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Leaving the Union: Brexit and Complex Constitutionalism in Northern Ireland

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Introduction

Brexit continues to dominate discussions across these islands and beyond. The decision of the United Kingdom (UK) to leave the European Union (EU) has generated a remarkable amount of comment and controversy. The narrow nature of the vote was further complicated by a clear disparity within the UK. Unlike the position in England and Wales, Northern Ireland and Scotland did not vote to leave. Although there was no internalised ‘lock’ on Brexit, in the sense that it was a UK-wide vote, it raises significant questions about the current nature of the UK and, in particular, what might be required to embark on (and complete) such a major process of constitutional change. What is striking is the contrast between legal and political forms of constitutionalism, when read in the light of arguments about a more pluralist UK. Visions of a multi-national ‘union state’ have had to confront the re-emergence of constitutional legal orthodoxies.

Brexit has serious implications for Northern Ireland and Ireland, and attempts to design a defensible ‘solution’ have proved challenging. The aim of this article (written and edited during the process of negotiation) is to focus on the position in Northern Ireland and to reflect on the potential consequences. First, an attempt is made to contextualise the debate; second, thought is given to how the process has advanced; and finally, there is consideration of ways forward. The suggestion in this article is that Brexit has sharpened the constitutional dilemmas of Northern Ireland, and in doing so it has prompted a transnational debate about its unique position and future. The region has increasingly functioned as a signifier of what is endangered in the Brexit process. This comes at a time when the political institutions in Northern Ireland are no longer operational, an outcome that Brexit did (in part) contribute to. Dealing with the consequences will also mean addressing the divisions that it has done so much to perpetuate; this will include putting power-sharing constitutionalism in Northern Ireland back together again.

The Context


2 Ibid. In Northern Ireland, on a turnout of 67.2%, it was: Remain: 440,707; Leave: 349,442. In Scotland, on a turnout of 67.2% it was: Remain: 1,661,191; Leave: 1,018,322.
3 In an analysis of the various questions around the result, note the following from Stephen Tierney: ‘In my view a more convincing concern rests upon a vision of the UK as a multinational union in which the consent of each of the constituent territories should be required for such a significant change. This raises a broader question about the federalisation of the UK (the full engagement of the devolved territories in the exit process will be essential for the stability of the state), but this is not the main objection of those who now question the legitimacy of the referendum result and was rarely heard beyond the borders of the devolved territories before the referendum.’ Stephen Tierney, ‘Was the Brexit Referendum Democratic?’, available at: https://ukconstitutionallaw.org/2016/07/25/stephen-tierney-was-the-brexit-referendum-democratic/ (last accessed 2 May 2018).
National Identity and Constitutional Contestation: The Good Friday Agreement Revisited

Brexit must be located in context if its ramifications for the island of Ireland are to be fully understood; the Good Friday Agreement 1998 (GFA) has a special place as the framework for this constitutional conversation. Whatever impact it may have had within mainstream British constitutionalism, the GFA represented a major turning point for the island of Ireland, underlined by its clear democratic endorsement North and South. It is evident that although much was anticipated in this Agreement, departure from the EU was not one of those things. The textual references, and political background, suggest that EU membership was a firm and unproblematic common assumption of all participants.

This multi-stranded and multi-party peace agreement is once again the subject of considerable interest, as the document that gave life to the institutional architecture of Northern Ireland’s current politics moves to the centre of the Brexit negotiations. What was adopted was a political agreement but also a British–Irish Agreement that provides the international legal underpinning for its vision, commitments and guarantees. Domestic legal meaning was given to this political agreement through legal reform in both states, notably, for example, amendment of the Irish Constitution. The Northern Ireland Act 1998 (as amended) still provides the legal framework in UK law and more attention is turning to the relationship between the GFA and this legislation. The Preamble to the British–Irish Agreement is suggestive of how the EU was viewed at the time:

Wishing to develop still further the unique relationship between their peoples and the close co-operation between their countries as friendly neighbours and as partners in the European Union ...

The GFA has been supplemented by subsequent agreements, the St Andrews Agreement 2006 in particular, but although they have brought further changes they have not departed from the fundamentals of the original document. In Robinson v Secretary of State for Northern Ireland and others, Lord Hoffmann noted that the ‘most fundamental purpose of the Agreement’ was ‘to create the most favourable constitutional environment for cross-community government’. He regarded the Northern Ireland Act 1998 as ‘a constitution for Northern Ireland, framed to create a continuing form of government against the background of the history of the territory and the principles agreed in Belfast’. In order to underline the constitutional nature of what was agreed, he noted this:

According to established principles of interpretation, the Act must be construed against the background of the political situation in Northern Ireland and the principles laid down by the Belfast Agreement for a new start. These facts and documents form part of the admissible

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5 10 April 1998 (Cmnd 3883).
6 Referenda were held in both jurisdictions on 22 May 1998.
7 It is worth recalling that one of the major political parties at the time the GFA was negotiated (the Social Democratic and Labour Party (SDLP)) was a consistently strong advocate for the EU—evident in particular in the work of its then leader, John Hume.
11 Robinson v Secretary of State for Northern Ireland and others [2002] UKHL 32.
12 Ibid [30].
13 Ibid [25].
background for the construction of the Act just as much as the Revolution, the Convention and the Federalist Papers are the background to construing the Constitution of the United States.\textsuperscript{14}

