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Brexit, the "unwritten" Constitution and the Populist Policy Agenda of the *Elective Dictatorship*

Mel Kenny and Antonio Cardesa-Salzmann*

"Brexit" represents the UK with multiple challenges, inter alia, for the coherence of its "unwritten Constitution" as well as for its territorial integrity. This paper assesses the extent to which the UK has become constitutionally compromised through this process, whether it has shifted towards a form of governance by "elective dictatorship" and now finds itself on a path to both increasingly turbulent relations with the EU and increasingly problematic policy contestation within the UK.

I. INTRODUCTION: "BREXIT", THE "UNWRITTEN" CONSTITUTION AND THE ELECTIVE DICTATORSHIP

The UK's exit from the EU ("Brexit") has exposed how disunited the UK truly is: while, in the 2016 referendum, England and Wales voted to leave the EU (53.4%; and 52.5%), Scotland und Northern Ireland voted to remain (62% and 55.8%).[1] Overall, given a voter turnout of 72.2%, only 37.5% of those eligible to vote voted to leave the EU. Yet, despite this slender margin, on 31 January 2020, 5,463,300 Scots and 1,893,700 Northern Irish[2] lost an important part of their identity as EU citizens despite the fact that referenda only have an *advisory status* in UK constitutional law[3] and despite the fact that the *Sewel Convention* had appeared to require *further* approval in the national parliaments.[4] Moreover, under the terms of the *Withdrawal Agreement* and its *Irish/Northern Ireland Protocol (I/NI Protocol),* this loss of identity is differently patterned: while Scots have lost their status as EU citizens, special dispensations guarantee all the inhabitants of Northern Ireland their EU free movement and establishment rights, membership of the EU Single Market and an invisible EU border on the Island of Ireland.[5] Scotland and Northern Ireland now face different forms of "remote" control.

*School of Law, University of Strathclyde, Glasgow. The usual disclaimer applies.

[1] *EU Referendum: The results in Maps and Charts*, *BBC News* (Online ed. 24 June 2016).
[2] ONS, 2019: https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates.
[3] *R (Miller) v The Prime Minister; Cherry and others v Advocate General for Scotland* [2019] UKSC 41, Judgment of the Court: Lady Hale and Lord Reed, para.7.
[4] *Sewel Convention:* "…Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish parliament." Lord Sewel, HL Deb 21 Jul 1998 Vol 592 c 791. The Scotland Act 2016 inserted a new s.28(8) into the Scotland Act 1998 to entrench the Convention: M. Elliott, The Supreme Court's Judgment in Miller: In Search of Constitutional Principle (2017) Cambridge LJ 257.
[5] *Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (Withdrawal Agreement)*, ((2020), OJ L29/7 of 31.1.2020); containing: *Protocol on Ireland/Northern Ireland* (2020) OJ L29/102): Editorial: 'Sour lessons from the Union's first encounters with the UK as a "free and sovereign country"' (2021) CMLRev 1.

Brexit thus represents a fundamental challenge for the "unwritten" UK Constitution; a Constitution in which the only limits are political and moral rather than substantive and legal. As *Lord Halisham* once described the constitutional constraints:

> "…They are found in the consciences of members (of Parliament), in the necessity for periodical elections, and in the so-called checks and balances inherent in the composition, structure and practice of Parliament itself." [6]

Given this constitutional fragility, *Hailsham* warned of the danger that an unscrupulous group of politicians could effectively *hijack* the constitution and establish an elective Dictatorship.[7] Behind this conceptualisation lies the "good chap" assumption of UK Constitutional law: that those who rise to high office will recognise the constraints to which the Executive must be held.[8]

This paper explores the shift towards Executive Sovereignty which Brexit has brought about and the implications of this, especially with regard to the future of EU/UK relations and the territorial contestation of policy within the UK. First, the paper surveys the archictecture of the emergent elective dictatorship: the politicisation of the Courts, the failure of Parliament and the strengthening of the Executive (Part II); second, the instrumentalisation of both sets of withdrawal arrangements - *Withdrawal Agreement* and the *Trade and Cooperation Agreement* - by the Executive and the promotion of a "Culture Wars" agenda (Part III). Finally, attention turns to an assessment of the implications of Brexit, in particular, for Scotland and the territorial contestation of future policy in the light of the *Continuity Act* 2021 (Part IV).

