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The Constitutional Implications of Brexit for Northern Ireland

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ABSTRACT

The ongoing Brexit process has profound consequences for Northern Ireland within the constitution of the United Kingdom of Great Britain and Northern Ireland. Given the overriding importance of the Irish border to the Brexit negotiations, this paper examines the historical and constitutional circumstances that led to partition of Ireland in the first place. It goes on to consider the injustices prevalent within Northern Ireland prior to and during the ‘Troubles’ era, and the resolution of these issues of justice/injustice, via constitutional means, with the Good Friday/Belfast Agreement of 1998. Finally, it considers how the Brexit process has reopened apparently settled questions on the constitutional status of Northern Ireland within the UK, such as the viability of the post-1998 power-sharing institutions and the issue of whether a referendum on reunification with a united Ireland should be called.

Introduction

In the 2016 referendum, an overall majority of 51.9% of UK voters agreed to the proposition that the UK should ‘Leave’ the European Union. However, the distribution of votes was not equally in favour of ‘Brexit’ across the UK regions. Only England and Wales demonstrated majorities in favour of Brexit – Scotland and Northern Ireland showed clear majorities for Remain. As a result, the pursuit of Brexit has provoked constitutional instability in both ‘Remain’ regions. This chapter focuses on the constitutional questions raised by the Brexit vote, and subsequent political decisions about the UK’s post-Brexit relationship with the EU, for Northern Ireland. As explored below, the consequences of

Brexit for Northern Ireland threaten to re-open ‘old wounds’ – issues of justice/injustice that were apparently resolved by the 1998 Good Friday/Belfast Agreement.

The June 2016 referendum did not specify a particular form of Brexit. In the aftermath of the vote, several options were available, including joining the European Economic Area (EEA) and the European Free Trade Area (EFTA). Had the UK government sought a ‘soft Brexit’ by aiming to join both the EEA and EFTA then concerns over the constitutional status of Northern Ireland would not have arisen. Yet, the UK government instead sought to achieve a ‘hard Brexit’. The post-referendum ‘red lines’ the UK government developed in pursuit of this policy include the following key aims: (i) that the UK should leave the customs union so to engage in an independent trade policy and negotiate trade deals with non-EU countries; and (ii) ending free movement of people, which means, in effect, leaving the single market.

These UK ‘red lines’ are of great importance to the island of Ireland. Exiting the single market and customs union will mean that the Irish border between Ireland and Northern Ireland will become the only external land border between the EU and the UK. The UK, including Northern Ireland, would become a ‘third country’ with respect to the EU. As a matter of normal practice, this would necessitate the creation of border infrastructure in order to enforce checks on tariffs, regulatory compliance and, potentially, free movement of people. For a number of reasons, this poses a serious problem for maintenance of the Northern Ireland peace process, and cross-border collaboration between Ireland and Northern Ireland. As explained below, for many in Northern Ireland, the border itself is viewed as fundamentally unjust and arbitrary. The effective disappearance of the border in practice, which has occurred since the 1998 Agreement, but which has been underpinned by the legal principles of the EU single market, is a great achievement – and one that can only be described as ‘just’.

Yet, the UK government’s aims, and its stated means to address those aims, are inconsistent. For instance, the UK government has committed to no new infrastructure at the Irish border. This brings up a (potentially unsolvable) quandary: how can Northern Ireland be part of a third country to the EU (Ireland), and thus require a range of checks at the Irish border, if no infrastructure to allow such checks can be placed at the border? There are no equivalent borders to the EU (e.g. Norway, Switzerland) featuring no infrastructure. Moreover, the re-imposition of border infrastructure will certainly be viewed through the prism of injustice by many in Northern Ireland – they will argue that Northern Ireland, as a region within the UK, did not vote in favour of Brexit for the precise reason that it would inevitably cause this profound alteration to their daily lives.

In their attempts to find a solution, the EU and UK issued a Joint Report in December 2017 outlined three possible solutions to Irish border question (i) the border issue could be resolved in the framework

of a future EU-UK trade agreement whereby the UK could, as a starting point, form a customs union with the EU; (ii) it could be resolved through specific technical solutions that eliminate the need for border infrastructure; (iii) the ‘backstop’ – in the absence of other solutions the UK could commit to align itself with EU customs and internal market rules.

The UK has not brought forward tangible and workable technological solutions to the border question. As a result, the backstop has emerged as key to the EU-UK Withdrawal Agreement.