In the fairly cursory treatment of the Northern Ireland issues in \textit{R (Miller and another) v Secretary of State for Exiting the European Union},\textsuperscript{15} the majority in the Supreme Court stated:

The NI Act is the product of the Belfast Agreement and the British-Irish Agreement, and is a very important step in the programme designed to achieve reconciliation of the communities of Northern Ireland. It has established institutions and arrangements which are intended to address the unique political history of the province and the island of Ireland.\textsuperscript{16}

It may be unwise to read too much into the language of a judgment that essentially revolved around the need for parliamentary approval for triggering Brexit, but it does suggest a much less ‘constitutional tone’ (it does not represent, however, a rejection of the spirit of Robinson).

Nevertheless, the Northern Ireland Act 1998 was intended to give legal force to the GFA principles and is clearly a ‘constitutional statute’ within the UK’s established tradition of classification. Although there is a persistent debate about what is achievable within the flexible contours of British constitutionalism, it seems possible for Parliament to take steps that would give genuine weight to Northern Ireland’s unique circumstances while respecting the post-conflict form of complex constitutionalism that is evolving.

There are several senses in which the GFA is relevant as context. First, there are the values that emerge from it. The Declaration of Support talks of ‘reconciliation, tolerance, and mutual trust, and the protection and vindication of the human rights of all’\textsuperscript{17}. This emphasis on human rights is one of the more remarkable features of the GFA (a document occasionally criticised for its ‘both communities’ narrative).\textsuperscript{18} It also speaks to the question of relationships across these islands and notes a commitment to ‘partnership, equality and mutual respect’.\textsuperscript{19} This is relevant when considering the ‘interlocking and interdependent’ nature of ‘all of the institutional and constitutional arrangements’.\textsuperscript{20} The GFA is steeped in \textit{relational} thinking grounded in values such as human rights but it has become intellectually impoverished through patchy implementation and often ill-informed commentary.

Second, everything in the document can be read as framed by the overarching provisions on ‘Constitutional Issues’; and it is worth taking these step-by-step. The participants and both governments endorsed propositions that can be misunderstood.\textsuperscript{21} The status of Northern Ireland (within the UK or a united Ireland) rests on the consent of a majority of its people.\textsuperscript{22} There is no

\textsuperscript{14} Ibid [33].
\textsuperscript{15} \textit{R (Miller and another) v Secretary of State for Exiting the European Union} [2017] UKSC 5.
\textsuperscript{16} Ibid [128].
\textsuperscript{17} GFA para 2.
\textsuperscript{19} GFA para 3.
\textsuperscript{20} GFA para 5: ‘... and that in particular the functioning of the Assembly and the North/South Council are so closely inter-related that the success of each depends on that of the other.’
\textsuperscript{21} In Mark Devenport, ‘Varadkar Faces Heat over Constitution Comments’, www.bbc.co.uk/news/uk-northern-ireland-41655699 (last accessed 2 May 2018), the Taoiseach was criticised for suggesting that 50+1 might not be sufficient to secure Irish Unity.
\textsuperscript{22} GFA para 1(i). See also, Northern Ireland Act 1998 s 1 and sch 1.
requirement for a special majority (but these provisions should be read in the principled context noted above).\textsuperscript{23} The right of self-determination is to be exercised by ‘the people of Ireland alone, by agreement between the two parts respectively and without external impediment’ and subject to the ‘agreement and consent of a majority of people in Northern Ireland’.\textsuperscript{24} If a majority decision to leave the UK is made then it is a ‘binding obligation on both Governments to introduce and support in their respective Parliaments legislation to give effect to that wish’.\textsuperscript{25} This would in principle not simply be an advisory referendum, as both governments have agreed to take forward the outcome, but this is always subject to the inherent limitations of British constitutionalism (reflected too in the relevant and more ambiguous provisions of the Northern Ireland Act 1998). This does not leave the currently ‘sovereign government’ free of obligations. The GFA contains a requirement of ‘rigorous impartiality’ and therefore responsibility must be exercised respectfully:

\textit{… on behalf of all the people in the diversity of their identities and traditions and shall be founded on the principles of full respect for, and equality of, civil, political, social and cultural rights, of freedom from discrimination for all citizens, and of parity of esteem and of just and equal treatment for the identity, ethos, and aspirations of both communities …}\textsuperscript{26}

The ‘birthright’ of people in Northern Ireland to ‘identify themselves and be accepted as Irish or British, or both, as they may so choose’ is of significance. It provides vital reassurance that no one in Northern Ireland should be forced to identify in a way that conflicts with their national preference or political aspirations.