II. POST-BREXIT UK GOVERNANCE ARCHICTECTURE: SHIFTING ROLES OF EXECUTIVE, PARLIAMENT AND JUDICIARY

Despite the Brexit campaign's slogan of "taking back control!", the UK Parliament was to prove largely ineffective in scrutinising and shaping the Brexit process. In fact, parliamentary activity centred on the production of super-majorities for *confidence votes* supported by both the main English political parties, first, to notify Brexit and, second, to settle the future relationship.[9] As a consequence, the Executive seized control of the process: seeking, initially, to notify Brexit by *Royal Prerogative* and, subsequently, seeking to *prorogue* Parliament to ensure that Brexit could take place without *parliamentary interference*. To this backdrop scrutiny was exercised by the courts, which, in turn, became subject to criticism for their "activism".[10]

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[6] *Lord Halisham*, 'The Richard Dimbleby Lecture: Elective dictatorship,' *The Listener*, pp. 496–500, 21 October 1976.
[7] Ibid. "…The sovereignty of Parliament has increasingly become, in practice, the sovereignty of the Commons, and the sovereignty of the Commons has increasingly become the sovereignty of the government."
[8] *A. Blick & P. Hennessy, 'Good Chaps No More? Safeguarding the Constitution in Stressful Times* (The Constitution Society, London, 2019): https://consoc.org.uk/wp-content/uploads/2019/11/FINAL-Blick-Hennessy-Good-Chaps-No-More.pdf
[9] *M. Loughlin & S. Tierney*, 'The Shibboleth of Sovereignty,' (2018) 81 MLR 989.
[10] 'Enemies of the people!' *Daily Mail*, 3 November 2016.

A. Judicial Review: *Miller I*

The first steps of judicial scrutiny were taken in *Miller* in the *High Court* (HC) and in *Agnew/McCord* in the *High Court of Northern Ireland* (HCNI):

- In *Miller*[11] the HC reviewed the legitimacy of Brexit notification. Here, the Government had originally wanted to use the *Royal Prerogative* for this purpose.[12] The HC disagreed[13] placing emphasis on the *European Communities Act* 1972 (ECA 1972). The judgment provoked furious press reaction.[14]
- In *Agnew/McCord*[15] the HCNI reviewed the relationship between Brexit and the Northern Irish *Peace Process*. Here, while the HCNI downplayed the use of the *Prerogative*,[16] it identified the core issue as whether the Northern Irish Constitution presupposed a *continuing* application of EU law. The HCNI decided that that it did not, holding that: first, Brexit notification neither trespassed on individual rights, nor interfered with the operation of Northern Irish institutions;[17] second, the *Sewel Convention* was not justiciable;[18] third, that *some* prerogative powers escaped judicial review;[19] fourth, the *Northern Ireland Office* was not bound to conduct any Brexit *impact assessment*;[20] and, fifth, that neither the *Northern Ireland Act 1998 (NIA)* nor the *Belfast/Good Friday Agreement 1998 (B/GFA)* required consent for every change to the status of Northern Ireland.[21]

Thus, whilst the HCNI saw EU Law simply as a body of *international* law, the HC saw EU law as a core, constituent part of national law.[22] The Government appealed and the cases were joined in the Supreme Court. [23] The Supreme Court subsequently held that an *Act of Parliament, such as the ECA 1972,*[24] could not be *subsequently* changed by Notice or Declaration.[25] Moreover, the *Prerogative powers* only played a subsidiary constitutional role,[26] and could be altered by subsequent legislation.[27] Brexit could, therefore, only be

