



Constitutional change in Northern Ireland

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IfG–Bennett Institute foreword

In February 2022, the Institute for Government and the Bennett Institute for Public Policy launched a Review of the UK Constitution, to offer an evidence-based and non-partisan analysis of the strengths and weaknesses of the constitution, and where necessary make recommendations for change.

To address the bold scope of this project, we have complemented our own in-depth research with a breadth of perspectives from some of the UK's foremost constitutional experts. In this series of expert guest papers, we publish the views and proposals of academics and practitioners, who take a range of stances from constitutional conservation through to major reform. While these papers respond to the pressing constitutional questions of the day, they all also look to construct long-term solutions that will inform political decision making as well as public debate.

Given the range of views expressed, we do not necessarily endorse all of the ideas found in these papers, but we can commend the rigour with which the arguments have been constructed and sincerely thank the authors for their thoughtful contributions.

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Introduction

In Northern Ireland, mention of constitutional change normally means just one thing: United Kingdom versus United Ireland. The 'constitutional question' that this juxtaposition connotes – whether or not a majority of the people in Northern Ireland will ever opt to leave the UK in favour of (re)joining Ireland – is not, however, the focus of this paper. While not seeking to discount or relegate the potential for constitutional change in Northern Ireland that would arise from a future 'border poll' referendum, the premise of what follows is that it is not the only kind of constitutional change that is possible in or important for Northern Ireland.

To this end, this paper has three aims:

1. to give a concise account of the constitutional history and particularities of Northern Ireland in the wider UK constitutional context
2. to explore the most pressing governance challenges in Northern Ireland today that arise, directly and indirectly, from its unique constitutional arrangements
3. to consider how those challenges could be mitigated and/or resolved through constitutional reforms that are short of, and without prejudice to, the possibility of that constitutional question being brought to the fore in a future border poll.

Section 1: a very brief overview of Northern Ireland constitutional history

The constitutional idiosyncrasies of Northern Ireland are not often given due consideration in discussions about the UK-wide constitution. As this section makes clear, Northern Ireland has been a consistent constitutional outlier in the UK and its contemporary constitutional architecture still sets it apart in the broader context of the state. The degree of this constitutional distinctiveness is such that any 'Northern Ireland blind spot' that exists in narratives about, or analyses of, the UK constitution is perhaps understandable; that does not, however, make it unproblematic.* What follows is a brief historical account of Northern Ireland, told with reference to four constitutional epochs:

1. the era of unionist rule from 1920 to 1972
2. the era of 'troubling' conflict from 1972 to 1998
3. the era of fragile peace and incremental institutional progress from 1998 to 2016
4. the era of Brexit and its disruptive outworking in Northern Ireland from 2016 to the present day.

* A longer version of this section appeared in *Northern Ireland and Brexit: An explanation*, a report by The Constitution Society (see Whitten, 2021).

Each subsection concludes with a brief consideration of and signpost to the significance of events and developments in Northern Ireland, for Northern Ireland and the rest of the UK.

Epoch 1: unionist rule – 1920 to 1972

Since it was established in 1921, Northern Ireland has been a place of constitutional contestation. Destabilisation of a union between Great Britain and Ireland that had existed since the Acts of Union of 1800 led (after a series of tumultuous and violent events) to the creation of two new constitutional settlements on the island of Ireland in the early 1920s: a devolved parliament under the authority of Westminster in Northern Ireland; and an independent Irish Free State south of the newly demarcated land border (see Quekett, 1928; Calvert, 1968; Hadfield, 1989). Partition of the island of Ireland into Northern Ireland and what would become (in 1949) the Republic of Ireland developed as a means of solving the so-called 'Irish question' that had dominated parliamentary debates in Westminster for much of the first two decades of the 20th century.

Legislative provision for the first chapter of devolution in the UK was made in the Government of Ireland Act 1920. Outside of a stated list of areas – including matters of the Crown, the military and foreign relations – the 1920 Act granted “power to make laws for the peace, order, and good government” of Northern Ireland to its new bicameral parliament and government (s4). Executive authority was located in the office of the prime minister for Northern Ireland – leader of the (invariably unionist) party – who presided over a same-party cabinet.

As enacted, the 1920 Act set up electoral systems that were designed to safeguard minorities in general and the nationalist/Catholic minority community in particular. During the first decade of devolved government, however, these were revised by the unionist Northern Ireland government* to first-past-the-post systems, which, combined with restrictions on suffrage and 'gerrymandering' of electoral boundaries, effectively ensured indefinite rule by unionist and Protestant representatives. In the words of the first prime minister of Northern Ireland, this was “a Protestant Parliament and a Protestant State” (Craig, 1934, cols 1091–5).

Throughout the 50-year history of its existence, scrutiny of the unionist Northern Ireland government on the part of Westminster was almost non-existent. This arose from two conventions, which developed early in the life of the new legislature. In 1923, the Speaker of the House of Commons ruled with regard to “those subjects which have been delegated to the Government of Northern Ireland” that any “questions must be asked of Ministers in Northern Ireland, and not in this House [Westminster]” (see House of Commons, *Hansard*, 1923). Additionally, in an early iteration of what is now referred to as the 'Sewel Convention', any Acts of the Westminster parliament dealing with matters delegated to the Stormont parliament did not extend to Northern Ireland without the express consent of the subordinate legislature.

* Via the Local Government (Northern Ireland) Act 1923, which changed local elections from a single transferable vote system to a first-past-the-post system – the latter (together with non-universal suffrage) helped secure unionist dominance – and later the House of Commons (Method of Voting and Redistribution of Seats) Act Northern Ireland 1929, which made the same change to the system for election to the Northern Ireland parliament (see Pringle, 1980).

The extent of powers granted under the 1920 Act, the early amendments to laws governing local and regional elections, and the conventions that developed in Westminster regarding devolved matters, combined to give the unionist Northern Ireland government a degree of autonomy unprecedented in the history of UK devolution, before or since. In possession of a prime minister, cabinet and parliament, and subject to almost no scrutiny from Westminster, Northern Ireland operated from 1920 to 1972 with all the trappings of “a mini-state” (Hadfield, 1989, p. 88). Its status was without parallel in the British Commonwealth at the time – being neither a dominion nor a colony, Northern Ireland was an integral part of the UK yet had a separate legislature and executive that derived from, and operated in accordance with, one codified constitutional text: the 1920 Act.

Epoch 1: unionist rule in a UK-wide context

From 1920 to 1972, Northern Ireland was the site of the UK’s first experiment in devolution. This fact is often overlooked in contemporary conversations about the evolution of the UK state generally and the origin of devolution in particular. Frequently this first chapter of UK devolution is mentioned in passing or omitted entirely from analyses that predominantly date its beginning to 1998 (see, for example, Hazell, 2000 p. 1; King, 2009, p. ix; Cabinet Office, 2011, paras 8.13–8.16).^{*} This is unfortunate because it diminishes our understanding of certain aspects of the UK constitution and/or how they came to be.

As indicated above, conventions established during this era are still apparent today, albeit in a somewhat revised form. What is now the Sewel Convention arose out of the approach taken by the Westminster parliament towards the first Stormont parliament. Similarly, the convention established by the Speaker in respect to Northern Ireland in 1923 still exists in moderated form through the “self-denying ordinance” whereby, subject to the discretion of the chair of the House of Commons, “questions may not be tabled on matters for which responsibility has been devolved by legislation” to Scotland, Wales or Northern Ireland (UK Parliament, 2019, e.g., para. 11.13).

Notwithstanding the continuity between some contemporary UK constitutional practices and those developed during the 1920–72 epoch of Northern Ireland government, there are also important differences; even some of these suggest, however, that lessons learnt during the 1920–72 devolution influenced aspects of its post-1998 formulation. For example, between 1920 and 1930, the Northern Ireland parliament passed laws changing the electoral systems for local government and to its own chamber from the single transferable vote (STV) to first-past-the-post (FPTP). Notably,

^{*} The *Cabinet Manual*, for example, references the “1998 Belfast Multi-Party Agreement” but makes no mention of the principle of consent, Strand Two relations or institutions, or the inter-governmental dynamic of Strand Three (see Cabinet Office, 2011, paras 8.13–8.16). Elsewhere, King, for example, justifies the exclusion of Northern Ireland from analysis in his book *The British Constitution* because to include “a Northern Ireland dimension” would have “greatly lengthened” the study and made it “incredibly complicated and indigestible” (King, 2009, p. ix), which may be true but also means that the study as it stands is incomplete. In another example of omission, an academic assessment of the ‘first year’ of devolution in the UK inaccurately cites this as “1999–2000” without acknowledging the 50-year history of devolution in Northern Ireland from 1920 to 1972 (Hazell, 2000, p. 1).

the franchise in local government elections was limited in Northern Ireland to property owners and their spouses, with only a limited number of exceptions for longer than was the case in the rest of the UK where such practices were abolished in 1945.

The collective effect of changes to electoral laws and the prolongation of franchise restrictions was to secure perpetual unionist rule in Northern Ireland throughout its first period of self-rule. By contrast, today, although local councils in England and Wales use FPTP, all UK devolved representatives are elected using proportionally representative systems, such as STV. Additionally, the ability of devolved governments to change their electoral systems is restricted: the Northern Ireland assembly cannot make changes to its electoral system, whereas the Scottish parliament and Welsh Senedd could opt to change theirs, but such a move would be subject to achieving two-thirds support for doing so.* While contemporary devolution arrangements therefore differ significantly from those evident in Northern Ireland during its epoch of unionist rule, arrangements today also echo some of the conventions developed and lessons learnt during that earlier period.

Epoch 2: 'The Troubles' – 1972 to 1998

Government in Northern Ireland continued in a state of relative stability under the terms of the 1920 Act until 1968 (see Lawrence, 1965; Hadfield, 1992). After a series of civil rights marches, organised that year, led to clashes between largely Catholic/nationalist demonstrators and largely Protestant/unionist counter-demonstrators as well as the Royal Ulster Constabulary (RUC) police force, that relative stability began to break down.

