

Response to the House of Lords EU Select Committee Brexit: Devolution Inquiry

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ESRC Project - Constitutional Conundrums: Northern Ireland, the European Union and Human Rights: The authors are engaged in an ESRC-funded project examining the impact of the Brexit Referendum on the relationship between Ireland and the United Kingdom (and in particular Northern Ireland). This evidence is presented in a personal capacity and does not represent the views of the ESRC or of Newcastle, Durham or Birmingham Universities.

Relevant Outputs:

Sylvia de Mars, Colin Murray, Aoife O'Donoghue and Ben TC Warwick, 'The Common Travel Area: Prospects After Brexit' (2017).

Sylvia de Mars, Colin Murray, Aoife O'Donoghue and Ben TC Warwick, 'Policy Paper: Brexit, Ireland and Northern Ireland' (2016).

Colin Murray, Aoife O'Donoghue and Ben TC Warwick, 'Policy Paper: The Place of Northern Ireland within UK Human Rights Reform' (2015).

Aoife O'Donoghue and Ben TC Warwick, 'Constitutionally Questioned: UK Debates, International Law, and Northern Ireland' (2015) 66(1) Northern Ireland Legal Quarterly 93.

Roger Masterman and Colin Murray, *Exploring Constitutional and Administrative Law* (Harlow: Pearson, 2013).

Summary of Key Points

- i. The political and economic implications of Brexit for Northern Ireland are unique in terms of the nations and regions of the UK due to the land border with Ireland. Leaving the single market, in particular, would have the potential to complicate access to the EU market and restrict cross border trade. Brexit has also impacted upon the Executive's flagship policy of adjusting corporation tax powers
- ii. The Northern Ireland Assembly/Executive have not to date displayed the capacity to cope with these additional responsibilities. In contrast to Wales and Scotland, most dealings with EU matters have to date been concentrated in OFMDFM and the Assembly has rarely considered EU issues. If substantial new responsibilities are devolved to Northern Ireland the Barnett Formula funding model will likely have to be reconsidered.
- iii. Brexit will see pressure to extend the competences of the Northern Ireland Assembly/Executive by taking on a range of repatriated EU competences, but also makes it harder for Northern Ireland to make effective use of recent transfers of competence, including over corporation tax.
- iv. The balance of power between the UK Government and Parliament and the devolved bodies has been called into question by Brexit. Brexit included no safeguards to protect the opinion of majorities in Wales and Northern Ireland, and the UK Government has to date proceeded on the basis that the Sewel Convention is not relevant to Brexit.
- v. The UK Government's ability to reflect the interests of Northern Ireland in the forthcoming negotiations is hampered by the state of flux imposed by the collapse of the Assembly as a result of the RHI scandal. Even in the wake of the forthcoming Assembly elections stalemate seems likely and a return to direct rule appears possible. The UK Government must do everything in its power to prevent this outcome and to ensure that Northern Ireland's Executive is involved in Joint Ministerial Committee (European Negotiations). This is preferable to *ad hoc* dealings with a range of Northern Ireland parties in which the participants can avoid responsibility for the outcome.

The Political and Economic implications of Brexit for Northern Ireland

[1] Of all the UK's component parts Brexit will fall most heavily on Northern Ireland, because of its unique historical, political and geographical situation. Key issues in the Brexit negotiations such as control of borders, diplomatic relationships with neighbouring states, and free movement and access to foreign markets have distinct impacts in the Northern Ireland context. For instance, while the political/diplomatic relationships with the EU27 will change for all parts of the UK, Northern Ireland's relationship with the Republic of Ireland stands at particular risk.

[2] At the moment the border between the Republic of Ireland and Northern Ireland is completely open, which is made possible by both states retaining border controls with other EU states. The passage of goods, people and services across the border will depend upon the negotiated settlement between the UK and the EU. Pledges of "no return to the borders of the past" are intended to sound promising,¹ but militarisation is hardly an immediate concern. For Northern Ireland, the more difficult task will be to minimise the degree to which cross border travel, trade and employment is disrupted by Brexit.

