ANSWERING ANOTHER 'IRISH QUESTION': BREXIT AND THE IRISH BORDER

Gladstone .. spent his declining years trying to guess the answer to the Irish Question; unfortunately, whenever he was getting warm, the Irish secretly changed the Question

W.C. Sellar and R. J. Yeatman *1066 and All That: A Memorable History of England* (1930)

PART TWO. BREXIT'S UNINTENDED CONSEQUENCES: FIVE KEY CHALLENGES

I have been struck, in my reading, by the presence of chaos and confusion at every level of human affairs. As we see today, the public world seems to veer from catastrophe to crisis without any perceptible pattern or explanation. It has always been so and there is a case for saying that human history, as it is generally described and understood, is the sum total of accident and unintended consequence. Peter Ackroyd (2011)

THE EUROPEAN DIMENSION OF THE BELFAST AGREEMENT

The Irish peace process ratified in 1998 was more a matter of contingency than design, a rather fortuitous alignment of circumstances that persuaded parties to an ancient quarrel to address their differences. What these parties signed up to was two principal commitments: a multi-party Agreement between the principal protagonists in Northern Ireland and a flanking Anglo-Irish Agreement between the two governments. A legally binding international treaty between United Kingdom and Irish governments was duly lodged with the United Nations, its co-signatories undertaking (Article 2) to support and ''where appropriate implement the provisions of the Multi-Party Agreement''. The signatories likewise committed to closer co-operation between the United Kingdom and Ireland as ''partners in the European Union'', and identified common issues as prospective subjects for discussion and further negotiation in the British-Irish Council, created as the medium for intergovernmental deliberations. These arrangements both confirmed and facilitated mutually reinforcing communal and international commitments, above all framed within the context of mutual EU membership of all parties, whether as citizens or governments.

The EU framework that facilitated and legitimized the peace process mirrored both the aspirations and experience of closer integration elsewhere in the Continent, with reciprocal political relations and functional co-operation on every level. The primary parties to the peace process were the governments in London and Dublin, but with both the EU and Washington acting as international guarantors, essential diplomatic interlocutors between the Northern Ireland parties and communities on both sides of the border.[1] The 1921 border symbolized a cultural fault line as much as a political border, and one until recently manifested by barbed

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[1] E. Meehan, Britain's Irish Question: Britain's European Question?: British-Irish relations in the context of the European Union and the Belfast Agreement', *Review of International Studies*, 26 (1) 2000, pp. 83-97.

wire, military fortifications and manned presence. EC / EU accession by both governments in 1973 reduced the border's formal significance, with increasing transit of goods services and people in both direction, as well as greater cross-border collaboration on a range of social, economic and infrastructural projects. The peace process after 1998 exponentially increased functional co-operation, much of it generously financed by EC / EU structural funding.[2]

On the political plane power sharing, although acknowledging mutual claims for cultural recognition, did commit belligerent communities to reconcile their differences by ensuring equivalence in accessing public power and resources. When the Belfast Agreement was signed there was no question that both the United Kingdom and the Republic would not continue as EU Member States in perpetuity, although the agreement does not explicitly refer to their EU status as such. Accordingly, the Belfast Agreement does not preclude either government withdrawing from the European Union.[3] The Brexit vote has ended any such complacency about ineluctable co-operation: indeed, it raises fresh doubts about the state of Anglo-Irish relations, and not least the status of the post-Brexit Irish border.

The Belfast Agreement underlined commitment to reconciliation, a landmark for ending an ancient quarrel, and in the process making the physical border both invisible and politically redundant. Or so it seemed until the Brexit vote. Brexit has raised many challenges for future EU / United Kingdom relations, though none of greater significance than the indeterminate status of the Irish border, reviving anxieties all round about renewed threat to what is still a fragile peace in this querulous region. This accord was always about more than domestic politics, inasmuch as commitment to shared European values was integral to both its procedures and delivery. Signatories are required to take account of common interests and in every aspect of the agreement.[4] The new institutional arrangements likewise acknowledge cross-border and EU-related dimensions of the peace process. A British-Irish Council has the formal task of reviewing all EU-related matters in otherwise bi-lateral relations, and an all-Ireland North-South Ministerial Council that includes members from the governments of the Republic and Northern Ireland is mandated with improving intergovernmental co-operation.

The EU's framework programmes for improving governance and political relations, cross-border co-operation and disbursing structural funds to these ends, have likewise contributed much to this remarkable transformation.[5] Moreover, this agency both facilitated and intensified co-operation across a range of activities: commercial / economic development, capital flows, business and enterprise, agriculture, tourism, and not least social inclusion and civic engagement.[6] The EU's 'four freedoms' (movement of goods, services and money)

[2] John Doyle, Governance and Citizenship in contested states: the Northern Ireland peace agreement as internationalised governance, *Irish Studies in International Affairs*, 10 1999, pp.201-219.

[3] A case heard in October 2016 in the Belfast High Court case ruled that there was nothing in the Good Friday Agreement to prevent the triggering of Article 50. In its ruling, the High Court declared that EU membership was no constitutional requirement of the Good Friday Agreement which would be breached by notification of Article 50. See R (Miller) and others versus the Secretary of State for Exiting the European Union, 29 October 2016, The UK Supreme Court upheld the Belfast High Court position in its ruling in January 2017, maintaining that the principle of consent for constitutional change contained in the Good Friday Agreement referred only to whether Northern Ireland remained in the UK or was unified with the rest of Ireland.

[4] *British-Irish Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland*, Belfast, 10 April 1998, at para 1.

[5] B. Laffan, The EU context of change in state and nation post- 1973', in N. Ó Dochartaigh, K. Hayward and E. Meehan (eds) *Dynamics of Political Change in Ireland: Making and breaking a divided Ireland* (Routledge, London, 2017), pp.44-60.

[6] J. Bradley and D. Hamilton Bradley, Making Policy in Northern Ireland: A critique of Strategy 2010, *Administration*, 47 (3), 1999 pp.32-50. (1999).

markedly increased with the onset of the Single Market, connecting communities across a porous border.[7] Moreover, free movement of persons as required by the rules of the Single Market has enhanced the sense of shared purpose, conferring additional citizens' rights in a common space defined not merely by market making, but also by facilitating closer formal and informal networking in civil society.

