THE BREXIT CHALLENGE FOR IRELAND AND THE UNITED KINGDOM

Since the 1950s, European integration has included ever more countries with ever-softening borders between them. In its apparent reversal of integration and its recreation of borders, Brexit intensifies deep-seated tensions, both institutional and territorial, within and between the constitutional orders of the United Kingdom and Ireland. In this book, leading scholars from the UK and Ireland assess the pressures exerted by Brexit, from legal, historical, and political perspectives. This book explores the territorial pressures within the UK constitution, connecting them to the status of Northern Ireland before exploring how analogous territorial pressures might be addressed in a united Ireland. The book also critically analyses the Brexit process within the UK, drawing on Irish comparative examples, to assess unresolved tensions between popular mandate, legislative democracy, and executive responsibility. Through practical application, this book explores how constitutions function under the most intense political pressures.

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978-1-108-96588-0 — The Brexit Challenge for Ireland and the United Kingdom
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The Brexit Challenge for Ireland and the United Kingdom

CONSTITUTIONS UNDER PRESSURE

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UNIVERSITY PRESS

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Shaftesbury Road, Cambridge CB2 8EA, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India

103 Penang Road, #05–06/07, Visioncrest Commercial, Singapore 238467

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www.cambridge.org
Information on this title: www.cambridge.org/9781108965880

DOI: 10.1017/9781108966399

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First published 2021
First paperback edition 2023

A catalogue record for this publication is available from the British Library

ISBN 978-1-108-83292-2 Hardback
ISBN 978-1-108-96588-0 Paperback

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Preface

This book originated in a conference of the British Irish Chapter of the International Society of Public Law (ICON-S) held at the University of Strathclyde in April 2019. The decision of the United Kingdom to leave the European Union had, perhaps ironically, illustrated the extent to which the constitutional futures of Ireland and the United Kingdom are intertwined. There has never been greater need for comparative constitutional scholarship that explores the relationships between and within Ireland and the United Kingdom. The ICON-S Chapter will continue that work, and this book is an attempt to bring some of that work to a wider audience.

We are grateful to all who presented papers at the Strathclyde conference, including those whose papers did not fit the theme upon which we settled for this book. We are also grateful to those authors who joined the project after the conference, helping us to provide a fuller account of the relevant issues. Strathclyde University and ICON-S provided financial support for the conference, without which it could not have proceeded. Cambridge University Press have provided impeccable and unstinting support for the project. In particular, we are grateful to Finola O'Sullivan, Marianne Nield, Becky Jackman, Malini Soupramanian, and Emma Sullivan.

The book proposal was approved in April 2020 as the world went into lockdown. Notwithstanding these most difficult circumstances, all authors worked with us to deliver a complete manuscript on schedule to Cambridge University Press on 1 September 2020. This date marks the cut-off point for the legal analysis in the book but it does raise significant issues. Eight days later, the UK government published the United Kingdom Internal Market Bill (now act), raising issues relevant to the analysis in many of the chapters. Rather than ask the authors to adapt their chapters to take account of the bill as it worked its way through the legislative process, we instead highlight here the ways in

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which the chapters in the book both anticipate the issues raised by the Internal Market Act and are affected by it.

For those outside the United Kingdom, the most striking feature of the bill as initially drafted were the provisions in Part V which authorised, in disregard of international law, UK government ministers to override aspects of the Withdrawal Agreement ratified by the United Kingdom and endorsed by the UK Parliament only eight months previously. In his chapter, Casey provides an account of how legal advice is deployed by the executive to enhance the legal credibility and political legitimacy of contested and controversial political positions. In some ways, the Internal Market Bill challenges this analysis, with the UK government making a virtue of its law-breaking, in defence of what it deemed the United Kingdom's national interests and its territorial integrity. In other ways, however, the damage caused by the resignation of legal advisors and Law Officers alongside the attempts – however unpersuasive – of other Law Officers to provide legal justifications for the bill, supports Casey's observations about the role played by government lawyers in legitimising executive decisions.