[3] The nature and shape of customs controls at the Ireland-Northern Ireland border after Brexit will be largely dependent upon the nature of the UK's new relationship with the EU. A bespoke trade deal, by which the UK Government aims to ensure the 'the freest possible trade in goods and services between the UK and the EU',² would have been based on the UK maintaining a regulatory regime which aligns with that in place in the EU. The UK Government has also, however, insisted that it will seek 'preferential trade agreements around the world'.³ These statements point in different directions in terms of their impact on trade with the EU. An aligned regulatory regime might facilitate cross-border movement of goods, but conversely the UK's desire to pursue new trade deals with other countries will put pressure on the EU to take steps to prevent these countries using the UK as a back-door to the single market.

[4] In terms of comparable agreements, even the EU's highly integrative Customs Union agreement with Turkey only covers certain sectors (applying to manufactured goods, for example, but not agricultural products) and requires border checks at specific approved customs crossings. More light-touch models of customs enforcement (limited spot checks and electronic filing of customs documentation) are practiced on EU borders with EEA countries, but even in such a scenario Ireland would still have to comply with the requirements of the Union Customs Code.⁴ In short, it will not be possible after Brexit to

¹ T. May, *The United Kingdom's exit from and new partnership with the European Union* (HMSO, 2017) Cm 9417, para. 4.2.

² *Ibid.*, para. 8.1.

³ *Ibid.*, para. 8.43.

⁴ See T. Walsh, *European Union Customs Code* (Kluwer Law International, 2015).

maintain the open border as it exists at present in terms of goods, and it should be no surprise that the Irish Government is scoping sites for new border posts.⁵

[5] With regard to the movement of people, the open border currently allows large numbers of people to live and work on opposite sides of the border. Brexit therefore risks considerable dislocation, and the UK Government have recognised this in making the maintenance of the Common Travel Area central to its objectives in the forthcoming negotiations.⁶ This might, however, be easier said than done, as the CTA rests upon reciprocal benefits and protections for citizens of the UK and Ireland in each other's law. The nature of this reciprocity may be difficult for Ireland to sustain after Brexit, in light of EU law, as it would potentially mean treating UK citizens more favourably than EU citizens from other member states.⁷

[6] The Good Friday/Belfast Agreement 'assumed' but did not 'require' the UK's continuing membership of the EU.⁸ The assumption was nonetheless particularly important for many actors in the peace process. Ireland and the UK pooling their sovereignty in the EU diluted the clash of nationalisms at work within Northern Ireland's society.⁹ With the "completion" of the EU's single market, physical manifestations of the border, such as the customs posts at Newry and Dundalk were able to be closed, facilitating the open border once the security architecture linked to the conflict in Northern Ireland could be dismantled.¹⁰ The return of physical manifestations of the border, however, will likely act as a lightning rod to dissident Republicans who have never been reconciled to the peace process.

The Capacity and Resources of the Northern Ireland Assembly/Executive

[7] Northern Ireland's institutions have historically undertaken much less engagement with EU matters than their Scottish and Welsh counterparts. The Northern Ireland Assembly has no European Union Committee and issues regarding the EU are handled not by a designated minister but fall within the expansive remit of the Office of the First Minister and Deputy First Minister, where they are apt to be overlooked.¹¹ This is in spite of Northern Ireland being a net recipient of EU funding, and therefore particularly reliant upon the EU.

[8] The administration of the Common Agricultural Policy is at present conducted by the Northern Ireland Executive on a model quite distinct from that operating in other parts of the UK. To enable this policy to function, Northern Ireland receives a proportion of the UK's

⁵ See B. Hughes, 'Brexit: Irish government scouting for border checkpoint sites' *Irish News* (16 February 2017).

⁶ T. May, *The United Kingdom's exit from and new partnership with the European Union* (HMSO, 2017) Cm 9417, para. 4.3.

⁷ The current case law of the Court of Justice of the European Union maintains that EU citizens are not treated less favourably than non-EU citizens in terms of the benefits they enjoy under the laws of the EU country in which they reside. See C-55/00 *Gottardo v Istituto Nazionale della Previdenza Sociale* [2002] ECR I-413, [34].

⁸ *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [129].