The principal EU agencies for facilitating these cross-border co-operation arrangements are the Support programme for Peace and reconciliation (SPPR), INTERREG, and Leader II programmes. Of particular importance for North-South collaboration is the Special European Union Programmes Body (SEUPB) that expedites and monitors the EU Programme for Peace and Reconciliation in Northern Ireland.[8] To date, these programmes have disbursed some 2.3 billion euros, making a significant contribution to improved trans-border relations and at every level, from community to intergovernmental co-operation.[9] The scale of this fiscal support has been crucial for exponential progress. The border region is in receipt of some 3.5 billion euros under the current 2014-20 Multiannual Financial Framework, and notwithstanding considerable additional subsidies and structural payments from the CAP. Overall, fully 8 percent of Northern Ireland's GDP derives directly from EU funds.[10]

THE PEACE DIVIDEND: CROSS-BORDER TRADE AND FUNCTIONAL CO-OPERATION

The border situation prior to the Belfast agreement was a tolerated rather than a fully settled arrangement. A confluence of competing and multi-level claims, uneasy synergy between domestic (Northern Ireland) regional (cross-border / North-South) and international (UK/Ireland) politics, as much contemporary politics is in an increasingly interdependent world. A once contested border and symptomatic of culturally embedded, almost tribal identities. The locus for ritualistic stand-offs and on occasion actual crisis, yet after 1998 more politically de-fused than at any time since partition.[11] At the outset a contested border but where over time improved relations and intergovernmental co-operation markedly increased, and most especially after 1973 with Anglo-Irish accession to the EEC. Thereafter, a border seen on either side as much less barrier than bridge, the conduit for increasing commercial and civic exchanges. Moreover, in the years following the Belfast Agreement, a border stripped of physical impediments, not least signage displaying national allegiance or symbols of exclusive sovereignty. A shared space rather than the 'no man's land' of former times known disparagingly as 'bandit country', but now facilitating closer political engagement and economic co-operation at every level.[12]

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[7] See the comparisons cited by in E Tannam, The European Union and Business Cross-Border Co-Operation: the case of Northern Ireland and the Republic of Ireland', *Irish Political Studies*, 11 1996, pp.103- 129 and idem Cross-Border Co-operation between Northern Ireland and the Republic of Ireland: Neo-Functionalism Revisited', *British Journal of Politics and International Relations*, 6 (2) 2006 , 256–276.

[8] E. Meehan, Europe and the Europeanisation of the Irish Question 1972-1998, in M. Cox, A. Guelke and F. Stephens (eds) *A Farewell to Arms? From 'Long War' to Long Peace in Northern Ireland* (Manchester University Press, 2000).

[9] C. Irvin and S. Byrne, Economic Aid and its role in the Peace Process, in J. Neuheiser and S. Wolff (eds) *Peace at Last? The Impact of the Good Friday Agreement on Northern Ireland* (Berghann, London 2002).

[10] Brexit: UK-Irish relations, European Union Committee, 6th Report of session 2016-17, House of Lords 12 December 2016, at p.46.

[11] E. Meehan, Britain's Irish Question: Britain's European Question?: British-Irish relations in the context of the European Union and the Belfast Agreement, *Review of International Studies*, 26 (1) 2000, pp. 83-97.

[12] A. Guelke, International dimensions of the Belfast Agreement, in R. Wilford (ed.) *Aspects of the Belfast Agreement* (Oxford University Press, 2001), pp. 245-263.

The assumption made by governments in London and Dublin, and by most of the parties in Belfast, was that both governments and implicitly the EU too were principal guarantors of an irreversible peace.[13] Anglo-Irish membership of the EU markedly improved mutual trade in goods and the EU was active in developing and financing extensive programmes for social and economic development on both sides of the border.[14] Efforts principally channelled, as many EU initiatives are on projects for closer trans-border integration. Success here is plain to see in metrics measuring enhanced co-operation: in commercial / economic development, expanding business and enterprise, and similarly in agriculture, tourism, social inclusion and civic engagement.[15] The very fact and quotidian experience of economic integration between formerly separated communities, agencies and governance saw exponentially increasing collaboration at every level.[16] The EU's free movement of goods, services, people and money markedly increased as consequence of the Single Market, as did enhanced connectivity in the political functional and communal domains.[17] For example, free movement of persons required by the rules of the Single Market was augmented by common EU citizenship and incorporation of the Charter of Fundamental Rights, conferring additional welfare entitlement, legal and political rights within a shared political space.

The success of these initiatives is nowhere better illustrated than in the matter of monetary union. The extent to which, and notwithstanding Ireland's membership of the Eurozone and Northern Ireland's retention of sterling, the border region has become a common business space, with both currencies accepted for transactions at every level. Co-operation not merely confined to economic matters, but with police and other agencies authorities on either side of an increasingly invisible border committed to maintaining security in what was formerly a contested cultural space, a conflict, and on occasions a war zone.[18]

BREXIT RISKS THE PEACE PROCESS: FIVE KEY CHALLENGES

Brexit has called into question the remarkable progress made in returning cross border relations and communal politics in Northern Ireland to something approximating civic normality'.[19] Apprehension distilled as perceptible unease over the future status of the border on both sides. Anxiety here is only partly over technical or legalistic matters, for example border management as this relates to customs rules, tariffs or transit procedures. There is uncertainty too about the potential political outage, anticipated disruption from reinstating any degree of border formalities, not least political signage and national symbolism that might play to sectarian instincts, increasing the prospects of return of political violence.

