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LIDIA BONIFATI¹

THE IMPACT OF BREXIT ON THE CONSTITUTIONAL STATUS OF NORTHERN IRELAND

SUMMARY: 1. Introduction. – 2. Historical background: the issue of the constitutional status and the Belfast Agreement. – 3. The role of the European Union and the constitutional nature of the Belfast Agreement. – 4. The constitutional challenges raised by Brexit in Northern Ireland and the possible solutions. – 5. Constitutional status vs. constitutional integrity: future perspectives. – 6. Conclusion.

1. *Introduction*

The decision of the United Kingdom to withdraw from the European Union raised several questions among academics, politicians, and citizens in Northern Ireland, concerning the constitutional future of the country. What will happen in Northern Ireland? Will there be a hard border separating it from the Republic of Ireland? Will terrorism and unrest return? What will be the future of the Good Friday Agreement? All these questions revolve around a deeply rooted and delicate issue, namely the constitutional status of Northern Ireland. Unfortunately, the process of negotiation has been complex and difficult and, at the time of this writing², the outcome of Brexit is still unclear. The aim of this paper is not to predict the future, but to map the debate on the constitutional status of Northern Ireland and the strong impact that Brexit had, from the very beginning, on the constitutional issues at the heart of the

¹ I am grateful to Gordon Anthony, David Capper, Brice Dickson, John Garry, Colin Harvey, Katy Hayward, David Phinnemore, Dagmar Schiek, Lisa Whitten, and especially to Christopher McCrudden for the fruitful exchange of ideas during the research period at Queen's University Belfast. I would also like to thank Giuseppe de Vergottini, Susanna Mancini, Elena Ferioli, and Leonardo Pierdominici, for their endless support. Special thanks to Chiara Reali, my personal editor.

² This paper refers to the events occurred until March 5th, 2019.

Good Friday Agreement. In order to correctly grasp the meaning of the constitutional debate surrounding the effects of Brexit on Northern Ireland, the article will briefly tackle the historical background, framing the political context of the Good Friday Agreement. The article will then move on to analyze three key aspects of the debate, namely: the role of the European Union in the forty years of the UK membership; the constitutional nature of the Belfast Agreement; and the constitutional issues addressed by the Agreement. These three aspects are essential to understanding the complexities of the challenges posed by Brexit on a constitutional level. Even though currently there is not a certain outcome of the Brexit process, the solution proposed and the possible future scenarios must be carefully assessed, since they will each have a different effect on the constitutional status of Northern Ireland and an overall constitutional impact on the parties involved, as it became evident when the concept of 'constitutional integrity' emerged in the public political debate. Finally, the article will draw some conclusions concerning the future of the ongoing constitutional debate.

2. *Historical background: the issue of the constitutional status and the Belfast Agreement*

The constitutional issues concerning the status of Northern Ireland lie far back in history. From 1801 to 1920, the island of Ireland was an integral part of the United Kingdom of Great Britain and Ireland, until the Government of Ireland Act 1920 partitioned the island in two parts: Northern Ireland, composed of the six north-eastern counties³, and Southern Ireland, the remaining counties of the island. The Act intended to create self-governing territories, each one with its own legislative and executive institutions, though remaining part of the United Kingdom⁴. The subsequent Irish War of Independence resulted in the Anglo-Irish Agreement, which established in 1922 the Irish Free State, that later became the Republic of Ireland in 1937, with the enactment of a new constitu-

³ The north-eastern region of Northern Ireland was traditionally called Ulster, where the first British settlement were planted in 1608.

⁴ David McKittrick and David McVea, *Making sense of the Troubles* (London: Penguin Books, 2012): 4.

tion⁵. The tensions that led to the creation of an independent Irish State were somehow reflected in the political and social life of Northern Ireland, where two communities coexisted in the same territories, pursuing divergent political goals concerning the constitutional status of the nation. In fact, on the one hand, the unionist, mainly Protestant, remained firm supporters of the belonging of Northern Ireland to the United Kingdom, while on the other hand, the nationalists, overwhelmingly Catholic, aimed at reunifying with the rest of the island in a united Ireland.