In view of violence and unrest catalysed by the civil rights movement, the governor of Northern Ireland commissioned an inquiry into the causes of the protests and reactions to them. The Cameron Commission report that followed concluded that a widespread “sense of political and social grievance” had been “long unadmitted” and therefore gone “un-redressed” by successive governments of Northern Ireland (Cameron, 1969, para. 6). The report highlighted a “rising sense of continuing injustice” among large sections of the Catholic population in Northern Ireland due to issues such as the inadequacy of housing provision and (at least) perceived misuse of discretionary powers of allocation on the part of (perpetually) unionist local authorities (Cameron, 1969, paras 128–131, 139). Concerns were also raised about the representation of Catholic/nationalist individuals in employment and civic life, with related discriminatory practices in the making of local government appointments highlighted (Cameron, 1969, paras 128, 138), alongside the deliberate manipulation of local government electoral boundaries with the aim of maintaining unionist majorities (Cameron, 1969, paras 133–7).

The report also noted resentment in the Catholic/nationalist community due to the existence of the partisan and paramilitary Ulster Special Constabulary (the ‘B Specials’), recruited exclusively from the Protestant/unionist community (Cameron, 1969, para. 145) as well as their concerns about the continuance in force of the Civil Authorities

* Scotland Act 1998, s31 and s31A; Government of Wales Act 1998, s111 and s111A; and Northern Ireland Act 1998, Schedule 2, s12.

(Special Powers) Act (Northern Ireland) 1922 (the 'Special Powers Act'), which empowered the minister of home affairs to "take all such steps and issue all such orders as may be necessary for preserving the peace and maintaining order" in Northern Ireland, including the (potential) imposition of curfews, use of internment and/or sanction of capital punishments (Cameron, 1969, para. 144). The findings of the report, alongside further instances of sporadic civil unrest, led to greater involvement of the UK government in the affairs of Northern Ireland.

In an effort to keep the peace, British Army troops were deployed to Northern Ireland in August 1969, but the security situation continued to deteriorate. In 1970, the Provisional Irish Republican Army (IRA) began a bombing campaign in Belfast. In September 1971, the Reverend Ian Paisley announced the formation of the Democratic Unionist Party (DUP) and the Ulster Defence Association (UDA) emerged as a co-ordinating body for several loyalist (paramilitary) bodies. On 9 August 1971, internment without trial was introduced under the Special Powers Act and subsequently used disproportionately against members of the Catholic/nationalist community – see Civil Authorities (Special Powers) Act (No. 3) Regulations (Northern Ireland) 1971.* On 30 January 1972, the infamous killing of 13 people in Derry/Londonderry by the First Parachute Regiment on 'Bloody Sunday' led to widespread disaffection and a campaign of civil disobedience by members of the Catholic/nationalist community.

Relations between Stormont and Westminster became increasingly strained throughout this time. To the ire of Northern Ireland's (unionist) government, talks between the British prime minister, Edward Heath, and the Irish Taoiseach, Jack Lynch, about the situation in Northern Ireland began in February 1972. Talks between Heath and the Northern Ireland prime minister, Brian Faulkner, followed in March 1972. The outcome of the latter was a UK government insistence that all powers for law and order be removed from the Northern Ireland government. Faulkner and his cabinet responded with the threat of collective resignation. On 24 March 1972, a bill was introduced in Westminster to suspend the parliament and government of Northern Ireland after Faulkner and his colleagues had been forced to fulfil their threat.

The Northern Ireland (Temporary Provisions) Act 1972 suspended the Northern Ireland institutions and vested their previously held powers in the newly created office of the secretary of state for Northern Ireland, which would be supported by the – also new – Northern Ireland Commission and Privy Council. As the title of the Act indicated, the 1972 Act provisions were not designed to last. In 1973, new arrangements for government were established under the Northern Ireland Assembly Act 1973 and the Northern Ireland Constitution Act 1973 (the '1973 Acts'), which together abolished the suspended (under the 1972 Act) parliament, established a new assembly to be elected by proportional representation (PR), provided for devolved government on the basis of power sharing between unionists and nationalists, and made arrangements for north–south co-operation between the proposed new Northern Ireland executive and the Irish government if/when agreed.

* Between August 1971 and December 1975, when internment was practised, 1,981 people were detained without trial, 1,874 of whom were from the Catholic/nationalist community and only 107 were from the Protestant/unionist community.

The provisions of the 1973 Acts were controversial. Within a year of their ratification, unionist reaction to the 'Irish dimension' of the proposed new governing architecture had brought an abrupt end to Northern Ireland's first experiment in power sharing.^{*} Despite a compromise being reached on the 'Irish dimension' issue at cross-party talks held in Sunningdale, England, in November 1973, grassroots unionists and loyalists opposed the implementation of what became known as the Sunningdale Agreement (implemented in the 1973 Acts). Following a strong electoral result for unionist candidates in the UK general election of February 1974, an umbrella unionist/loyalist organisation – the Ulster Workers' Union – called a general strike in May 1974. The strike lasted two weeks. Food and electricity supplies were badly affected across Northern Ireland, there were instances of serious violence and bombings took place. On day 14 of the strike, the resignation of the moderate unionist leader of the new power-sharing government, Brian Faulkner, sparked a series of resignations, which collapsed the executive and thus, in effect, ended the first iteration of power-sharing devolution in Northern Ireland.

In the wake of the executive collapse, the UK government brought in a system of 'interim' direct rule under the Northern Ireland Act 1974. Section 1 of the Act made provision for "temporary" direct rule in an "interim period" (s1(4)) until the next devolutionary scheme of government for Northern Ireland was agreed at the 'constitutional convention' established under section 2 of the Act. Elections to the constitutional convention took place in May 1975 but, in the context of escalating violence, its proceedings were marred by political divisions and abstentions. The convention's summative report, laid before parliament in November 1975, reflected the views and preferences of the powerful United Ulster Unionist Council (see Northern Ireland Office, 1975). The report was rejected by the secretary of state for Northern Ireland on the grounds that its proposals did not "command sufficiently widespread acceptance" from all communities in Northern Ireland (Rees, in House of Commons, *Hansard*, 1976). The constitutional convention was dissolved on 4 March 1976.

As failure to reach consensus on a new form of devolved government became a recurring theme, the 'direct rule' provisions in section 1 of the 1974 Act became the new normal. Under these provisions, legislation for Northern Ireland was passed by Order in Council for all matters previously reserved or transferred under the terms of the 1920 Act. In practice, therefore, under direct rule the majority of laws that applied in Northern Ireland were made in the form of delegated legislation, via a procedure that did not allow for amendment, and which left almost no room for parliamentary scrutiny (see Hadfield, 1989, pp. 130–5).

Under these direct rule provisions, the power to determine the political direction of new legislation in Northern Ireland was vested in the secretary of state for Northern Ireland and five junior British government ministers; scrutiny of their powers happened in Westminster, on a limited basis and with almost no input from Northern

* For reasons of space, the events between May 1973 and May 1974 are not covered in detail in this paper. For further analysis of the Sunningdale Agreement, see Gillespie (1998); for more on the Ulster workers' strike, see Aveyard (2014); and for an account of the relationship between the Sunningdale Agreement and the 1998 Belfast 'Good Friday' Agreement, see Tonge (2000).

Ireland representatives.* This system of direct rule, which had been justified by the UK government on the basis of (granted) an exceptional circumstance, and with the intention that it would not last, became the blueprint for the governance of Northern Ireland for more than two decades.

Epoch 2: 'The Troubles' in a UK-wide context

Much can (and has) been said about the significance of the events that took place during the period known as 'The Troubles' in Northern Ireland. While a comprehensive analysis of the constitutional implications of this epoch of UK history is beyond the scope of this paper, three brief observations can be made. First, that The Troubles constituted an era of prolonged violent conflict in the UK over aspects of its constitution, primarily, but not exclusively, located in Northern Ireland. Such an obvious observation is pertinent because it challenges the (still prevalent) idea that UK constitutional development has, since 1688, been characterised by non-violent democratic evolution rather than any form of revolution (see, for example, Loughlin, 2018, p. 2). Yet to describe UK constitutional history in this way, Northern Ireland must be, at least to some degree, excluded – but this is problematic because it renders any description incomplete.

Second, it is also worth noting that policies implemented in Northern Ireland prior to and during The Troubles were not in keeping with human rights standards pronounced by the UK government and domestic legislation at the time. Perhaps the most prominent example in this regard is the Special Powers Act – used as cover for (at least alleged) excessive use of force (primarily) before the collapse of the Northern Ireland government, as well as for the introduction and use of internment thereafter.

A third and final observation is that 'temporary' governance arrangements developed in/for Northern Ireland during The Troubles, once adopted, continued in perpetuity for almost three decades; as later sections demonstrate, this progression – from temporary to semi-permanence – has become a pattern.

Epoch 3: a fragile peace – 1998 to 2016

In 1998, the circumstances in and constitutional arrangements of Northern Ireland changed. Following prolonged talks between previously warring parties, the Belfast 'Good Friday' Agreement, which was signed on 10 April 1998, marked the beginning of a new era in the societal, political and constitutional development of Northern Ireland, one defined by the absence of widespread political violence (see Government of Ireland, 2000; UK Government, 2000).**

In pursuit of peace, the 1998 agreement relied on a 'constructively ambiguous' compromise on issues of nationality and statehood, which had been at the core of the decades-long conflict between communities, defined by their opposing visions for the constitutional future of Northern Ireland.

* There was no select committee on Northern Irish affairs during direct rule. There existed a Northern Ireland (Standing) Committee, which could choose to deliberate on any Northern Ireland matter; deliberation was its sole power. Otherwise, Northern Ireland received the same treatment as any other issue of government, being on a rota for oral questions, supplemented by written questions if/when submitted.

** The activities of paramilitary groups in Northern Ireland have continued. This has included 'paramilitary-style attacks', which have continued to take place at a relatively steady rate since and notwithstanding the 1998 agreement (see Police Service of Northern Ireland, 2023).

The 1998 agreement has two parts: a political agreement between political parties in Northern Ireland (the Multi-Party Agreement – MPA); and an international legal agreement between the UK government and the Ireland government (the British–Irish Agreement – BIA). Through the latter, the two governments adopt the role of ‘guarantors’ to the substance of the former. In its entirety, the 1998 agreement is founded on a series of statements regarding the constitutional status of Northern Ireland. In the opening sections of both the Multi-Party Agreement and the British–Irish Agreement, signatories recognise that “the present wish of the majority of the people of Northern Ireland” is to remain in the UK (MPA, *Constitutional Issues*, 1(iii); BIA, Article 1(iii)) but that, if that wish changes, “it is for the people of the island of Ireland alone... to exercise their right of self-determination on the basis of consent... to bring about a united Ireland” (MPA, *Constitutional Issues*, 1(ii); BIA, Article 1(ii)). The two guarantor governments agree to:

- exercise any sovereign power held at any time in respect to Northern Ireland with “rigorous impartiality” (BIA, Article 1(v))
- recognise the birthright of people in Northern Ireland “to identify themselves and be accepted as Irish or British, or both” regardless of the constitutional status of Northern Ireland (BIA, Article 1(vi))
- introduce legislation necessary to recognise the constitutional status of Northern Ireland in the event of any future change in that status.