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[13] Marie Smyth,Putting the Past in Its Place: Issues of Victimhood and Reconciliation in Northern Ireland's Peace Process, in Nigel Biggar (ed), *Burying the Past: Making Peace and Doing Justice after Civil Conflict* (Georgetown University Press, Washington DC 2003), pp. 125-53.
[14] B. Laffan in N. Ó Dochartaigh et al, op cit (2017)
[15] J. Bradley and D. Hamilton Bradley, Making Policy in Northern Ireland: A critique of Strategy 2010, *Administration*, 47 (3), 1999 pp.32-50. (1999).
[16] J. Goodman, *Single Europe, Single Ireland? Uneven development in process*. Dublin (Irish Academic Press, 2000).
[17] See the comparisons cited by in E Tannam, The European Union and Business Cross-Border Co-Operation: the case of Northern Ireland and the Republic of Ireland, *Irish Political Studies*, 11 1996, pp.103- 129 and ibid Cross-Border Co-operation between Northern Ireland and the Republic of Ireland: Neo-Functionalism Revisited', *British Journal of Politics and International Relations*, 6 (2) 2006 , 256–276.
[18] P. Teague, The EU and the Irish Peace Process', *Journal of Common Market Studies*, 34 (4) 1996,pp. 549-70.
[19] Duncan Morrow, The Rise (and Fall?) of Reconciliation in Northern Ireland, *The Canadian Journal of Peace and Conflict Studies* 44 (1) (2012), pp. 5-35.

What are the likely consequences of Brexit for undermining political stability in these troubled lands? More important still, what are the most appropriate means for avoidance of a formal or 'hard' border between Ireland north and south that will mitigate this latent threat? What was already a mostly nominal border after 1973 and since the Belfast Agreement an increasingly meaningless one, has regained some of its former political edginess and cultural salience. Not merely as a source of friction between the EU and London, as witnessed in the Brexit negotiations, but also and depending on what kind of Brexit eventually emerges, as potent symbol of embedded cultural and politically charged differences over identity mostly dormant since 1998, set aside if not yet forgotten nor forgiven by everyone other than sectarian zealots.[20]

Brexit's has revived the prospect of a formal EU / UK border and not only in Ireland. Indeed, these are conjoined issues. Nevertheless, reinstatement of a hard border in Ireland brings its own special problems, threatens to revive the exclusivist communalism abated by the Belfast Agreement. It is hardly coinci*de*nce, that soon after the referendum, the power-sharing arrangement between the respective communities in the North stalled, followed by the longest period without a power-sharing executive at Stormont since 1998. Significant too is the fact that this particular fall-out is indicative of so far irreconcilable cultural differences that relate to communal identity, translated in this instance as an impasse over the official status of the Irish language.[21]

There is broad agreement on all sides, in the Province, the United Kingdom and in EU counsels that Brexit raises broader issues, not least the capacity for new governance arrangements appropriate for what radical voices in this debate recommend as post-national politics. These are matters of concern, not only for future relations in Ireland but also for the United Kingdom's future constitutional design. Challenges easily identified and a consequence of Brexit, but for which there are no easy solutions. These challenges translate as five critical questions facing the parties to the current negotiations. Distinct challenges, although each one a consequence of the historic acceptance of parity of esteem in public administration, legal practice and governance that requires equal status and civil rights for every citizen. No less important, is the threat to settled communal and constructive Anglo-Irish relations. All of these issues supposedly resolved by the peace process, but now imperiled by the political fallout from Brexit.

The first post-Brexit challenge is insidious threat to peace and political stability in Northern Ireland. What is at stake here is the future state of inter-communal relations, supposedly resolved in 1998 by ensuring cultural equality and civil rights. The second challenge relates to the practicalities of border management: how best to navigate these functional matters, managing cross-border transactions (notably, passage of goods, services and persons) that are unavoidable outcomes of a reinstated 'hard' border, and confirming soon-to-be separate international jurisdictions. A third and related challenge is how to avoid disruption to cross border regimes: the widely anticipated economic dislocation and not merely in Ireland, but also to the United Kingdom and European economies from the likely reinstatement of a

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[20] Duncan Morrow, The Rise (and Fall?) of Reconciliation in Northern Ireland, *The Canadian Journal of Peace and Conflict Studies* 44 (1) (2012):, pp. 5-35.
[21] J. Doyle and E. Connolly, *Brexit and the Future of Northern Ireland* , Dublin City University Brexit Research and Policy Unit (2017).available online at http://dcubrexitinstitute.eu/wp-content/uploads/2017/06/WP-2017-1-Doyle-Connolly.pdf.

'hard' border regime. Arrangements that will impair transit of trade, services and people, hinder business and other functional co-operation and constrain the flow of social capital between citizens and communities on the ground. A fourth challenge relates to avoidance of ancillary damage to free movement of people across a formalised or 'hard' border. Finally, and by no means the least of these cognate issues is the challenge of Brexit for civil rights and the potential impact of a reinstated border on identity politics. In effect, the elusive search for border arrangements that will ensure continuous and constructive inter-communal relations, and thereby guarantee the positive social, political and cultural legacies of the peace process.

(1)Political stability and inter-communal relations: Brexit has no immediate consequences for the status or functioning of Northern Ireland's power-sharing institutions. However, the fact that it might revive political tensions will have major and negative implications for the peace process. Uncertainty is no friend of stability and anxiety about the legal status of the border, rising unease about future relations between governments in London and Dublin, the political authorities in Stormont and Dublin and local governments on both sides of the border, threatens return to febrile politics supposedly set aside in 1998.

Reinstating a border freighted with the usual symbolism of statehood, whether political insignia or documentation checks, may well reignite old resentments, attracting malign attention from extremist paramilitaries marginalized by the peace process.[22] All of this in addition to purely functional concerns that will accompany a reinstated border, and most notably: reintroduction of customs checks, policing new financial rules and collecting customs dues, monitoring differential cross-border tax rates, tariffs, regulations and products standards in every commercial sector from manufactured goods to agri-food products. Not the least of these concerns is potential disruption to complex transnational supply chains, an increasing facet of modern production and globalised markets. All of these are pressing matters for Anglo-Irish relations and for both Northern communities, as they are too for ongoing negotiations between London and Brussels over Britain's withdrawal terms.