⁹ See M. Ritchie, HC Debs, vol.620, col.973-974 (31 January 2017).

¹⁰ S. Royle, 'Ireland' in G. Baldacchino (ed), *The Political Economy of Divided Islands* (Palgrave, 2013) 119, 130.

¹¹ See R. Minto, J. Hunt, M. Keating, & L. McGowan, 'A Changing UK in a Changing Europe: The UK State between European Union and Devolution' (2016) 87 *Political Quarterly* 179, 181.

total EU agricultural support payments which is almost three times greater than its proportion of the UK population.¹² Therefore any change in how agricultural support funding is allocated by Westminster to replace the CAP could seriously impact upon farmers in Northern Ireland. Although the UK Government has committed to replacing the CAP in the short term, such funding could be further put at risk by new trade deals which require the UK to limit agricultural subsidies.

[9] INTERREG IVA provides structural funding for border regions. Ireland and Northern Ireland fall within several of the designated regions, North West Europe, Northern Periphery and Arctic and the Atlantic Area. Under the Programme, Ireland/Northern Ireland/Scotland is recognised as a region requiring specific funding. This programme is worth €240 million, with €42 million of matching funding from Ireland and the UK.¹³ There are also specific programmes which follow from the peace process which are aimed at increasing cross-border co-operation. The Special EU Programmes Body PEACE IV Programme (2014-2020) provides funding to manage cross-border European Union Structural Funds programmes in Northern Ireland, the Border Region of Ireland and parts of Western Scotland. The programme was agreed between the Irish Government and the Northern Ireland Executive and covers the entire border region. Over the course of the programme €229m was slated to be made available, 85% of which would have come from the EU.¹⁴

[10] Additional provisions under the Barnett block-grant formula could address all of the shortfalls in funding resultant from Northern Ireland losing access to EU funding. Indeed, during the campaign Brexit supporters insisted that '[t]he Treasury ... will have more money; money that will not go to Brussels but will come to Belfast, Ballymoney and other parts of the United Kingdom'.¹⁵ But the Barnett formula has come under increasing pressure in recent years and Brexit provides the UK Government with an opportunity to re-evaluate the way in which devolution is funded. Even if this re-evaluation only covers forms of funding repatriated from the EU, it could nonetheless result in real-terms funding cuts within the devolved jurisdictions, which would fall hardest on Northern Ireland because of its current dependency upon EU funding.

Brexit and the Competences of the Northern Ireland Assembly/Executive

[11] The Brexit campaign opened a fresh rift between the two parties in the 2016-2017 Executive, Sinn Féin and the DUP. They campaigned on opposite sides of the referendum. Post-Brexit the DUP has become increasingly distrustful of Sinn Féin, seeing its Executive partner as using Brexit to agitate for a Border Poll in Northern Ireland.¹⁶ Brexit, moreover, tore a hole in the 2016-2017 Executive's programme for government. The transfer of

¹² See D. Bell, *Brexit, EU Area-based Policies, and the Devolved Governments* (2017) 5. Available at: <http://www.centreonconstitutionalchange.ac.uk/sites/default/files/papers/area-based-policies-and-devolved-government.pdf>.

¹³ See M. Murphy, *Northern Ireland and the European Union* (Manchester University Press, 2014) 47-51.

¹⁴ See S. de Mars, C. Murray, A. O'Donoghue and B. Warwick, 'Policy Paper: Brexit, Ireland and Northern Ireland' (2016) 21.

¹⁵ M. Storey (Minister for Finance & Personnel), NI Assembly Debates (8 March 2016).

¹⁶ See J. Manley, 'Sinn Féin call for border poll rejected by two governments' *Irish News* (25 June 2016).

competence for corporation tax to Northern Ireland provided the basis for the Executive's flagship economic policy of lowering corporation tax to 12.5% to make Northern Ireland more competitive with the Republic of Ireland in attracting inward investment.¹⁷ In light of the uncertainty of the UK's relationship with the EU's single market post-Brexit, however, the Republic of Ireland continues to enjoy a competitive advantage which undermines the effectiveness of this key policy.

