29 above) [82].

## A VICIOUS CYCLE OF GOVERNANCE FAILURE

This crisis of governance was exacerbated by a parallel crisis for Northern Ireland's public finances. In mid-October 2022, the Northern Ireland Secretary was downplaying the budget he was preparing to impose on Northern Ireland as 'a small technical piece of legislation'.<sup>50</sup> By late 2022, however, a perfect storm for public finances had been generated by severe inflationary pressures, the need to repay overspending during the months in 2022 when Stormont ministers continued in office without legislative oversight (an unwelcome side-effect of the extended period of ministerial office after an election under the Northern Ireland (Ministers, Elections and Petitions of Concern) Act 2022), and a more restricted funding allocation by the UK Government by comparison to previous years. The extra funding negotiated as part of the DUP's confidence-and-supply agreement with Theresa May's beleaguered Conservative Government in 2017 had temporarily disguised the underlying weakness of Northern Ireland's public finances, but the end of this one-off boost to public finances only made this drop-off in the block grant more precipitous.<sup>51</sup>

Into this crisis waded the Northern Ireland Secretary, Chris Heaton-Harris, who between mid-October and mid-November 2022 developed a sudden determination to plug the £660 million shortfall in public finances which had opened up during the 2022–2023 financial year.<sup>52</sup> This was no longer to be downplayed as a dry, 'technical' budget; after all, it is rarely harmful for the prospects of an ambitious Conservative minister to be regarded as a bastion of fiscal rectitude, especially when his party has no elected representatives in Northern Ireland to challenge the impact of cuts. A divided society still adapting to the aftermath of a protracted conflict, however, inevitably brings with it additional costs, including those arising from the duplication in the provision of services. These challenges have generated intense difficulties for the Executive for years.<sup>53</sup> UK Government ministers, however, have scarcely acknowledged these structural challenges for efficient

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50 Northern Ireland Affairs Committee (n 41 above) Q339 (Chris Heaton-Harris MP).

51 Cabinet Office, 'Confidence and Supply Agreement between the Conservative and Unionist Party and the Democratic Unionist Party' (June 2017). The extra funding provided under this arrangement came after a previous round of retrenchment under the austerity measures imposed by the UK Government between 2010 and 2017: see B Dickson, 'Devolution in Northern Ireland' in J Jowell, D Oliver and C O'Connell (eds), *The Changing Constitution* 9th edn (Oxford University Press 2019) 239, 260–261 and 264–265.

52 Chris Heaton-Harris MP, HC Deb, vol 723, col 14WS (24 November 2022).

53 See K O'Connor, *Public Administration in Contested Societies* (Palgrave 2014) 64–86.

public service provision in their zeal to constrain public spending in Northern Ireland.<sup>54</sup> And although the Secretary of State maintained that the cuts required by the Northern Ireland Budget Act 2023 and Northern Ireland Budget (No 2) Act 2023 were focused purely on addressing Northern Ireland's budget deficit and were not a means to exert pressure upon the DUP to abandon a boycott which had outlived its usefulness to the Conservatives' post-Brexit agenda, they have undoubtedly provided the UK Government with additional leverage over the party.<sup>55</sup> The intertwining of the boycott and the budget crises, however, potentially distracted from the latter's unique seriousness. Even after decades of stop-start power sharing, the current budgetary pressures are so profound that far from galvanising Northern Ireland's politicians, they rendered the task of governing Northern Ireland as so daunting as to become an additional barrier to restoring Stormont. No local politician would want to take responsibility for cuts on the scale Conservative ministers were requiring. But then, neither did the UK Government, given that it shifted responsibility for the management of this debacle onto the Northern Ireland Civil Service.

The October 2022 imposition of indirect rule, as noted above, mirrors the arrangements instituted during the 2017 to 2020 collapse of power sharing, with civil servants being tasked with managing a form of administrative devolution with limited input from Westminster and Whitehall. The invidious funding picture, however, has made the civil service's task between 2022 and 2024 radically different from the earlier era. Civil servants were not being tasked with temporarily keeping the administration of government ticking over, they were being asked to suddenly halt significant elements of public sector activity. They were moreover required, on an open-ended basis since the enactment of the Northern Ireland (Interim Arrangements) Act 2023, to actively set policy priorities in this funding context. Although it can be tempting to think of Northern Ireland's governance order as being held in stasis by these arrangements, this was not the case amid the funding crisis. Civil servants were constrained, by the absence of direct ministerial authority and concerns over the cross-cutting nature of more extensive reforms to public administration, from undertaking the very work which could address issues such as duplication in public service provision.<sup>56</sup> Every day of such deferred decisions under administrative devolution thereby

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54 These issues are occluded in the UK Government's euphemistic framing of 'the systemic issues that are facing public services': Chris Heaton-Harris MP, HC Deb, vol 723, col 16WS (24 November 2022).