On the British side, there is rather more wishful thinking than clear-sighted realism about these matters. The official letter from the Prime Minister to the European Council formally triggering Article 50, acknowledged the ''important responsibility to make sure that nothing is done to jeopardise the peace process in Northern Ireland, and (the commitment) to continue to uphold the Belfast Agreement''. The official government position paper on Northern Ireland and Ireland, likewise confirmed the Belfast Agreement as ''the bedrock of the peace process'', affirming and that ''nothing agreed as part of the United Kingdom's exit in any way undermines the Agreement''.[23] Noble intentions, but followed by diplomacy that focused primarily on Britain's preoccupation with securing favourable trade terms post-

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[22] Brian Walker, *The Irish government is pursuing Northern Ireland's interests more actively than the UK government*, The Constitution Unit, UCL May 23 2017 available online at https://constitution-unit.com/2017/05/23/the-irish-government-is-pursuing-northern-irelands-interests-more-actively-than-the-uk government/.
[23] *Northern Ireland and Ireland. Position Paper*, HMG 16 August 2017,pp. 1-6.

Brexit, with the border issue almost an afterthought and relegated some way down London's list of priorities.[24]

The EU negotiators too have prioritised their own interests, principally to secure Britain's financial obligations under the EU 2014-20 Multiannual Financial Framework and ensuring continuing rights for EU citizens' resident in the United Kingdom. Only latterly has the border issue become a priority in its own right, once these other issues were resolved, and more significantly for both sides only after preliminary negotiations about likely prospects for future British trade relations trade became inextricably linked to the Irish border issue. Of the principal European institutions, the European Parliament has devoted greater attention to the border question, preoccupied as representative assemblies usually are with the ramifications of high-level politics and policy on the wider public.

Elected members from border communities on both sides have worked assiduously in Strasbourg / Brussels, lobbied hard to ensure the achievements of the peace process are not lost to political expediency. In a resolution of 3rd October 2017, for example, the Parliament affirmed: ''the unique position and special circumstances confronting the island of Ireland must be addressed in the withdrawal agreement and this in a manner fully consistent with the Good Friday Agreement in all its parts…. in order to ensure the continuity and stability of the Northern Ireland peace process.''[25] The Parliament's insistence on assurances over the border have just about paid off, raising these concerns up the EU's agenda, such that workable British proposals for managing the border are now seen on the EU side at least as the likely deal-breaker of any withdrawal agreement.

(2) Practicalities of border management: The 'problem' of managing cross-border traffic, whether of goods or people, was widely anticipated, not least by those hostile to Brexit during the 2016 referendum campaign. So far, it has not been by no means the dominant issue in the withdrawal negotiations, except for those who live, work or do business in Ireland. The present Prime Minister Theresa May (speaking in her then capacity as Home Secretary) cautioned that, should the United Kingdom vote to leave the EU and with it arrangements for free movement, maintaining ''an open border with a country (Ireland) that was in the EU and had access to free movement'' would be to say the least problematic.[26] So it has proved, although at the time she issued this prescient warning it went mostly unheeded by voters on the mainland. Brexit will certainly disrupt present arrangements at this border (as will at every point on the EU / UK border), on the functional as much as the political levels. Reversion to separate economic orders and legal jurisdictions in Ireland will require reinstatement of formal procedures at the border in conformity with WTO rules. This in turn will incur not merely economic inconvenience and impose additional business costs, but the return of statist signage that symbolizes national domains (policed crossing points and uniformed customs posts) will almost certainly attract malign attention from rogue

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[24] Prime Minister's letter to Donald Tusk triggering Article 50, London, 29 March 2017, available online at https://www.gov.uk/government/publications/prime-ministersletter-to-donald-tusk-triggering-article-50.

[25] State of play of negotiations with the United Kingdom, European Parliament, P8_TA-PROV(2017)0361, 3 October 2017, available online at https://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8- TA-2017-0361+0+DOC+PDF+V0//.

[26] Available online at http://www.bbc.co.uk/news/uk-northern-ireland-politics-36587809, 21 June 2016.

insurgents, as it did in these borderlands in earlier times when mayhem and political violence was 'normal' politics.

The critical issue here is how 'hard' or 'soft' a border will result from current negotiations. A febrile debate is underway between respective stakeholders that threatens to overshadow more mundane, if no less important matters such as finding agreement on appropriate trade and tariffs arrangements. In an increasingly interdependent and globalizing economy, production is transnational as much as merely local or national activity. Products at various stages of manufacture transit between EU Member States, and sometimes more than once in what are complex production processes and elaborate supply chains. The Single European Market has both facilitated and accelerated frictionless trade across internal EU borders. Britain's exit from the SEM and the customs union will severely curtail these arrangements. A principal issue for both sides in the current negotiations is how to meet the challenge of maintaining the economic benefits of open borders and exponential economic interdependence for business, consumers and workers. Rapid transit of goods services and the passage of people is presently facilitated by Single Market and Customs Union arrangements. The United Kingdom's exit from this open borders regime is certain to cause delays, introducing time-consuming administrative checks and with adverse economic consequences, disrupting commerce, adding to business costs and so on.

No less important for Irish stakeholders is how to reduce the detrimental consequences for what is still a brittle peace of reversing, or at best impeding functional integration that is the essential ballast of stable inter-community politics on the ground. Formal border arrangements will re-politicize the border, as much as hindering transit of goods and people, impeding commerce and disrupting supply chains, ratcheting business costs, and inhibiting free movement of people in either direction. The latter an especially disruptive consequence, given that many thousands of citizens live in one part of Ireland yet work, study, access health care or other public goods, and do business in the other. Another negative externality of a hard border will be disruption to public procurement contracts, the sharing of resources and co-operation between trans-border agencies in the public sector, notably in health service provision and education.