Third, the GFA is multi-stranded; it was never envisaged that a purely ‘internal’ Northern Ireland solution would or could work. Strand One deals with democratic institutions in Northern Ireland, Strand Two addresses the North–South Ministerial Council, and Strand Three covers the British–Irish dimension. Strand One refers to ‘effective co-ordination’ and to ‘national policy-making, including on EU issues’.\textsuperscript{27} Strand Two mentions the format of North–South Ministerial Council meetings with EU matters listed as ‘cross-sectoral’.\textsuperscript{28} The EU is plainly implicated in relation to the Implementation Bodies created under this element of the GFA (for example, the Special EU Programmes Body). It is also stated:

The Council to consider the European Union dimension of relevant matters, including the implementation of EU policies and programmes and proposals under consideration in the EU framework. Arrangements to be made to ensure that the views of the Council are taken into account and represented appropriately at relevant EU meetings.\textsuperscript{29}

Fourth, a range of other issues are addressed in the GFA that merit attention here. The ‘Rights, Safeguards and Equality of Opportunity’ section contains no reference to EU law, but if it was being negotiated now it is hard to imagine that a reference to the (subsequently adopted) EU Charter of Fundamental Rights would be absent. It is also difficult to read the references to equality without thinking of the taken for granted advances on that concept in the EU. What this aspect of the GFA does reveal is the critical centrality of rights and equality, both in terms of normative standards and

\textsuperscript{23} Colin Harvey, ‘A Unity Referendum is not a Silly Idea’, http://qpol.qub.ac.uk/irish-unity-referendum/ (last accessed 2 May 2018).
\textsuperscript{24} GFA para 1(ii).
\textsuperscript{25} GFA para 1(iv).
\textsuperscript{26} GFA para 1(v).
\textsuperscript{27} GFA para 31.
\textsuperscript{28} GFA para 3(iii).
\textsuperscript{29} GFA para 17.
institutional protections (Human Rights Commissions on the island—including a Joint Committee\textsuperscript{30}— and a new unified Equality Commission in Northern Ireland\textsuperscript{31}). The British Government agreed to incorporate the European Convention on Human Rights (ECHR) into Northern Ireland law\textsuperscript{32} with the Irish Government committing to ‘bring forward measures to strengthen and underpin the constitutional protection of human rights’.\textsuperscript{33} Although much followed in terms of, for example, the creation of new Commissions, and giving effect domestically to the ECHR, the anticipated Bill of Rights for Northern Ireland never appeared (despite comprehensive advice from the Human Rights Commission in 2008\textsuperscript{34}) and the idea of a Charter of Rights for the island of Ireland has not advanced beyond the position reached by both Commissions in 2011.\textsuperscript{35}

The aspects of the GFA dealing with ‘Security’ and ‘Policing and Justice’ are relevant to the extent that they envisage all-island co-operation along with measures to render the border relatively ‘invisible’. The progressive ‘normalisation of security arrangements and practices’ had clear implications for border areas\textsuperscript{36} and consultation with the Irish Government on ‘any continuing paramilitary activity’ is noted.\textsuperscript{37} Discussion with the Irish Government regarding policing and criminal justice reform is mentioned\textsuperscript{38} and the terms of reference for the Commission on Policing (what became the ‘Patten Commission’) refers to structured co-operation with the Garda Síochána.\textsuperscript{39}

This review of the 1998 Agreement is necessary principally because it is such a focus of attention within the Brexit discussions. This includes the argument that Brexit itself is in conflict with or incompatible with its terms. Brexit arguably touches on almost all aspects of the ‘Constitutional Issues’, in addition to the specific textual references within the British-Irish Agreement and sections relating to the North–South Ministerial Council (for example, how will the views of the Council on North–South matters be ‘represented appropriately at relevant EU meetings’ after Brexit?).

There is little doubt that ‘consent’ has a particular meaning in the GFA, relating specifically to continuing constitutional status. Much emphasis is placed on what the majority of the ‘people of Northern Ireland’ decide. While it is possible to confuse the different meanings of consent, it still makes its notable absence in relation to Brexit a relevant consideration. The debate on this point is often hampered by versions of narrow legalism that are themselves trapped within notions of British constitutionalism that pay little regard to the distinctive form of political constitutionalism that has evolved to provide a principled basis for stability in Northern Ireland.

Without further action there is a real risk that exit from the EU would be an ‘external impediment’ to the right of self-determination; Northern Ireland would be in a third-country for EU

\textsuperscript{30} GFA paras 5, 9 and 10.
\textsuperscript{31} GFA para 6.
\textsuperscript{32} GFA para 2.
\textsuperscript{33} GFA para 9.
\textsuperscript{36} GFA para 1.
\textsuperscript{37} GFA para 3.
\textsuperscript{38} GFA para 6.
\textsuperscript{39} GFA Annex A.
purposes. This fact was spotted and acted upon, following closely the example of German reunification. It generated much excitement and comment but was little more than a political display of basic respect for the GFA.

The ‘birthright’ elements of the GFA will raise their own complications. Entitlement to and conferral of nationality in both states (an issue that remains within the competence of states) mean that things can look (legally) different when viewed from London or Dublin. Unless a special arrangement is put in place then EU citizenship will be a potential source of division and differential treatment. This may cause a host of practical problems, as well as lead to several intriguing dilemmas (for unionists in Northern Ireland, for example) many of which may still not have been anticipated.

Power-Sharing Constitutional Politics

The constitutional politics of Northern Ireland must be noted, as Brexit has helped to re-open the sovereignty fracture that the EU and the peace process attempted to heal and mend. The two major political parties took opposite positions in the referendum campaign. Sinn Féin supported ‘Remain’ and the Democratic Unionist Party (DUP) opted for ‘Leave’. The difference between the UK result and the Northern Ireland outcome has complicated matters further.