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[11] *R (Miller) v. Secretary of State* [2016] EWHC 2768 (Admin); *Lord Pannick QC*, 'Let's call the whole thing off': Litigation to ensure Parliamentary Approval before Ministers gave notification of UK's intention to withdraw from the EU,' in *The UK Supreme Court Yearbook 2016-17,* (Hrsg. Clarry) (London: Appellate, 2018 (Vol. 8)); *S. Douglas-Scott* 'Brexit, Art. 50 and the Contested British Constitution,' (2016) MLR 1019; *N. Aroney, 'R (Miller) v Scretary of State for Exiting the EU*: Three Competing Syllogisms,' (2017) MLR 726; *J. Murkens*, 'Mixed Messages in Bottles: The European Union, Devolution, and the Future of the Constitution,' (2017) MLR 685; *T. Poole,* 'Devotion to Legalism: On the Brexit Case,' MLR, 2017, 696; *K. Ewing,* 'Brexit and Parliamentary Sovereignty,' (2017) MLR 711.
[12] ibid. *Miller,* Para. 4.
[13] ibid. Para. 92 und 94. *European Communities Act, 1972* passed to accede to the EEC.
[14] 'Enemies of the people!' *Daily Mail*, 3 November 2016.
[15] *Re McCord*, [2016] NIQB 85.
[16] ibid. Para. 109.
[17] ibid. Para. 107.
[18] ibid. Para. 122.
[19] ibid. Para. 131.
[20] ibid. Para. 145.
[21] ibid. Para. 152.
[22] *C. McCrudden & D. Halberstam*, '*Miller* and Northern Ireland: A Critical Constitutional Response,' University of Michigan, Public Law and Legal Theory Research Paper Series Paper No. 575, October 2017 (http://ssrn.com/abstract=3062964 pp.25-29).
[23] *R(Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.
[24] ibid. Para. 34. See: *M. Elliott,* 'The Supreme Court's Judgment in Miller,' (2017) Cambridge LJ 257.
[25] ibid. Para. 44.
[26] ibid. Para. 47.
[27] ibid. Para. 48.

notified through an *Act*.[28] In contrast, *Agnew/McCord* barely figured in the Supreme Court's judgment:[29] the *B/GFA* 1998 only provided Northern Ireland with a binary choice between remaining within the UK or uniting with Ireland[30] and the *Sewel Convention* was not justiciable.[31] The result is paradoxical. *Miller I* is both modern (rejecting the *Prerogative*) and dangerous (undermining the *Peace Process).* Moreover, the Supreme Court appeared to suggest that neither the *Peace Process* nor *Devolution* had changed the substantial arrangements of the UK Constitution! In contrast to the treatment of the ECA, laws and agreements entered into on either basis were neither "constitutional" nor did they possess "constitutional character."[32]

A generous reading of *Miller I* focuses on the confirmation of constitutional checks and balances. Yet to what extent can the EU now trust any of London's "Brexit-concessions"? The *Withdrawal Agreement* is binding only if contained in national law, yet any such law can be revoked by an *Act* at any time! Nevertheless, the Supreme Court's conclusions were to prove significant to the extent that they found their expression in the *European Council's Guidelines* to the Brexit process.[33] Resolution of the *Irish Question* thus became a precondition for proceeding to the second phase of the UK-EU Negotiations (Trade and Cooperation).[34]

B. Judicial Review: *Miller II*

Again, it fell to the courts to scrutinise the controversial 2019 *Prorogation of Parliament*: questions on its compatibility with the *Northern Ireland (Executive Formation) Act 2018* and *European Union (Withdrawal) Act 2018* were referred to the *Court of Session, Inner House* (CSIH) in Edinburgh[35] and the *High Court* (HC) in London.[36]

- In *Cherry (CSIH)* Lord President Carloway held the *Prorogation* illegal because: "…First, the prorogation was sought in a clandestine manner… Secondly, the decision to prorogue… was taken against the background… in which it was being suggested that MPs would be unable to prevent a no deal Brexit if time was simply allowed to elapse. …[P]rorogation was being mooted… as a means to stymie any further legislation…"[37]

[28] ibid. Para. 78.
[29] ibid. Para. 126.
[30] ibid. Para. 135.
[31] ibid. Para. 151.
[32] ibid. Para. 67.
[33] *Council Guidelines on Brexit negotiations*, 29 April 2017: https://ec.europa.eu/commission/publications/european-council-article-50-guidelines-brexit-negotiations_en Para. 11.
[34] *European Council Conclusions from the Meeting of Delegates on 20 October 2017* http://www.consilium.europa.eu/en/meetings/european-council/2017/10/19-20/ European Commission Guiding Principles for the dialogue on Ireland/Northern Ireland, 20 September 2017.
[35] *Joanna Cherry QC MP & Others v The Advocate General* [2019] CSIH 49.
[36] *R (Gina Miller) v The Prime Minister* [2019] EWHC 2381.
[37] Fn.35. Lord Carloway Para.54, pp.25-6.