55 N Emerson, 'Stormont's budget cut is a manufactured problem' *Irish News* (Belfast 26 April 2023).

56 See, for example, Department of Education, *Annual Report and Accounts 2022–23* (15 November 2023) HC 21, 45.

added to a backlog of structural reforms which the UK Government regards as overdue and further exacerbates cost overruns.

The cuts imposed since late 2022, moreover, had a cumulative impact on many of the most marginalised people in society; the same families affected by the sudden end to holiday hunger payments for school children by the Department for Education lost out as a result of the cuts to youth group funding and the social welfare provision of discretionary support imposed by the Department for Communities.<sup>57</sup> Cuts to programmes which tackled educational underachievement cannot simply be reversed at a later date: they created cohorts of left-behind pupils with long-term societal implications.<sup>58</sup> Civil servants were required to manage the cuts necessary to meet these budgetary constraints under the terms of loose and conflicting guidance supplied by the Secretary of State for Northern Ireland.<sup>59</sup> This Guidance, modelled on that put in place between 2017 and 2020, was inadequate to the straitened budgetary circumstances. Senior officials were informed that the 'primary principle' in determining whether it was in the public interest that they act without ministerial authorisation was that they 'must control and manage expenditure within the limits of the appropriations set out in Budget Acts'.<sup>60</sup> But this was subject to a prior statement that 'major policy decisions' and, specifically, 'a major change of an existing policy, programme or scheme' should ordinarily be left for ministers to decide or agree.<sup>61</sup> The prioritisation of meeting the requirements of the Budget Acts, moreover, necessitated immediate cuts, notwithstanding their long-term implications. The resultant problems that this approach stored up for Northern Ireland are severe and cannot be squared with the countervailing priority in the Guidance 'to maintain the delivery of public services as sustainably, effectively, and efficiently as possible'.<sup>62</sup>

There was, moreover, a logical inconsistency in Chris Heaton-Harris's position that the cuts were nothing to do with generating pressure for a restoration of power sharing, but that more money could be available if Stormont was restored. For all his insistence that funding alone 'will not solve' the challenges Northern Ireland faces,

57 C Fitzpatrick et al, *The Consequences of the Cuts to Education for Children and Young People in Northern Ireland* (Stranmillis University College 2023) 27.

58 Ibid 24.

59 Department of Education (n 56 above) 17–18.

60 C Heaton-Harris, *Guidance on decision-making for Northern Ireland Departments until an Executive is formed or for the six month period beginning with the day on which the NI (Executive Formation etc) Act 2022 is passed (6 December)* (2022) CP 766, para 10(a).

61 Ibid para 9.

62 Ibid para 10(d). The Guidance was renewed in 2023 to reflect indirect rule being put onto an open-ended footing.

the sudden withdrawal of funding undoubtedly exacerbated them.<sup>63</sup> After more than a year of swingeing cuts, Northern Ireland's public sector remained unable to meet the spending limits imposed by Westminster, with civil servants struggling to both balance the books and recoup previous spending overruns.<sup>64</sup> The UK Government's plans thus belatedly turned to additional avenues for raising revenue within Northern Ireland, from the introduction of distinct water charges to increases in student fees. Such steps replay the sort of pressure applied ahead of the St Andrews Agreement.<sup>65</sup> They also took the Northern Ireland Office more deeply into the task of making active governance choices for Northern Ireland, notwithstanding the limited oversight of its activity.<sup>66</sup> Rather than ramping up pressure on the DUP boycott, however, such proposals further intensified the problem. If efforts to raise additional revenue appear inevitable alongside funding cuts, many politicians in Northern Ireland would rather complain about the Secretary of State's impositions than be responsible for implementing such changes themselves. And even the prospect of a slightly improved financial settlement would not alleviate hard choices over Northern Ireland's public services; it was widely assumed that any new money would come with unattractive strings attached.

## ROADS UNTRAVELLED OUT OF NORTHERN IRELAND'S OVERLAPPING CRISES

The DUP adopted and maintained a position of opposition to Northern Ireland's post-Brexit arrangements which could not be satisfied by the EU and UK Government. This position was the core of the party's message, making it difficult for its leadership to adapt its stance towards the Windsor Framework and keep the party and its support base from fracturing ahead of the next UK general election. Added to that, returning to the Northern Ireland Executive meant taking responsibility for administering funding inadequate to the public sector's needs and playing second fiddle to Sinn Féin following the

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63 J McCormack, 'NI secretary says funding alone will not solve financial challenges' (*BBC News* 10 July 2023).

64 'Stormont on course for half a billion overspend' (*RTE News* November 2023).

65 See, for example, the promulgation of the Water and Sewerage Services (Northern Ireland) Order 2006 (SI 2006/3336), and the prospect of water charges was accompanied by a ministerial recognition that '[a]n incoming Assembly would be free to reverse the process, but it would have to find the money to keep the investment going into water and sewerage services that they desperately need': David Cairns MP, HC Deb, vol 450, col 282 (11 October 2006).