The most controversial proposal so far for addressing these issues is to relocate the border in the middle of the Irish Sea. Altogether less dramatic are various proposals to relocate customs and other procedural checks away from historic crossing points, for instance by establishing customs' clearing stations away from politically sensitive crossing points. A raft of so-called median or hybrid solutions, each of them competing preferences for post-Brexit relations at the Irish border, are circulating between the parties to present negotiations, and they feature in the accompanying political discourse that frames the debate on this contentious question. These various proposals, their respective merits and shortcomings are discussed and in more detail in the third paper in this series.[27]

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[27] Answering Another 'Irish Question': Brexit and the Irish Border: Part Three: Solving the border conundrum? (August 2018)

The issue to be considered here is how feasible is it, the encumbrances of history notwithstanding, to relocate the Irish border if only for administrative convenience? Wherever 'border' checks take place will not avoid or significantly reduce delay or disruption to presently smooth and mostly uncomplicated transit across what is likely to become a more formal frontier demarcating quite separate political realms and legal jurisdictions. Any such formalities will add to administrative clutter, require considerable investment by the appropriate customs and revenue authorities on either side and certainly disrupt the smooth flow of business, with the collateral consequence of increasing smuggling and other illicit cross-border activity. The prospective threat to current ease of transit across what is for the time being at least a mostly notional border does present real challenges to British negotiators, whose determination to recover control of the national border unites unionists in Northern Ireland and Tory ideologues at Westminster alike. Moreover, it precludes any 'solution' to the border issue likely to be acceptable to the EU, Irish nationalists, and most especially to the Irish government. For EU27 on the other hand, the principal driver of their response to these issues is entirely opposite to the British Government's: to resist any demand, avoid any concession to the departing United Kingdom that compromises the singularity of the Customs Union and Single Market, and that in the process might unravel a hard-won peace.

 (3) Disruption of cross border regimes: EU and bilateral intergovernmental programmes alike have improved cross-border contacts, delivering the peace process on the ground as practical citizen-based as much as top-down elite projects. Co-operation in both public sector projects and business ventures intended to reinforce cross-border and inter-communal integration are the functional anchor of the peace process.[28] Notable here are arrangements for improving transportation and communication links, a common regime for food safety, for coastal lights and navigation of internal waterways that traverse the Irish border, and cultural exchanges and civic engagement between formerly disconnected and ideologically estranged communities.

Significant examples of trans-border functionality are the all-island energy market for the generation and supply of electricity, as well as mutual sanitary-phytosanitary arrangements for monitoring animal health on the island, the latter essential for agriculture and especially the dairy industry that is crucial for the local border economy.[29] A raft of common regulatory arrangements exemplifies the classic functionalist paradigm of European integration, yet each of these regimens is likely to be curtailed or cease altogether post-Brexit. Divergence here will significantly dilute regulatory and standards approximation for traded products and service provision, including consumer protection and health and safety, with obvious and adverse consequences for cross-border trade and regulatory harmonization.

Further negative externality from restoring a formal border will ensue from the discontinuance of trans-border public procurement contracts and joint bids for EU framework programmes and structural funds. Agencies on either side of the present border have grown used to pooling public resources, co-operating together to develop mutual programmes and

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[28] B. Laffan and D. Payne, The EU in the Domestic: Interreg III and the Good Friday Institutions, *Irish Political Studies*, 17.1, 2002, pp. 74-96.
[29] See https://www.daera-ni.gov.uk/articles/cattle-imports-gbUK Withdrawal ('Brexit') and the Good Friday Agreement.

other common endeavors for improving efficiency and delivering economies of scale in service provision, notably in public health, social services and education. An unprecedented level of interdependence is now operational in Ireland, but again likely to be disrupted or discontinued altogether after Brexit. The work of the Special European Union Programmes Body (SEUPB) is a telling example here. The most important North-South agency for managing cross-border EU structural funds and responsible for implementing the EU Programme for Peace and Reconciliation in Northern Ireland, with four substantive peace projects operationalised thus far. SEUPB financially bankrolls programmes and actions that actually deliver the peace process as practical projects, to date providing some 1.5 billion euros of funding. These programmes have contributed signally to reducing the formalities, indeed the very visibility of the border as an palpable presence in the lives of local communities on either side, by improving transportation and communication links, fostering those social and economic networks and civic exchanges that have markedly improved co-operation between both communities and various agencies and governance on every side. The British Government's rather lame assurance that trans-border initiatives and community programmes essential to the peace process will continue regardless, for instance by its guarantee of continued funding for the current EU Peace IV and INTERREG programme up to 2020 should Brexit happen earlier than that date, is hardly a convincing case for the maintenance of the status quo ante.

 (4) Free movement of people: A Common Travel Area (CTA) exists between the United Kingdom and the Republic without any requirement for immigration controls. This arrangement is less a direct consequence of EU membership - it has been in existence since partition – although it does reinforce the EU's free movement requirement. The CTA is a legacy, indeed an affirmation of close if ambivalent historical and cultural ties between the two states following their formal separation in 1921.[30] Since the Republic's constitutional break from the British State, Irish citizens have enjoyed special privileges in the United Kingdom, including the right to reside, to access certain social benefits, and even to exercise the franchise in British general elections.[31] In strictly legal terms, Irish citizens are subject to British immigration law, but both countries have exercised a self-denying ordinance here, with border checks imposed only during wartime after the Republic opted for neutrality.[32] Although not deriving in any degree from EU membership these uncommon arrangements are entrenched as protocols appended to the EU treaties. Most especially Article 2 of Protocol No.20 of the Lisbon Treaty that confirms both countries, ''may continue to make arrangements between themselves relating to the movement of persons between their territories''.[33]

Brexit is both a political and juridical challenge to these novel provisions and arrangements, as it is to other aspects of this singular post-imperial relationship. Freedom of movement between these neighbouring islands post-Brexit raises the important issue of how to

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[30] See the evidence from Professor Bernard Ryan to House of Lords European Union Committee , '*Brexit: UK Irish relations*', House of Lords Paper 76 (2016), pp.32-33.
[31] *The United Kingdom's exit from and new partnership with the European Union*, UK Government, CM 9417, 2 February 2017.
[32] See the evidence from Professor Bernard Ryan to House of Lords European Union Committee (2016) 'Brexit: UK Irish relations', House of Lords Paper 76, pp.32-33.
[33] Available online at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN, p.293.

distinguish between categories of citizens, whether Irish or British citizens and those of other EU countries. Neither country is signatory to the Schengen Agreement and both apply border controls to arrivals from elsewhere in the EU. The British Government's 'solution' to this conundrum, as with so many other Brexit-related technicalities is simply affirmation, to proclaim its 'determination' to avoid a rigid system of passport controls at the Irish border, and likewise to maintain visa free access to the EU for its citizens and vice versa.