As part of the backstop, Northern Ireland would become a Common Regulatory Area (CRA) and would continue to abide by EU customs laws and EU legislation concerning the free movement of goods. Northern Ireland would be in a unique trading position within the UK. If the rest of the UK – Great Britain – left the customs union to seek trade deals elsewhere, Northern Ireland would remain under the EU customs and regulatory umbrella. The advantage to Northern Ireland of the backstop are: (i) the avoidance of infrastructure at the border and (ii) continued participation in the single market for goods, as well as more than a dozen related economic areas, which would benefit NI’s agriculture industry and other businesses. The backstop, therefore, is an attempt to prevent the injustice that would inevitably be caused by a ‘hard border’. Nonetheless, the Democratic Unionist Party, which has 10 MPs at Westminster, who are currently in a confidence-and-supply agreement with the government, strongly opposes any agreement that would see Northern Ireland classed as a separate territory with respect to EU law. At time of writing, this quandary is not resolved.

This chapter proceeds as follows: first, I examine the constitutional history of the Irish border, namely the political and legal decisions that led to partition in 1920; second, I examine the history of Northern Ireland from 1920 until 1998, including the ‘Troubles’; third, I consider the Good Friday Agreement 1998; and finally I explore the consequences of the current impasse – the potential for a hard border on the island of Ireland and whether a ‘border poll’ – a referendum on reunification – could be called in Northern Ireland in the coming years.

How the island of Ireland came to be Partitioned

Partition in the case of the island of Ireland is unique in that it results in both an internal (within the UK) separation and, eventually, an external one as first the Irish Free State acquired Dominion status (1922), and later full independence as a republic (1937, 1949). Yet, Ireland has only known partition since 1920. Prior to that Ireland was governed and administered as whole territory, and was wholly a member of the United Kingdom of Great Britain and Ireland. So in order to understand Northern Ireland as a contested territory, we must first examine how partition came to pass. Furthermore, it is impossible to examine the question of partition without noting the legacy of British imperialism and the

constitutional changes that occurred within the United Kingdom of Great Britain and Ireland during the 19th and early 20th century.¹

During the 19th century, the disadvantageous, and arguably unjust, system that saw Irish MPs taking their seats at Westminster rather than in an Irish Parliament in Dublin (as had been the case prior to The Acts of Union 1801) led to calls for the creation of a new Irish Parliament - in effect, Irish 'Home Rule' within the UK - by the Irish Parliamentary Party. Notably, Irish Home Rule was opposed by the key constitutional thinker of the day – AV Dicey. Loughlin notes that Dicey's outright rejection of Home Rule for Ireland was rooted in a foundation, not of law, but of sheer power dynamics: 'from the inherent capacity of a strong, a flourishing, a populous, and a wealthy country to control or coerce a neighbouring island which is poor, divided, and weak'.² Notably, for Dicey, the question of what was 'just' in the situation was irrelevant.

Partition arose as an idea in Ireland in the early 20th century, due to conflict over Irish Home Rule, the signature policy supported by the Liberal Party and the Irish Parliamentary Party, headed by John Redmond, which became legally achievable only after the constitutional changes made by the Parliament Act 1911. It was only with the passing of the 1911 Parliament Act, which reduced the power of the (Conservative-dominated) House of Lords to block bills in the House of Commons, that Home Rule for Ireland could be enacted by the Liberal-led government. Home Rule emerged at this time as a seeming inevitability – eventually leading to the passing of the Irish Home Rule Bill in 1914.

The attempt, via Home Rule, to resolve the longstanding 'Irish Question' stirred up a corollary – the 'Ulster Question'. Unionists in Ireland, who were mainly Presbyterians or Anglicans located primarily, but certainly not exclusively, in the north-eastern counties of Ulster, claimed that 'Home Rule' in Ireland would be unjust to them as it would amount to nothing less than 'Rome Rule'. The reason for this was that the Home Rule parliament envisaged for Ireland would not be Grattan's Anglican institution (which did not allow Catholic or Presbyterian participation), but, in keeping with changes to the British electoral franchise during the 19th century, would be a relatively open, majoritarian one. This would, Ulster Unionists feared, entrench a permanent governing majority of parties loyal to Catholicism and to Nationalist causes.