This series of commitments is referred to collectively as the ‘principle of consent’.

Based on the principle of consent, the 1998 agreement sets out an innovative system for multi-levelled government in Northern Ireland through the ‘three strands’ of the Multi-Party Agreement. Strand 1 provided for the creation of democratic institutions – the Northern Ireland assembly and the Northern Ireland executive – to which powers were devolved on the basis of a consociational system for power sharing between nationalists and unionists, underpinned by rights-based guarantees. Strand 2 provided an all-island or north–south dimension through the North South Ministerial Council (NSMC) and north–south implementation bodies, which allow for co-operation between the Irish government and the Northern Ireland executive. Strand 3 provided an intergovernmental or east–west dimension through the creation of: the British–Irish Council (BIC), designed to facilitate relations between Ireland, the UK, its devolved governments and Crown Dependencies; and the bilateral British–Irish Intergovernmental Conference (BIIC), to preserve and strengthen relations between the governments of the neighbouring states.

The UK and Ireland governments affirmed, in the 1998 agreement, “their solemn commitment to support, and where appropriate implement, the provisions of the Multi-Party Agreement” (BIA, Article 2). As such, in 1998, the Irish government proposed an amendment to remove its territorial claim to Northern Ireland, which was contained in

the constitution of Ireland at the time; this was subsequently approved by referendum.* Following a concurrent, confirmatory referendum in Northern Ireland, the principal content of the Multi-Party Agreement was transposed into UK law via the Northern Ireland Act 1998. The explicit purpose of the 1998 Act is “to make provision for the government of Northern Ireland”; it remains the primary statutory source of those constitutional laws and norms that apply to Northern Ireland in particular. Reflecting this, the 1998 Act has been judicially recognised to be “in effect a constitution” for Northern Ireland, the content of which “must be construed against the background of... the principles laid down by the Belfast Agreement for a new start” (in *Robinson v. Secretary of State for Northern Ireland and others* [2002] UKHL paras. 11; 25).

Notably, the 1998 agreement and the 1998 Act, which gives most of its provisions domestic legal effect, embrace ‘constructive ambiguity’ on those issues that were at the heart of three decades of violent conflict in Northern Ireland. In respect to national identity, citizens in Northern Ireland can choose to identify as British, Irish or both, according to preference. In respect to constitutional future, the 1998 agreement (and Act) represents a consensus on means but not ends – if ever there is a change in the constitutional status of Northern Ireland from being part of the UK to forming part of Ireland, this will be for the people of Northern Ireland (and Ireland) to decide. In the meantime, the Strand 2 north–south and Strand 3 east–west dimensions of governance in/of Northern Ireland symbolise the multiplicity of national identities and constitutional aspirations represented in the place – the Britishness of unionists, the Irishness of nationalists and the non-aligned position of those who fit into neither definition. Through its ‘constructively ambiguous’ compromises, the 1998 agreement enabled previously warring parties to, in short, agree to disagree and live together anyway. In this way, the 1998 agreement did not solve the conflict in Northern Ireland but rather established a series of political principles and governing institutions by which it could be managed differently.

The first elections to the newly established Northern Ireland assembly were held on 25 June 1998 and its inaugural meeting took place on 1 July 1998, albeit in ‘shadow’ form until full powers were formally devolved on 2 December 1999. Since established, the operation of the 1998 agreement’s governing architecture has had a staccato quality. In particular, institutions established under Strand 1 have proved liable to collapse due to the capacity and propensity of one or other of the two largest political parties to withdraw their support for the mandatory power-sharing government, which, in effect, puts the Northern Ireland executive (and potentially also the assembly) into abeyance.

* The 1937 Irish constitution stated: “The national territory consists of the whole island of Ireland, its islands and the territorial seas.” After the 1998 agreement, the text was amended to recognise that: “It is the entitlement and birth-right of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish nation...” (Article 2) and that while “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... 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” (Article 3(1)). Under Article 47(1) of the constitution, amendments can only be made if “approved by the people” via referenda; following a 94.4% vote in favour of doing so on 22 May 1998, the 19th amendment to the constitution was made on 3 June 1998 to accept the British–Irish Agreement and the amendments to Articles 2 and 3 outlined (see Government of Ireland, 2020 [1937] in the ‘Table of legislation’ section towards the end of this paper).

Prior to 2016, the Northern Ireland assembly had been suspended on four separate occasions following related collapses of the power-sharing executive. Three of these suspensions were brief but the most significant lasted nearly five years. Strand 1 institutions were not fully operational between October 2002 and May 2007 after unionist politicians withdrew from the executive in protest following police raids on Sinn Féin offices as part of an investigation into allegations of intelligence gathering on behalf of the IRA by members of the party in Parliament Buildings.

The Northern Ireland devolved government was only re-established in 2007 when multi-party talks resulted in the signing of the St Andrews Agreement in October 2006. The St Andrews Agreement is the most significant of the numerous 'successor' agreements that build on the commitments and provisions of the 1998 agreement, because of the specific revisions contained within it and because these were sufficient to bring the DUP on board. Under the leadership of Ian Paisley Snr, the party had previously (and vociferously) opposed the 1998 agreement; however, with the changes agreed in St Andrews, primarily regarding procedures for nominating first and deputy first ministers, the DUP consented to the mandatory power-sharing structure of post-1998 government for the first time (see Anthony, 2008). The St Andrews Agreement also contained a commitment from Sinn Féin to support the Police Service of Northern Ireland (PSNI) and provided for a 'transitional assembly' to be established, which began preparations for the return of devolution in advance of elections to a fully restored assembly. Elections were held on 7 March 2007 and, for the first time, the DUP was returned as the largest unionist party and Sinn Féin as the largest nationalist party. The two thus agreed to enter power-sharing government together under the respective leaderships of First Minister Ian Paisley and Deputy First Minister Martin McGuinness.

Strands 2 and 3 of the 1998 agreement have been somewhat more resilient than Strand 1. During periods of assembly suspension, the work of the north–south implementation bodies, established under Strand 2, and the work of the east–west implementation bodies, established under Strand 3, have continued, albeit on a slightly less regular basis during the 2002–07 suspension. It is, however, also the case that the tripartite structure was designed to ensure that the nature and extent of (in)operation of any one strand affects the nature and extent of (in)operation of the other two. The clearest demonstration of this inherent mutuality is between Strands 1 and 2 where the ministerial body of the latter – the NSMC – cannot meet if the ministerial body of the former – the Northern Ireland executive – is not functioning; the NSMC was not operational during the five-year hiatus in devolution.

There have been various other 'successor' agreements that build on the provisions and principles of the 1998 agreement. Three of these have been agreed since St Andrews and prior to 2016; they are worth briefly noting. The Hillsborough Castle Agreement, reached in February 2010, laid the ground for the devolution of justice and policing to the Northern Ireland institutions later that year (see Northern Ireland Office, 2010). The Stormont House Agreement, reached in December 2014 following inter-party talks chaired by US diplomat Richard Haas, made recommendations to deal with (contested)

issues of flags, identity, culture and tradition as well as setting out a process for the resolution of so-called legacy issues – meaning unsolved atrocities committed during The Troubles and compensation to victims and survivors of the same – and making some proposals regarding the Irish language (see Northern Ireland Office, 2014). Difficulty implementing aspects of the 2014 Stormont House Agreement led to more inter-party talks the following year, which resulted in the conclusion of *A Fresh Start: The Stormont Agreement and Implementation Plan*, reached in November 2015, which addressed a range of issues, including provisions for tackling paramilitarism, procedures for implementing its 2014 predecessor and some measures to deal with more ‘normal’ policy problems such as tax, welfare and financial stability (see Northern Ireland Office, 2015).

Epoch 3: a fragile peace in a UK-wide context

For the past 25 years, those UK constitutional arrangements that are specific to Northern Ireland have been based on international legal text – the 1998 agreement – and codified, largely, in one domestic legal text – the Northern Ireland Act 1998 (NI Act 1998) – which has been judicially recognised to serve ‘in effect’ as its constitution; in the UK context, this is unique. Although there are important similarities between the NI Act 1998 and the Scotland Act 1998 (as amended) and the Government of Wales Act 1998 (as amended), neither of the latter two have an international law basis. Arguably, the international legal basis of the 1998 agreement sits in tension with the UK’s ‘fundamental constitutional principle’ of parliamentary sovereignty; *if* a future UK parliament voted in favour of disapplying the NI Act 1998, or parts of it, there would be serious international law and diplomatic consequences for the state.

Alongside its status, aspects of the substance of the 1998 agreement are also constitutionally novel in domestic and international terms. It is uncommon for states to adopt ‘succession clauses’ such as that contained in section 1(1) of the NI Act 1998, which follows from the principle of consent in the 1998 agreement. In the immediate setting of the UK, the provision for Northern Ireland to opt to leave the state – subject to a majority of its people consenting – contrasts starkly with the situation in Scotland where no such provision exists, despite the government there requesting as much repeatedly. Another set of unique constitutional implications of the 1998 agreement arises from its Strand 2 and Strand 3 provisions concerning north–south and east–west relations respectively. From a Northern Ireland perspective, the institutions established for co-operating with Ireland under Strand 2 are quasi-confederal in that they grant the devolved government considerable autonomy to conduct relations and reach agreements with another state without approval or necessarily oversight from the UK government. The NI Act 1998 reflects this through an exception to the otherwise constitutionally standard arrangement in the UK for international relations to be a reserved/excepted matter (see NI Act 1998, Schedule 2(3)). Not dissimilarly, Northern Ireland (and not Scotland or Wales) is able to act (at least in theory) autonomously in the Strand 3 institution of the BIC on the basis of the same NI Act 1998 exception to the otherwise reserved powers of the central UK government to act in the arena of international relations.