This is hardly adequate response, in that the realities of ingress and egress across a reinstated and indeed a politically controversial border will present difficulties for citizens of the Republic, even if they do retain the privileges conferred by the Common Travel Area. More problematic is the incentive of a less restrictive border between the EU and United Kingdom domains than at the present British border at Calais and elsewhere for non-EU citizens' intent on reaching the United Kingdom, by circumventing the customary requirements for visa, work permits or asylum status. Depending on the final withdrawal arrangements, former EU partners (notably France and Belgium) might have less inducement to police their own borders on behalf of the United Kingdom than they presently do.

The British Government has somewhat disingenuously proposed what its representatives describe as light-touch 'point of contact' controls, whereby ordinary citizens will implement 'checks' on the rights of non-British and non-Irish citizens to work, reside and access key services. A proposal that is fraught with political problems: on one side, certain to raise objections from Irish citizens in Northern Ireland being required to act as de facto border guards on behalf of the British State. On the other, resistance from the hard-Brexit lobby committed to tighter controls on British immigration. After all, this one issue was the main catalyst, the most successful recruiter for the Brexit vote, and one that is likely to rally domestic support behind calls for a much stronger border regime in Ireland in order to deter illegal entry into the United Kingdom by migrants via what is regarded as Britain's most permeable external border.

There is no agreement yet on an issue that is crucial for those who campaigned and voted for Brexit, and who see immigration controls are a paramount concern. To resolve this issue however will require more than merely lame assurance or bland words from politicians. A rigorous border regime to deter illicit entry to the United Kingdom via the geographically porous Irish border and to ensure an end to free movement of EU citizens into the British domain can only mean reinstating and policing a 'hard' border in Ireland, and for that matter elsewhere. That, or remaining at the very least within the Customs Union or something very much like it, an outcome that would contravene the Government's pledge to the majority who voted for Brexit to 'take back control', to recover national sovereignty *sine die*. This seeming inconsistency, or policy paradox as London prefers to see it, is the crux of the border conundrum. Critics of the British Government's lackadaisical assertions about avoidance of a hard border in Ireland, whether in the 'remain' or 'leave' camps, point out a fundamental inconsistency in Government policy. On the one hand, ministers boldly claiming the return of national control at the border by ending free movement, and outright refusal to compromise sovereignty by remaining in the EU's customs regime. Whereas those same ministers refuse to own up to the incontrovertible fact that to avoidance of the 'hard' border regime they claim as an achievable policy objective is only attainable by participating in *some* version of a customs union with Ireland and indeed the rest of EU27.

For this very reason, the dilemma facing the British Government is entirely discrepant: both to deliver an uncompromising and unequivocal Brexit, whilst concurrently avoiding what objective observers regard as the inescapable reality of making unpalatable compromises on its so-called 'red lines' for securing a trade deal with the EU.[34] One can quite see why this difficult choice is even more complicated in the special circumstances that define the Irish border. Some thirty thousand people on both sides of the border live in one part of Ireland whilst working, trading or studying in the other. To say nothing of the challenges of managing cross border traffic flows which have risen exponentially since 1998. A 'border' that has become a complex weft of interdependencies: social, commercial and civic networks, all of them activities for which rigorous border checks will be severe impediment, imposing additional costs on business, placing further strain on official agencies mandated to implement them. Not the least of these challenges is the ratchetting of familiar political tensions in a region where historical memory is very much alive and still in play.[35]

(5) Assuring civil rights and equality: Rights equivalence is the normative underpinning of the Belfast Agreement and the *sine qua non* of the peace process. The legal denominator of communal reconciliation and shared civic purposes, and for that very reason enshrined in EU law, providing assurance to citizens against unwonted discrimination regardless of their cultural origin or religious affiliation. The United Kingdom's withdrawal from the transnational legal order that is the safeguard of these rights is more likely than not to dilute the juridical defence of their rights for the citizens of Northern Ireland.[36] Of particular concern about these arrangements post-Brexit, is how far rights guaranteed in the Belfast Agreement that derive from EU membership will be impaired or even curtailed.[37] The Agreement affirms equivalence in the standard of rights protection both in the Republic and in Northern Ireland, indeed 'rights' are the principal gauge of 'parity of esteem' as between individual members of the unionist and nationalist communities in Northern Ireland.

Whether or how far British withdrawal from the EU's supranational legal code might devalue or otherwise diminish these legal guarantees to citizens is a source of considerable anxiety, even as the United Kingdom remains, for the time being at least, adherent to the European Convention of Human Rights. If fundamental rights are elemental to the peace process, as they surely are, the question of trammelling such rights, or losing them altogether is a matter of concern for all citizens of the United Kingdom and not merely those in Northern Ireland. Although this is a matter of broader constitutional remit, and one that is properly a subject for separate and more informed review elsewhere.[38] For the minority community in the North, long time victims of civil rights abuses that eventually gave rise to an insurgent politics, Brexit is an uncomfortable reminder of decades of official and informal discrimination and at

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[34] *The United Kingdom's exit from and new partnership with the European Union*, London: HM Government, HMSO, CM9417, available online at
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf.
[35] *Brexit: UK-Irish relations*, House of Lords European Union Committee ,House of Lords Paper 76, (2016) p.18.
[36] European Commission, Guiding principles for the Dialogue on Ireland/Northern Ireland, Brussels, 20 September 2017 available online at https://ec.europa.eu/commission/publications/guidingprinciples-dialogue-ireland-northern-ireland_en. p. 4.
[37] C. McCrudden, *The Good Friday Agreement, Brexit and Rights* (British Academy London and Royal Irish Academy Dublin 2017), at p.16.
[38] See Vernon Bogdanor, *Brexit And Our Unprotected Constitution*, The Constitution Society, 2018.

every level of society and politics. A fact acknowledged by the government in Dublin and the Brussels institutions alike, indeed by anyone concerned to ensure and protect fundamental rights as the normative ballast of liberal and democratic politics, and essential for sustaining the peace process.[39] To remove the EU and most especially its legal order as a principal guarantor of the peace process while not in itself implying any downgrading of fundamental rights in Northern Ireland is entirely problematic for minorities there. And in light of the recent debate on legal impediment to a woman's rights to abortion in the Province, not only for the nationalist minority.[40] To exit the EU's legal order will undoubtedly take a toll of the still fragile trust across the communal divide, by weakening the institutional pillars of a rights-based order in a polity, where prior to 1998 rights were frequently compromised or merely arbitrary.