66 Some proposals, such as those for the continuation of hospital car-parking charges, would involve Westminster overriding recent Assembly legislation: Hospital Parking Charges (Northern Ireland) Act 2022.



latter's electoral success. These realities blunted successive efforts to restore power sharing, no matter how often the UK and Irish Governments paid lip service to the 'critical importance' of this end.<sup>67</sup> That focus on restoring power sharing, however protracted the task, appeared to operate to the exclusion of other options by which to either circumvent a boycott by one of the major parties or, at least, to deliver better governance for Northern Ireland notwithstanding the collapse of power sharing. This section reflects upon these options, and on why the two governments did not pursue them more actively.

### **Adjusting the operation of consociationalism**

The immediate aim of the Northern Ireland peace process has always been modest – to provide for what Rick Wilford described as 'a durable, if interim, political accord'.<sup>68</sup> Within that rubric, the governance arrangements established under Strand One of the 1998 Agreement have been demonstrated to be transitional; they work until they do not. At various points when these arrangements have buckled in the last quarter century, efforts have been made towards addressing the particular impasse, which have included adjustments to significant features of power sharing. In 2006, for example, responses to the issues of weapons decommissioning and support for policing came alongside adjustments to the system of appointments to the offices of First Minister and deputy First Minister within the St Andrews Agreement. In 2020, the *New Decade, New Approach* deal tackled substantive issues, including around language rights and the management of Brexit, but it also modified the petition of concern mechanism and, as we have seen above, the arrangements around Executive formation. Northern Ireland's governance architecture has thus been adaptive to the changing needs of society as the lived reality of the conflict recedes, even if those adaptations have only ever been precipitated by crisis.

Against the backdrop of the dysfunction of power sharing since January 2017, this evidence of transition within Northern Ireland's governance arrangements generates questions over when the 1998 Agreement's consociational provisions can be said to have become obsolete. There is no structured means by which to wean Northern Ireland's system of governance off aspects of consociationalism where these have come to undermine good governance.<sup>69</sup> As John Nagle writes of consociational systems more generally, this is a common problem; '[o]ne of the main problems in relation to zombie power-

67 Northern Ireland Office, 'BIIGC June 2023 Joint Communiqué' (19 June 2023).

68 R Wilford, 'Northern Ireland: St Andrews – the long Good Friday Agreement' in J Bradbury (ed), *Devolution, Regionalism and Regional Development: The UK Experience* (Routledge 2008) 67, 67.

69 See Dickson (n 51 above) 267.

sharing is not just the evisceration of the state; it is its incapacity to reform and transform'.<sup>70</sup> The lack of a structured off ramp puts the issue in the hands of the two governments, and there are various interventions that they could make in response to the boycott by a major party. With regard to the Executive, the two governments have previously agreed adjustments to the system for electing the First and deputy First Ministers in the St Andrews Agreement. On a legislative level, the Assembly could be restored by an intergovernmental agreement to amend the cross-community super majority which the Northern Ireland Act requires for the election of its Speaker. Or, in the more limited alternative Adam Evans suggests, Assembly committees could be enabled to function if steps were taken 'to bypass a Speaker election and go straight to using D'Hondt to determine which party secures which committee chair and to populate the committees'.<sup>71</sup> Even at this more limited end of the spectrum of interventions, which would do no more than restore some level of Assembly oversight of the operation of Northern Ireland departments, the governments could expect concerted opposition.

Neither of Stormont's major parties, both of which have used boycotts, would find such a reform acceptable. Even at the height of the DUP's Protocol boycott, Sinn Féin sidestepped any suggestion that a workable solution lay in reform of power sharing.<sup>72</sup> Any of the prospective adjustments to the rules around the functioning of the Strand One structures amounts to a significant departure from the 1998 Agreement. The Governments of the UK and Ireland undoubtedly could alter the terms of their treaty. Indeed, previous adjustments to the 1998 arrangements have not always resulted from the active participation by Northern Ireland's major parties in negotiations, but instead 'represented the best estimates of the UK and Irish Governments of the terms upon which Northern Ireland's political and constitutional future could evolve'.<sup>73</sup> To address the persistent problem of boycotts, however, the UK and Irish Governments would have to make an obvious abridgement of the post-1998 arrangements without general acceptance across Northern Ireland's major parties. In response to Alliance Party entreaties in July 2022, the UK Government asserted that 'any recalibration or update of the agreements, and of the institutions and mechanisms that flow from them, is best achieved

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70 J Nagle, 'Consociationalism is dead! Long live zombie power-sharing!' (2020) 20 *Studies in Ethnicity and Nationalism* 137, 142.

71 Evans (n 48 above) 557.

72 See J Manley, 'Sinn Féin and DUP fail to support MPs' Stormont reform recommendations' *Irish News* (Belfast 4 December 2023).