From 1912 Ulster Unionist politicians headed by Edward Carson, and encouraged by British Conservative politicians, opposed Irish Home Rule with great virulence, both by political means, and

¹ K.J. Rankin, 'Deducing rationales and political tactics in the partitioning of Ireland, 1912-1925' *Political Geography* 26 (2007) 909-933.

² AV Dicey, *A Leap in the Dark, or Our New Constitution* (London: John Murray, 1893), 29. As related by M. Loughlin, 'The British Constitution: Thoughts on the Cause of the Present Discontents' *LSE Law, Society and Economy Working Papers* 2 (2018), 8.

via the threat of militant violence (the formation and arming of the Ulster Volunteer Force). Ulster Unionist politicians opined that Home Rule would, on a majoritarian basis, create an Irish Parliament in which the interests of the Protestant-Unionist minority on the island could be subjected to a Catholic-Nationalist majority. For Unionists, this was perceived as creating the potential for tremendous injustices to occur – they did not welcome the idea of becoming a potentially vulnerable minority community within a Home Rule system.

It is also relevant that the area around Belfast was by far the most economically important in Ireland – it was the centre of the ship-building industry, where famous ocean liners such as The Titanic, were built. Ulster Unionists feared that the economic links with Great Britain could suffer if Home Rule were enacted – especially if it ended up being a stepping-stone to full independence for Ireland.

It was in this context that the foundational document of Ulster Unionism – the Ulster Covenant - was written in 1912. By then Edward Carson had emerged as the leading Unionist Politician, leading the Irish Unionist Party. Ulster Unionists began to arm themselves, forming the Ulster Volunteer Force. In this they were encouraged by British Conservative politicians, such as Bonar Law, to defend their interests against the creation of what Unionists envisaged would be a Catholic-dominated Irish Home Rule parliament.³

Before any internal (to Ireland) conflict took place, WWI broke out, and many thousands of Ulster Unionists and Irish nationalist supporters of Home Rule enlisted in the British army. Home Rule was suspended. By the time WWI had ended, the circumstances of the relationship between Britain and Ireland had changed profoundly, both politically and constitutionally. Before the Home Rule Bill could be given Royal Assent, WWI broke out. During WWI the 1916 Easter Rising happened, and the Irish nationalist mood shifted towards full independence. The 1918 General Election led to a majority of anti-Home Rule, pro-independence Sinn Féin MPs being elected – they refused to take their seats at Westminster and instead formed a shadow government in Dublin.

From a political perspective, the 1916 Easter Rising in Dublin, and the subsequent execution of most of the principal instigators, radicalised a generation of Irish nationalists. The executions were viewed as acts of great injustice – and an Irish political majority turned away from the promise of Home Rule, and threw their weight behind the goal of complete independence from Britain; constitutionally, changes to the electoral franchise post-WWI increased the electorate in Ireland by two-thirds, and led to the election of a substantial majority (73 out of 105) of Irish MPs from Sinn Féin, the pro-

³ J. Anderson and L. O'Dowd, 'Imperialism and nationalism: The Home Rule struggle and border creation in Ireland, 1885-1925' *Political Geography* 26 (2007) 934-950

independence and anti-Home Rule party, while also bringing 26 Unionist candidates to power in the northern counties.⁴ When the Home Rule was finally enacted in 1920, it came in the form of the Government of Ireland Act 1920, which partitioned Ireland into North and South, with each having its own Home Rule parliament.

Partition is a political device that must be accommodated in constitutional terms. It is commonly put forward as the solution to the problem of contested territory – of competing nationalisms (British/Irish) – and of demography – majority/minority communities (Protestant-Unionist, Catholic-Nationalist).⁵ While partition is viewed as a political solution allowing ‘decision-makers to find a way out of seemingly intractable political dilemmas’,⁶ it brings up vital questions for constitutional drafters and lawyers: who encompasses the nation that the constitution is proclaimed for? What territory does the constitution claim and where does its legal jurisdiction end? Rather than providing a just and comprehensive solution to the tensions that arise when territory is contested, partition succeeds only in so far as it creates new problems – in Ireland partition inverted the problem of a Protestant-Unionist minority on the island, by creating a six county statelet with a Protestant-Unionist majority; over time the way this Protestant-Unionist majority was politically engineered (gerrymandering of constituencies; discrimination in housing and employment) created injustices that erupted in political violence (The Troubles). Therefore, the impact of partition in Ireland was experienced very differently by Unionists and Nationalists. For Irish Nationalists, it was viewed as a great injustice – whereas for Unionists it was a just and proper reassertion of their role within the UK. Partition did not solve the underlying problem of majoritarian nationalism – it merely turned that problem on its head.