A final point worth making in this (very much) non-exhaustive account of the implications of the post-1998 constitutional arrangements of Northern Ireland is to highlight the unusual process of developments since the 1998 agreement was concluded. As discussed further in subsequent sections, the recurring pattern of institutional breakdown, followed by inter-party talks, brokered by the governments of the UK and Ireland, usually leading to some form of successor agreement to the original, is an unconventional means of constitutional evolution in the UK setting. The substance and repeated necessity for this process testify to the constitutional uniqueness of contemporary Northern Ireland within the UK.

Epoch 4: the Brexit effect – 2016 to the present day

As the only part of the UK to share a land border with another EU member state, Northern Ireland was always going to be the most visible physical canvas for the outworking of the UK's decision to leave the bloc. As the only part of the UK with a recent history of violent conflict over the legitimacy or otherwise of its borders and, consequentially, the only part of the UK with a carefully constructed constitutional architecture that hinged on making those same borders less significant and more fluid, Northern Ireland was even more exposed to the effects of Brexit than its geography alone suggested.

From early on in UK–EU negotiations, both parties had agreed that the 'unique circumstances' on the island of Ireland in the context of the UK's decision to withdraw from the EU (arising from the Ireland/Northern Ireland land border, alongside the 1998 agreement and the north–south co-operation it had facilitated) would require some sort of special accommodation.

Bypassing a considerable amount of Brexit-related political and constitutional drama, the agreement eventually negotiated between the UK and the EU on arrangements for Northern Ireland came in the form of a Protocol on Ireland/Northern Ireland, which formed part of the Withdrawal Agreement (see *Official Journal of the European Union*, 2020, in the 'Table of legislation' section of this paper). Under the terms of the protocol, Northern Ireland would remain aligned with a specified selection of EU law so as to continue to trade freely into the EU single market for goods, thereby avoiding the need for a physical hardening of the land border on the island of Ireland, which was, all sides agreed, to be avoided. The corollary of the compromise embodied in the protocol, read together with the 'thin' nature of the wider EU–UK trading relationship agreed during Boris Johnson's tenure as UK prime minister, was that new checks, controls and restrictions would be applied on goods entering Northern Ireland from the rest of the UK; this proved controversial. Exacerbating established political divisions in Northern Ireland and stoking long-standing fears, the effective creation of a so-called 'Irish Sea border' was deemed an anathema to unionists and loyalists, many of whom interpreted the new trading arrangements as a contravention of and threat to Northern Ireland's place in the UK. In February 2022, the largest unionist party – the DUP – resigned from the Northern Ireland executive in protest against the protocol, and thereby, under the power-sharing arrangement, collapsed devolved government. Neither Northern Ireland assembly elections in May 2022 nor the subsequent agreement, on the part of the UK

and the EU, of revisions to the protocol, have yet catalysed a shift in the DUP's protest position regarding the post-Brexit arrangements for Northern Ireland and its resultant refusal to restore the devolved institutions.

Although negotiated and agreed between the two sides, the implementation of the protocol also became a source of contestation between the UK and the EU. The former accused the latter of being overly legalistic in its interpretation and the latter accused the former of reneging on commitments it had signed up to. After a tumultuous first two years of implementation, in February 2023, the UK and the EU agreed a new set of conditions by which the protocol – thereafter known as the Windsor Framework – would be interpreted and applied.

Under these new arrangements, which have not yet been fully implemented, EU law will continue to apply to producers and traders in Northern Ireland, but goods coming from Great Britain to Northern Ireland and remaining there need not fully conform to EU standards – instead, UK standards will apply, subject to a set of conditions including trader authorisation, data sharing and labelling. As in the previous iteration of the protocol, a selection of EU rights and equality directives still applies in Northern Ireland, and these are overseen by a 'dedicated mechanism' in the remit of Northern Ireland rights and equality bodies established under the 1998 agreement. Additionally, EU rules related to energy and electricity supplies, VAT and excise and state aid also continue to apply in Northern Ireland with the latter two areas being somewhat narrower under the Windsor Framework than was the case under the original protocol. From a constitutional and governance perspective, the most significant changes brought in by the Windsor Framework are its novel series of provisions for the greater involvement of Northern Ireland representatives in the implementation of arrangements. This ranges from new 'working groups' and 'stakeholder consultation' mechanisms to the introduction of the so-called 'Stormont brake', by which 30 members of the legislative assembly (MLAs) from two parties in Stormont can notify the UK government of their desire for a specific change or update to EU law that would ordinarily apply in Northern Ireland *not* to do so, subject to a case being made that the given change would have a lasting negative effect on the daily lives of people in Northern Ireland.

Epoch 4: the Brexit effect in a UK-wide context

Again, addressing comprehensively the significance and implications of Northern Ireland's dedicated post-Brexit arrangements is beyond the scope of this paper. Several pertinent points ought, however, to be made. First, the fact that such arrangements were deemed necessary affirms the constitutional distinctiveness of Northern Ireland. Second, the substance of the provisions made for post-Brexit Northern Ireland can be said to further reinforce its position as the most constitutionally distinctive part of the UK. Third, the reactions to the unique post-Brexit arrangements for Northern Ireland underline the vulnerability of its post-1998 constitutional set-up to collapse in the face of internal or (in this instance) external shocks. Fourth, the new position of Northern Ireland as the touching point between the UK and EU markets and regulatory orders serves to increase its profile and, therefore, in effect to raise the stakes of any effort to secure the efficacy of its governance and the stability of its constitutional status.

A very brief conclusion to a very brief history

Necessarily, many important constitutional events and their effects have been overlooked or underdeveloped in this all-too-brief account of developments that span over a century of history in a constitutionally complex and contested place. Nonetheless, before turning to focus more intently on the challenges facing contemporary Northern Ireland and considering potential solutions, it is valuable to set out some key implications of history for the present day.

- Since it was established, Northern Ireland has had unique governance arrangements.
- Northern Ireland was the site of a prolonged conflict between opposing national identities and visions for its constitutional future.
- Contemporary constitutional arrangements in/for Northern Ireland were difficult to agree on and have an international law basis – this makes changing or reforming them harder to do.
- Devolved government in Northern Ireland is contingent on achieving and maintaining consensus between opposite ends of the political spectrum – this renders it liable to collapse.
- Due to the still-fragile nature of the post-conflict society in Northern Ireland, its government arrangements are easily destabilised, including by external events.

To current and possible future consequences of all of these matters, the next two sections now turn.

Section 2: constitutional and governance challenges facing Northern Ireland

Contemporary Northern Ireland faces a range of governance challenges, most of which are linked to and arise from its constitutional arrangements. While non-exhaustive, this section sets out five of the most prominent issues and obstacles, which will need to be considered, mitigated and/or overcome if Northern Ireland is to maximise governing efficacy and constitutional stability in the medium and long term. Section 3 will build on the content that follows by making a series of proposals for reform.

Challenge 1: the representation discrepancy

The requirements of power-sharing government in Northern Ireland render its institutions vulnerable to collapse and subject its people to periods of “decay and stagnation” (Sterling, 2019) as regards policy development and public service delivery; if good government is the aim, this situation is not ideal. The reliance on mutual buy-in from representatives of ‘both communities’ named in the 1998 agreement (BIA, Article 1(v)) for the operation of government acted as a necessary safeguard for the preservation of the legitimacy of the institutions by the majority 25 years ago. Its logic notwithstanding, the consequential requirement for the parallel consent of the two

largest political parties of the first and second largest designations (as per the NI Act 1998, s16A) has stymied stability in Northern Ireland due to the power it grants either 'side' to exercise an effective veto of the power-sharing institutions by withdrawing from and thereby collapsing the Northern Ireland executive and assembly. Without calling into question the principle of power sharing in Northern Ireland, it is important to observe that, in practice, the current system has not fostered constitutional stability. The frequency with which institutions in Northern Ireland collapse and remain as such arguably results in a democratic deficit commensurate with a period of stasis – this is not ideal.

Since 1998, the electoral map of Northern Ireland has changed. While in the assembly elections of 1998, eight out of 108 seats (representing 9%) went to candidates who did not designate as either unionist or nationalist, in the assembly elections of 2022, 18 out of 90 seats (representing 20%) went to candidates who did not designate as either unionist or nationalist. What this means is that, although the majority of political representatives in Northern Ireland do still fit into a unionist versus nationalist binary, there has been a substantial and consistent growth in support for those who fit into neither of the 'two main communities' named in the 1998 agreement. This has implications for the premise that underlies power-sharing government in Northern Ireland. *If*, as electoral and demographic indicators suggest, a growing number of individuals continue to align with neither a unionist nor a nationalist identity in Northern Ireland (see Hayward and McManus, 2018; Whitten, 2019; NILT, 2021), a growing discrepancy between the identity of its population and its structure of government can be expected – unless, that is, the system is amended such that the sharing of power in Northern Ireland is based on its multiplicity of communities and identities, and not only the two that were predominant in 1998.

Challenge 2: the implementation gap

There is an established gap between political commitment and policy implementation in the constitutional context of Northern Ireland. While most democratic systems involve some level of discrepancy between what politicians say they will do and what they end up doing, this dynamic is exacerbated in Northern Ireland such that there exists a significant and multidimensional 'implementation gap', which too often goes either unnoticed or unchallenged. This Northern Ireland-specific implementation gap manifests in at least two ways.

Gap 1: between multi-party successor agreements and policy delivery

On current estimates, the Strand 1 institutions have only been fully operational for approximately 60% of their lifespan (see FactCheckNI, 2022). By convention, when the devolved institutions in Northern Ireland have collapsed, a process of inter-party talks is normally initiated by representatives of the UK government and the Ireland government acting jointly. *If/when* consensus is found on whatever matter(s) led to the breakdown of power sharing, a political text setting out the substance of the agreements reached, and commitments made, by parties at the talks (including the two governments) is normally published. On the basis of the relevant political text, the would-be executive parties in Northern Ireland generally re-enter office, and *in theory* any legislation required to

enact commitments made in the political text is taken forward in Westminster, Dublin or Stormont, as needed. This process is constitutionally novel yet rarely incorporated in UK-wide constitutional discussions. In particular, the Irish government in inter-party political talks aimed at restoring the subnational governing institutions of Northern Ireland is constitutionally unconventional, notwithstanding that it follows from its status as signatory to the 1998 agreement. Successor agreements have often included pledges from the Irish government to provide funding and/or take relevant policy steps towards implementation. In substance, then, this pattern of constitutional development in a subnational part of the UK (Northern Ireland) also routinely and necessarily involves a foreign government (Ireland), thereby reflecting and arguably reinforcing the extra-UK dimension of Northern Ireland's constitutional arrangements.