73 Wilford (n 68 above) 67.

through cross-party agreement'.<sup>74</sup> Even as late as October 2023, with the DUP boycott seemingly unresolvable, the Irish Government likewise maintained that '[i]t would be premature to talk about reform while the institutions are not up and running'.<sup>75</sup> This gives rise to a paradox in the reform of consociationalism, that pressure for reform is most acute when these institutions are not functioning, but the two governments are often reluctant to make significant interventions in these circumstances. Even if it was generally presumed in 1998 that Northern Ireland would eventually need to scale back, or at least adjust, the operation of consociational arrangements as a post-conflict society emerged, there is no indication that the government or opposition parties in Ireland or the UK regarded this as an appropriate response to the DUP boycott.<sup>76</sup>

### **Direct rule: the intergovernmental partnership remix**

The challenges inherent in reforming power sharing to restrict the impact of boycotts without undermining key tenets of consociationalism have spurred interest in alternative modes of accountable governance. The problem, however, is that most actors disagree with what this might involve; there is a gulf between accounts of direct rule and joint authority when these terms are invoked by unionist and nationalist politicians. There is no provision for an expansive conception of joint authority under the 1998 Agreement, and indeed the intergovernmental development of such arrangements would run counter to the Agreement's undertaking that any changes to the UK's statehood over Northern Ireland require the consent of the people of Northern Ireland.<sup>77</sup> Conversely, however, direct rule would require fresh legislation from Westminster and, as noted above, to be compatible with the 1998 Agreement would require Dublin's assent. Direct rule would therefore undoubtedly bring with it pressure for more substantive operation of the British–Irish Intergovernmental Conference, under Strand Three of the Belfast/Good Friday

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74 Conor Burns MP, HC Deb, vol 717, col 852 (5 July 2022).

75 Sean Fleming TD (Minister of State at the Department of Foreign Affairs), Dáil Éireann Deb, Speech 84 (25 October 2023).

76 A Commons' Select Committee suggested the use of a Citizens' Assembly on Stormont reform to reach over the heads of parties seeking to stymie potential reforms: Northern Ireland Affairs Committee, *The Effectiveness of the Institutions of the Belfast/Good Friday Agreement* (2023) HC 45, para 162.

77 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, British–Irish Agreement, Constitutional Issues, para 1. See *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [135].

Agreement 1998.<sup>78</sup> This provides a mechanism for intergovernmental cooperation, including the Irish Government being consulted by UK ministers about aspects of Northern Ireland's governance within their remit. The Intergovernmental Conference ordinarily addresses policy issues reserved to the UK Government, but there is scope to extend its operation to address all public policy issues affecting Northern Ireland in periods when power sharing is not functioning, and the UK Government steps into its place.<sup>79</sup> For some unionists, however, the Conference raises dark memories of the operation of the Intergovernmental Council under the Anglo-Irish Agreement and the explicit admission of Northern Ireland's difference from other parts of the UK. Such a prospect also raises uncomfortable questions for a UK Government fixated, amid Brexit, upon maintaining the image of national sovereignty.

By mid-2023 the Irish Government was increasingly flagging the need to consider 'Plan B' in response to the collapse of Northern Ireland's devolved institutions, as efforts to restore power sharing stalled.<sup>80</sup> This term can sometimes seem like a deliberate abstraction; a formulation designed to appear as unthreatening as possible to unionists while nodding in the direction of joint authority to nationalists, but in reality satisfying neither. Plan B, however, dates from the period prior to the St Andrews Agreement when the two governments sought to develop a long-term alternative to direct rule as it had hitherto operated should power sharing not be restored. As a Joint Statement from April 2006 recognised:

We are beginning detailed work on British–Irish partnership arrangements that will be necessary in these circumstances to ensure that the Good Friday Agreement, which is the indispensable framework for relations on and between these islands, is actively developed across its structures and functions. This work will be shaped by the commitment of both Governments to a step-change in advancing North–South co-operation and action for the benefit of all.<sup>81</sup>

The UK Government promised legislation to give effect to these commitments if power sharing was not restored.<sup>82</sup> Following this Statement, Bertie Ahern, then Taoiseach, explained this step-change in intergovernmental cooperation as follows:

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78 See Leo Varadkar TD (Taoiseach), Dáil Éireann Deb, vol 986, no 2, Speech 264 (18 September 2019).

79 O'Leary (n 5 above) 311.

80 G Gordon and R McKee, 'Stormont stalemate: Irish PM calls for Plan B talks if autumn opportunity missed' (*BBC News* 9 August 2023).

81 Joint Statement by Tony Blair and Bertie Ahern on the recalling of the Assembly, Armagh (6 April 2006) para 10.

82 *Ibid* para 11.

