Brexit, Democracy and Peace in Northern Ireland

Colm O'Cinneide

21.10.2019 doi: 10.17176/20191022-073055-0

A Brexit deal has been reached been the EU and the UK. To be more precise, a revised Withdrawal Agreement (WA) has been negotiated between the EU27 and the current UK government. This bridges the divide that had existed between the UK and Ireland as to the future status of the Irish border, by making provision for EU Single Market and Custom Union rules to be applied within Northern Ireland. An end to the first phase of Brexit may now be in sight, even though much yet needs to be decided about the future shape of the EU/UK relationship.

One particular issue proved to be very divisive in the negotiations leading up to the EU/UK deal, and threatens to cause further disruption in the future. This is the question of 'consent': how to give the people of Northern Ireland a democratic say over the new legal arrangements that will apply to them under the WA? Given the deeply divided nature of Northern Irish society, this is a legal, political and constitutional conundrum. The WA, exceptionally for an EU/international treaty, sets out a complex mechanism regulating how the Northern Ireland Assembly may vote in the future to grant or withhold democratic consent to the terms of the WA as it applies to Northern Ireland. However, this mechanism may yet prove to be a recipe for future political conflict. This blog post sets out (i) the background context, (ii) the difficulties in establishing a workable 'democratic consent' mechanism in the Northern Irish context, and (iii) the strengths, potential weaknesses and overall significance of the consent mechanism established under the revised WA.

The Context

The Irish government, backed by the rest of the EU27, has always insisted that any Brexit deal should ensure that no 'hard border' is re-established between the two parts of Ireland, in order to protect the fragile Northern Irish peace process initiated by the Good Friday Agreement (GFA) in 1998. Successive UK governments have recognised the strength of these concerns. However, they have been reluctant to agree to any arrangement that would lock the UK into close regulatory relationship with the EU.

This circle was initially squared by the original text of the Ireland/Northern Ireland Protocol of the Withdrawal Agreement agreed in November 2018 between the EU and the UK – the infamous 'Irish backstop'. This provided for Northern Ireland to maintain regulatory alignment with key aspects of the EU Single Market, and to remain within the EU Customs Union (in tandem with the rest of the UK) until 'alternative arrangements' were agreed.

However, the backstop proved to be politically toxic. British pro-Leave politicians attacked it on the basis that it left the UK enmeshed in an unduly close relationship with the EU. It also attracted a hostile response from within parts of the Unionist community in Northern Ireland – and especially from the Democratic Unionist Party (DUP), the largest Unionist party, which has been propping up the minority Conservative government in London since 2017. The DUP argued that the backstop would weaken the relationship between Northern Ireland and the UK. They also argued it was undemocratic, on the basis that it would subject Northern Ireland to a special regulatory regime without appropriate 'consent' having been obtained from the people of Northern Ireland and their elected representatives. (The backstop agreement had contained no provisions relating to democratic consent. The then UK government, headed by Theresa May MP, took the view that the appropriate body to 'consent' to the terms of the WA was the sovereign UK Parliament in London – although it undertook to involve the Northern Irish devolved authorities in

future decision-making involving the backstop mechanisms.)

These concerns about the lack of democratic consent were partially responsible for the rejection of the Withdrawal Agreement by the UK Parliament in early 2019. Subsequently, the new UK government lead by Boris Johnston MP made new proposals on 2 October 2019, arguing that the backstop should be scrapped and replaced with a loose framework of regulatory and customs controls. The UK government also argued, in line with the DUP position, that the people of Northern Ireland must give specific consent to such arrangements. They also proposed a specific consent mechanism – namely that the Northern Irish Assembly and Executive (the devolved organs of government in Northern Ireland) must endorse these arrangements before they entered into force, and subsequently vote every four years on whether they should continue to apply.

At first glance, these 'consent' proposals by the UK government might appear to be unobjectionable. Who could be opposed to the people of Northern Ireland having a say over the laws that govern them? However, Northern Ireland remains a seriously fractured society. Deep divisions persist between the Unionist and Nationalist communities. The peace process initiated by the GFA require constant reinforcement and recalibration.[1] The problem with the UK government's proposals for 'democratic consent' is that they risked destabilising that careful balance. In particular, they risked giving the DUP a *de facto* veto over the coming into force and subsequent continuation of these arrangements – and, by extension, risked further undermining the already shaky malfunctioning power-sharing mechanisms established by the GFA. As a result, the issue of consent proved to be divisive in the intense negotiations that led up to the deal finally concluded on 17 October 2019 – and continues to be controversial.