A related concern is the prospect (widely anticipated) of impending British withdrawal from the ECHR, and another barometer of the United Kingdom's present 'exceptionalism' and increasing nativist mind-set. A late signatory to the Convention after the Blair Government incorporated it into British law it was never entirely acceptable to many in the Conservative Party who regard it as improper constraint on judicial autonomy and parliamentary sovereignty. Exiting the Convention remains a distinct possibility, although to do so would further weaken what is a fundamental juridical mainstay of the Belfast Agreement. A move too that will signify further attrition of the United Kingdom's commitment to the transnational European legal order, and with that the demise of an important safeguard for minority rights in Northern Ireland. A risk widely acknowledged by EU authorities and institutions, although rather less so by some Westminster politicians' intent on 'taking back control' of British laws. The familiar assertion by those who regard a sovereign Parliament as the surest, indeed from this sovereigntist standpoint the *only* rightful guarantor of fundamental rights, is hardly convincing, bearing in mind the acute observation of the eminent English jurist William Blackstone that what 'Parliament' has done any successive parliament may just as readily undo.[41]

A final consideration here is the likely consequence of Brexit for the singular arrangement that is citizenship in Northern Ireland. The unique status that predates British and Irish EU accession is the right of anyone born on the island of Ireland to hold Irish citizenship without relinquishing British nationality. There is no reason why Brexit should alter this status, unless either government determines otherwise: the Irish government withdrawing the right to duality, or the British Government prohibiting it for its own citizens in Northern Ireland. As things currently stand, both are unlikely occurrences. Exercising the right to EU citizenship post-Brexit is however altogether more problematic for the Province's denizens. National citizenship is the legal requirement for acquiring the status and rights of European

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[39] *Guiding principles for the Dialogue on Ireland/Northern Ireland*, Brussels, European Commission, 20 September 2017, at p. 4.
[40] Eloise Todd, For Northern Ireland Women, The Abortion Referendum and Brexit Negotiations have Huge Ramifications, *Huffington Post* 24 May 2018, available online at https://www.huffingtonpost.co.uk/entry/irish-referendum-brexit_uk_5b0699f3e4b0784cd2b1e5ae?guccounter=1&guce_referrer_us=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbi8uVrLw&guce_referrer_cs=BqvHt3DG3uMdLY7d6z2uiA.
[41] *Commentaries*, Volume 1 (1765 edition), at pp. 160-162.

citizenship. Citizens in the Province who opt for singular British nationality will automatically lose those rights, unless they choose dual nationality.[42]

This may be accounted no great loss, and for sovereigntists who see 'Europe' as entirely 'other' and EU citizenship as essentially meaningless. Yet for some citizens, especially the young for whom multi-layered arrangements for political attachment and belonging confirm novel opportunities and arrangements for altogether more nuanced expressions of political and cultural identity this derogation is certainly problematic. The idea of multiple citizenships is an attractive option for those of a cosmopolitan outlook, a means of accessing the emergent and multi-faceted socio-cultural reality that is contemporary cultural attachment, what some scholars commend as 'post-national identity'.[43] Citizenship arrangements that confer a degree of individual choice about how to express identity, that permit altogether novel ways of manifesting ontological ideas about 'self' and for redefining political obligation to community and polity are counted by contemporary youth in particular as a demonstration of meaningful choice about how to express 'selfhood', identity and belonging . Choices that offer the prospect for transnational attachments and plural identities that some residents of Northern Ireland might prefer to embrace, but variable or layered identities that Brexit now threatens to foreclose.

BREXIT AND UNANTICIPATED CONSEQUENCES

Brexit has called into question many shibboleths about British and European politics, not least assumptions about ineluctable progress towards a new politics in Ireland. In the process, it has revived anxieties, both there and further afield about likely inimical consequences of reinstating a physical border between Northern Ireland and the Republic. Of course, nothing in the sinuous world of politics is ever certain. The only infallible law of politics is that which predicts 'unanticipated consequences', and by definition the 'unanticipated' usually catches us completely unawares! And a truism that pertains as much to Brexit as to any other hominine design. Brexit has certainly called into question steady if tentative progress towards communal co-operation and cultural reconciliation in Ireland that is the consequence of the peace process, and accordingly reviving familiar anxieties about a hard border in Ireland. Paramilitary insurgents are still active in some border communities, emboldened by the Province's increasingly dysfunctional politics and not least by the prospects of impending chaos at the border. How far then are such anxieties merely exaggerated, and how might they be averted?

Since 1998 the border has become invisible, more conduit than barrier between Ireland North and South and at every level. Cross-border trade has expanded exponentially and increasing civic engagement is both entrenching and normalizing the peace process on both sides.[44] The border region is slowly but surely becoming as much a shared civic and political, as a merely functional or economic space. A process made easier by removing insignia and signage

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[42] Brian Ó Caoindealbháin, *Citizenship and borders: Irish nationality law and Northern Ireland*, IBIS working paper no. 68, Working Papers in British-Irish Studies No. 68, Institute for British-Irish Studies, University College Dublin 2006.
[43] G. Delanty, Habermas and post- national identity: Theoretical perspectives on the conflict in Northern Ireland, *Irish Political Studies*, 11 (1) 1996, pp.20-32.
[44] J. Goodman, *Single Europe, Single Ireland? Uneven development in process*. Dublin (Irish Academic Press, 2000).

denoting national allegiance or exclusive sovereignty.[45] The prospect of a reinstated border threatens that endeavor, concentrating minds in both communities, in government and in Brussels about the malign consequences of what seems to most observers to be an entirely retrograde move.

