

Imposing Brexit onto Northern Ireland's Post-Conflict Governance Order

Colin Murray

2023-04-05T11:56:21

The Westphalian state provides for an all-but ubiquitous building block of governance. It stacks neatly into dominant accounts of multi-level governance, with all states being presented as nominal equals on the plain of international law. Where reasons of scale or the needs of diverse societies require, sub-state levels of governance can be introduced into the equation. Multiple states, moreover, can pool aspects of their law and decision making where they see the advantages of so doing, resulting in regional supra-national bodies such as the EU.

The neatness of the model, even if its flaws have long been identified, makes it all the more difficult for policy makers to interact with polities which refuse to fit obediently within it. Familiarity generates a self-sustaining set of expectations. Northern Ireland, however, continues to defy these expectations, with the [Belfast/Good Friday Agreement 1998](#) instituting a complex multi-level governance order, sustained by a sophisticated electorate (although one deeply divided by rival accounts of how the polity should be governed) and an active civil society. For the better part of half a century, the UK and Ireland's shared membership of the EU helped them to [cooperate](#), even amid the Northern Ireland conflict. It also made the 1998 Agreement a more focused package to reach; the operation of the four freedoms under EU membership was already operating to soften many practical impacts of the border. This legal-political order provides a vibrant, frequently frustrating, counterpoint to simplified accounts of statehood. It has also generated intractable problems for the EU and UK, with its place in the [Withdrawal Agreement](#) continuing to sour their post-Brexit relationship.

The preeminent challenge for the UK Government regarding Northern Ireland has long been one of scale. Northern Ireland has only "broken through" onto the agenda in Westminster and Whitehall in instances of governance breakdown such as the long years of direct rule from Westminster during the Northern Ireland conflict. In the wake of the conflict, it was thus attractive for UK policy and lawmakers to "devolve and forget", even if the ongoing peace process and the conflict's legacy meant that Northern Ireland issues continued to intermittently intrude onto their agenda. The UK Government paid little attention to how Brexit would affect Northern Ireland until it was deep in negotiations with the EU, and then Brexit's [prime movers](#) resented the complexity it introduced as 'the tail wagging the dog'.

Seven years into the Brexit saga, it is no longer the case that policy makers lack a general appreciation of Northern Ireland's distinct governance order, although the learning curve in the months after the Brexit referendum was steep and Brussels was faster to master it. The EU Commission's ability to pinpoint significant elements

of the 1998 Agreement, on rights protections and North-South cooperation, to connect these to other factors, including the island of Ireland being a single unit for SPS purpose and the all-island electricity market, and to build these elements into its proposals for a Withdrawal Agreement, repeatedly wrong-footed the UK Government. But having achieved an Agreement which addresses these issues by keeping Northern Ireland in a state of high alignment with the Single Market for goods and maintaining an extensive range of EU rights and equality protections, the EU's challenge has become making this work amid the Johnson Government's recalcitrance towards this deal.

The Brexit deal recognises the instability of Northern Ireland under simplified conceptions of statehood. The EU and the UK agreed that its post-1998 governance arrangements could not have been sustained if these considerations did not condition either the Brexit deal as a whole (Theresa May's attempt towards a UK-wide high-alignment model under the backstop version of the Protocol) or Northern Ireland's part in it (Boris Johnson's ultimate deal). But three years on from Brexit, policy makers in Brussels and London still struggle with the task of making such a special governance order work in practice, especially when it is in the interests of London to leverage Northern Ireland's stability to attempt to secure improved terms. Many of the frictions resultant from the Northern Ireland Protocol's operation are as much a facet of the Johnson Government's refusal to countenance more extensive alignment with EU law under the [Trade and Co-operation Agreement](#), particularly where SPS rules are at issue, as with any feature of the Protocol itself. Both parties knew what the Protocol required if such steps were not taken in the 2020 negotiations.

Such machinations, however, should always have been expected. Special governance arrangements have intermittently been relied upon in an effort to address urgent issues in contested polities, and those inauspicious circumstances have almost invariably played a role in unravelling them. The aftermath of the First World War was a high point of such constitutional experimentation. From French control of the Territory of the Saar Basin, to the creation of the Free City of Danzig, swathes of the Versailles Treaty were devoted to using novel arrangements to abridge or attenuate aspects of statehood in order to provide rough-and-ready fixes for particular challenges. Poland needs a major Baltic Port? Carve out a predominantly German-populated city and tie it into a customs union with Poland, allowing the latter to manage its foreign relations. Sovereignty was exceedingly mutable in the hands of the victorious powers.

None of the schemes, however, would survive the inter-war period. No matter how committed French officials were (in the words of one [report](#) in the League of Nations archives) to not administering customs in the Saarland too strictly, so as to avoid „clashing with the habits of the locals“, the special arrangements would be swept away after the 1935 plebiscite. And at Danzig, the constant friction between the Poland and the city authorities led to hundreds of disputes before successive League of Nations High Commissioners and accounted for much of the caseload of the Permanent Court of International Justice in the 1920s. Such special arrangements, especially if they are seen as being externally imposed, are invariably contentious.