The cleavages in the Northern Irish society were further reinforced by the social and institutional discrimination against Catholics and by the substantial political domination of unionists in the national Parliament⁶. In 1968, when the so-called 'Troubles' began, the tensions dramatically escalated, and efforts were made to solve some of the social and political issues, even though they failed to prevent violence from eventually erupting. The conflict between the two communities, caused by the military actions of the paramilitary groups on both sides, lasted for over thirty years and had devastating effects in terms of losses of human lives and numbers of injured people. The tensions escalated in 1969 when British troops were demanded to restore order. By 1972, due to the massive deterioration of the situation, the United Kingdom decided to suspend the Northern Irish Parliament to re-impose direct rule on the nation.

The first attempt to end direct rule and to restore self-government was the Sunningdale Agreement⁷ in 1973, which provided a devolved administration for Northern Ireland, introducing for the first time power-sharing mechanisms, and an 'Irish dimension' with the involvement of the Irish government in the internal affairs of Northern Ireland, through the establishment of a 'Council of Ireland'. Due to weak political support, Sunningdale collapsed in 1974 and violence escalated again soon thereafter. Another effort to find a solution to the 'Irish question' that is worth mentioning is the Anglo-Irish Agreement (AIA)⁸, signed in 1985 by the British Prime

⁵ David McKittrick and David McVea, *Making sense of the Troubles* (London: Penguin Books, 2012): 4.

⁶ David McKittrick and David McVea, *Making sense of the Troubles* (London: Penguin Books, 2012): 17.

⁷ Marc Mulholland, *Northern Ireland. A very short introduction* (Oxford: Oxford University Press, 2002): 79.

⁸ *Ibidem*, 117-119

Minister, Margaret Thatcher, and the Irish Prime Minister, Garret FitzGerald. The AIA provided the Irish government with an advisory role in the affairs of Northern Ireland. Both legal texts provided that the constitutional status of Northern Ireland would not change without the consent of its people, a fundamental principle attached to the constitutional status that was also included in the final agreement that ended the Troubles. The turning point towards the conclusion of the 'long war' was the ceasefire announced by the IRA⁹ in 1994 when the two parts involved mutually realized that the war was unwinnable solely by military means. Moreover, two actors entered negotiations, playing a new role. On the one hand, Sinn Féin, the political branch¹⁰ of the IRA, had started to commit to political and peaceful means; on the other the United States, led by President Bill Clinton, took on an active role in the process of conflict resolution, appointing former Senator George Mitchell as chair of the talks. It is not surprising that the presence of Sinn Féin at the table of negotiations was not appreciated by many unionists and loyalist forces, especially by the Ulster Unionist Party (UUP) and the Democratic Unionist Party (DUP). However, the UUP led by David Trimble agreed to participate in the talks on the condition that paramilitary groups were committed exclusively to peaceful and democratic means. On the contrary, the leader of the DUP, Ian Paisley, abandoned the talks, not accepting the inclusion of Sinn Féin in the overall process¹¹. Senator Mitchell had to overcome the internal divisions of the unionist front and further killings by paramilitary groups operating on both sides, stalling the table of negotiation. Eventually with the direct intervention of the British and Irish governments, on April 10 the Belfast ('Good Friday') Agreement was reached, supported by the main unionist and nationalist parties, but strongly opposed by the DUP. The Agreement was developed along three Strands. Strand One (internal) involved the re-

⁹ On the republican side, the main paramilitary group was the Provisional Irish Republican Army (generally referred as IRA), result of the split in 1969 of the original IRA. On the loyalist side, there were the Ulster Volunteer Force (UVF) and the Ulster Defense Association (UDA).

¹⁰ During the Troubles, the political branch of the IRA were Sinn Féin, while those of UDA were the Unionist Democratic Party (see David McKittrick and David McVea, *Making sense of the Troubles* (London: Penguin Books, 2012))

¹¹ David McKittrick and David McVea, *Making sense of the Troubles* (London: Penguin Books, 2012): 266.

lationship within Northern Ireland, with the establishment of a new Assembly and an Executive, according to power-sharing principles. Strand Two (north-south) regulated the relationship within the island of Ireland, with the establishment of the North-South Ministerial Council. Strand Three (east-west) concerned the relations between the United Kingdom and the Republic of Ireland, through the British-Irish Council and the British-Irish Intergovernmental Conference.