- In contrast, the HC held the *Prorogation* non-justiciable: "The [PM's] decision… and the advice given to Her Majesty… were political. They were… political in nature and there are no legal standards against which to judge their legitimacy..."[38]

The cases were joined on appeal to the Supreme Court.[39] The Supreme Court decided that the PM's advice to the Queen was illegal and that the *Prorogation* was unlawful: "It is impossible for us to conclude… that there was any reason… to advise Her Majesty to prorogue Parliament for five weeks… We cannot speculate… upon what such reasons might have been..."[40]

C. Provisional Conclusions

As a result of what both the UK Government and the UK media saw as the *Judicial Activism* of the *Miller* case-law, the Government subsequently announced its intention to limit recourse to judicial review.[41] In the *Queen's Speech 2021,* it went on to set out a *Judicial Review Bill*.[42] By reducing the scope of judicial review, power will be further concentrated with the Executive and away from Parliament and the Judiciary; a key step in establishing a constitutional archictecture for the elective dictatorship.

III. INSTRUMENTALISATION OF EU/UK NEGOTIATIONS: AGREEING TO (AND THEN RESILING FROM(?)) THE WITHDRAWAL ARRANGEMENTS

A. *Withdrawal Agreement* 2019-20: Shift from *Backstop* to *Frontstop*

To some surprise, on coming to power PM Johnson returned to an old EU proposal to resolve the regulatory Brexit dilemma in Northern Ireland: the introduction of a *single regulatory area* for the Island of Ireland.[43] Under this arrangement, Northern Ireland would remain in the Single Market, and a border for agriproducts and foodstuffs would run through the Irish Sea: a *Frontstop* would replace the *Backstop!*[44] Parliament subsequently voted for fresh elections in which the PM successfully presented the *Withdrawal Agreement* incorporating this *Frontstop* as an "*Oven-Ready*" deal to finally *„Get Brexit Done!"* The PM promised Northern Ireland that there would be no customs formalities,[45] even urging business to throw any paperwork required at the regulatory border in the bin(!)[46] The *Conservatives* won the

[38] Fn.36. Para.51.
[39] *Miller I* (Supreme Court), Fn.3.
[40] ibid. Lady Hale and Lord Reed, Para.61.
[41] 'Government zealots fix their sights on judicial review,' *Prospect*, 28 August 2020.
[42] The Queen's Speech, 11 May 2021: Background Briefing Notes: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/985029/Queen_s_Speech_2021_-_Background_Briefing_Notes..pdf.
[43] UK proposals for a new Protocol on Ireland/Northern Ireland, 2 October 2019: https://www.gov.uk/government/publications/uk-proposals-for-a-new-protocol-on-irelandnorthern-ireland
[44] *M. Dougan*, 'So Long, Farewell, Auf Wiedersehen, Goodbye: the UK's Withdrawal Package,' (2020) CMLRev 631.
[45] 'Brexit: No checks on goods from NI to UK, says PM,' *BBC,* 15 November 2019.
[46] Fact Check - Johnson contradicts own cabinet on Northern Ireland Trade, *Channel 4 News*, 8 November 2019.

2019 election with 43.6% of the votes, 365 seats in the *House of Commons* and a parliamentary majority of 80.[47]

The new administration's first priority was the second reading of the *Withdrawal Agreement Bill* (WAB). Yet, with the new majority, the new "December" WAB was to take a radically different form to the pre-election "October" WAB: The Government could now dispense with the issues on which parliamentary compromise had been necessary in the "October" WAB. The true character of Brexit became more explicit: first, a more radical rejection of EU Law: *Clause 26* reversing previously agreed guidance to the courts[48] that retained EU law was to be followed after the implementation period;[49] second, the rejection of parliamentary controls: abolition of "*Meaningful Votes*" (*Clause 13*); weakening scrutiny (*Clause 31*);[50] third, the reduction of Ministerial oversight*:* eroding ministerial decision-making (*Clause 30*);[51] powers to delay implementation (*Clause 33)*;[52] fourth, the reduction of employee rights: withdrawal of guarantees *(Clause 34);*[53] and fifth, the weakening of Asylum laws (*Clause 37*).[54] A narrow path to Brexit was now open. On the EU side the concessions seemed to supply workable contours for a Free Trade deal.[55] Meanwhile, London had achieved a yet deeper rejection of EU law, a more radical watering down of employment rights and a more fundamental reversal of Asylum law!