If implemented, the threat to breach the Northern Ireland Protocol – the product of months of careful negotiation between actors in the EU, the United Kingdom, Ireland, and Northern Ireland, as documented by de Mars and O'Donoghue in their chapter – would likely have led to the re-introduction of a border between Ireland and Northern Ireland. This in turn would probably have further increased support for a united Ireland – as analysed in the chapter by Doyle, Kenny, and McCrudden and the subsequent chapter by Rooney. In early December 2020, agreement was reached between the chairs of the EU-UK Joint Implementation Committee which allowed the provisions in Part V to be withdrawn, and these potential adverse consequences to be averted. Nevertheless, the very threat to break international law calls into question the United Kingdom's commitment to all international treaties, including the Belfast/Good Friday Agreement. It raises real doubts as to whether the United Kingdom – or at least the current UK government – would respect a decision of the Irish people, ratified in referendums north and south, in favour of unification.

The Internal Market Act also exerts significant pressure on the devolution settlement within the United Kingdom. It creates new legal supports for frictionless trade within the United Kingdom, to replace the homogenising effects of EU law, but in ways which are likely to restrict the ability of the devolved institutions to regulate their own territories in accordance with local needs and local political priorities, to a significantly greater extent than EU law. The Act also empowers UK ministers to spend in devolved policy areas,

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again prioritising UK-wide objectives above devolved autonomy. As with other Brexit legislation, the Internal Market Act amounts to a unilateral rewriting of the devolution settlement by the UK government, over-turning the consensual process of development of devolved governance that had hitherto prevailed. Hunt's chapter most directly anticipates the Internal Market Act, noting that the approach in the preceding Internal Market White Paper was 'markedly less collaborative, more top-down, and potentially damaging to the scope and exercise of devolved competence'. The bill's enactment process more than bears out this assessment. Although both the Scottish and Welsh Parliaments, once again, voted to withhold their consent, the Bill was enacted anyway, with only minimal compromises offered by the UK government, providing further evidence of Casanas Adam's analysis of the way in which the Brexit process has strained the Sewel Convention almost to breaking point.

The legislation's liberal use of Henry VIII clauses, threatening to allow ministers to put the United Kingdom in breach of international law, as well as to alter the scope of the internal market principles, bears out Tucker's claim that 'a likely legacy of the Brexit process will be (and perhaps already is) the exacerbation of the already troubling constitutional position of delegated legislation'. By the same token, as Howarth's analysis also suggests, the Act marks a further assertion of Whitehall's power at the expense of Westminster. Here, however, the legislation raised new issues (as regards the Brexit process) – in the context of a UK government which once again has a strong majority in the House of Commons – about the ability and willingness of the House of Lords to defend constitutional values and act as a brake upon the executive. Although peers significantly amended the Bill in order to defend devolved autonomy, and - usually - insisted on those amendments through several rounds of parliamentary 'ping pong', they ultimately dropped their opposition in return for relatively limited concessions by the government.

Part V of the bill also contained a sweeping ouster clause, no doubt intended to deter the kind of constitutional litigation that McCorkindale and McHarg identify in their chapter as having been such a notable feature of the Brexit process. Nevertheless, given the Welsh Government's unprecedented threat to seek judicial review of the Act, it seems like litigation (even where, as in this instance, it appears highly speculative) remains an attractive prospect where political channels of influence seem to be closed off.

In his chapter, Loughlin identifies six phases of constitutional development, with the final phase (2015–19) described as 'Paralysis'. It may be that we are witnessing an attempt to move beyond paralysis, by centralising power in the hands of a UK executive intolerant of constraints upon its power, whether these come from Parliament, the courts, the devolved institutions, or

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international agreements. However, the fate of the bill so far suggests that such centralising attempts are likely to continue to be resisted, highlighting an ongoing mismatch between the constitutional ambitions which motivated Brexit and the reality of constrained and dispersed constitutional power.

In sum, the UK Internal Market Act provides a vivid illustration of the constitutional pressures that continue to be exerted by Brexit on the constitutions of both the United Kingdom and Ireland, and on relationships between them. The constitutional implications of Brexit did not come to an end on 31 January 2020, when the United Kingdom finally left the EU; nor did they end when the implementation period elapsed. Rather, Brexit is likely to shape and condition the constitutional futures of these islands for many years to come.

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