A number of elections then followed the Brexit result. There were both Northern Ireland Assembly and UK parliamentary elections in 2017. The Assembly elections in March saw the two main parties draw closer together, unionism in Northern Ireland no longer enjoys an overall majority (in the Assembly). The DUP secured 28.1 per cent of the first preference votes (28 seats) while Sinn Féin was on 27.9 per cent (27 seats). The Westminster elections in June 2017 saw all three sitting Social Democratic and Labour Party (SDLP) MPs lose their seats. The DUP vote share rose markedly (to 36 per cent: 10 seats) with Sinn Fein’s vote also rising notably (to 29 per cent: seven seats).

These elections confirm that the electorate of Northern Ireland is wedded to the DUP and Sinn Féin as the lead partners in power-sharing constitutional politics (with the DUP remaining as the ‘largest’ political party). The outcome for nationalism/republicanism is notable because (due to Sinn Féin’s long-standing position on abstention from Westminster) there is now no ‘Irish nationalist voice’ in the House of Commons. The decision of the DUP to reach a ‘confidence and supply agreement’ with the Conservative Party attracted much comment, including on the DUP’s

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41 The Taoiseach, for example, has made the point that Northern Ireland may be a legal space outside of the EU where the majority of people are EU citizens. See Pat Leahy, ‘Even Unionists Will Want Irish Passport after Brexit, says Varadkar’, www.irishtimes.com/news/ireland/irish-news/even-unionists-will-want-irish-passport-after-brexit-says-varadkar-1.3262088 (last accessed 2 May 2018).
43 Ibid.
45 Ibid.
questionable record on human rights.\textsuperscript{46} This has made agreement more difficult within the delicate constitutional politics of Northern Ireland, and provoked debate about the implications for the role of the Secretary of State.\textsuperscript{47} Brexit is therefore now progressing with a UK Government that is in an arrangement with one of the main political parties in Northern Ireland and when the Northern Ireland Assembly and Executive are not operational. At the time of writing, Northern Ireland remained without a government and in a strange form of confusing and rudderless political/legal limbo.\textsuperscript{48}

Unique, Special and Particular: Finding a Place for Northern Ireland

Brexit Does Not Mean Brexit?

Brexit includes \textit{and} excludes Northern Ireland. ‘Includes’ in the sense that the UK plans to leave; ‘excludes’ because the term (if it is referring to Britain) automatically leaves the region out (the \textit{UK} is exiting the EU). The process so far has prompted agonised reflection about the nature of the UK and its constitution, but this seems to have only occurred to many participants after the decision was taken.\textsuperscript{49} To what extent has the constitutionalisation process of the GFA had a practical impact in the world of law? Although the \textit{Miller} case significantly underlined the role of Parliament in taking forward Brexit, the treatment of the devolution issues provided a reminder that many of the ‘basics’ of the traditional British constitution persisted (including its habit of paying insufficient regard to the dynamics and normativity of peace process constitutionalism in Northern Ireland).\textsuperscript{50} This is evident in relation to matters of consent, and the much discussed impact of the Sewel Convention. The Supreme Court stressed the essentially political nature of conventions of the constitution and concluded that there was no \textit{legal} requirement of legislative consent from the Northern Ireland Assembly. So, legally the devolved institutions cannot block Brexit. However, it did observe that although non-legal this did not mean that conventions are irrelevant:

In reaching this conclusion we do not underestimate the importance of constitutional conventions, some of which play a fundamental role in the operation of our constitution. The Sewel Convention has an important role in facilitating harmonious relationships between the UK Parliament and the devolved legislatures. But the policing of its scope and the manner of its operation does not lie within the constitutional remit of the judiciary, which is to protect the rule of law.\textsuperscript{51}


\textsuperscript{47} Colin Harvey, ‘Northern Ireland and Rigorous Impartiality: Untangling a Constitutional Mess’ (13 June 2017), http://qpol.qub.ac.uk/ni-rigorous-impartiality/ (last accessed 2 May 2018).

\textsuperscript{48} The problems (particularly for civil servants) are evident in the following High Court judgment: \textit{Buick’s (Colin) Application (ARC21)} [2018] NIQB 43.

\textsuperscript{49} Although there were attempts to stress the potential impact, see Colin Harvey, ‘EU Referendum Perspectives’, www.youtube.com/watch?v=_xbx5UbhVg (last accessed 2 May 2018).

\textsuperscript{50} See \textit{R (Miller and another)} (n 15).

\textsuperscript{51} \textit{R (Miller and another)} (n 15) [155].
It is easy to skip over this statement, but it is a reminder that the political constitution has profound value\textsuperscript{52} and that the Sewel Convention has an important and even fundamental constitutional role (but the courts will not ‘police it’). So, although no legal remedy is available, and the courts will not enforce the Convention, it is equally plain that by neglecting it the Westminster Government would be acting against the wider interest in facilitating ‘harmonious relationships’ within the UK (and therefore risk operating unconstitutionally).