Plan B ignores the politicians of Northern Ireland and the deals and co-operation and partnership basis between the two governments [sic]. We would have to do that because we're the custodians of the Agreement and we're the stewards of the process – but that is not by a long shot our preferred option.<sup>83</sup>

On these terms, a partnership arrangement is evidently an eventuality that the two governments have historically accepted as being compatible with the 1998 Agreement.<sup>84</sup>

The persistent dysfunctionality of power sharing since January 2017 is comparable to the prolonged breakdown hiatus between 2002 and 2007, if not worse given the shortcomings of indirect rule and the crisis engulfing Northern Ireland's public services. This model of intergovernmental partnership, even though it stops well short of joint sovereignty, would require the UK Government to consult the Irish Government over proposed public service cuts, and even provide the basis for an integrated approach to Dublin providing funding for elements of public service provision or infrastructure of benefit to Northern Ireland.<sup>85</sup> The partnership model also moves beyond the caretaker operation of indirect rule; it allows the two governments to address structural issues in governance and public service provision in Northern Ireland and provides for parliamentary accountability. Such an approach could also have made inroads on some of the backlog of policy issues which have built up since 2017.<sup>86</sup> This model thus provides for a unique protection for Northern Ireland in the context of the UK's other devolution arrangements, and a necessary one given the scale of the cuts being imposed between 2022 and 2024.

The insurmountable difficulty, however, was that the close intergovernmental cooperation which existed in 2006 has been undermined by the acrimony over Brexit.<sup>87</sup> Even if the Irish Government were to explicitly challenge open-ended indirect rule as

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83 D Keenan, 'Ahern's "Plan B" sidelines North's parties' *Irish Times* (Belfast 10 April 2006).

84 See Peter Hain MP, HC Deb, vol 458, col 1310 (27 March 2007).

85 The Irish Government currently manages this support under its Shared Island Fund: see C Buckler and L-A McKeown, 'Micheál Martin defends Dublin's investment in Northern Ireland' (*BBC News* 8 November 2023).

86 To take just one example, Northern Ireland's legislation on the gender pay gap has never been brought into effect, and the jurisdiction has thus fallen out of step with Ireland and other parts of the UK: Employment Act (Northern Ireland) 2016, s 19. See S Craig et al, *European Union Developments in Equality and Human Rights: The Impact of Brexit on the Divergence of Rights and Best Practice on the Island of Ireland* (Equality Commission for Northern Ireland 2022) 47.

87 See C Kelly and E Tannam, 'The future of Northern Ireland: the role of the Belfast/Good Friday Agreement institutions' (2023) 94 *Political Quarterly* 85, 93.

an affront to the 1998 Agreement's aims and the good governance of Northern Ireland, the current UK Government remains so averse to the possibility of a more substantive role for Dublin that it only began to be mooted by senior Conservative figures as the power-sharing impasse dragged on into 2024. This drew a vitriolic response from David Jones, a senior figure in the European Research Group of Brexit-backing Conservative MPs, that '[a]ny involvement by the Irish government in the administration of Northern Ireland would be unacceptable to most, if not all, Conservative colleagues'.<sup>88</sup> The problem with Plan B thus lies not in the terms of the 1998 Agreement, but in the Conservative Party's absolutist stance towards national sovereignty after Brexit.

### Improving indirect rule

If reform of power sharing was unrealisable and the current UK and Irish Governments are unable to cooperate to the degree necessary to make intergovernmental partnership work, then the only option remaining, had power sharing not been restored in February 2024, was to re-evaluate the functioning of indirect rule. In this regard, only the perceived need to generate leverage around the resumption of power sharing tied the possibility of additional funding for Northern Ireland to this end. The Barnett Formula's inadequacies have long been well known.<sup>89</sup> Although it currently allocates more than England's average funding per head to Northern Ireland, it also operates over time to reduce Northern Ireland's level of funding to this average. The 'Barnet squeeze' is exacerbated in the context of prolonged public sector funding cuts in England. This means that Northern Ireland is not being treated comparably to disadvantaged areas of England, which are not currently facing comparable funding cuts, even though its needs are exacerbated by its post-conflict context. The UK Government was long resistant to any needs-based replacement of the Barnett Formula, but, in Wales, a concerted focus on the effect of the Barnett squeeze did see a recognition of the Holtham Commission proposals and an improved funding settlement.<sup>90</sup> As a result of these arrangements for Wales, '[t]he principle of the floor to resist the Barnett squeeze taking you to unreasonably low levels has been conceded'.<sup>91</sup> Comparable

88 'Sir Robert Buckland comments: former NI Secretary Villers says there is no role for Dublin in running NI – as Tory MP calls idea "unacceptable"' (*The Newsletter* 12 January 2024).

89 See Select Committee on the Barnett Formula, *The Barnett Formula* (2009) HL 139, para 49-63.

90 Independent Commission on Funding and Finance for Wales, *Fairness and Accountability: A New Funding Settlement for Wales* (Welsh Government 2010).

91 Northern Ireland Affairs Committee, 'Oral evidence: The funding and delivery of public services in Northern Ireland' (2023) HC 46, Q238 (Gerald Holtham).

adjustments for Northern Ireland, even if they fell short of a genuinely needs-based approach, would do more to stabilise Northern Ireland's public finances than one-off deals of the kind that accompanied the 2017 confidence-and-supply arrangement between the DUP and the Conservatives. The UK Government belatedly recognised the strength of this case in the package for restoring Stormont that it began to unveil in December 2023, but it continued to resist providing this funding unless power sharing is restored, even in the face of widespread industrial action. Extra funding was thus dangled as a carrot within a negotiation process, when in reality it had become generally accepted that public services in Northern Ireland require this funding notwithstanding the dysfunction of power sharing.