3. *The role of the European Union and the constitutional nature of the Belfast Agreement*

Although there are many aspects concerning the Belfast Agreement that are worth exploring, for the limited purpose of this article it is meaningful to consider three elements.

The first aspect is the overall relevance of EU membership for both the United Kingdom and the Republic of Ireland in addressing the tensions over Northern Ireland. It must not be forgotten that 1973, year of the establishment of the Sunningdale Agreement, was also the year that marked the entrance of both the United Kingdom and the Republic of Ireland in the European Economic Community. This is significant since the first attempt at solving the conflict happened in a context in which the governments representing the two sides acted as members of the same supranational community, which provided a common framework and a new forum for discussion, negotiation, and mediation. In this respect, the words of Professor Schiek come to mind, when she describes the EEC as a ‘peace process based on equality and cooperation of its Member States’¹². In this newly established context of mutual cooperation, ‘the conflict had to be overcome’¹³. Schiek further observes that, at the time, ‘the optimism for the effectiveness of the European integration project overweighed any concern that the EEC had just acquired two potentially warring Member States’¹⁴. If we look at the current situation, the hope is that the EU as a ‘peace project’ will continue to protect and preserve the peace process in Northern Ire-

¹² Dagmar Schiek, “Brexit on the island of Ireland: beyond unique circumstances” *NILQ* vol. 69, n. 3 (autumn 2018): 370.

¹³ *Ibidem*.

¹⁴ *Ibidem*.

land, regardless of the chaos generated by Brexit. Besides offering a new political forum in which the conflict could be defused, the common membership benefited both Ireland and the UK from an economic point of view by granting them access to a larger market, to EEC structural funds, and to the PEACE funds for reconciliation and reconstruction. The EEC/EU became an overall common framework, not only economically but also legally. In fact, even if Ireland and the UK have a dualist approach towards international law, the courts of both countries accepted the EU law doctrine of supranationality, based on the doctrine of direct effect and supremacy of EU law developed by the European Court of Justice, and engaged in extensive judicial dialogue with the latter. These supranational elements were essential for the EEC Treaties to become legally binding and a reliable basis for cross-border cooperation¹⁵. However, it must be noted that it was not until 1992, with the adoption of the Community Customs Code, that the necessity of controls at the border between the Republic of Ireland and Northern Ireland came to an end. The other tool to avoid border posts in the EU (and therefore on the Irish island) was theoretically provided by the Schengen Agreement, which the UK decided not to ratify; therefore, Ireland and the UK agreed to adopt an alternative agreement, namely the Common Travel Area on the island of Ireland. Thus, border controls became superfluous, and they could be motivated only by security concerns¹⁶.

The second relevant aspect is the constitutional nature of the Agreement. First, the Good Friday Agreement deals with constitutional issues rooted in the historical divisions between unionists and nationalists. Second, it had different ‘constitutional consequences’, since it meant that the British government had to repeal previous legislation related to the constitutional status of Northern Ireland, specifically section 75 of the Government of Ireland Act 1920, enacting the Northern Ireland Act 1998¹⁷, the latter providing (along with the Northern Ireland Assembly Act 1998) the basic le-

¹⁵ Dagmar Schiek, “Brexit on the island of Ireland: beyond unique circumstances” *NILQ* vol. 69, n. 3 (autumn 2018): 372.

¹⁶ *Ibidem*, 373.

¹⁷ Christopher McCrudden, “Northern Ireland, the Belfast Agreement, and the British Constitution” *University of Michigan Law School, Public Law and Legal Research Paper Series*, Research Paper No. 48 (2004): 203.

gal framework for establishing the institutional aspects of the Belfast Agreement in British legislation¹⁸. For its part, the Republic of Ireland had to amend Articles 2 and 3 of its Constitution, relating to its claims on the six north-eastern counties¹⁹. Third, along with the Northern Ireland Act 1998 and the British-Irish Agreement²⁰, the Belfast Agreement constitutes a source of what may be defined as the ‘Northern Ireland Constitution’²¹, thus enhancing its foundational nature and its peculiar relevance.