The status of what tend to be termed 'successor agreements' to the 1998 agreement is not well defined or understood. Texts such as the St Andrews Agreement of 2007, the Hillsborough Agreement of 2010 and the Fresh Start Agreement of 2014 seem to sit somewhere between domestic memorandums of understanding (MOUs) between UK (Northern Ireland) political parties and bilateral UK-Ireland treaties; they are neither one nor the other yet have similarities to both. This matters because it relates to, and arguably facilitates, the first dimension of what can be termed Northern Ireland's 'implementation gap'. Perhaps due in part to the ambiguous status of successor agreements, their implementation generally depends on political will, on the part of the two guarantor governments, and on political consensus between governing parties in the Northern Ireland context.

Generally, successor agreements have not contained robust enforcement mechanisms or established means for monitoring implementation and when such measures are in the texts, they have had limited effect in practice. What this has meant is that, once the Northern Ireland institutions are back up and running on the foot of a successor agreement, there is limited pressure on, or scrutiny of, authorities as regards the delivery of commitments made therein. As a result, substantial policy issues that have been at the centre of political disputes and institutional collapses since 1998 have been 'addressed' in successor agreements, yet delivery of the related policies is, at least in some instances, still pending or has not been implemented in line with the terms of the relevant agreement.

Numerous examples could be drawn. To begin, the 1998 agreement provided for consultation and advice on the development in UK law of 'a Bill of Rights for Northern Ireland' to supplement the implementation of the European Convention on Human Rights (British-Irish Council, no date, para. 4); to date, no Northern Ireland Bill of Rights has been agreed. Commitments were also made in the 1998 agreement regarding 'linguistic diversity' and the Irish language and Ulster-Scots more particularly; despite commitments in subsequent successor agreements, no legislative action was taken until the Identity and Language (Northern Ireland) Act 2022 passed 24 years later in Westminster during a period of institutional stasis in Northern Ireland. Another example relates to corporation tax – in 2014 in the Stormont House Agreement the UK government committed to "enable the devolution of corporation tax" (para. 8),

which it subsequently did via the Corporation Tax (Northern Ireland) Act 2015, but the legislation contained a conditional commencement clause (see s5). Despite further related commitments in the Fresh Start Agreement of 2015 (see 1.16–1.18), no Northern Ireland specific corporation tax rate has yet been agreed. Unsurprisingly, the most recent successor agreement – *New Decade, New Approach* (HM Government, 2020) – contains the greatest number of as yet unrealised commitments, including, for example, and non-exhaustively:

- a pledge to reduce the number of NHS patients waiting more than a year for assessment or treatment
- a commitment to deliver a new special educational needs framework
- a commitment to urgently invest in wastewater infrastructure
- a commitment to develop and implement an anti-poverty strategy
- a commitment to publish an agreed childcare strategy.

The processes by which successor agreements have been concluded also typically involve little or no consultation with or scrutiny by the public. Limited transparency in talks processes may contribute to a lack of public ownership over the commitments contained in successor agreements and therefore a lack of widespread pressure from or expectation among the electorate regarding their implementation.

Gap 2: between party manifesto and programme for government

Elsewhere in the UK, party manifestos have a significance that they lack in Northern Ireland. In the traditional (Great) British system, commitments made by any party in their manifesto during an election campaign are generally understood to be a blueprint for the governing agenda they would adopt if they were to secure sufficient support to form a majority government. While these party-political texts have no legal weight, they do tend to be framed and understood as political contracts, which (at least in theory) represent a written record of the mandate granted by the electorate to the government of the day.

The importance of party manifestos is most evident in and applicable to UK general elections. The comparative centrality of manifestos in UK general elections arises from the fact that the first-past-the-post (FPTP) election system is, of all those used in the UK, the most conducive to majority government; alongside the operation of the 'Salisbury Convention', whereby a government bill mentioned in an election manifesto is, by convention, not voted down by the House of Lords (UK Parliament, 2023). While elections to the devolved legislatures in Scotland and Wales under the additional member system (AMS) are not as likely as a UK general election to yield majority government, it is only in Northern Ireland where majoritarian rule is outright

prohibited.* Under the power-sharing constitutional arrangement in Northern Ireland, in the aftermath of a Northern Ireland assembly election, a formulaic process, in theory, follows and results in the formation of a cross-party executive involving MLAs from (at least) the largest political party of the largest political designation and the largest political party from the second largest political designation (see NI Act 1998, s16A). In practice, so far, this has meant power sharing between the largest unionist and the largest nationalist political parties.

The Northern Ireland system therefore sets up a unique relationship between the electorate and political parties as regards 'mandate'. Unlike in the rest of the UK, citizens in Northern Ireland go to the polls knowing that the parties they vote for will be obliged to enter a mandatory coalition if/when an executive is formed. This means in effect that any manifesto pledges made by any individual party are unlikely to be delivered, at least not in the form proposed. Notwithstanding this outworking of power sharing, distinct to Northern Ireland, its election campaigns and requirements on political parties involved in them are broadly similar to those held in Scotland and Wales, where majority or minority governments can be returned on the basis of the relevant party manifesto.

Instead of relying on manifestos as a basis for the agenda of any incoming government, over the past decade, the policy trajectory of devolved institutions in Northern Ireland has *in theory* been determined by an outcomes-based 'programme for government', developed on a cross-party basis and open to public consultation. Reflecting a commitment laid down in the Fresh Start Agreement of 2014 (see Stormont Agreement, 2015, para. 61), in 2016 the Northern Ireland executive published its first draft programme for government consultation document, setting out an "outcomes-based approach" to achieving a vision of "improved wellbeing for all... citizens" in Northern Ireland (Northern Ireland Executive, 2016, p. 4). Building on this, a Northern Ireland Civil Service (NICS) outcomes delivery plan was developed during the 2017–20 hiatus in devolved government (see The Executive Office, 2019).

Then, reflecting a requirement of the *New Decade, New Approach* agreement (see HM Government, 2020, p. 10), the Northern Ireland executive published another consultation on an updated programme for government draft outcomes framework in January 2021 (see Northern Ireland Executive, 2021). Due to operational delays and political breakdowns, no programme for government document has yet been finalised in the course of a Northern Ireland executive and therefore no programme for government has yet become fully operational. This reflects the second dimension of the 'implementation gap' that exists in Northern Ireland today: technically there is no agreed, comprehensive democratic mandate on the basis on which it is being governed.

* As measured over time according to the Gallagher index of the proportionality of electoral outcomes, the single transferable vote (STV) system of Northern Ireland assembly elections is the most proportional of those used in the UK, followed by, respectively, the AMS used to elect representatives to the Scottish parliament and Welsh Senedd, which is slightly less proportional, and the UK general election FPTP system, which is the least proportional. This matters because the degree of proportionality of an electoral system generally determines the likelihood or otherwise of any one party returning a majority and therefore that party being able or obliged to implement its manifesto. For a comparative discussion of UK electoral systems, see Shuttleworth (2020); and for a more detailed discussion, including regarding theory and method, see Gallagher and Mitchell (2008).

Failure to agree and implement a programme for government in Northern Ireland cannot, of course, be solely or even primarily attributed to difficulties in translating multiple different party manifestos into a collective programme after an election, although this may be a contributing factor. Instead, the absence of a shared vision for the future of Northern Ireland, which is the reason for the power-sharing coalition system of government in Northern Ireland, is the greater challenge. Even once formed, any Northern Ireland executive can by definition be expected to include parties with very different political philosophies and therefore perspectives on policy development and delivery; this tends to stymie cross-departmental working and/or whole-of-government co-ordination, thus further reinforcing gaps in the implementation of policy commitments if and when they do exist.

Neither of the implementation gaps described is an easy problem to solve; nonetheless, as the final section sets out, steps could perhaps be taken to mitigate them.

Challenge 3: the democratic deficit

A prominent critique of the post-Brexit arrangements agreed for Northern Ireland under the UK–EU Withdrawal Agreement has concerned the degree to which they uphold democratic norms of representation and accountability. Not dissimilarly, recent UK government legislative strategies to deal with periods of political stasis and institutional stagnation in Northern Ireland are also questionable as regards democratic norms. This subsection briefly sets out both components of the ‘democratic deficit’ evident in the contemporary Northern Ireland constitutional architecture.

Deficit 1: the protocol/Windsor Framework and dynamic alignment

With the objective of avoiding the necessity for a physical hardening of the Ireland/Northern Ireland land border in the context of Brexit, the protocol requires Northern Ireland to stay aligned with a specified body of EU laws primarily concerned with the movement and regulation of goods. Under Article 13(3) of the protocol, the majority of EU laws that continue to apply in the UK in respect of Northern Ireland (or ‘UKNI’) do so “as amended or replaced” in the ordinary processes of EU legislative development. This creates a relationship of ‘dynamic regulatory alignment’ with those EU laws in scope of the provision; in effect, post-Brexit Northern Ireland is, by default, aligned with the EU single market in goods as it evolves. The protocol’s critics have highlighted the questionable democratic credentials of this set-up whereby Northern Ireland must follow a body of EU laws despite not having a role in shaping them. Without representation in relevant EU institutions, there is a risk that Northern Ireland is obliged to implement EU rules that create problems there but also has little or no opportunity to raise objections or deal with issues.

Addressing the ‘democratic deficit’ inherent in the protocol was a focus of UK–EU talks on its implementation, which led to the agreement of the Windsor Framework reforms. Although not altering the default arrangement for the dynamic regulatory alignment of Northern Ireland, the framework makes a series of measures designed to ensure greater representation of Northern Ireland in its implementation. These include commitments to involve Northern Ireland stakeholders in some of the bodies set up to oversee the

implementation of the protocol, in particular the Joint Consultative Working Group (JCWG), alongside commitments on the part of the European Commission to provide annual briefings to Northern Ireland stakeholders on its work programme alongside ad hoc briefings on relevant changes. There are also new provisions under the so-called 'Stormont brake' procedures for Northern Ireland representatives to express views on and potentially prevent the implementation of updates arising from its dynamic regulatory alignment with EU law and/or any additions to those EU laws that apply. While, at the time of writing, the framework provisions relating to Northern Ireland representation have yet to be operationalised, if enacted and utilised effectively, they have the potential to mitigate the democratic deficit that otherwise arises under the protocol arrangement for the alignment of Northern Ireland with EU laws, despite Northern Ireland having left the bloc along with the rest of the UK.