The Government of Ireland Act in 1920 therefore paved the way for a settlement based on a determination that whatever happened to the remainder of the country, the six counties of what thereafter became known as Northern Ireland would remain within the United Kingdom. It is within this context that the Treaty between the British negotiators and the Irish nationalist representatives was negotiated and agreed in 1921. Yet, evidence suggests that the British did not see partition as being a permanent split between nationalists and unionists.⁷ As Anderson and O’Dowd remark:

The imperial architects of partition neither intended to separate Ireland from the empire, nor Ireland’s unionists and nationalists from each other. The Cabinet Committee saw its ‘six-county solution’ as short-term and meant its effects to be minimised as a prelude to restoring the island’s unity within the empire, but in this they were largely thwarted by Ulster unionists.⁸

⁴ J. Coakley, ‘The Impact of the 1918 Reform Act in Ireland’ *Parliamentary History* 37 (2018) 118-132.

⁵ B. O’Leary, ‘Analysing partition: Definition, classification and explanation’ *Political Geography* 26 (2007) 886-908.

⁶ T.G. Fraser, *Partition in Ireland, India and Palestine: Theory and practice* (London: Macmillan, 1984), x.

⁷ T.G. Fraser, *Partition in Ireland, India and Palestine: Theory and practice* (London: Macmillan, 1984).

⁸ Anderson and O’Dowd, 945.

Despite intentions, partition quickly became permanent – with the tacit acceptance of the Irish Free State. Indeed even in the original text of the 1937 Irish Constitution, which cleared the way for the 26 counties of Ireland to become a republic, the reality of partition was impliedly acknowledged from a practical legal perspective, even if a territorial claim on the entire island was still maintained.

Indeed, Northern Ireland from its creation was given exceptional status within UK law – framed by a written constitutional statute – the 1920 Act - with a devolved parliament and executive, but crucially without any counter-majoritarian checks on these powers. Thus Northern Ireland's special status, and the apparent autonomy of it as an exceptional, contested territory, dates from this constitution-making moment (1920-22). The constitutional state of exception created both an ambiguous relationship with the central administration (Westminster), which at various times assumed direct rule, and an antagonistic relationship with the neighbouring nation state that saw the territory as part of its own expansive idea of the nation (Ireland). Rather than facilitating justice, reconciliation and co-existence, the special status granted to Northern Ireland actually begat a form of unjust exceptionalism that led to the erosion of constitutional guarantees. At the same time, the exceptional status accorded at the time of partition led to later attempts at resolving tensions via constitutional means, with varying degrees of success.

Put simply, the UK created Northern Ireland as a state of exception underpinned by constitutional law.⁹ Partition is a question of justice because a substantial portion of the population do not identify with the nation-state they are officially a part of. As a result, since 1920 this exceptional province has featured frequent campaigns of violent opposition against what are often perceived as 'occupying forces' with limited or no political legitimacy.

Northern Ireland within the United Kingdom Constitution (1920-1998)

The Government of Ireland Act 1920 was enacted as the foundational constitutional statute for Northern Ireland. Yet, despite the fact that the Act established partition, creating the lawful basis for what was then envisaged as Home Rule Parliaments for both Northern Ireland and Southern Ireland, partition was not intended at the time to be a permanent fixture of the new established order. Sections 1-3 of the Government of Ireland 1920 Act provided for the eventual establishment of a united Home Rule parliament for Ireland – showing that partition was envisaged as an impermanent and non-ideal solution. However, the idea of a Home Rule Parliament for Southern Ireland met with staunch nationalist opposition, and was rejected by Irish nationalist politicians. Instead, a shadow Irish Parliament – the first Dáil - continued to operate in Dublin constituted by the 1918 General Election mandate, which

⁹ C. Schmitt, *Political Theology: Four Chapters on the Meaning of Sovereignty* (Cambridge, MA: MIT, 1985).

returned a majority of obstructionist Sinn Fein MPs. For this reason, the 1920 Act had significance in reality only for the institutions of Northern Ireland. One key aspect of the Act made clear that Executive powers largely devolved to the Lord Lieutenant's (later in 1922, the Governor's) administration.