It was apparent from the discussions over the EU (Withdrawal) Bill that devolved consent was a major problem for the Westminster Government and although initially the Scottish and Welsh Governments adopted a common approach this harmony fractured around the subsequent amendments proposed by the UK Government (at the time of writing the Scottish Parliament had refused its consent and passed its own legal continuity legislation, which has been referred to the UK Supreme Court).\textsuperscript{53} The idea that the Government may be planning to act in an unconstitutional (but lawful) way is something that still merits serious attention. It highlights the extent of the constitutional problems unleashed by Brexit.

**Grappling with the GFA and its Implications**

The scale of engagement with Brexit around these islands (and across Europe) is staggering. The decision has prompted deep and wide consideration of ways forward across politics and society. It is an ongoing process and at the time of writing the EU27 and UK had agreed a Joint Report in December 2017 and the Commission had produced a draft Withdrawal Agreement, containing a Protocol on Ireland/Northern Ireland (as a way of reflecting the agreement to provide a ‘backstop’ guarantee in the absence of UK-wide or other specific solutions).\textsuperscript{54}

Where do the Irish and UK Governments stand in all this? Both the UK and Irish Governments have indicated their desire to see the unique circumstances of Northern Ireland (and the island of Ireland) respected.\textsuperscript{55} The UK’s position thus far has been to reiterate its commitment to the Common

\textsuperscript{52} It is possible to neglect the distinctive nature of political constitutionalism in Northern Ireland, see Colin Harvey, ‘Reconstructing the “Political Constitution” of Northern Ireland’, https://ukconstitutionallaw.org/2012/08/02/colin‐harvey‐reconstructing‐the‐political‐constitution‐of‐northern‐ireland/ (last accessed 2 May 2018).


\textsuperscript{54} For the Joint Report see: https://ec.europa.eu/commission/sites/beta‐political/files/joint_report.pdf (last accessed 29 May 2018); and for the draft Withdrawal Agreement see https://ec.europa.eu/commission/sites/beta‐political/files/draft_agreement_coloured.pdf (last accessed 29 May 2018)

Travel Area (CTA), the GFA, the need to avoid a hard border as well as continuing North–South and East–West co-operation.\(^{56}\) In its position paper the UK indicated that:

There is significant overlap in the objectives set out by the UK Government, the Irish Government and the EU. In particular, it is clear that our high level objectives are wholly aligned with regards to: avoiding a hard border; maintaining the existing Common Travel Area and associated arrangements; and upholding the Belfast (‘Good Friday’) Agreement, including the principles of continued North-South and East-West cooperation. The UK therefore welcomes the opportunity to discuss how best to deliver these shared objectives.\(^{57}\)

There is something in this; at a high level of abstraction the key participants at state and supranational levels do appear to share the same broad objectives. The challenge has been to articulate in precise terms what this might mean, and to translate political agreement into legally meaningful texts. The UK Government’s paper does attempt to offer a measure of detail. For example, on the GFA there is reference to mutual recognition of support for the peace process, formal recognition of GFA citizenship rights and the continuation of funding.\(^{58}\) There is a proposal that the Withdrawal Agreement should confirm that the position on citizenship remains unchanged\(^{59}\) and that the CTA should be formally recognised too.\(^{60}\) The UK Government also stresses its desire to commence the conversation about creating as ‘frictionless and seamless a border as possible’.\(^{61}\) Although the CTA matters and citizenship issues will present formidably difficult challenges, there is a measure of clarity on how these might be resolved and addressed (and there is now recognition that the UK and Ireland can continue this system). The situation remains much less clear with the debate on the nature of the border, where the overall aims of Brexit appear to conflict in a direct way with the objective of invisibility.\(^{62}\)

The Irish Government has outlined its approach to the Brexit negotiations, and made clear the impact on Ireland.\(^{63}\) It has been proactive, both before and after the vote and identified itself strongly as one of the EU27. The establishment of an all-island Civic Dialogue process underlined this.

\(^{56}\) HM Government ibid.
\(^{57}\) Ibid p 2.
\(^{58}\) Ibid p 24.
\(^{59}\) Ibid p 5
\(^{60}\) Ibid p 11.
\(^{61}\) Ibid p 15.
\(^{62}\) For comment on the UK position, see: European Parliament resolution of 3 October 2017 on the state of play of negotiations with the United Kingdom (2017/2847(RSP), www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bTA%2bP8‐TA‐2017‐0361%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN (last accessed 2 May 2018) ‘9. Strongly believes that it is the responsibility of the UK Government to provide a unique, effective and workable solution that prevents a “hardening” of the border, ensures full compliance with the Good Friday Agreement in all its parts, is in line with European Union law and fully ensures the integrity of the internal market and customs union; believes also that the United Kingdom must continue to contribute its fair share to the financial assistance supporting Northern Ireland/Ireland; regrets that the United Kingdom’s proposals, set out in its position paper on “Northern Ireland and Ireland”, fall short in that regard; notes on the other hand that in her speech of 22 September 2017 the Prime Minister of the United Kingdom excluded any physical infrastructure at the border, which presumes that the United Kingdom stays in the internal market and customs union or that Northern Ireland stays in some form in the internal market and customs union.’
\(^{63}\) See ‘Ireland and the Negotiations on the UK’s Withdrawal from the European Union: The Government’s Approach’ above n 55.
commitment to reflect deeply on the consequences and attempt to include a range of voices. In terms of the matters of deep concern to Ireland, the Government has indicated:

Our headline priorities are clear: minimising the impact on our trade and economy, protecting the peace process and the Good Friday Agreement, maintaining the Common Travel Area with the UK, and securing Ireland’s future in a strong European Union. All of these underpin the most fundamental objective of all – ensuring the continued wellbeing of our citizens.