Deficit 2: UK strategies for governing without a government

The unique and explicable vulnerability of Northern Ireland mandatory power-sharing institutions to collapse elevates the importance of the alternative default arrangements in the (all-too-frequent) event of a hiatus in devolved government. Recent 'Plan B' approaches to Northern Ireland governance and administration of public services in the absence of ministers have been questionable from the perspective of democratic norms.

During the 2017–20 hiatus in devolved government in Northern Ireland, the UK government introduced legislation concerning the processes and timelines involved in the formation of a Northern Ireland executive and the "execution of governmental functions" in any interim period between any collapses. When the first of these – the Northern Ireland (Executive Formation and Exercise of Functions) Act 2018 – was considered by the House of Lords Constitution Committee, it emphasised that "in any other circumstances" the provisions of the legislation that "challenge established constitutional principles would not be acceptable", further that "no part of [the Act]... should be taken as a precedent for future legislation" (House of Lords Select Committee on the Constitution, 2018, para. 24). The legislation was fast-tracked through parliament to make a series of provisions with constitutional effects, including:

- suspension of the statutory duty on the secretary of state for Northern Ireland to call a Northern Ireland assembly election
- extension of the period by which ministerial appointments must be made following any election (s1)
- most significantly, the granting of senior civil servants in Northern Ireland departments general powers of administration, subject to a public interest test and in line with guidance from the Northern Ireland secretary (s3).

The last of these effects – empowering senior civil servants in Northern Ireland with regulation-making capabilities that are normally only available to ministers – represents, as the House of Lords Select Committee on the Constitution indicated, a challenge to established constitutional principles in the domestic setting and a challenge to democratic norms more universally.

The Northern Ireland (Executive Formation and Exercise of Functions) Act 2018 has since been repealed. Subsequent legislation has, however, had very similar effects. As indicated in Table 1, overleaf, a series of Acts have in recent years enabled elections in Northern Ireland to be delayed and provided/prolonged law-making powers for/ of senior officials. In this way, the 2018 Act laid down a new and 'constitutionally challenging' precedent for what can or ought to be the Plan B arrangements for government in Northern Ireland if and when its power-sharing institutions collapse.

Table 1 UK laws making provisions related to the absence of the Northern Ireland executive (2018–23)

Legislation	Made
Northern Ireland (Executive Formation and Organ and Tissue Donation) Act 2023	28 February 2023
The Northern Ireland (Executive Formation etc) Act 2022 (Commencement) Regulations 2023	30 January 2023
The Northern Ireland (Extension of Period for Making Ministerial Appointments) Regulations 2022	7 December 2022
Northern Ireland (Executive Formation etc) Act 2022	6 December 2022
Northern Ireland (Ministers, Elections and Petitions of Concern) Act 2022	8 February 2022
The Northern Ireland (Extension of Period for Executive Formation) (No. 2) Regulations 2019	21 October 2019
The Northern Ireland (Ministerial Appointment Functions) (No. 2) Regulations 2019	15 October 2019
Northern Ireland (Executive Formation etc) Act 2019	24 July 2019
The Northern Ireland (Extension of Period for Executive Formation) Regulations 2019	20 May 2019
The Northern Ireland (Ministerial Appointment Functions) Regulations 2019	19 February 2019
Northern Ireland (Executive Formation and Exercise of Functions) Act 2018	1 November 2018

The constitutionally novel provisions of the Northern Ireland (Executive Formation and Exercise of Functions) Act 2018 and its successors, particularly in respect to the granting of regulation-making powers to civil servants, are perhaps understandable in the unfortunate context of a sustained hiatus in functioning Northern Ireland government. Nonetheless, these arrangements are also inherently undemocratic inasmuch as they enable the exercise of discretionary governing powers on the part of unelected officials, with minimal opportunity for scrutiny of any decisions made. Alongside critiques of the democratic credentials of the protocol/Windsor Framework, these domestic Plan B arrangements for government in Northern Ireland in the event of institutional collapse represent an additional component of the standing democratic deficit in the constitutional arrangements of Northern Ireland.

There is no wholly unproblematic alternative for how to govern Northern Ireland during prolonged periods of institutional collapse. Previously (for example, during the 2002–07 hiatus), the UK government opted to implement ‘direct rule’ whereby Northern Ireland Office ministers became responsible for Northern Ireland departments’ portfolios and were granted powers to legislate in relevant devolved policy areas via Orders in Council – a type of secondary legislation. Such a system does not afford much by way of parliamentary scrutiny or democratic accountability as Northern Ireland Office ministers are not elected by people in Northern Ireland and the time devoted to assessing Orders in Council in Westminster has typically been very short. Moreover, any introduction of direct rule in Northern Ireland today would require the UK parliament to pass new primary legislation, and doing so would be politically contentious in/for Northern Ireland; this is likely part of the current government’s apparent reluctance to consider it.

Another option would be to consider some form of ‘joint authority’, meaning an intergovernmental arrangement whereby responsibility for the implementation of devolved policy in Northern Ireland is shared or agreed bilaterally by the Irish and UK governments working jointly. Representatives of nationalist political parties in Northern Ireland have expressed a preference for this sort of arrangement – but again, any move towards a joint authority system would be politically contentious and require (at least) new domestic legislation as well as likely some kind of new bilateral agreement.

Challenge 4: inherent complexity

Arrangements for government in Northern Ireland are complex. Inasmuch as the 1998 agreement architecture is multi-levelled and interdependent, complexity is arguably an intentional design feature of the post-conflict Northern Ireland constitution. Against this backdrop, the decoupling of the UK and EU legal orders that resulted from Brexit, save for and subject to the unique set-up agreed for the continued alignment of Northern Ireland with EU laws that are in the scope of the protocol, has reinforced and exacerbated any existing complexity in the Northern Ireland system.

In the post-Brexit context, Northern Ireland acts as the touching point between the internal markets and regulatory regimes of the EU and the UK. This has the potential to be beneficial or burdensome; likely it will be both. The requirement, under the

protocol, for Northern Ireland to stay aligned with areas of EU law where the rest of the UK does not, introduces the possibility and probability of intra-UK divergence along a Great Britain–Northern Ireland axis. At the same time, for areas outside the scope of the protocol, the lack of requirement for Northern Ireland to stay aligned with EU laws after Brexit introduces the possibility and probability of divergence along an Ireland–Northern Ireland axis. Importantly, the extent to which divergence occurs along these ‘north–south’ and ‘east–west’ axes, and the nature of its effect on Northern Ireland, will largely depend on choices made outside its recently (in)famous borders. The policy trajectories of the UK government read alongside the policy trajectories of the EU (and therefore Ireland) in relevant areas can be expected to determine the degree and effects of divergence experienced in Northern Ireland.

When implemented, the changes brought in under the Windsor Framework can be expected to make the already complex governing environment of post-Brexit Northern Ireland even more so. The framework permits some retail agri-food goods imported from Great Britain to be sold in Northern Ireland even if they do not meet EU standards in some areas. The ‘Stormont brake’ procedures create an obligation on politicians and officials in Northern Ireland to monitor the evolution of EU law and policy on a scale never before required and in areas that are not necessarily devolved.

The inherent complexity of post-Brexit Northern Ireland can be expected to add more pressure to its already strained governing architecture. Ensuring the effective implementation of the unique arrangement for Northern Ireland under the Windsor Framework will likely be difficult due to its technical implications and political ramifications. Moreover, officials and (presuming the institutions are restored) politicians in Northern Ireland will be obliged to manage its newly novel position against the evolving legislative landscape of the post-Brexit UK.

Challenge 5: Northern Ireland (il)literacy

The constitutional particularities of Northern Ireland are not often fully considered or acknowledged in UK-wide analyses; when they are referenced, any mention is often cursory and/or partial. Given the extent to which the constitutional history and contemporary constitutional structure of Northern Ireland differs from that of the rest of the UK (see Section 1), any ‘Northern Ireland blind spot’ in broad narratives about UK constitutionalism is arguably as understandable as it is problematic. Taking the Brexit process as an example, it is clear that the constitutional idiosyncrasies of Northern Ireland have implications for the UK state as a whole. What is also clear, however, is that the particular circumstances of Northern Ireland were (at the very least) underappreciated in the development of UK policy on Brexit from the outset. Consequentially, the implementation of successive governments’ policies regarding the UK’s withdrawal from the EU had a destabilising effect in Northern Ireland and/or Northern Ireland had a destabilising effect on the implementation (or attempted implementation) of UK government policies. On this example alone, the case can be made that illiteracy on Northern Ireland and its constitutional arrangements, insomuch as it exists at the centre of the UK system, is problematic.

The reasons for a lack of Northern Ireland literacy (or even illiteracy) at the centre of the UK system are varied and debatable. Historically (as set out in Section 1), Northern Ireland has tended to be framed and treated as 'a place apart' in UK-wide discussions. While such differentiation has often followed from its frequent position as an exception to rules and norms that apply in the rest of the UK, this does not, or ought not, justify the omission of Northern Ireland from wider discussions. In the contemporary setting, the different party-political landscape of Great Britain vis-à-vis Northern Ireland is also likely a contributing factor to a lack of Northern Ireland literacy in UK-wide discussions. The traditionally dominant parties in Great Britain – Conservative, Labour and the Liberal Democrats – either choose not to stand for election or have very little support in Northern Ireland. By implication, there is less immediate political pressure on political representatives in the rest of the UK to develop an understanding of Northern Ireland issues, thus contributing to a lack of general literacy.

With Northern Ireland after Brexit now occupying a unique position both within and between the internal markets of *both* the UK and the EU, the hitherto established trend of 'blind spotting' Northern Ireland's constitutional uniqueness is potentially more consequential than it has been. Under the Withdrawal Agreement and Windsor Framework, more than 300 EU instruments continue to apply in Northern Ireland, which also remains in the EU's state aid regime. Ensuring these EU laws are implemented is the responsibility of the UK government and mechanisms for the enforcement of the arrangement include continued jurisdiction of the Court of Justice of the European Union (CJEU). What this means is that the stakes of any future failure to adequately consider and/or accommodate Northern Ireland in the development of UK policy are therefore much higher after Brexit.*

Section 3: proposals for constitutional and governance reforms in Northern Ireland

Ensuring delivery of good governance in Northern Ireland is in the interests of all, regardless of political affiliation or constitutional aspiration. Achieving this, however, will require politicians and authorities within Northern Ireland and across the rest of the UK to face up to the governance and constitutional challenges it faces. Building on the previous section, what follows is a non-exhaustive account of some ways this could be taken forward. Proposals made here are intended as a basis for discussion and have been developed with the aim of setting out reforms and/or initiatives that could be actioned in the short to medium term.