[12] The Scottish and Welsh Executives are eager to see a range of what are currently EU competences and related funding, particularly with regard to agriculture, fisheries and regional policy, transferred to their remit on the occasion of Brexit.¹⁸ The UK Government, however, might feel considerable pressure to allocate funding in a radically different way from the EU in response to expectations generated by the Vote Leave campaign.¹⁹ Its White Paper has certainly indicated an intention to 'to ensure that more decisions are devolved', but this leaves open scope for many repatriated competences to be managed by Westminster.²⁰ Northern Ireland's Executive, even before the collapse precipitated by the Renewable Heating Incentive scandal, had not clarified its desired outcomes in this regard, likely as a result of the inability of the Executive partners to establish an agreed position.

Brexit and the Balance of the UK Constitution

[13] In the spring of 2016 Oliver Letwin, then Chancellor of the Duchy of Lancaster, was confident that following a period of upheaval the devolution arrangements in Wales, Scotland and Northern Ireland were beginning to settle: 'all those pieces of the jigsaw are in place, so far as the relationships between the component nations of the UK are concerned'.²¹ Brexit, however, has knocked these arrangements out of kilter once again. Indeed, many interconnected constitutional changes are currently bedding in, being introduced or discussed, including increased powers for the devolved governments (in the aftermath of the Scottish Independence referendum), English Votes for English Laws, city devolution within England, potential reform of the upper chamber and even potential reform of the UK's role in the Council of Europe.

[14] The UK Supreme Court's *Miller* decision affirms that Westminster Parliament remains able to make laws for Northern Ireland, even if they change the nature of devolved institutional competences, and that this *legal* power is unaffected by devolution.²² The

¹⁷ The Corporation Tax (Northern Ireland) Act 2015 allows the UK Government to transfer of powers over corporation tax to Northern Ireland. The UK Government has pledged to do so once the Executive demonstrated that it is able to manage its finances.

¹⁸ See Scottish Government, *Scotland's Place in Europe* (Edinburgh, 2016) para. 176 and Welsh Government, *Securing Wales' Future* (Cardiff, 2017) 28.

¹⁹ See D. Bell, *Brexit, EU Area-based Policies, and the Devolved Governments* (2017) 2. Available at: <http://www.centreonconstitutionalchange.ac.uk/sites/default/files/papers/area-based-policies-and-devolved-government.pdf>.

²⁰ T. May, *The United Kingdom's exit from and new partnership with the European Union* (HMSO, 2017) Cm 9417, para. 3.5.

²¹ See Select Committee on the Constitution, *The Union and Devolution* (2016) HL 149, para. 97.

²² Northern Ireland Act 1998, section 5(6).

Court did recognise that a constitutional convention exists whereby the devolved legislatures will *normally* assent to changes in their competence by means of a Legislative Consent Motion.²³

[15] In the words of the majority judgment, conventions can ‘play a fundamental role in the operation of our constitution’ but the policing of their scope and operation ‘does not lie within the constitutional remit of the judiciary’.²⁴ As no lock was built into the Referendum legislation requiring the assent of all of the UK’s constituent nations for the vote to leave the EU, the Court would not contemplate introducing such a restriction by the back door. The UK Government has used the room for manoeuvre generated by this decision to insist that there is no need for the devolved legislatures’ consent for the European Union (Notification of Withdrawal) Bill.²⁵

[16] Although this Bill does not of itself make law within an area of devolved competence or alter the competences of the devolved institutions the logic of the “pulling the trigger” on withdrawal argument, which was so influential before the Supreme Court in persuading the majority that Parliament would need to authorise the notification of Article 50, is that this authorisation will ultimately have irrevocable consequences for the devolved administrations.²⁶ The *Miller* decision in many respects reinforces a divide between the legal framework and practical reality of the UK’s polycentric constitutional arrangements. As the onus is upon the UK Government to respect the purview of the devolved administrations the Government has been able to prioritise the short-term goal of being able to swiftly trigger Brexit over the long-term damage to the relationship with the devolved administrations inherent in ignoring their concerns. The UK Government will not, however, be so easily able to wish away the need for Legislative Consent Motions in the context of the Great Repeal Bill, which will directly affect many areas of devolved competence.