These baleful consequences were not remotely on the political radar until Brexit reset the dial, revived concerns about future relations between the two jurisdictions in Ireland. A discourse on the United Kingdom's constitutional design by no means confined to the affairs in Northern Ireland. The divorce of the United Kingdom from the EU will likely have important constitutional reverberations beyond Ireland, not least for the ongoing discourse on the constitutional status of the British State and its four constituent territories. A majority of voters in Scotland and Northern Ireland chose in the 2016 referendum to remain in the EU. The most politically contentious consequence of this decision is whether or how far the ramifications of the 'remain' vote in two of the United Kingdom's constituent polities will impact on and potentially alter the future state of British politics. Possibly offering an incentive to those bent on further constitutional dislocation, potentially bringing closer the prospect of the disintegration of what only a few short decades ago was a stable centralized and unitary state.

Brendan O'Leary amongst other commentators takes a rather more sanguine view of these potential and unintended consequences. As he sees it, the Belfast Agreement permits altogether more flexible constitutional arrangements between the constituent parts of the United Kingdom than presently exist, not least in the context of an increasingly devolved British polity. To that extent, Brexit might ratchet further demands from nationalist parties and other self-styled modernizers within the territorial polities for further devolution from the centre: demands that will likely resonate with some in marginalized electorates already receptive to ideas about a federal Britain, or even to outright independence. In the process, legitimating at least for many voters on the Celtic fringes claims for an unprecedented degree of constitutional autonomy that would permit Northern Ireland, and should voters there will it Scotland too, to demand a distinct and to a degree even a separate political status from the rest of the British State.[46] A 'claim of right' as it were expressing popular sovereignty that Westminster politicians could hardly deny them after their own pursuit of autonomy and 'escape' from putatively 'remote', 'interfering' and centralized governance located in Brussels. This constitutional aftershock should it come to pass would be the most dramatic of Brexit's prospective 'unanticipated outcomes.

According to this imaginative if unorthodox interpretation of Britain's constitutional future, Northern Ireland and Scotland might feasibly retain EU membership, even as they nominally remain within the devolved framework of the British State, or they might do so pending the outcome of further referenda in both countries. A border poll in Northern Ireland to determine the Province's status vis à vis the United Kingdom, and a further referendum in Scotland to review relations with the rest of the United Kingdom, and prospectively even to endorse full independence. On this permissive reading of the United Kingdom's present

[45] A. Guelke, International dimensions of the Belfast Agreement, in R. Wilford (ed.) *Aspects of the Belfast Agreement* (Oxford University Press, 2001), pp. 245-263.

[46] Brendan O'Leary, *Detoxifying the UK's exit from the EU, a multi-national compromise is possible*, available online at https://blogs.lse.ac.uk/brexitvote/2016/06/27/de-toxifying-the-uks-eu-exit-process-a-multi-nationalcompromise-is-possible/, 27 June.

constitutional situation, enforced exit of both countries from the EU solely on the grounds of a majority pro-Brexit vote in England would be claimed by proponents as reasonable and principled, even if not strictly legal grounds on which to determine their own constitutional futures according to the established principle of devolution. An assumed right to remain in the United Kingdom, or to withdraw from the union state, and each separate territorial nation determining its own future relations with the EU is now at least on the agenda, an outcome never considered likely before Brexit. Whether any such claim to self-determination would have constitutional validity, let alone political credibility is quite another matter. Nevertheless, any claim along these lines would almost certainly propel the United Kingdom into full-blown political crisis, prompting rebellion by territorial nationalists in the smaller constituent nations who are already ideologically committed to the break-up of the British State.[47] A far-fetched scenario maybe, but Brexit has brought all manner of uncertainty and unintended consequences to United Kingdom politics and governance, and not least to Ireland.

The mood of apprehension in Ireland following Brexit in both principal communities and on either side of the border threatens to discontinue, or at least to abate local community projects that have successfully engaged formerly disconnected and even mutually hostile border communities. For that very reason, there it is existential risk to the peace process itself. When the Belfast Agreement was first concluded there was no question that both the United Kingdom and the Republic would remain as Member States of the European Union, and as such conjointly guarantors of the peace process. Brexit is now a clear and present challenge to these presumptions of continuity, whether for the peace process per se but more widely for Anglo-Irish and UK-EU relations in what will be an uncertain future. An uncertain situation is already feeding anxiety on the ground, not least about the closing of actual and metaphorical 'doors' opened in Belfast's infamous 'peace walls' erected at the height of the Troubles in order to improve security by maintaining physical separation between what were then conflictual and even warring tribes. A recent report about the removal of these symbolic barriers to sectarian divisions ruefully observed: ''The fact that so many (barriers) remain in place is evidence of the often glacial pace of progress. As the painstaking work continues, however, it is not lost on those labouring to bring down physical and sectarian barriers that the vote for Brexit has led to the threat of new ones being erected.''[48]

In these uncertain times, the likelihood is that the significantly altered status of the post-Brexit border will have far-reaching and mostly negative consequences for future relations on the island of Ireland, and at every level. Brexit threatens a fundamental reversal of a tentative yet tangible peace process, a fundamental downshift in political, commercial and civic relations that means North-South co-operation cannot continue on present terms. Certainly not, if as seems likely, quite different economic and regulatory arrangements will pertain in the island's respective political jurisdictions, a fact that will become even more conspicuous by a reinstated and formal border. The next paper in the series will review various and by no

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[47] Fintan O'Toole, United Ireland will not be based on '50 per cent plus one'. Brexit has made Irish unity more likely, but we need to reunify people first, *The Irish Times*, August 15 2017.
[48] Michael Savage, In Belfast fear is growing that the hated barriers will go up again. The row over Brexit and the border threatens to stop the slow removal of the peace walls that divide Protestant and Catholic, *The Observer* (London), 6 May 2018, available online at https://www.theguardian.com/global/2018/may/06/no-one-wants-border-ireland-belfast-barriers-stay-up.

means mutually consistent proposals for resolving the conundrum that is the post-Brexit Irish / United Kingdom border.