* Some other legislative provisions also reflect the newly potentially pivotal position of Northern Ireland in the post-Brexit era and introduce associated obligations for the development and implementation of broader UK policies. The United Kingdom Internal Market Act 2020, for example, introduces a requirement for authorities to take "special regard" of "the need" to maintain Northern Ireland's integral place in the UK internal market (see s46). Elsewhere, in the European Union (Withdrawal) Act 2018, any powers exercised under its terms are obliged to be compatible with the terms of the NI Act 1998, which implements the 1998 agreement (see s10).

Addressing the representation discrepancy

Since 1998, the electoral preferences of Northern Ireland appear to have changed. As set out in the previous section, support for candidates who do not identify as either unionist or nationalist has grown steadily, at the same time as the percentage of the population who do not align with either of the 'two communities' has also grown. In this context, the reified requirement for a necessary condition for the functioning of government in Northern Ireland to be, in effect, dual consent of *only* unionist and nationalist representatives seems time-limited if not already moribund. If recent trends continue and no institutional reform regarding designation is agreed, Northern Ireland could quickly be in a situation whereby the operation of government is contingent on choices made by a split minority (unionist + nationalist) despite and against the desire of the lesser-represented majority (neither).

Review of the 'cross-community' threshold

CONTEXT. According to the 1998 agreement (as reflected in s42 of the NI Act 1998), achieving 'cross-community' consent requires achieving (Strand 1 (5) (d)) consent of either a majority of members present and voting including a majority of unionist and nationalist designations (parallel consent) or a 60% majority of all MLAs present and voting that includes 40% of the unionist MLAs and 40% of the nationalist MLAs present and voting (weighted majority). The current threshold for a vote on any matter becoming contingent on securing cross-community consent (of either type) is that it is deemed to be 'cross-cutting' or 'controversial' and/or has been subject to a successful 'petition of concern' motion lodged by at least 30 MLAs from two parties.

PROPOSAL. In keeping with the principle of power-sharing government, the established third designation – 'neither' – could be granted equal democratic weight by amending the definition of 'cross-community' consent such that, to pass, qualifying votes would be required to meet a threshold of *either* a majority of members present and voting that included a multiplicity of the three designations (reformed parallel consent) *or* a 60% majority of members present and voting that included 20% designated unionist, 20% designated nationalist and 20% designated 'neither' representatives (reformed weighted consent). Alongside revising the definition of 'cross-community' consent, the criteria by which it is decided that achieving such consent is required could also be revisited, with the aim of minimising instability and reorientating the 'community safeguards' towards issues concerning national identity and constitutional aspiration rather than the day-to-day operation of public service delivery and policy development. To this end, building dually on the provisions of the *New Decade, New Approach* agreement and the Windsor Framework, a new threshold for initiating a petition of concern regarding a particular measure in the assembly could be introduced such that the relevant group of 30 MLAs would be obliged to demonstrate how the proposed change would

affect the daily lives of the community designation they represent in a manner that is 'liable to persist' and is to the detriment of that community's specific identity or experience.

Nomination of first and deputy first ministers

CONTEXT. Under section 16A of the NI Act 1998, in the aftermath of a Northern Ireland assembly election, the largest political party of the largest political designation nominates an MLA to be first minister and the largest political party of the second largest political designation nominates an MLA to be deputy first minister. If one or other party opts not to nominate an MLA, no executive can be formed; in practice, therefore, the largest parties of the two largest designations enjoy veto powers over the formation of devolved government in Northern Ireland.

PROPOSAL. The text of the 1998 agreement required that first and deputy first ministers would be "jointly elected into office by the Assembly voting on a cross-community basis" (Strand 1(15)). The revised system was introduced under the St Andrews Agreement and is more conducive to either of the largest political parties of the first and second designations refusing to nominate. That said, it is worth noting that, to date, the electoral make-up of Northern Ireland assemblies has been such that (post 2007) the DUP and Sinn Féin would still have, in effect, wielded veto powers over the formation of an executive under the original 1998 agreement-derived system. Building on the previous recommendation of reforming the 'cross-community' threshold to better reflect the multiplicity of political identities in contemporary Northern Ireland, the system for electing first and deputy first ministers could be revised back to the original 1998 agreement-derived system but under the new threshold for achieving consent – either parallel or weighted – across all three political communities. Such a revision would make it harder for any one party to wield a power of veto without removing the requirement for broad support for the appointment of first and deputy first ministers.

Addressing the implementation gap in Northern Ireland policy delivery

The electoral system and the requirements for power-sharing government constrain the ways in which the policy implementation gap in Northern Ireland can be addressed. This notwithstanding, even assuming the status quo as regards the PR–STV voting and mandatory coalition, changes could be introduced with the aim of narrowing the distance between promises made and policies delivered in Northern Ireland.

Mandating a 'programme for government'

CONTEXT. Steps taken towards developing a programme for government in/for Northern Ireland are to be welcomed, notwithstanding that none has yet been successfully agreed, let alone implemented.

PROPOSAL. Premised on the recognition of the unique implications of Northern Ireland's power-sharing structure of government for political parties' electoral mandate and the necessity of post-election bargaining, efforts could be made to better ensure transparency and accountability in the process. During election campaigns, or in the immediate aftermath (for example, within 14 days), Northern Ireland political parties could be required to publish their respective roadmaps for executive formation, including preferences of departmental selection, and for the development of a programme for government – said publications could be released alongside or addended to individual party manifestos. Instead of the current open-ended provision, the process of developing and consulting on a programme for government could be time bound and conditional, with budgetary implications linked to it.

Devolving more powers to local government

CONTEXT. Local councils in Northern Ireland have significantly fewer powers than their counterparts in Great Britain. In 2015/16, councils in Northern Ireland were responsible for less than 4% of public spending; this compared to 27% in Scotland and in Wales and 20% in England (Kenway and Petrie, 2018, pp. 4–5). When the Northern Ireland assembly and executive are not functioning, local councils continue to operate.

PROPOSAL. Devolution of more powers to the local government level in Northern Ireland could mitigate what is, at present, an expansive democratic deficit that takes effect automatically when the Northern Ireland executive collapses and/or the assembly is not sitting. Such an initiative could either be introduced as a 'Plan B' arrangement for if/when the assembly and executive are not functioning or could reform the division of Northern Ireland local policy competence and Northern Ireland regional policy competence on a more permanent basis. Initially, any expansion of local councils' powers in Northern Ireland could consider granting equivalent competence to that enjoyed by counterparts in England, Scotland and Wales. That said, certain public services that are local government responsibilities in Great Britain are purposefully delivered differently in Northern Ireland (for example, in housing and social care), so any programme for empowering local government in Northern Ireland would also need to be responsive to its specific context.

Defining the 'successor' relationship

CONTEXT. Since 1998, a series of 'successor agreements' have arisen from inter-party talks brokered by the co-guarantor governments of the 1998 agreement – the UK and Ireland governments. Although these successor texts have generally provided the basis for Strand 1 institutions to return, their status is not well defined, and their implementation or non-implementation is not well monitored.

PROPOSAL. Commitments made in existing and future successor texts and the ways in which these have or have not been actioned could be (re)assessed in a systematic way, with the aim of devising a means of monitoring their implementation/non-implementation. On the back of this, a publicly accessible, likely online, 'implementation tracker' could be set up and maintained. In addition, a proportionate system for the sanctioning of political parties that actively delay implementation of commitments/initiatives contained in a successor agreement could also be developed.

On the more academic side, further consideration could also usefully be given to the novel aspect of UK constitutional development that successor agreements represent and where they sit in the broader picture of continued evolution of the UK's uncodified constitution.

Addressing the democratic deficit in 'Plan B' arrangements

Current 'Plan B' arrangements for Northern Ireland governance fall far short of the standards of democracy and transparency that apply elsewhere in the UK. Given the propensity of devolved government in Northern Ireland to collapse, steps should be taken to bolster the democratic credentials of the default setting for governance and administration if and when devolution fails.

Providing for a 'shadow' Northern Ireland assembly

CONTEXT. At present, the Northern Ireland assembly and executive are not operational due to one party's refusal to engage generally and, in particular in the assembly, to support the election of a new Speaker, thus preventing the cadre of MLAs elected in May 2022 to take their seats for the first time.

PROPOSAL. Steps could be taken to ensure that the Northern Ireland assembly continues to function if/when the Northern Ireland executive collapses. A minor amendment to the Northern Ireland assembly's Standing Orders, such that the election of Speaker was not subject to achieving the 'cross-community' threshold, would enable the continued operation of the legislature notwithstanding the absence of ministers. Alternatively or additionally, new provision could be made by statute passed in Westminster such that the

Northern Ireland assembly could meet in 'shadow' form, notwithstanding the lack of successful election of a new Speaker, with business instead being overseen, according to convention, by the 'grandmother/father' of the assembly. The aim of such an initiative would not be to make new legislation but rather to bolster the democratic credentials of the current Plan B arrangements by enabling decisions made either by the secretary of state or by senior Northern Ireland officials (under the authority of the former) to be subject to indicative/confirmatory votes in the Northern Ireland assembly, held on the basis of simple majority voting.

Clarifying and scrutinising the 'public interest'

CONTEXT. Recent UK legislation made in view of 'temporary' hiatuses in the operation of the Northern Ireland executive and assembly has empowered senior NICS officials to exercise departmental functions "if the officer is satisfied that it is in the public interest" to do so (see Northern Ireland (Executive Formation etc) Act 2022 s3(1)). In making a judgment on the 'public interest' threshold, a senior official is to be guided by a series of principles set out by the Northern Ireland secretary in a dedicated *Guidance on Decision-making for Northern Ireland Departments* document (see Northern Ireland Office, 2023, paras. 10–11); this guidance also creates an obligation for a monthly summary report of decisions taken by senior officials under the relevant legislation to be prepared and copies placed in the public domain (Northern Ireland Office, 2023, para. 15). These measures indicate an attempt to ensure that NICS actions are in keeping with established departmental mandates and that there is transparency as regards decisions made. Nonetheless, the current arrangements could be improved.