Reflecting Northern Ireland’s Interests in Negotiations

[17] Minimising the impact of Brexit upon current cross-border business arrangements with the Republic of Ireland needs to be a priority to prevent severe damage to the Northern Ireland economy. Northern Ireland will moreover require a transitional arrangement mitigating the effects of Brexit and allowing its institutions time to develop responses to this new environment. Northern Ireland is unlikely to be able to adjust its entire business environment within the next two years, especially as considerable uncertainty will attend the negotiations ongoing within that time frame. Beyond this, the many variables at play in the negotiations between the UK and EU make it difficult to provide a clear account of all the ways in which Northern Ireland’s interests will be affected, but illustrate why Northern Ireland’s political institutions need to be operative to respond to these developments in a way which reflects the needs of the people of Northern Ireland.

²³ *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [140].

²⁴ *Ibid.*, [150]. See A. Dicey, *Introduction to the Study of the Law of the Constitution* (8th Ed., Liberty Fund, 1982) p.292.

²⁵ European Union (Notification of Withdrawal) Bill Explanatory Notes (2017), para.5.

²⁶ *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [94].

[18] Even if the Assembly and the Executive are functional in the aftermath of the March 2017 elections, however, the increasingly entrenched differences between the DUP and Sinn Féin mean that it is becoming more difficult to achieve consensus on what constitutes Northern Ireland's interest. In this context a return to direct rule is a real possibility. Indeed, for the UK Government, this might even be an attractive option in that it negates the need to negotiate with the Northern Ireland Executive over post-Brexit arrangements, thereby removing one moving part from the already complicated scenario of how competences are divvied up under the Great Repeal Bill.²⁷

[19] For all the shortcomings of consociationalism in Northern Ireland, and despite the current difficulty in achieving consensus between Northern Ireland's parties, Northern Ireland's system of representative government must not be put into abeyance at this time. It is vital that formal mechanisms are maintained by which the consequences of Brexit for the people of Northern Ireland can be fed into negotiations in the same way that the interests of Scotland and Wales will be represented.

[20] That being said, the required formal mechanisms for cooperation are distinctly limited. The UK constitution's structures for ensuring cooperation between devolved and central government have not kept pace with changes in the UK's governance arrangements since devolution. There has been no movement on the Calman Commission's recommendation that a 'standing joint liaison committee of the UK Parliament and [each devolved legislature] should be established to oversee relations and to consider the establishment of subject-specific ad hoc joint committees'.²⁸ Nor has anything come of the Ministry of Justice counter-proposals in 2009 to extend the British-Irish Parliamentary Assembly's role to build relations between the devolved institutions and Westminster.²⁹ This shortcoming is likely to be exposed in the course of the Brexit negotiations.

[21] The Joint Ministerial Committee (European Negotiations Sub-Committee) is the main formal structure by which the Northern Ireland Executive can contribute to the UK's Brexit negotiating position. There has been a commitment that it will meet monthly as Brexit negotiations are ongoing. However, the body (as opposed to the JMC's plenary session) is not transparent in its operation. There is, moreover, no mechanism by which the devolved administrations can hold the UK Government to account for assurances given within this forum. In this context a joint parliamentary committee, potentially drawing its membership from across the UK's legislatures, could provide vital public scrutiny of the responsiveness of the UK Government's negotiating position to the interests of the devolved nations.³⁰

²⁷ 'A renewed stand-off seems inevitable, which might in turn trigger renewed direct rule'; Editorial, 'The Guardian view on the Northern Ireland election: vote to keep the border soft' *The Guardian* (19 Feb 2017).

²⁸ Commission on Scottish Devolution, *Serving Scotland Better: Scotland and the United Kingdom in the 21st Century* (HMSO, 2009) 145.

²⁹ Ministry of Justice, *Devolution: A Decade On, Government Response* (HMSO, 2009) Cm 7687, para.19.

³⁰ See C. Murray, 'Response to the Call for Evidence issued by the Select Committee on the Constitution regarding the Union and Devolution' (2015) para. 13-21. Available at: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/constitution-committee/the-union-and-devolution/written/22490.html>.