Beyond the finances available to Northern Ireland's departments, the way the Secretary of State engages with questions of Northern Ireland's governance could also have been reformed. As explored above, civil service decision making already operates under a rubric of guidance from the Secretary of State, in addition to the requirements laid down in legislation such as the Budget Acts. There is nothing in the nature of indirect rule to say that this guidance has to be as limited and contradictory as it is at present. Indeed, as has recently been the case for the commissioning of abortion provision, the Secretary of State can be provided by Westminster with the capacity to engage in specific areas of policy making.<sup>92</sup> Again, however, the very nature of indirect rule, and the advantages that the UK Government derives from it, militate against any such change in practice. The more the Secretary of State intervenes with specific instruction, as opposed to loose guidance, the more likely he will find himself accountable to Parliament and answerable before the courts for such interventions. Indirect rule will, perforce, become more like direct rule. The abortion provision instructions, after all, were only issued in light of specific statutory requirements and after judicial review.<sup>93</sup>

The restoration of North–South cooperation under Strand Two of the 1998 Agreement, moreover, did not require the operation of full direct rule. In the exchange of notes in 2002, discussed above, the UK Government accepted that Northern Ireland's departments could participate in the North–South bodies developed under the Agreement

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92 Chris Heaton-Harris MP, HC Deb, Written Statement UIN HCWS341 (24 October 2022). The courts had previously found the Northern Ireland Secretary's failure to commission these services unlawful: see *In re Northern Ireland Human Rights Commission* [2021] NIQB 91, [115] (Colton J).

93 Northern Ireland (Executive Formation etc) Act 2019, s 9. The slow progress towards operationalising the Identity and Language (Northern Ireland) Act 2022 showcases the degree to which legal pressure is often needed to see the UK Government actualise statutory commitments.

notwithstanding the collapse of power sharing at that time.<sup>94</sup> The Northern Ireland courts have, moreover, recognised, in no uncertain terms, that the withdrawal of the DUP from these bodies was unlawful; '[t]he respondents' decision to withdraw from the North–South Ministerial Council was and is unlawful because it frustrates, is contrary to, and is in breach of the legal duties and responsibilities contained within Part V of the Northern Ireland Act 1998'.<sup>95</sup> In the context of the Withdrawal Agreement's special provisions for the alignment of Northern Ireland with aspects of EU law, this poses particular issues as the operation of North–South bodies has long been particularly valuable in the context of the implementation of EU law.<sup>96</sup> Given the impact and illegality of the curtailment of Strand Two arrangements, an equivalent exchange of notes should have been prioritised as soon as the DUP sought to withdraw their ministerial involvement in September 2021. Admittedly, under indirect rule as operated since 2022, Northern Ireland departments would be unable to advance cross-cutting policy as a result of such cooperation, but it would not have taken a major legislative adjustment to enable the Secretary of State to authorise such activity. Such immediate action in response to this first element of the DUP's boycott plan could have provided a show of resolve which would have faced down the boycott altogether. This, however, would have required the UK Government not to be intent on instrumentalising the DUP's actions as part of its post-Brexit policy.

The intermittent involvement of Westminster in the processes of indirect rule between 2022 and 2024 has not provided for effective management of Northern Ireland's public finances. The processes which have contributed to the Budget Acts, for example, showcase the significant limitations in equality-focused budget setting. The conclusion of the 1998 Agreement was a significant milestone in terms of the substantive equality commitments of Northern Ireland's public authorities, including all of the Northern Ireland departments and the Northern Ireland Office in terms of activity with impacts upon Northern Ireland.<sup>97</sup> Under section 75 of the Northern Ireland Act 1998 these bodies are required to have 'due regard' to promoting equality of opportunity for groups in society with protected characteristics.<sup>98</sup> This duty extends to these bodies having arrangements in place to

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94 See Birrell (n 24 above) 176–178.

95 *Re Napier's Application* [2021] NIQB 86, [38] (Scofield J).

96 See G Lagana, *The European Union and the Northern Ireland Peace Process* (Palgrave 2021) 159–184.

97 1998 Agreement (n 77 above) Rights, Safeguards and Equality of Opportunity, para 3.