The last, highly meaningful aspect, concerns how the Agreement addressed the constitutional issues at the heart of the conflict. In the first half of the provisions relating the constitutional status, the parties agreed on the fact that the future of Northern Ireland was to be left in the hands of the people of Northern Ireland, reaffirming the principle of consent and of self-determination²². In the following provisions, the parties also affirmed that, whatever choice was to be made in the future, ‘[...] it will be a binding obligation on both Governments to introduce and support in their respective Parliaments legislation to give effect to that wish’²³, thus providing that either Government would have to accept the wish of the majority of the people of Northern Ireland. The last two provisions address the respect of fundamental rights and citizenship. The Agreement clearly addresses the factors determining the deep fragmentation of society (‘identities and traditions’ and ‘aspirations’²⁴) and the need to respect the fundamental rights and freedoms that had been violated for decades, with the aim to provide a common ground for civil and peaceful coexistence. It is extremely interesting to notice that the protection of rights was considered so crucial that it was mentioned in the constitutional issues, preliminarily to the

¹⁸ Christopher McCrudden, “Northern Ireland, the Belfast Agreement, and the British Constitution” *University of Michigan Law School, Public Law and Legal Research Paper Series*, Research Paper No. 48 (2004): 201.

¹⁹ *Ibidem*, 203.

²⁰ The British-Irish Agreement is an international treaty annexed to the Good Friday Agreement, concluded between the British and Irish governments, reaffirming their mutual commitment and support to the Belfast Agreement.

²¹ Christopher McCrudden and Daniel Halberstam, “Miller and Northern Ireland: a critical constitutional response” *University of Michigan Public Law and Legal Theory Research Paper Series* paper n. 575 (October 2017): 9.

²² Belfast Agreement, Constitutional Issues, 1(i)-(iii).

²³ Belfast Agreement, Constitutional Issues, 1(iv).

²⁴ Belfast Agreement, Constitutional Issues, 1(v).

full text of the agreement, thus assuming a fundamental position in the latter. The last provision dealing with citizenship recognized ‘the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose’²⁵ and accordingly it confirmed that ‘their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland’²⁶.

4. *The constitutional challenges raised by Brexit in Northern Ireland and possible solutions*

When the Belfast Agreement was concluded, the common European Union membership of both the United Kingdom and the Republic of Ireland was assumed as permanent and nobody at the time could foresee that one of the two countries one day would withdraw from the EU. Brexit has had a dramatic impact on Northern Ireland since the days following the referendum, because it posed the risk of establishing a hard border between the ‘two Irelands’. Indeed, the idea of re-establishing a hard border, with checks and police controls, was initially excluded since it could have meant reigniting past tensions and possibly a return of violence in Northern Ireland. Moreover, since the Good Friday Agreement assumed EU membership as permanent, another preoccupation concerned how to uphold its ‘spirit’, that stemmed from a reality of cooperation within a supranational organization aimed at preserving a peaceful coexistence. By breaking the shared context provided by EU membership, Brexit holds a potentially disruptive effect on the peace process, begun in 1998 and still ongoing. The trajectories between the UK and Ireland would diverge, in many sectors, as law, trade, security, rights, policies, and politics²⁷. From the very beginning of negotiations, the UK government and the EU-27 committed to upholding the profound meaning of the Good Friday Agreement, and all the main political parties in Northern

²⁵ Belfast Agreement, Constitutional Issues, 1(vi).

²⁶ Belfast Agreement, Constitutional Issues, 1(vi).

²⁷ David Phinnemore and Katy Hayward, “UK Withdrawal (“Brexit”) and the Good Friday Agreement” *European Parliament’s Committee for Constitutional Affairs* (November 2017).