The Problem

To understand the problems with the UK government's initial consent proposal, and how the mechanism set out in the revised WA differs from it, some background explanation is needed. In Northern Ireland, the GFA is the nearest thing that exists to an agreed framework of constitutional governance. Its provisions, as given legal effect through the Northern Ireland Act 1998 (NIA), provide for two separate 'consent mechanisms' through which the people of Northern Ireland can exercise self-determination.

The first such mechanism is set out in the 'Constitutional Issues' section of the GFA and S.1 of the NIA. This affirms that no change in the constitutional status of Northern Ireland can take place without the 'consent of a majority of its people', as expressed through a popular referendum vote. This provision was inserted to reassure the historically dominant Unionist community that a united Ireland could not come about without majority approval. As a result, successive UK governments have taken the position that any changes resulting from Brexit do not qualify as such and therefore do not require democratic approval via a referendum.

This argument has been challenged, but in its judgment in the *Agnew* and *McCord* cases which were joined to the claim in *Miller v Secretary of State for Exiting the EU* [2017] UKSC 5, the UK Supreme Court ruled that nothing in the GFA or s. 1 NIA required the UK government to seek majority approval from the people of Northern Ireland before starting the Brexit process.[2] Furthermore, at the political level, there is widespread reluctance to use a popular referendum which might prove to be even more divisive in the particular circumstances of Northern Ireland than the 2016 Brexit referendum has been throughout the UK as a whole.

As a result, the debate about democratic consent has focused on the second mechanism. This is the Northern Ireland Assembly, established by the NIA to

[1] Jonathan Powell, one of the architects of the GFA, has said that 'keeping the [GFA] working was always like a see-saw: once you get one end settled, you need to rush down the other end to prevent it landing with a bang on the ground.' J. Powell, 'DUP Justifiably Aggrieved over Brexit Deal', *The Irish Times*, 19 October 2019.
[2] *Miller,* [2017] UKSC 5, [135].

legislate in areas of devolved competence, even though the UK's international relations with Ireland and the EU do not technically fall into the scope of that.

The problem is, however, the special ‚cross-community consent' mechanism the GFA requires for controversial issues or important decisions relating to its internal functioning. This mechanism may be triggered by a 'petition of concern' tabled by 30 Assembly members, and it requires a majority of both the distinct Unionist and Nationalist groups of Assembly members to vote in favour of a measure before it is passed.[3] This mechanism was originally intended only to be used for 'key decisions' affecting fundamental rights. However, it has become common for petitions of concern to be tabled across a wide range of different political issues. This gives the dominant parties within the Unionist and the Nationalist groups, DUP and Sinn Féin, a *de facto* veto over Assembly business. Partially as a result, the Northern Ireland Assembly has frequently been paralysed – and, since January 2017, it has been suspended.

Before that backdrop, the UK government's proposal to require consent by the Northern Irish Assembly was less innocent than it sounded. In effect, this made such arrangements hostage to the 'petition of concern' procedure in the Assembly and, more specifically, to the DUP. As Nationalists in contrast are very supportive of keeping the Irish border open, the UK government's proposals would also risk inflaming tension between the two communities in Northern Ireland – and give Nationalists a big incentive to keep the Assembly in a state of paralysis rather than see a return of a hard border.

As a result, the UK government's consent proposals were strongly opposed by the Irish government and by many civil society and business groupings within Northern Ireland, who were concerned that the UK proposals risked creating a semi-permanent state of political and economic crisis within Northern Ireland.

The Solution?

Given these difficulties, it is unsurprising that this issue loomed large in the talks leading up to the arrangement on a revised WA on 17 October 2019. This new deal makes provision for Northern Ireland to remain aligned with the EU Single Market and for EU custom rules to be applied there – while remaining within the customs territory of the UK.[4] Unlike the original backstop, this arrangement is not expressed to be a temporary measure, pending any future agreement on 'alternative arrangements'. Instead, it is to be permanent – subject only to the operation of the democratic consent mechanism that was agreed at the last moment during the talks process, which is set out in Article 18 of the revised Protocol.[5]

This requirement of democratic consent has thus been made integral to the Ireland/Northern Ireland Protocol, having been absent from the original WA. It therefore constitutes a significant new element to the architecture of the EU/UK Withdrawal Agreement, going some way to meeting UK concerns about the 'undemocratic' nature of the original backstop.