98 See C McCrudden, 'Equality' in C Harvey (ed), *Human Rights, Equality and Democratic Renewal in Northern Ireland* (Hart 2001) 75, 86–98.



assess the impact of their policies on equality of opportunity.<sup>99</sup> These legal duties were a radical innovation in the context of UK governance. Indeed, they were perhaps too radical, because the Northern Ireland courts were reluctant to police the operation of equality schemes as a unique aspect of Northern Ireland's administrative law. The Equality Commission for Northern Ireland was left with a gatekeeper role over the enforcement of these duties against public bodies.<sup>100</sup> As a result, the development in other parts of the UK of the public sector equality duty under the Equality Act 2010 has seen Northern Ireland left behind in terms of embedding legally enforceable equality protections in budgetary processes.<sup>101</sup>

The Northern Ireland Office has explained the equality processes currently involved in budget drafting as follows:

Northern Ireland departments completed indicative assessments with regard to the Section 75 statutory equality duty under the Northern Ireland Act 1998 as part of the 2022–23 budget setting process which informed the budget allocations placed on a statutory footing through the Northern Ireland Budget Act 2023. It was the responsibility of the Northern Ireland departments to consider what further equality impact assessments were required in accordance with the statutory equality duty under the Northern Ireland Act 1998 on the spending decisions which were needed to live within their final budget allocations.<sup>102</sup>

This statement acknowledges that the Northern Ireland departments were expected to provide indicative assessments before they were aware of the budget allocations and that their subsequent substantive assessments can have no impact upon the final allocations which they are required to 'live within'. There is no suggestion that the Northern Ireland Office undertook an overarching equality impact assessment of the budgets as a whole. Instead, the conduct of equality assessments is explicitly treated as resting upon individual departments in Northern Ireland, even though this UK Government department was effectively mandating multi-strand public service reforms operative across Northern Ireland departments.<sup>103</sup>

This approach is particularly inadequate in the context of complex interdepartmental programmes, as illustrated by the example of the School Holiday Food Grant, which was terminated as a result of the Northern Ireland Budget Act 2023.<sup>104</sup> This scheme was an Executive

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99 Northern Ireland Act 1998, sch 9, para 4(2)(b).

100 *In re Neill* [2005] NICA 5.

101 Equality Act 2010, s 149.

102 Steve Baker MP, HC Deb, Written Answer UIN 192218 (6 July 2023).

103 J Meers, 'The "cumulative impact" problem in social welfare: some legal, policy and theoretical solutions' (2022) 44 *Journal of Social Welfare and Family Law* 42, 59.

104 Fitzpatrick et al (n 57 above) 25–26.

policy with an explicit anti-poverty aim. As such, it would ordinarily have rested within the remit of the Department for Communities. In this instance, however, the Department for Education undertook the administration of the programme because it could draw upon the Education Authority's database of Free School Meals recipients to conduct the scheme. As a result, no one department was responsible for assessing the equality impact of the termination of the School Holiday Food Grant. An adequate assessment could only have been conducted by conducting an overview of the relationship between the assessments of the Executive Office, the Department for Communities and the Department for Education. In the absence of such an assessment by the Northern Ireland Office, the equality impact of the removal of funding to support this scheme fell between these actors. All that the Department for Education was thus able to confirm, in its published equality assessment, was that the end of this scheme did not impact upon the provision of Free School Meals during term time.<sup>105</sup>

The section 75 duties engaged by the preparation of a budget for Northern Ireland by the Northern Ireland Office cannot be adequately met by subsequent equality assessments conducted by the Northern Ireland departments and without a cumulative impact assessment having previously been conducted for the budget as a whole. In such circumstances the civil servants responsible for administering the 2022–2023 and 2023–2024 budgets had, in many cases, no meaningful choice over the necessary cuts. When presented with a budget inadequate to cover the full range of departmental programmes, schemes which cover statutory or regulated provision, or which are the subject of contractual obligations, have taken precedence over discretionary or short-term schemes, regardless of the relative societal benefit. Late-stage equality impact assessments by individual departments have no meaningful effect upon such decision making. The operative equality processes have become a superfluous exercise in light of the scale and speed at which the required cuts must be made and the lack of active ministerial involvement in making choices between competing programmes which draw on public resources. This stands in stark contrast to what is now the accepted practice of good governance elsewhere in the UK; cumulative equality impact assessments of draft budgets have become an established feature of what other public bodies consider to be necessary for compliance with public sector equality duties. The UK Treasury, for example, has noted its responsibility for conducting equality assessments in circumstances of funding decisions which cross-cut departmental

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105 Department for Education, 'Equality and human rights policy screening for discontinuation of school holiday food grant (SHFG) payment scheme at the end of 2022/23 financial year' (3 August 2023) 4–5.

responsibilities in public statements, accepting that ‘it is its usual practice in published distributional analysis to demonstrate the cumulative impact of decisions made since a nominated baseline year’, and having published this analysis for budgets and other fiscal events since the 2019 Spending Review.<sup>106</sup>

Indirect rule will never look like anything other than an aberration in the context of a UK constitutional order which supposedly prizes the accountability of executive decision making to elected representatives.<sup>107</sup> It does not, however, have to be as blunt a tool as operated between 2022 and 2024. Efforts could be made to ensure more detailed ministerial guidance from the Northern Ireland Office over decision making, to restart North–South bodies, to undertake the same consideration of the operation of devolution’s funding arrangements as has taken place in Wales and to ensure that effective equality impact assessments are embedded within budgetary processes. But perhaps this is very much the point. In the words of Girvan LJ, ‘Parliament can legislate to ensure the proper and lawful government of Northern Ireland if devolved government is not being provided in a way which is compatible with the principles of democratic and accountable government.’<sup>108</sup> But between 2022 and 2024 it singularly failed to do so, and other institutions have not been able to push the matter.<sup>109</sup> For all the prominence of parliamentary accountability in the UK Supreme Court’s *Miller/Cherry* judgment,<sup>110</sup> it has gone missing in the Northern Ireland context.<sup>111</sup> When Westminster has become so insulated from the need to consider questions of Northern Ireland’s governance during indirect rule, there is no meaningful source of pressure upon the UK Government to make this mode of governance any more effective. The inadequacy of indirect rule becomes self-realising.