Ireland demanded that the specific needs of their small nation would be addressed in the process, so that the spirit of the Agreement would not have been diminished. In this light, there has been a widely recognized necessity to preserve the status quo as much as possible by assuring free movement, avoiding the hardening of the border, maintaining the economic interdependence and prosperity on the island of Ireland (and specifically in Northern Ireland), guaranteeing access to EU funding, and preventing any disparity of citizenship rights for those born and residing in Northern Ireland. Moreover, it is necessary that the fundamental principles of self-determination and consent, as laid down by the Agreement, are not be compromised in any way by the Withdrawal Agreement. One should bear in mind that the Good Friday Agreement established a differentiated status for Northern Ireland, given its social and political components. The process of negotiations should thus consider the specific conditions of Northern Ireland, and provide for flexible solutions, aimed at reaching compromises that could preserve the overall stability of the peace process. In this respect, the British-Irish relationship is key, today just as it was as in 1998. The same ‘relational’ (and not strictly binary) character of the Good Friday Agreement, and the institutions it enshrines, should be crucial not only in the process of negotiations but also in the post-Brexit relationship between the UK and the EU (and thus Ireland)²⁸.

Moreover, Brexit poses serious issues concerning the protection of human rights, since it will mean that the EU-derived rights (especially those derived by the EU Charter of Human Rights) will no longer be protected in the UK, and thus in Northern Ireland. This is particularly worrisome in areas such as equality, anti-discrimination law and citizenship²⁹, where the EU law has so far provided a common legal framework. The tools that could guarantee the protection of these rights after Brexit (at least for now) are the international human rights obligations that the UK is bound to respect, the European Convention of Human Rights, and the Human Rights Act 1998. However, these tools cannot be taken for granted

²⁸ Colin Harvey, “Brexit, rights and the constitutional future of these islands” *European Human Rights Law Review* (January 2018): 10.

²⁹ Colin Harvey, “Brexit and human rights in Northern Ireland” *BrexitLawNI blog* (October 2018), available at <https://brexitlawni.org/blog/brexit-and-human-rights-in-northern-ireland/>.

and they need to be secured after Brexit. Finally, Brexit, in order to ‘take back control’, has the potential to reshape devolved governments ‘by increasing the power of devolved institutions in some respects, and decreasing their power in others’³⁰. This aspect could pose additional difficulties to the maintaining of power-sharing institutions in Northern Ireland, which have a long history of political instability³¹.

The ‘uniqueness’ of Northern Ireland, as expressed by the European Council Guidelines, requires ‘flexible and imaginative solutions’³². The current official solution to avoid the hard border is the so-called ‘backstop solution’, eventually agreed upon in the final draft of the Withdrawal Agreement³³ first published on November 14, 2018. The backstop, as intended in the Protocol on Northern Ireland annexed to the Withdrawal Agreement, can be described as an ‘insurance policy’³⁴, a series of arrangements designed to avoid border controls on the island of Ireland. In fact, Article 1(3) of the Protocol states that the purpose of the backstop is to ‘address the unique circumstances on the island of Ireland, maintaining the necessary conditions for continued North-South cooperation, avoid a hard border and protect the 1998 [Good Friday of Belfast] Agreement in all its dimensions’³⁵. According to the plan, from the end of the transition period the whole United Kingdom would remain in the EU Customs Union, and Northern Ireland specifically would be treated differently, since it would remain aligned with the EU’s Internal Market. Moreover, the Protocol presents some important

³⁰ Christopher McCrudden, “The Good Friday Agreement, Brexit and Rights” *A Royal Irish Academy - British Academy Brexit Policy Discussion Paper* (October 2017): 7.

³¹ For a commentary on this point, see Gordon Anthony, “Britain Alone: a view from Northern Ireland” in *Britain Alone! The implications and Consequences of United Kingdom exit from the EU*, edited by Patrick J. Birkinshaw and Andrea Biondi (Alphen aan den Rijn: Kluwer Law International, 2016).

³² European Council (Art. 50) guidelines for Brexit negotiations, available at <https://www.consilium.europa.eu/en/press/press-releases/2017/04/29/euco-brexit-guidelines/>.

³³ Draft Withdrawal Agreement of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (14 November 2018), available at https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement_0.pdf.

³⁴ David Phinnemore, “What is the backstop?” in *Brexit and the backstop* (UK in a changing Europe, February 2019): 6-7.