However, the mechanism by which this consent is to be obtained differs from that originally proposed by the UK government. Instead, Article 18 of the Protocol, supplemented by an attached unilateral declaration by the UK government, sets out a very different – and highly complex – mechanism for obtaining consent. Under this mechanism, the Protocol arrangements will automatically come into force after an initial transition period. Four years after this, Article 18 provides that a straight majority of members of the Northern Irish Assembly must decide whether to keep these regulatory/customs arrangements in force. This consent must be renewed periodically afterwards: every four years if originally approved by the majority of Assembly members, or eight years if approved via a 'cross-community' vote in the Assembly. If neither

[3] A super-majority of 60% of the Assembly will also be sufficient, if 40% of both the Unionist and Nationalist groups vote in favour of the measure.

[4] In simplistic terms, this should ensure no hard border in the island of Ireland, but will require a regulatory border and certain customs checks to be applied at Irish Sea crossings between Northern Ireland and the rest of the UK.

[5] As Michel Barnier has said, the Protocol 'is no longer an insurance policy that applies unless & until EU-UK conclude a subsequent agreement…It is a fully legally operative solution that will continue to apply unless it fails to receive democratic support'.

type of consent is forthcoming, than a two-year 'cooling off' period will apply before the Protocol ceases to apply to Northern Ireland.[6]

In other words, the Protocol will come into effect and bed down for an initial four years without a vote. After that, the Assembly will vote every four years to maintain it in effect (or eight years, if it receives cross-community consent – with the extra time serving as an inducement to reach such cross-community agreement). Furthermore, the agreed final text makes it clear that a majority vote in the Assembly to continue opting into the Protocol arrangements will be sufficient.[7] This differs significantly from the UK original proposal which would have effectively required cross-community consent, whereas the text of the Protocol makes approval by simple majority vote possible. The effect of this change is to make it much more likely that the Protocol arrangements will remain in force. Opinion polls suggest there is strong support for such arrangements across the general public in Northern Ireland, which transcends the Unionist/nationalist divide, and a clear majority of Assembly members elected in the most recent (2017) elections have been public supporters of the backstop.

Conclusion

In many ways, this revised consent mechanism is a skilful piece of legal engineering. Providing for democratic consent is in principle justified. Providing for the Protocol arrangements to be in place for four years before a vote will ensure some much-needed stability in the aftermath of Brexit. Providing for the possibility of a simple majority vote will force political parties in Northern Ireland to try and build alliances, and prevent a single party having a *de facto* veto. Other possible mechanisms, such as a referendum vote, pose considerable risks.

However, the mechanism remains something of a constitutional oddity. Set out in an international agreement, it commits the UK to departing from 'business as usual' within the functioning of the Northern Assembly – where 'cross-community consent' (controversially) remains the norm.[8] It also risks re-igniting political tensions over Brexit and the Irish border issue every four years or so, potentially introducing an additional element of uncertainty into an already unstable political landscape. The Protocol arrangements may yet come back to haunt UK/EU/Irish relations: the DUP has been highly critical of the removal of the requirement for cross-community consent. However, the long-term success of the Protocol arrangements will inevitably depend on their ability to attract support in Northern Ireland – and thus the consent mechanism is perhaps best viewed as a necessary compromise.

[6] During this 'cooling off' period, the Joint Committee of EU and UK representatives established to review the functioning of the Protocol will make recommendations as to what if any arrangements should replace it, taking the provisions of the GFA into account: see Article 18 (4) of the Protocol.

[7] The attached Unilateral Declaration by the UK government also makes provision for a majority vote of Assembly members to take place even if the Assembly itself is suspended: see paras 5 & 6.

[8] Its requirements will have to be legislated for in the forthcoming UK Withdrawal Agreement Bill 2020.

ABOUT THE AUTHOR

Colm O'Cinneide

Colm O'Cinneide is a Professor of Constitutional and Human Rights Law at University College London (UCL). He was also from 2010-14 Vice-President of the European Committee on Social Rights of the Council of Europe, and General Rapporteur of the Committee from 2014-6.

SUGGESTED CITATION

O'Cinneide, Colm: Brexit, Democracy and Peace in Northern Ireland, Verfassungsblog, 21.10.2019, doi: 10.17176/20191022-073055-0.

Licensed under CC BY-SA 4.0.

Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20191022-073055-0.