Many of the themes are familiar, with a particular emphasis on the GFA and the peace process. Specific issues are mapped out and explored, including the shared land border, the constitutional status of Northern Ireland, and citizenship and human rights provisions. The Irish Government has clearly articulated its position and its objectives during the negotiations. These embrace questions around the avoidance of a hard border but also address ‘continued EU engagement in Northern Ireland’ and the ‘protection of the unique status of Irish citizens in Northern Ireland’. As with the UK, Ireland continues to emphasise the value of the CTA and the need for the maintenance of these arrangements. The Joint Report of December 2017 indicated that it was possible to find a measure of agreement between the EU27 and the UK around core principles and possible approaches.

Before the collapse of the institutions in January 2017, the First and deputy First Ministers (Arlene Foster and the late Martin McGuinness) did agree a joint letter (August 2016), in which they set out matters that are of ‘particular significance’ for Northern Ireland and that were presented as ‘initial thoughts’. Given the political context this letter has taken on added importance, as a relatively isolated indicator of possible shared concerns. It makes clear that ‘the region is unique’, ‘the border should not become an impediment to the movement of people, goods and services’ and that it should not ‘create an incentive for those who wish to undermine the peace process and/or the political settlement’. There is not much in this communication, but it does hint at the optimistic notion that a joint position around some core areas of common concern might be carved out, if the political institutions were working. Amidst all the intense conversations and disagreements there would appear to be sufficient consensus around the idea that Northern Ireland faces unique regional challenges.

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66 See ‘Ireland and the Negotiations on the UK’s Withdrawal from the European Union: The Government’s Approach’ above n 55 p 19: ‘The outcome of the UK referendum raises particular challenges in Northern Ireland, not least as the electorate in Northern Ireland voted to remain while the UK as a whole voted to leave. The preservation of the gains of peace over the past 20 years must be a priority for the EU in the upcoming negotiations with the UK and we must ensure that there is no disruption to the integrity of the peace settlement achieved through the Good Friday Agreement.’
71 Ibid.
There have been several parliamentary inquiries in the UK and Ireland, and much of this work is ongoing. The Seanad Committee on the Withdrawal of the UK from the EU published its report in July 2017, dealing with what it termed the potential implications and practical solutions, and the Joint Committee on the Implementation of the Good Friday Agreement produced its report in August 2017. The Northern Ireland Affairs Committee published a report prior to the referendum, in which it set out matters it regarded as of note for Northern Ireland. It has also published a report on the issue of the land border between Northern Ireland and Ireland.

The EU has paid considerable attention to Northern Ireland in its own negotiating stance, and this is one of the more remarkable features of the Brexit story thus far. It is arguably the case that the EU has considered the unique regional anxieties of Northern Ireland more intensively and sensitively than the Westminster Government. For example, it has made the situation on the island of Ireland a priority issue for the negotiations. The European Council has adopted negotiating guidelines that stress the phased nature of its approach, as well as how central the unique circumstances of Northern Ireland/Ireland are:

The Union has consistently supported the goal of peace and reconciliation enshrined in the Good Friday Agreement in all its parts, and continuing to support and protect the achievements, benefits and commitments of the Peace Process will remain of paramount importance. In view of the unique circumstances on the island of Ireland, flexible and imaginative solutions will be required, including with the aim of avoiding a hard border, while respecting the integrity of the Union legal order. In this context, the Union should also recognise existing bilateral agreements and arrangements between the United Kingdom and Ireland which are compatible with EU law.

The Commission has published Guiding Principles for the Dialogue on Ireland/Northern Ireland. There is again a firm commitment in this document to the GFA ‘in all its parts’ and a call for ‘flexible and imaginative solutions’. The Principles call on the UK to ensure there is ‘no diminution of rights’

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75 European Council (Art 50) guidelines following the UK’s notification under Article 50 TEU (EUCO XT 20004/17) www.consilium.europa.eu/media/21763/29-euco-art50-guidelinesen.pdf (last accessed 2 May 2018).
76 Ibid para 11.
77 Ibid pp 2–3.
and this includes non-discrimination guarantees that are part of EU law. In terms of citizenship rights arising from the GFA, there is clarity that the Withdrawal Agreement should ‘respect and be without prejudice to these rights’. As with the position taken by the UK and Irish Governments, the Commission notes the need to continue the CTA ‘in conformity’ with EU law. These Commission priorities all found their way into the Joint Report and the draft Withdrawal Agreement.

Ways Forward?