³⁵ Art. 1(3) - Protocol on Northern Ireland of the Draft Withdrawal Agreement.

political elements in order to gain the support of the more demanding parties. In fact, on the one hand, the Protocol clearly provides that the principle of consent enshrined in the Good Friday Agreement, as well as the constitutional status of Northern Ireland, remains protected and unaltered; on the other, it states that it will respect the territorial integrity of the United Kingdom³⁶. These specific provisions are aimed at meeting the concerns of the DUP, which opposed the backstop from the beginning since it would mean for Northern Ireland to be treated differently from the rest of the UK. Nonetheless, the Protocol goes beyond trade; it addresses the rights of individuals, stating that there would be no diminution of the rights set out in the 1998 Agreement³⁷. It also proposes new bodies to oversee it, such as the Joint Consultative Working Group, comprising UK and EU representatives, and a Specialized Committee responsible for the implementation of the Protocol. It must also observe that the Court of Justice of the EU would be responsible for the interpretation of EU law under the Protocol³⁸. The Withdrawal Agreement does not offer the same benefits of EU membership, but it is certainly more advantageous for the UK and Northern Ireland than a ‘no-deal’ Brexit, which would make a hard border necessary once again³⁹.

5. *Constitutional status vs. constitutional integrity: future perspectives*

In the first draft of the withdrawal agreement of February 28, 2018, in the Protocol on Northern Ireland, the EU Commission proposed a ‘common regulatory area’⁴⁰ to solve the problems rela-

³⁶ Katy Hayward, “Northern Ireland and the Withdrawal Agreement” *UK in a changing Europe* (16 November 2018), available at <http://ukandeu.ac.uk/northern-ireland-and-the-withdrawal-agreement/>.

³⁷ *Ibidem*.

³⁸ *Ibidem*.

³⁹ Dagmar Schiek, “Brexit and the island of Ireland - any news from the EU’s revised offer for a withdrawal agreement?” *Northern Ireland Legal Quarterly Contributors’ Blog* (15 December 2018), available at <https://nilq.qub.ac.uk/index.php/nilq/issue693-article6>

⁴⁰ As set by the Agreement, the common regulatory area on the island of Ireland would have kept Northern Ireland in the Customs Union and internal market of the EU, breaking the internal market of the United Kingdom.

ted to Northern Ireland, which the British Prime Minister Theresa May rejected⁴¹. May held that this provision would have disrupted the ‘constitutional integrity’ of the United Kingdom, since the common regulatory area would have created a barrier in the Irish Sea, separating *de facto* Northern Ireland from the rest of the United Kingdom, and that would have been unacceptable for any British Prime Minister. Since then, the argument of protecting the ‘constitutional integrity’ has been used differently by the various parties involved in the process, namely the EU, the UK, the Republic of Ireland, and Northern Ireland itself. Interestingly, the concept of constitutional integrity has varied depending on the different understanding the parties had of the constitutional status of Northern Ireland.

The possible hardening of the border and the solutions proposed, especially the backstop plan, have rekindled the positions of the different communities and political parties involved, concerning the constitutional status and the constitutional integrity of Northern Ireland. On the one hand, the DUP is firmly opposed to the backstop, since it would potentially breach the constitutional status of Northern Ireland as part of the United Kingdom by treating Northern Ireland differently from the rest of the Union. On the other, the nationalists would accept it, since it would preserve part of the status quo and thus it would not separate Northern Ireland from the rest of the island of Ireland.

While it is reasonable to think that Brexit could affect the constitutional status and integrity of Northern Ireland, the question arises whether it would threaten the constitutional integrity of the United Kingdom, as claimed by the British Prime Minister Theresa May. Most commentators have answered this question in the negative. On the one hand, Harvey states that the sudden defense of constitutional integrity seems not in line with the development of UK constitutional law since its trend in the last 20 years has been towards decentralization through an asymmetrical process of devolution⁴². On the other hand, Skoutaris refers to the possibility of

⁴¹ BBC News, “Theresa May rejects EU’s draft option for Northern Ireland”, available at <https://www.bbc.com/news/uk-politics-43224785>