PROPOSAL. In view of the prolonged absence of Northern Ireland ministers in post, read alongside the absence of any agreed programme for government, an initiative could be taken forward to better define, legitimise and then scrutinise both the mandates of Northern Ireland departments and the substance of the 'public interest' test. To this end, the Northern Ireland assembly could be recalled, and indicative votes held on matters that would normally be decided by ministers, but which are currently being handled by officials. At the same time, the monthly reports of decisions taken by Northern Ireland departments could be brought before Northern Ireland assembly committees meeting in shadow form, with the possibility of requesting additional information on the substance of the issue and related decision-making processes.

Addressing the democratic deficit in the UK (Northern Ireland) and EU relationship

The Windsor Framework provisions for greater Northern Ireland involvement in the implementation of its unique post-Brexit arrangements are to be welcomed both because they mitigate the democratic deficit that otherwise applies and because, if operationalised effectively, they make it more likely that Northern Ireland will benefit from its newly novel position.

Preserving and expanding Northern Ireland stakeholder engagement

CONTEXT. One of the lesser-discussed effects of Brexit in Northern Ireland has been the co-ordination and mobilisation of business and civil society. During EU–UK negotiations, in the absence of a functioning Northern Ireland executive or assembly, representatives from industries and sectors in Northern Ireland that were due to be affected by the outcomes of the withdrawal process, individually and collectively engaged with both the UK and EU sides to communicate the likely and potential implications of any post-Brexit arrangement for Northern Ireland and its particular circumstances. That the changes agreed in the Windsor Framework to the architecture for overseeing its implementation are premised on the recognition of the “valuable insight that stakeholders can offer on Northern Ireland’s unique circumstances” (European Commission, 2023) is a testament to the utility and efficacy of the efforts of non-political Northern Ireland representatives over recent years.

PROPOSAL. In view of the propensity for Northern Ireland governing institutions to collapse, alongside the demonstrable efficacy of engaging non-political representatives in policy-shaping processes, establishing new mechanisms to better enable stakeholder input as part of the day-to-day running of government in Northern Ireland ought to be considered. Building on, and complimentary to, the new mechanisms in the Windsor Framework, provision could be made to facilitate more regular stakeholder engagement in/with the work of Northern Ireland institutions. The form and structure of any such initiative could be co-designed between stakeholder representatives, officials and politicians.

Addressing the inherent complexity of post-Brexit Northern Ireland

Some degree of legislative complexity in Northern Ireland after Brexit is unavoidable; the key question, therefore, is how complexity can be managed effectively such that it does not hinder the development of beneficial policies and/or the delivery of good public services. With this aspiration, at least two proposals are worthy of consideration.

Tracking complexity

CONTEXT. At present, no comprehensive UK record of what law applies to Northern Ireland and under what circumstances currently exists; for seekers of legal certainty and/or government transparency, this situation is less than ideal. To date, the UK government has declined to commit to keeping an up-to-date public record of the law that applies to Northern Ireland under the terms of the protocol/Windsor Framework. This is not conducive to effective democratic scrutiny or policy delivery in Northern Ireland.

PROPOSAL. An authoritative and agreed record of the law that applies to Northern Ireland under the terms of the Withdrawal Agreement could be published on a dedicated section of [legislation.gov.uk](https://www.legislation.gov.uk), updated to reflect the evolution of relevant laws in both EU and UK contexts. In this respect, the UK site would correspond to, and be maintained in collaboration with, the section of the EUR-Lex website dedicated to the protocol and those laws it makes applicable.

North–south and east–west impact assessments

CONTEXT. The legislative decoupling of the UK and Ireland that has resulted from the withdrawal of the former from the EU legal order creates the potential for, and probability of, divergence on a 'north–south' basis between Ireland and Northern Ireland as well as on an 'east–west' basis, either intergovernmental (between Ireland and the UK) or interjurisdictional (between the UK, its devolved regions, Ireland and the Crown Dependencies). This new potential for flux in Strands 2 and 3 of the 1998 agreement contributes to the newly complex setting of post-Brexit Northern Ireland governance.

PROPOSAL. An obligation could be introduced in the UK such that any new legislation and/or any significant revision of existing domestic legislation is required to account for the impact it does or may have on existing or future areas of co-operation across either a north–south or east–west axis, or both. To this end, the UK government commitment in its Windsor Framework command paper to ensure that “any impacts for Northern Ireland arising from relevant future regulatory changes” are specifically monitored by the Office for the Internal Market is to be welcomed (HM Government, 2023, para. 52). This recently proposed role for the Office for the Internal Market, which is currently limited to monitoring Great Britain–Northern Ireland divergence, could be expanded to include specific monitoring of the regulatory divergence implications of UK policy choices on north–south co-operation on the island of Ireland as well as across the two other dimensions (intergovernmental and interjurisdictional) of east–west relations. Such an initiative could build on and contribute to the worth of the new formulation of the Specialised Committee

on the Implementation of the Windsor Framework – the Special Body on Goods – tasked with assessing the potential impact of future UK legislation in Northern Ireland arising as a consequence of the Windsor Framework.

In addition, explanatory notes or explanatory memoranda published alongside any new UK legislation could be required to include an assessment of its anticipated implications for intra-UK divergence as well as divergence across the 1998 Agreement axes of north–south and east–west.

Addressing Northern Ireland (il)literacy

Because of its constitutional distinctiveness, any UK-wide constitutional reforms can be expected to have particular effects in Northern Ireland. While this was true long prior to the UK’s decision to withdraw from the EU, it is even more pertinent in the post-Brexit era in light of Northern Ireland’s newly unique position as the touching point for the internal markets and regulatory orders of the UK and the EU. Ensuring that due consideration is given to, and accommodation is made for, the unique position of Northern Ireland in the development of UK-wide and UK (Great Britain) policy after Brexit is (or ought to be) a pressing priority.

A revised Cabinet Manual

CONTEXT. The development of a *Cabinet Manual* was an initiative of the UK government that concluded during the premiership of Prime Minister David Cameron. Designed as “a guide to laws, conventions and rules on the operation of government” (Cabinet Office, 2011) and published in 2011, the *Cabinet Manual* makes almost no mention of the uniquely contested constitutional history of Northern Ireland or its novel post-1998 constitutional architecture (particularly as regards Strand 2/3 relations and institutions). The omission of Northern Ireland particularities in the *Cabinet Manual* is indicative of a broader ‘Northern Ireland blind spot’ in central UK government and politics.

PROPOSAL. As part of a more general review of the ‘laws, conventions and rules’ that apply in the UK after Brexit, an initiative to develop a revised and updated *Cabinet Manual* could usefully be taken forward. Any new version ought to include more comprehensive consideration of the constitutional arrangements of Northern Ireland alongside those of Scotland and Wales (which were also granted short shrift in the original).

The Home Civil Service and the Northern Ireland Civil Service

CONTEXT. One of the legacies of the longer history of devolution in Northern Ireland is the separation of its civil service from the Home Civil Service that operates in Great Britain. The interaction between Northern Ireland Civil

Service (NICS) departments and their devolved counterpart departments or their central counterpart departments can be good and effective. Whether or not this is so, however, often depends on the quality of relationships developed organically between individuals and/or teams; it is not the result of a dedicated or systematic cross-service co-ordination.

PROPOSAL. In recognition of the importance of interjurisdictional literacy at all levels of the UK civil service, steps could be taken to formalise engagement, co-operation and knowledge sharing between the NICS and its central/devolved counterparts in Great Britain. A programme of short-term reciprocal secondments could be established alongside the setting up of cross-departmental/jurisdictional groups of senior officials.

Westminster in Stormont and Stormont in Westminster

CONTEXT. Due in part to the very different party-political landscape of Northern Ireland as compared with that of England, Scotland and Wales, broadly speaking (and notwithstanding honourable exceptions) there tends to be a lack of nuanced understanding of Northern Ireland affairs in Westminster, which is perhaps more pronounced than any knowledge deficit that may or may not also exist in relation to other parts of the UK.

PROPOSAL. The appearance of central UK government ministers before parliamentary committees in devolved legislatures could be regularised, with obligations introduced for ministers to accept invitations when given on a periodic basis. In Northern Ireland, building on the appearance of the Cabinet Office minister David Frost before the Northern Ireland assembly Committee for the Executive Office in July 2021 (see Northern Ireland Assembly, 2021), central UK government ministers with relevant policy portfolios could in future be obliged to appear in Stormont if/when invited by committees to do so. Additionally, if/when the Northern Ireland assembly returns, a new programme for interparliamentary meetings and initiatives could be developed, with the aim of ensuring that departmental/subject committees in Stormont regularly appear before and/or hear evidence from their counterpart committees in Westminster. This programme could also be expanded to incorporate the governments and legislatures across the UK.

Conclusion

The constitutional arrangements that are specific to Northern Ireland have never been orientated towards good government. Instead, due to the historic requirement to resolve conflict between opposing understandings of Northern Ireland history and visions for its future, the constitutional architecture of the place has, more often than not, reflected a 'lowest common denominator' logic whereby the arrangements for its government derive from what can be agreed rather than what ought to be agreed. Recognising this is a crucial first step if the quality of government in Northern Ireland is to be improved and its constitutional stability secured.

This paper offers no panacea for the Northern Ireland constitution. Short of proposing any single solution to the challenges facing Northern Ireland and its constitution, the aim here has been to instead contextualise the novel governing architecture of Northern Ireland, to draw attention to some of the shortcomings in its contemporary constitutional architecture, and on this basis to propose a series of relatively modest measures that could be used to address them.

As indicated in the introduction, circumventing '*the constitutional question*' normally considered in analyses of Northern Ireland has been intentional. Doing so ought not to be taken to indicate any particular position or preference as regards the 'United Kingdom versus United Ireland' debate that tends to dominate constitutional discussions about Northern Ireland and its future. Instead, the premise and central argument of this paper has been that there are challenges that concern and arise from the unique constitutional arrangements of Northern Ireland, which are often overlooked in UK-wide debates, and overshadowed in Northern Ireland-specific debates by the former, more traditional (United Kingdom versus United Ireland) bifurcated constitutional lens. While offering little by way of conclusive proposals, this paper has sought to underline the importance – arguably exacerbated by Brexit and its outcomes – of ensuring that the UK's most exceptional constitutional case is given due consideration and accommodation in any efforts to review or reform the fundamental arrangements of the state.

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