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106 Information Commissioner Decision Notice IC-181445-Y2S0 (21 March 2023) para 31.

107 See, for example, *In R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 644 (Lord Diplock) and *Bobb v Manning* [2006] UKPC 22, [13] (Lord Bingham).

108 *In re Hughes* [2018] NIQB 30, [69].

109 A challenge to the inadequate equality protections in the indirect rule budgetary processes was given leave for judicial review on the day the UK Government announced its plans to address the DUP’s concerns and provide a basis for restoring power sharing: *In re Children’s Law Centre* [2024] NIKB 4.

110 *R (Miller) v The Prime Minister* [2019] UKSC 41, [46] (Baroness Hale).

111 What Alison Young recognises as ‘inter-woven existence of mutual accountability processes and actors’ within the UK’s general constitutional order is hollowed out; A Young, ‘Accountability, human rights and beyond: lessons from social security law’ in M Flinders and C Monaghan, *Questions of Accountability: Prerogatives, Power and Politics* (Hart 2023) 171, 171.

## Darkest before the dawn?

Years of indirect rule and austerity have taken a heavy toll on large sections of society in Northern Ireland. By the autumn of 2023 Jeffrey Donaldson appeared to recognise that the longer that governance drift continues, the more public discourse will turn towards the possibility of radical changes to Northern Ireland's post-conflict governance order, and even to its constitutional status; 'having local institutions that succeed in delivering for everyone in Northern Ireland is an essential element in building our case [for maintaining the Union]'.<sup>112</sup> But still he vacillated. There was always the possibility that if the boycott remained in place until after the UK general election, then a new UK Government might take office which would be willing to contemplate general sanitary and phytosanitary (SPS) alignment with the EU, thereby removing further barriers to trade between Great Britain and Northern Ireland without the need to risk party unity or electoral losses. Even as a deal seemed on the cusp of being announced in December 2023, Donaldson put off the decision in the face of sustained opposition. The next statutory deadline for the formation of an Executive arrived and passed in January 2024, with the clock once again being reset with fresh legislation.<sup>113</sup>

This deadline extension, however, was for a matter of weeks, with the UK Government forcing a take-it-or-leave-it moment on the DUP. The offer, made public at the end of January, was for a funding package which would incorporate a new fiscal floor, equivalent to that operative in Wales,<sup>114</sup> together with a relaunch of the Windsor Framework in unionist-friendly packaging in the *Safeguarding the Union* Command Paper.<sup>115</sup> When this moment eventually came, the Assembly and Executive were restored within days. The DUP leadership faced some internal opposition, but for all that Jim Allister raged, there were no thunderous protests on the streets. And yet the mere possibility of such widespread public opposition had delayed the restoration of power sharing for months. The upheavals of 2022 to 2024 have thus exposed how, even after decades of a peace process, constitutional politics in Northern Ireland still has painfully shallow roots. Nor is the future set fair; the Assembly has to legislate for extensive revenue-raising measures in order to secure the new fiscal arrangements offered by the UK Government and the operation of the Stormont Brake and

112 J Donaldson, 'Conference 2023 – leader's address' (*MyDUP* 14 October 2023).

113 Northern Ireland (Executive Formation) Act 2024, s 1.

114 J Campbell, 'Stormont: what is in the £3.3bn financial package?' (*BBC News* 15 January 2024).

115 HM Government, *Safeguarding the Union* (2024) CP 1021. See C R G Murray, 'Saying nothing much at all, to general acclaim – the Windsor Framework relaunch' (*EU Law Analysis* 1 February 2024).

Stormont Lock vote will see Brexit continue to intrude on devolution's day-to-day workings. Notwithstanding the full operation of the measures introduced in the Northern Ireland (Ministers, Elections and Petitions of Concern) Act 2022, the instability inherent in the current power-sharing arrangements remains evident. Another boycott or the expansive use of the blocking mechanisms within the Executive and Assembly remain likely to undermine good governance in Northern Ireland at some point in the future. This means that we cannot cordon off analysis of indirect rule as an unfortunate episode, never again to be repeated. If the operation of the Strand One institutions remains fractious and disjointed, then the time will have come to break this cycle of logjams and pursue substantive reform of how Northern Ireland is governed. Too many good crises have already gone to waste.