⁴² Colin Harvey, “No, the Northern Ireland Brexit solution was not going to break up the United Kingdom” *The Telegraph* (5 December 2017), available at

territorial differentiation⁴³ by which EU law applies under art. 355(1) TFEU in territories that have a different relationship with the EU than their national governments, without challenging the sovereignty of the state or the constitutional relationship of these territories with their national government⁴⁴. Thus, it is reasonable to assume that perhaps it was not the ideal of ‘constitutional integrity’ at the heart of the concerns of the British PM, but indeed the more material concept of ‘market integrity’, since the common regulatory area would have meant possibly disrupt the unity of the UK internal market. In this light, one could hold that constitutional and market integrity may overlap from a variety of perspectives. In fact, the EU Brexit chief-negotiator responded to Theresa May that the EU would respect the UK constitutional integrity, whilst preserving the EU internal market integrity⁴⁵. Once again, the two concepts of constitutional and market integrity overlap, and from a European perspective this overlap could be even more understandable considering that the process of European integration began as a process of economic and thus market integration. The overlap of constitutional and market integrity also emerges if one considers the Irish perspective. Having renounced any claim on the northern territories, the concerns of Ireland are mainly linked to the preservation of the market integrity on the island of Ireland. Although, the Republic of Ireland must face the issue of Irish citizens living in Northern Ireland, and therefore the concerns for the protection of rights go beyond market integrity, moving slightly toward the concept of constitutional integrity. In partial contrast to the position by which Brexit is a matter of market integrity for the European Union, we may find the words of the European Court of Justice in

<https://www.telegraph.co.uk/news/2017/12/05/no-northern-ireland-brexite-solution-not-going-break-united-kingdom/>.

⁴³ Nikos Skoutaris, “Territorial differentiation in EU law: can Scotland and Northern Ireland remain in the EU and/or the Single Market?” *Cambridge Yearbook of European Legal Studies*, vol. 19 (2017): 300.

⁴⁴ Nikos Skoutaris, “Why the EU’s Brexit ‘backstop option’ for Northern Ireland doesn’t threaten the UK’s constitutional integrity” *The Conversation* (6 March 2018), available at <https://theconversation.com/why-the-eus-brexite-backstop-option-for-northern-ireland-doesnt-threaten-the-uks-constitutional-integrity-92869>

⁴⁵ Speech by Michel Barnier at the closing session of Eurochambre’s European Parliament of Enterprises 2018 (10 October 2018), available at http://europa.eu/rapid/press-release_SPEECH-18-6089_en.pdf.

*Wightman*⁴⁶. In this case, the court held that forcing a Member State to withdraw contrasts with the ‘purpose [of] the creation of an ever closer union among the peoples of Europe’⁴⁷. On this ground, we may argue that the court is referring to the constitutional integrity of the European Union and thus believes that Brexit would mean disrupting such integrity.

In this light, the two concepts of constitutional status and constitutional integrity have been strongly interlinked from the beginning of the Brexit saga. In fact, the border issue has been primarily treated as an economic problem rather than a constitutional problem. The British sudden objections in defense of the constitutional integrity of the UK seem rather odd, especially considering that, constitutionally, Northern Ireland has already been treated differently from the rest of the UK since 1998. As mentioned, the principle of consent provides that if the people of Northern Ireland wish to reunify with the Republic of Ireland, thus departing from the UK, the British government must accept it. One may think that, in case the Northern Irish people would decide to reunify with the Republic of Ireland, the UK would not oppose the process in the name of the constitutional integrity of the Union. Therefore, one may suppose that what lies behind the logic of the British Prime Minister considerations is mainly political nature. To approve a final agreement on the withdrawal of the UK from the EU, PM Theresa May needs to secure the political support of the DUP, which would not accept to be separated from the United Kingdom, both politically and economically. In fact, the DUP would never renounce to its unionist stance that the constitutional status of Northern Ireland is as part of the British Union, and the Northern-Irish economy is highly dependent on the exportations towards the rest of the UK⁴⁸. Therefore, to make sure that the DUP does not withdraw its support to the government, Theresa May claimed alleged national and constitutional concerns (namely the constitutional integrity of the UK), while she is, in fact, referring to the market integrity of the UK.

⁴⁶ European Court of Justice, 10 December 2018, C-621/18, *Wightman v. Secretary of State for Exiting the European Union*.

⁴⁷ European Court of Justice, C-621/18, *Wightman*, par. 67.