B. Internal Market Bill 2020: Resiling from the *Withdrawal Agreement*?

Predictably, the disruption was then complete when the Government announced its intention, through the *Internal Market Bill (IMB),* to disapply the *Withdrawal Agreement* "in a very specific and limited way"(!)[56] The logic for this was the danger that the negotiations on the future relationship *might* fail; competences therefore needed to be transferred back to London on a precautionary basis(!) With this move, the *I/NI Protocol* was shaken to its foundations.[57] Moreover, the casual way in which the announcement was made caused consternation in the *Lords*[58] as much as in the United States.[59] The problematic provisions were: Clause 42, which transferred regulatory competence for the trade in goods back to London.[60] Provisions

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[47] Election Results 2019: https://www.bbc.co.UK/news/election/2019/results
[48] *European Union (Withdrawal Agreement) Bill 2019:* "October" version (s 6).
[49] *European Union (Withdrawal Agreement) Bill 2019:* "December" version: https://publications.parliament.uk/pa/bills/cbill/58-01/0001/20001.pdf 'The European Union (Withdrawal Agreement) Bill and the Rule of Law,' *Bingham Centre for the Rule of Law*, 24 Januar 2020.
[50] WAB changes: https://commonslibrary.parliament.UK/the-new-eu-withdrawal-agreement-bill-whats-changed/.
[51] Fn.49: Clause 30.
[52] ibid.: Clause 33.
[53] ibid.: Clause 34.
[54] ibid.: Clause 37.
[55] Fn.44, pp.631-704.
[56] *UK Internal Market Bill 2019-21*: https://publications.parliament.UK/pa/bills/cbill/58-01/0185/200185.pdf Brandon Lewis MP, Secretary of State for Northern Ireland, Hansard: HC Deb 29 Sep 2020 Vol 679 c 509. See: *CMLRev Editorial* (2021), Fn.5. pp.3-7.
[57] *International Bar Association, Webinar on the IMB: Lady Kennedy, Lord Neuberger, Phillipe Sands QC and Dominic Grieve QC*, 29 September 2020: https://www.ibanet.org/International-Law-and-the-Internal-Market-Bill.aspx
[58] The *House of Lords* voted by 433 to 165 against clauses 42-43, and with 407 to 148 votes against clauses 44-46: HL, 9. November 2020: https://hansard.parliament.uk/lords/2020-11-09/debates/67BF795E-B630-4922-B1AB-2A0197888C5C/UnitedKingdomInternalMarketBill.
[59] 'Biden warns Johnson N Ireland peace cannot become casualty of Brexit,' *Financial Times,* 17 September 2020.
[60] *IMB*, Fn.56, Clause 42(1) 'A Minister of the Crown may by regulations make provision about the application of exit procedures to goods, or a description of goods…'

to the contrary would not be applied.[61] Clause 43(1) which transferred regulatory competence for subsidies back to London.[62] And Clause 45, which butressed Clauses 42 and 43,[63] and specified that measures: "…under…42(1) or 43(1) are not to be regarded as unlawful on the grounds of any incompatibility or inconsistency with relevant international or domestic law." New domestic measures had supremacy over *Retained law* so that provisions of EU law "…cease to be recognised and available in domestic law, or enforced, allowed and followed….".[64]

That a State should publish draft legislation with the intent of revoking an international agreement which it had signed just nine months' previously, and which, in turn, sought to support the international *B/GFA 1998*, is without parallel. Here, the *Vienna Convention* not only recognises the principle of *Pacta Sunt Servanda* but that: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty…."[65] Moreover, in preparing this legislation, Ministers and *Law Officers*[66] seem to have fallen foul of the *Ministerial Code* which requires them to clarify and implement the law.[67] Despite the attempts to curtail these obligations,[68] the courts have confirmed that the *Code* is to be given a broad interpretation.[69] Yet, while the *Lord Chancellor* argued that the Bill could be put to Parliament precisely *because* it would never be applied(?), [70] the Scottish *Advocate General, Lord Keen,* resigned.[71]