What can be extracted from the various positions adopted to date? The question raised by the analysis thus far is precisely what is to be done about translating broad agreement in the abstract into precise legal language and what models might offer workable solutions. There have been several proposals advanced. These range from ideas around membership of the European Economic Area (EEA), suggestions on a ‘Cyprus Model’ or ‘reverse Greenland’ to the notion of a special designated status for Northern Ireland and options around a ‘GFA plus model’, as well as the suggested value of the German example when considering questions of future Irish reunification. As with much of the discussion on Northern Ireland, the problem is rarely the absence of proposed solutions (a library could be filled with suggested ways forward). In fact, across many of the areas of continuing constitutional contestation there are multiple models on offer, all with varying degrees of detail (feasibility is always dependent on perspective). It is the cross-communal political demands of consensus (equally vital in terms of Northern Ireland’s version of constitutionalism) that stand in the way. At the time of writing, the Commission’s attempt to offer a legal answer, as a ‘backstop’, met with considerable resistance in mainstream British politics (even though to many in Ireland it seemed like a logical conclusion flowing from the Joint Report and in tune with the asymmetrical, differentiated, decentralised and pluralist UK that has evolved since 1998).

There are several points to highlight in reflecting on ways forward but five themes are drawn out here. First, there is a division between those suggestions that focus narrowly on what might be termed ‘technical fixes’ to immediate problems and those that scope out the wider constitutional implications. British constitutionalism is well known for being historically prone towards pragmatism over constitutional or normative pyrotechnics. However, there is a clear need to ensure that the consequences of Brexit for the island of Ireland are fully understood in all their constitutional and legal consequences.

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80 Ibid p 4.
81 Ibid p 4.
82 Ibid p 5.
83 See above n 54.
86 Ibid. See also Sinn Féin, ‘The Case for the North to Receive Special Designated Status within the EU’, www.sinnfein.ie/files/2016/The_Case_For_The_North_To_Achieve_Special_Designated_Status_Within_The_EU.pdf (last accessed 2 May 2018); Sinn Féin, ‘Securing Special Designated Status for the North within the EU’, www.sinnfein.ie/files/2017/BrexitMiniDocs_April2017_Final.pdf (last accessed 2 May 2018). See the work undertaken by the BrexitLawNI project: https://brexitlawni.org/ (last accessed 2 May 2018).
88 Gallagher and O’Byrne (n 85) p 56.
normative complexity. A singular UK-wide decision has been taken that is expressly against the wishes of the majority of people of Northern Ireland. Viewed from within the dynamics of UK constitutional law this may appear justifiable and legally permissible. However, if events are understood through the lens of political and legal constitutionalism, as it has developed over the course of the peace process, then it is a problematic outcome. Brexit will mean that one part of the island of Ireland will be outside of the EU, with all the implications that flow from that. It is therefore appropriate that the questions have been escalated to the EU level, and gained such prominence in those debates and within the negotiations. The challenge for the Irish Government and the EU will be in maintaining this level of focus as these discussions advance and other matters come to dominate.

Second, it is plainly possible, with the required political will, to design arrangements that would reflect and respect the unique circumstances of Northern Ireland. The vast body of work already undertaken reveals that the EU recognises a host of special arrangements.\(^89\) The UK constitution can be criticised for many things, but rigidity is not one of them; this flexible constitutional system has the capacity to deliver an ‘imaginative’ outcome if the requisite political will is there. In this context, the legislative supremacy of the Westminster Parliament means that major constitutional initiatives can be taken (it is the question of binding any future Parliament to what is agreed that is the problem). There are risks with this model but in terms of designing solutions there is ample scope for creative constitutional thinking.

Third, the human rights and equality framework takes on additional meaning in the light of Brexit. The GFA gave weight to guarantees in these areas, some of which, such as the Bill of Rights, have never been delivered.\(^90\) Although human rights advocates have tended historically to look to the Council of Europe, the EU has increasingly taken on a rights-based orientation. This is evident, for example, in the EU Charter of Fundamental Rights and there is a sense in which (while acknowledging the limits of its scope of application) the potential of this instrument is still being realised. The EU has had much to say about matters of equality and non-discrimination and here departure may have severe implications.

Debates on the future of the UK remain speculative and the volatility of politics means that much is uncertain. However, it is possible to imagine a future Westminster Government that is minded to view the equality, rights and social justice dimensions of domestic law and policy as impediments to Global Britain’s new economic ambitions (particularly as these relate to trade). Without reasonably robust guarantees on rights and equality (that are sustainable and have mechanisms of enforcement and oversight) there is a real risk that the UK could fall behind and fail to keep pace with European developments. The decision of the current Government to defer (but not abandon) repeal and replacement of the Human Rights Act 1998 adds to the level of worry about the future. The tendency to refer to its replacement as a ‘British Bill of Rights’ does not appear to demonstrate much sensitivity to the ethno-national divisions of Northern Ireland.\(^91\) This has all inevitably re-opened a much needed debate about a possible Bill of Rights for Northern Ireland as well as discussion of a Charter of Rights for the island of Ireland. The GFA already envisaged these as

\(^91\) Colin Harvey, ‘Northern Ireland and a Bill of Rights for the United Kingdom’ (British Academy Briefing 2016), www.britac.ac.uk/sites/default/files/NI%20BOR%20178.pdf (last accessed 2 May 2018).
constitutionalised solutions to the potential problems that ethno-national power-sharing might give rise to.

Whatever the outcome of these reflections, Brexit will prompt tough questions about the implementation and enforcement of rights and how any commitments undertaken now will be guaranteed into the future. One of the lessons from the history of the peace process since 1998 is precisely the need for clarity and codification in this area.