⁴⁸ Financial Times, “Brexit disruption threatens business in Northern Ireland” (13 August 2018), available at <https://www.ft.com/content/90ed1198-9eef-11e8-85dae7a9ce36e4>

This being said, one cannot deny that Brexit has caused an overall constitutional crisis in the UK since the British system must confront three paradigm shifts that are shaking it to its core: the move from parliamentary to popular sovereignty, the fall of the traditional two-party systems, and the increasing involvement of the Parliament in treaty negotiations⁴⁹. One cannot thus downplay the difficulties the UK government is currently facing, that are made worse by the complex situation of Northern Ireland and the legacy of its troubled relationship with the rest of the country.

6. Conclusion

The aftermath of Brexit re-launched the conversation concerning the constitutional status of Northern Ireland. Compared to past debates, however, the current discussion does not address the constitutional dimension directly, as it had been the case during the Troubles. But, when discussing the Irish border and the relationship between Northern Ireland and the United Kingdom, it is inevitable to return to the very roots of the Northern-Irish question, namely its constitutional status. Colin Harvey argues that a no-deal scenario offers a context in which the consent of the people of Northern Ireland might be assessed as well as a strong argument in favor of Irish unity since it would provide effective guarantees on human rights, equality, and identity⁵⁰. Besides, the relational terms of the 1998 Agreement might lead us to imagine that the Agreement has created a system of institutions that could resiliently ‘self-sustain’ in a time of crisis such as Brexit, since it provides instruments to preserve the North-South relationship and the East-West relationship. Unfortunately, this is something that may be true only on paper, since the institutions provided by the Good Friday Agreement are deeply affected by political dynamics and they have not been able to counterbalance the effects of Brexit during negotiations⁵¹.

⁴⁹ Holger Hestermeyer, “Disastrous stability: Brexit as a constitutional crisis” *Verfassungsblog* (7 February 2019), available at <https://verfassungsblog.de/disastrous-stability-brexite-as-a-constitutional-crisis%E2%BB%BF/>.

⁵⁰ Colin Harvey, “Brexit has altered the conversation on Irish unity” *UK in a changing Europe* (7 February 2019), available at <https://ukandeu.ac.uk/brexit-has-altered-the-conversation-on-irish-unity/>.

⁵¹ At the moment, without the Northern Irish Executive in place, the North-South Ministerial Council cannot be convened, as well as the British-Irish Council has barely worked in the past few years.

Colin Harvey correctly maintains that Brexit should re-launch a constitutional conversation about Northern Ireland and its future in the island of Ireland⁵², but this conversation should not be limited to Northern Ireland or its place in the United Kingdom. In fact, Brexit has raised multiple constitutional questions. The departure of the United Kingdom from the European Union must prompt an in-depth debate on the constitutional integrity of the United Kingdom and the future of devolution in terms of UK constitutional law. Moreover, Brexit has an impact on the constitutional integrity of the European Union as well, as shown by the ECJ decision on *Wightman*. There is, thus, a need for a meaningful ‘constitutional conversation’ addressing crucial principles, such as human rights and equality, which are at stake. In this light, one must hope that the constitutional issues will eventually become of greater relevance in the public debate than the merely economic and market interests encompassed by Brexit.

Abstract

Il recesso del Regno Unito dall’Unione Europea ha posto svariati interrogativi riguardo il futuro dell’Irlanda del Nord, per le sue particolarità di natura politica, storica e giuridica, che la distinguono dalle altre *devolved nations*. L’articolo si concentra in particolare su una di questi elementi cruciali, ovvero il futuro dello status costituzionale dell’Irlanda del Nord, in quanto parte del Regno Unito oppure della Repubblica d’Irlanda, e di conseguenza sul significato del dibattuto concetto di ‘integrità costituzionale’.

The withdrawal of the UK from the EU raises several questions related to the future of Northern Ireland. The latter presents peculiarities of political, historical, and legal nature that set it apart from the other devolved nations. The aim of this article is to focus on one of these crucial aspects, that is the constitutional status of Northern Ireland, as part of the United Kingdom or of the Republic of Ireland, and consequently, on the concept of ‘constitutional integrity’.

⁵² Colin Harvey, “Good Friday Agreement and a new constitutional conversation” (August 30, 2017), available at <http://www.agendani.com/good-friday-agreement-new-constitutional-conversation/>.