Importantly, Northern Ireland's constitution had few safeguards on majoritarian and executive dominance. Yet, Section 5(1) of the Government of Ireland Act 1920 guaranteed freedom of religion and appeared to outlaw discrimination on the basis of religion. Despite this, injustice and discrimination became endemic – it was particularly apparent in the electoral system. Section 14 of the Government of Ireland Act 1920 established proportional representation (P.R.) as the electoral system to be used in local government and the parliaments of Northern Ireland (and Southern Ireland), though after a 3 year period it enabled the Parliament to change the electoral system. Indeed, following Unionist Party losses in the 1925 general election in Northern Ireland, PR was abandoned in favour of FPTP, which proved more favourable to the party's chances in the 1929 election, where it lost vote share, but gained four seats. Similarly, PR was quickly abolished for local government elections.¹⁰ This can only be viewed as unjust – a majority polity changing the electoral rules to better suit its opportunity to entrench majoritarianism.

Moreover, the voting system for local elections did not follow the course of mid-century British reforms, but rather maintained 'the property franchise' which denied votes to those who were not property owners, and those who paid business rates could further avail of additional votes. These measures primarily benefited those who were Unionist/Protestant, creating the conditions for further injustice in the administration of local government.¹¹ At the same time, the gerrymandering of constituencies in Catholic-majority cities such as Derry and Enniskillen is well documented.¹² Moreover, it is clear there was some discrimination in the award of local authority housing, and that this was linked to inequalities in electoral representation.

The overall provincial Unionist majority, coupled with these inequalities, meant that the Ulster Unionist Party was in continuous office at Northern Ireland parliament from 1922-1972. The entrenchment of a permanent Unionist majority, no matter what the cost, was the unashamed goal of many Unionist politicians. The phrase 'a Protestant Government for a Protestant people' – often attributed to Lord Craigavon - became commonly known.¹³ The anomalies between the electoral rules in Great Britain

¹⁰ P. Buckland, *The Factory of Grievances. Devolved Government in Northern Ireland 1921-39* (Dublin, Gill & Macmillan, 1979). See also Roy Foster, *Modern Ireland 1660-1972* (1988).

¹¹ <https://www.theguardian.com/politics/2018/apr/22/lost-moment-exhibition-northern-ireland-civil-rights-1968-troubles-what-if>

¹² Tbc

¹³ TBC

and those in Northern Ireland were not ended in Northern Ireland until the Electoral Law Amendment Act was passed in 1968, while PR was reintroduced for local elections in 1973.

Finally, the Royal Ulster Constabulary (RUC) came to be an overwhelmingly Unionist/Protestant institution, with a disproportionately low number of Catholics represented. This led many in the nationalist community to question its legitimacy – a particularly acute problem once ‘The Troubles’ began in the late 1960s.

The above examples of injustice are well documented and not in any historical doubt. That in its first decades Northern Ireland became a ‘factory of grievances’ is a point that has been long-accepted.¹⁴ Paul Bew argues that there are shades of grey in this narrative, but even he accepts its overall validity.¹⁵

CONSTITUTIONAL ‘EXEMPTIONS’, POLITICAL VIOLENCE, AND PRAETORIAN RULE

Northern Ireland is a contested territory. A place where there is, perhaps, no consensus on what is just and what is unjust. Its unique legal arrangements within the UK from 1920 onwards created the conditions executive dominance, praetorian rule, and human rights violations. Injustice was particularly evident during the thirty-year period known as ‘The Troubles’ (1968-1998).¹⁶ I do not intend to conduct a detailed analysis of this period. However, it is worth noting a number of key legal points that demonstrate Northern Ireland’s unique state of exception, including several cases of injustice that typify a wider problem of unjust governance.

The Civil Authorities (Special Powers) Act (Northern Ireland) 1922 was passed by the Parliament of Northern Ireland in the context of continued violent unrest following partition. It was extremely controversial and provided for security-related quasi-military police action to be taken by the Ulster Special Constabulary (USC or ‘B Specials’) who were distrusted by the nationalist community. The USC were not disbanded until 1970. The Special Powers Act was not repealed until the Northern Ireland (Emergency Provisions) Act 1973, enacted under direct rule by the British government.

Key signifiers of the injustices that occurred during ‘The Troubles’ included the following: internment, Bloody Sunday, the imposition of direct rule from Westminster, and the ECHR case of *Ireland v UK* (1978) (the ‘hooded men’ case). Internment without trial was introduced on the 9th of August 1971.