Fourth, and as noted, there is much energy being invested in working out how to address the British–Irish dimensions of Brexit, including the question of a 'hard border' on the island of Ireland, the specific citizenship provisions of the GFA, as well as the continuation of the CTA. This is vital and essential work but Brexit has disturbing implications for ‘others’ who reside on these islands (or who wish to do so) and this makes human rights a particularly apt frame of reference. UK immigration and asylum law remains a consistent source of unease for those working for human rights and equality. Successive governments have adopted ever more repressive measures and the ‘Leave’ campaign’s language of ‘take back control’ clearly sought to bring migration into view. It is distinctly possible that UK migration policy will become ever more restrictive and that this approach will frame the conversation in Northern Ireland too (immigration remains an ‘excepted’ matter). The long-term price of an ‘invisible border’ on the island of Ireland may be paid by minority ethnic communities if the end product is enhanced internalised migration control with the subsequent risk of racial profiling and racial discrimination.92 The UK Government is steadily ‘subcontracting’ aspects of migration control throughout society and while it may be possible to resist elements of this trend in Northern Ireland, it is clear that ‘immigration status’ is going to become a key determining factor in how people are treated in the post-Brexit world. This is likely to manifest itself in enhanced requirements to demonstrate a right to be in the UK in order to access services, as well as more penalties for those who do not pay sufficient attention to these rules. This will all be part of a rebranded but unchanged ‘hostile or compliant environment’ for those deemed to be ‘illegal migrants’ in the UK.93 These measures may also pose challenges for attempts to respect the citizenship provisions of the GFA, depending on what arrangements are eventually put in place.

And finally, the debate on Brexit has triggered a conversation about Irish unity. Although this has generated tired and predictable responses, it is an appropriate question to raise for reasons that go beyond well-worn debates.94 The constitutional status of Northern Ireland is supposed to rest on continuing consent, and the position at present is that a majority appear to want to remain within the UK.95 If consent really is the underpinning element then it hardly seems excessive to ask that it be tested. Brexit alters the proposition around Irish unity in a fundamental way; the constitutional context for the debate is now different. For example, one way for Northern Ireland to remain in the EU is simply to leave the UK. This can be comfortably framed within the GFA and there is an argument that it should be normalised in political discourse (primarily to avoid potential future antagonism when a vote is held). There is a tendency to avoid this solution for reasons that are connected to well-founded anxieties about the peace process. That is understandable, and there is

95 See, for example, the election results noted in nn 42 and 44.
little doubt that a referendum on unity would generate dissent. The reaction to the suggestion remains concerning, however, primarily because it seems to call into question a constitutional fundamental of the GFA; it promotes the idea that this constitutional option might be for decorative purposes only. One solution to Brexit, that would respect the GFA fully, would be for Northern Ireland to be given the option of continuing membership of the EU through a vote on Irish reunification (a vote would also be held in Ireland). As with other proposals, it is one among many possible options and will come into play in a focused way once the outcome of the negotiations are clear (especially if they fail to deliver on the rhetoric about the peace process and the need to avoid a hard border on the island of Ireland).

The idea of a vote also poses the question of whether the final agreement reached, particularly if it has serious implications for the GFA and subsequent agreements, should be put to a vote in Northern Ireland (or even of the island of Ireland). Although much has been done since 1998, including amending the approach within the architecture of the GFA, Brexit is arguably of such profound constitutional seriousness that any ‘flexible and imaginative’ solutions that emerge should be put to the electorate and not simply left to the Westminster Parliament. This option would fall short of a vote on Irish unity but it would have the merit of testing the views of the people of Northern Ireland.

Conclusion

The decision to leave the EU was a profound constitutional moment for the UK and the island of Ireland. As simple as it may have seemed to some, it has provoked major constitutional contestation and been a destabilising factor in the politics of Northern Ireland. It also reveals the depth of complexity within the current political constitution of the UK.96 Practical measures are being advanced that might address the priorities that all seem agreed on, in principle at least; the problem is whether the political will is there to be genuinely creative and undertake binding (and enforceable) legal obligations. These debates too, however, can be a sophisticated form of linguistic constitutional code; what is ‘flexible and imaginative’ to some may not be to others and there is a real risk that solutions that emerge may be unified merely by their profound lack of imagination and failure to address, for example, human rights and equality concerns. The GFA is relevant to these conversations precisely because of the creativity on display there. Those who crafted this document displayed a dedication to contextualised thinking about the law and politics of these islands and a sensitivity to models of co-operation that might work. It gave life to a form of ‘both/and’ constitutionalism that has its weaknesses but which still represents a framework that stands the best chance of promoting long-term stability on a sustainable basis. It is difficult to escape the conclusion that despite the many verbal commitments to the GFA its spirit is more often breached than respected. This seems particularly evident in the story of rights and equality, where reasonable expectations from the peace process have not been achieved, including but not limited to a Bill of Rights. Brexit makes addressing this gap even more urgent but also presents an opportunity to confront complacency around rights and equality. There might even be a slender prospect that the

intense constitutional dialogue that has erupted gives legal life to meaningful guarantees. At this point, however, the long-term consequences of Brexit, and the constitutional outcomes of the new forms of political volatility, are hard to predict.