Undeterred by the persistent instability around these arrangements and their ultimate collapse, one of the newly-minted United Nations' first major initiatives was to advance a plan, promulgated by its [Special Committee on Palestine](#), for the partition of the mandate territory of Palestine, already gripped by internal conflict from the latter stages of the Second World War, which would see the two new proposed states conjoined in a full [economic union](#). In a startling example of not letting the facts on the ground get in the way of constitutional experimentation, the newly created states would put aside the ongoing conflicts and immediately cooperate in terms of trade in goods, currency and infrastructure, in a level of integration which it would take the Eurozone members decades to achieve under the auspices of the EU. The imposition of the shekel as a common currency for Israel and the occupied territories would follow the 1967 war, as would a de facto customs union, but this would be an arrangement hedged with protectionist measures in favour of Israel (a major point of contention in the negotiation of the [Oslo Accords](#)).

The Protocol is not a reprise of any of these schemes. EU officials do not administer customs within Northern Ireland, and there is nothing therein approaching Poland's management of Danzig's foreign affairs. The deal, moreover, was hardly imposed upon the UK Government; then Prime Minister Johnson concluded it willingly as a means of addressing commitments made towards Northern Ireland in a manner which imposed minimal restrictions on post-Brexit freedom of action with regard to Great Britain. It is, however, a marker of how alienated Unionist sentiment is from London that the Protocol can continue to be presented as an external imposition. Furthermore, the complexities of managing a border between modern product standards regimes, and not simply customs duties, dwarfs some of the challenges of these antecedents. The depth of the EU Single Market for goods makes it very difficult to operate what is, in effect, part of that Market's external boundary, in a flexible way in the Northern Ireland context. Protocol mitigations, which for weeks seemed tantalisingly close, rest not on trust but on the UK finally providing the EU with the real-time data on goods movements across the Irish Sea.

A strikingly similar discourse swirls around the Protocol as these antecedent "special arrangements". [Lord Frost](#) consistently portrayed the Protocol as unwelcome experimentation imposed on the UK at a time of weakness: 'the Protocol represents a moment of EU overreach when the UK's negotiating hand was tied, and therefore cannot reasonably last in its current form'. Likewise, in 1919, his ministerial predecessor Lord Birkenhead, no stranger to rousing Unionist sentiment, [foresaw](#) the '[h]alf-measures' around Danzig generating a 'a crop of troubles'. Claims that Northern Ireland has been subject to EU vassalage or has been cut off from the rest of the UK mirror the twin (Nazi) campaign slogans of „Zurück zum Reich“ (Back to Germany) and „Gegen vertragliche Willkür“ (Against [Versailles] Treaty Arbitrariness) regarding Danzig in the late 1930s. This is not to say that the anti-Protocol campaigns are in some way fascist, but to illustrate that (supposedly imposed) special governance arrangements have the capacity to provoke visceral responses.

The UK and EU established a new composite governance order for Northern Ireland through the Brexit deal. As the [courts](#) have made clear in implementing this deal,

the UK is not a unitary state when it comes to its internal trade rules and goods regulation. But this deal will not be stable for as long as Eurosceptic actors continue to harness Unionist concerns over the impact on Northern Ireland's resultant constitutional status as a way to undermine the Protocol. Once the [UK Supreme Court](#) accepted that there was nothing constitutionally improper in the way that the Protocol was concluded, Rishi Sunak's Government was in a better position to grasp the opportunity to co-operate with the EU in mitigating many of the resultant barriers to trade. There is, however, no grand "solution" to the issues of the Protocol; notwithstanding the [Windsor Framework](#), there will inevitably be further hurdles to cross. The Withdrawal Agreement nonetheless includes structures for managing these and a deal does hold out the possibility of lancing the dangerous discourse which has upended constitutional governance in Northern Ireland.

All of which raises the question of the extent to which the 1998 arrangements themselves are worth this effort. In 1998, attempts to develop workable governance arrangements for the "two communities" in Northern Ireland understandably prioritised an 'end' to the conflict, with relative peace and stability being the accepted preconditions of effective governance. This 'end', however, was incomplete; the overarching narrative of conflict/peace process/transition/normality has yet to reach its fulfilment. Indeed, the space for alternate political agendas became increasingly constricted because of the 1998 Agreement's prioritisation of Unionist/Nationalist identities. Nonetheless, amid Brexit's upheavals, reproductive rights, same-sex marriage, language and legacy questions have all forced their way onto the national legislative agenda. If power sharing is not restored, an opportunity instead emerges to [rework](#) the post-1998 governance arrangements to better address interests which they have, to date, marginalised.

Notwithstanding that opportunity, EU membership can be appreciated as a vital lubricant within Northern Ireland's distinct governance order, one that has been very difficult to replace. It connected multiple strands of law and policy across the islands of Great Britain and Ireland. In doing so, it provided an operative dilution of the differences between the UK and Ireland. But it also sustained alternate constitutional visions for Northern Ireland. Supporters of the reunification of Ireland would be able to point to the shared requirements of EU membership as a platform of commonality, facilitating transition if there was a referendum vote in favour of it. Unionist opponents of that outcome could instead emphasise that the existing level of commonality rendered any vote for reunification nugatory.

Brexit, for some Northern Ireland Unionists, held out the possibility of increasing the differences between Ireland and the UK (including Northern Ireland), driving the sort of wedge between their legal orders that it would dramatically increase the transactional costs of any future effort at reunification. Instead, with the combination of an intractable governance crisis in Northern Ireland and a set of special arrangements maintaining significant aspects of alignment between Ireland and Northern Ireland under the auspices of EU law, the people of Northern Ireland have more reasons than ever to contemplate reunification as a way out of the current malaise. Without consistent and sustained effort to make them work, European history suggests special governance arrangements tend to be transitory.