¹⁴ P. Buckland, *The Factory of Grievances. Devolved Government in Northern Ireland 1921-39* (Dublin, Gill & Macmillan, 1979). See also Roy Foster, *Modern Ireland 1660-1972* (1988).

¹⁵ P. Bew, ‘The Political History of Northern Ireland since Partition: The Prospects for North-South Co-operation’ *Proceedings of the British Academy* 98 (1999), 401-418.

¹⁶ See for instance, C. Kennedy-Pipe, *The Origins of the Present Troubles in Northern Ireland* (Routledge, 1997) and R. English, *Irish Freedom* (Macmillan, 2006).

More than 300 people were interned, many of whom had no connection with the IRA, some of whom were mistreated (leading to the ECHR case). On 30 January 1972, fourteen unarmed demonstrators were shot and killed by British soldiers during the march that became known as Bloody Sunday. Home Rule was suspended shortly afterwards, in March 1972, and Northern Ireland was thereafter ruled directly from London until the 1998 Agreement came into force. The ECHR case of *Ireland v UK* in 1978 underlined Northern Ireland's exception status, with respect to derogation from ECHR principles in time of 'war' (Article 15).¹⁷

The overall point that emerges from the above analysis is that rather than cement its status within the wider UK, Northern Ireland's constitutional existence was defined continually in contrast to the remainder of the UK. It was the only part of the UK to have what was in effect a written constitution in the form of the 1920 Act; and the only part that had a separate democratically elected governmental administration possessing the power to rule on a wider range of matters. In this context the UK constitution could be described as the 'normal' state of affairs; by contrast Northern Ireland's legal status has always been an exception. Nothing that has happened since 1920 has undermined this exceptional status – at every stage it has been reinforced, at times even radically, as in the 1998 Agreement, which built upon earlier attempts at creating a constitutional resolution such as the Sunningdale Agreement 1972 and the Anglo-Irish Agreement 1985.

THE GOOD FRIDAY AGREEMENT AND THE NEW INSTITUTIONS OF POWER-SHARING

Looking at the text of the 1998 Agreement one of its most striking aspects is that it attempts to accomplish many of the same things that the Government of Ireland Act 1920 aimed to achieve – provision for cross-border institutions, and envisaging a united Ireland (this time as fully independent) only when that is so wished by a majority on the north side of the border.¹⁸ Yet its structures are innovative - as Loughlin notes, the 1998 agreement 'reframed the entire structure of Northern Ireland government and, running against the grain of traditional British practice, established a range of modern constitutional techniques explicitly designed to overcome division and to bolster trust'.¹⁹ This included the creation of a consociational form of government with respect to the Northern Ireland Assembly.²⁰ The Agreement was approved by referendums on both sides of the border.

¹⁷ *Ireland v United Kingdom* (1979-80) 2 EHRR 25.

¹⁸ H. Lerner, *Making Constitutions in Deeply Divided Societies* (CUP, 2011)

¹⁹ M. Loughlin, *op cit.*

²⁰ C. McCrudden, 'Northern Ireland and the British Constitution since the Belfast Agreement' in J. Jowell and D. Oliver (eds), *The Changing Constitution* (Oxford: Oxford University Press, 6th edn, 2007), 227-270.

On the UK constitutional side, the Northern Ireland Act 1998 was passed by the Westminster Parliament, devolving power to the newly created Assembly. The Act also accepts the principle that Northern Ireland can leave the UK to reunify with the Republic of Ireland based on majority consent.²¹ Section 1 of the Northern Ireland Act 1998 states that Northern Ireland can secede from the UK and join a united Ireland if the majority of its people agree to this in a referendum (as called for by the Secretary of State for Northern Ireland when he/she considers it likely that there is a majority in support of such a poll). From the Irish nationalist perspective, 1998 Good Friday/Belfast Agreement represented a profound political and legal shift.²² After approval by referendum, the Irish Constitution, enacted in 1937, was amended in 1998 to remove the outright Irish territorial claim on the entire island and to accept the principle that reunification can only happen when majorities on both sides of the border accept it. The new text is as follows:

Article 3 – (1) It is the firm will of the Irish Nation, in harmony and friendship, to unite all the people who share the territory of the island of Ireland, in all the diversity of their identities and traditions, recognising that a united Ireland shall be brought about only by peaceful means with the consent of a majority of the people, democratically expressed, in both jurisdictions in the island. Until then, the laws enacted by the Parliament established by this Constitution shall have the like area and extent of application as the laws enacted by the Parliament that existed immediately before the coming into operation of this Constitution.

(2) Institutions with executive powers and functions that are shared between those jurisdictions may be established by their respective responsible authorities for stated purposes and may exercise powers and functions in respect of all or any part of the island.”

Martin Loughlin notes that UK and Irish membership of the EU contributed to the peace settlement because it ‘set in place a dynamic scheme for devolving governmental powers to its several constituent nations and, perhaps most crucially, it provides the supporting structure for the unique cross-border arrangements that brought about a peace settlement in Northern Ireland’.²³

Recently tensions over Northern Ireland’s status have re-emerged a result of the Brexit process. For the first time in the 21st century the territory’s immediate status within the United Kingdom is being openly and seriously questioned by Northern nationalists, and even by many politicians and scholars across the rest of Ireland.²⁴ On the Unionist side, the Good Friday Agreement has been called into question both

²¹ Northern Ireland Act 1998, s.1

²² J. Coakley and Liam O’Dowd, ‘The transformation of the Irish border’ *Political Geography* 26 (2007) 877-885.

²³ M. Loughlin, op cit.

²⁴ See generally F. O’Toole, *Heroic Failure: Brexit and the Politics of Pain* (Apollo, 2018); T. Connelly, *Brexit and Ireland: The Dangers, the Opportunities, and the Inside Story of the Irish Response* (Penguin, 2018); R. Humphreys, *Beyond the Border: The Good Friday Agreement and Irish Unity after Brexit* (Merrion Press, 2018).

by the DUP and prominent English Tory politicians such as Boris Johnson.²⁵ The prospect of a hard-border on the island of Ireland has been raised, which would undo much of the political and constitutional work of the last two decades (that was, after all, aimed to ameliorate the injustices arising from partition while respecting both communities and their traditions). Lost in much of the Brexit debate is the fact that much of the 1998 Agreement is presaged on viewing Northern Ireland as an exceptional case within the UK i.e. as ‘bi-national’.²⁶ It is, therefore, not an exaggeration to say the 1998 Agreement accepted an element of shared sovereignty that the idea of a ‘hard Brexit’ could obliterate.

Brexit and the Irish Border Quandary

With Brexit, the UK seeks to engage in an independent trade policy and negotiate trade deals with non-EU countries. The UK government under Prime Minister Theresa May also has committed to ending the EU principle of free movement of people. The cumulative effect of the exercise of these two ‘red lines’ is that the UK aims to exit the customs union and single market, in order to deviate from EU rules.

These UK ‘red lines’ are of great importance to the island of Ireland. Exiting the single market and customs union will mean that the border between the independent Ireland of 26 counties and the 6 counties of Northern Ireland will become the only external land border between the EU and the UK. As a matter of normal practice, this would necessitate the creation of border infrastructure in order to enforce checks on tariffs, regulatory compliance and, potentially, free movement of people. For a number of reasons, this poses a serious problem for maintenance of the Northern Ireland peace process, and cross-border collaboration between Ireland and Northern Ireland. Yet, the UK has also committed to no new infrastructure at the Irish border. It is hard, perhaps impossible, to ‘square the circle’.

In their attempts to find a solution, the EU and UK issued a Joint Report in December 2017 outlining three possible solutions to Irish border question: (i) the border issue could be resolved in the framework of a future EU-UK trade agreement whereby the UK could, as a starting point, form a customs union with the EU; (ii) it could be resolved through specific technical solutions that eliminate the need for border infrastructure; (iii) the ‘backstop’ – in the absence of other solutions the UK could commit to align itself with EU customs and internal market rules.²⁷ Potentially, there are other options, such as

²⁵ F. O’Grady, ‘Boris Johnson’s sickening comments typify Brexiteers’ approach to Ireland’ *The Guardian* (28 February 2018).

²⁶ B. O’Leary, ‘The Nature of the British-Irish Agreement’ *New Left Review* 1/233 (Jan-Feb 1999).

²⁷ *Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase I of negotiations under Article 50 TEU on the United Kingdom’s orderly withdrawal from the European Union* (8 December 2017) - https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf

those explored by Nikos Skoutaris in this volume, whereby different parts of the UK could remain in the EU while others leave – using Cyprus as a potential model – but these are not discussed in this chapter as they are not part of the current negotiations.²⁸

The collapse of the NI Assembly power-sharing operations in early 2017 has meant that there is no operational executive capable of showing leadership and, crucially, a willingness to compromise. In the current EU-UK Withdrawal Agreement, attention has been focused on ‘the backstop’ which, although supported by a clear majority in Northern Ireland (on current polling) is opposed by the DUP and certain members of the governing Tory party.²⁹

The Backstop and its controversies

The UK has not brought forward tangible and workable technological solutions to the border question. As a result, the ‘backstop’ has emerged as key to the EU-UK Withdrawal Agreement. The backstop envisages a hard border on the island of Ireland being avoided via the overarching agreement on the future EU-UK trade relationship or via a subsequent agreement to replace the backstop. If the backstop were triggered, Northern Ireland would become a Common Regulatory Area (CRA) and would continue to abide by EU customs laws and EU legislation concerning the free movement of goods. Northern Ireland would be in a unique trading position within the UK. If the rest of the UK – Great Britain – left the customs union to seek trade deals elsewhere, NI would remain under the EU customs and regulatory umbrella. The advantage to NI of the backstop are: (i) the avoidance of infrastructure at the border and (ii) continued participation in the single market for goods, which would benefit NI’s agriculture industry and other businesses. The single market relationship between the EU and NI would relate to goods and cross-border trade. NI would have to follow relevant EU law and accept the Court of Justice of the European Union’s jurisdiction over issues falling within this scope.

Some members of the Conservative Party and the Democratic Unionist Party are concerned that the backstop will trap the UK in a permanent customs union – with Northern Ireland additionally effectively remaining in the Single Market. At time of writing, this is a key stumbling block to MPs approving a Brexit deal. At present there are efforts by the British government to reopen the legally-binding Withdrawal Agreement to remove the backstop, but this seems unlikely.

²⁸ See N. Skoutaris, ‘Brexit and transitional justice: Brexit as a challenge to peacebuilding’ (this volume), as well as N. Skoutaris, ‘Territorial Differentiation in EU Law: Can Scotland and Northern Ireland Remain in the EU and/or the single market?’ *Cambridge Yearbook of European Studies* (2017), 1-24.

²⁹ ‘DUP confirms to vote against Brexit deal and ‘toxic’ backstop’ *Reuters* (15 January 2019).

Ultimately, the possibility that a ‘no deal’ Brexit will occur in April or in May 2019 will necessitate the construction of customs infrastructure along or close to the Irish border, as the UK will suddenly become a third country under EU law and checks would be required on goods. Whether such infrastructure would be set up by the Irish government, per EU instructions, or by the UK government on the Northern side, is uncertain. However, the setting up of such infrastructure is likely to exacerbate political and sectarian tensions within Northern Ireland, making the reconstituting of the Northern Ireland Assembly less and less likely. In time, and with demographic changes on the horizon in Northern Ireland that favour Irish nationalists, and continued support for the EU being a majority view across NI, the likelihood of a ‘border poll’ can only increase. Prior to the Brexit referendum it did not appear likely that Irish reunification would come to be an active issue in British and Irish politics during the next decade. Brexit has re-opened old wounds and increased the likelihood that it will occur. Time is moving faster than expected on this issue. The next years may see a constitutional resolution, either via an eventual soft Brexit or via a hard or no deal Brexit, and a referendum on Irish reunification. As with partition, reunification would be a question of justice/injustice – with nationalists and unionists having different conceptions of what is just and unjust in the circumstances.

CONCLUSION

The ongoing Brexit process has profound consequences for Northern Ireland within the constitution of the United Kingdom of Great Britain and Northern Ireland. Given the overriding importance of the ‘Irish border’ to the Brexit negotiations, this paper examined the historical and constitutional circumstances that led to partition of Ireland in the first place. It considered the injustices that occurred during the ‘Troubles’ era, and the apparent resolution of these questions of justice/injustice, via constitutional means, with the Good Friday/Belfast Agreement of 1998. Finally, it considered how the Brexit process has reopened apparently settled questions on the constitutional status of Northern Ireland, such as the viability of the post-1998 power-sharing institutions and the issue of whether a referendum on reunification with a united Ireland should be called. The question of what, for each community, is just and unjust regarding the border between Ireland and Northern Ireland remains an open one in the post-Brexit environment.