Yet more subtlely still, the *IMB* also challenged the demarcation of regulatory competences *within* the UK, as we shall see further below with the specific area of devolved environmental policy in Scotland. London's priority, post- Brexit, is for a competition of legal orders *between* the four Nations; a priority which explains the prominence given to *Clause 2, IMB* on mutual recognition.[72] This explains Scottish concerns of a regulatory *race to the bottom*. In this way, the powers of the Parliaments in Edinburgh and Belfast will be undermined.

Finally, the *IMB* disrupted demarcation to the TFEU and the *Withdrawal Agreement:* the EU instituting infringement proceedings against the UK under Article 258 TFEU and Article 131 of the *Withdrawal Agreement*;[73] the *IMB* contravening Articles 5(3), 5(4) and Article 10 of the *I/NI Protocol* as well as the direct effect of Article 4 of the *Withdrawal Agreement*. These proceedings should not come as a surprise, especially in the wake of the EU's *2014 Framework on the Rule of Law*.[74] While the utility of such legal action is weakened when

[61] ibid. Clause 42(5).
[62] ibid. Clause 43(2).
[63] ibid. Clause 45(1): "...have effect notwithstanding any relevant international or domestic law with which they may be incompatible or inconsistent."
[64] ibid. Clause 45(2)(b).
[65] *Vienna Convention on the Law of Treaties* of 23 May 1969, Art. 27 (Art. 26: *Pacta sunt servanda*).
[66] *Attorney General*, *Solicitor General*, *Advocate General for Scotland,* and the *Secretary of State for Justice*.
[67] *2015 Ministerial Code, Cabinet Office,* Para. 1.3: "… to comply with the law, including international law and treaty obligations, and to uphold the administration of justice and to protect the integrity of public life."
[68] ibid. Para. 1.3.
[69] *R (Gulf Center for Human Rights) v The Prime Minister, The Chancellor of the Duchy of Lancaster* [2018] EWCA Civ 1855, para. 22.
[70] 'Brexit: Buckland says power to override Withdrawal Agreement is 'insurance policy'' *BBC*, 13 September 2020.
[71] 'Lord Keen: Advocate General for Scotland resigns over Internal Markets Bill', *The Scotsman,* 16 September 2020.
[72] *IMB,* Fn.56, Clause 2(1).
[73] *Withdrawal Agreement,* Fn.5, Art. 131.
[74] *2014 A New EU Framework to Strengthen the Rule of Law*, COM(2014) 158 final/2.

States are at the point of departure from the EU,[75] perhaps their real significance is more to do with the *rule of law* concerns that would apply should the UK (or England?) ever try to rejoin the EU.

However, the attempt to resile from the *Withdrawal Agreement* through the *IMB* was, ultimately, prevented in the *Joint Committee*. The concessions made to facilitate agreement on the terms of GB-Northern Ireland trade included: the simplification of import declarations; a six-month transition phase to streamline import modalities for the large supermarket chains; limits to the application of the EU State Aid rules to Northern Ireland; measures to facilitate the identification of *"at risk" products*.[76] In return, the problematic IMB Clauses were removed, so that the *Internal Market Act (IMA)* could be passed into law[77] and negotiators could address the future trading relationship by concluding the TCA.

C. The Trade and Cooperation Agreement 2020

The Trade and Cooperation Agreement (TCA) was finally agreed in the last week of December 2020.[78] In the UK, the TCA was ratified through adoption of the *EU (Future Relationships) Act 2020,*[79] which was waived through Parliament on 30 December 2020, passing the *Commons* with a super-majority of 521 votes to 73. The *Act* was passed so quickly that there was no time for scrutiny in the Brexit-subcommittee.[80] In contrast, the *Scottish Parliament* withheld its consent by 92 to 30 votes. The *Northern Ireland Assembly* similarly withheld its consent by 47 to 28 votes.[81] The *European Parliament* delayed ratification until the last possible moment, 27 April 2021.[82]

From the EU Perspective, the TCA aims at maintaining an equilibrium between the UK's Sovereignty, the EU's *Level Playing field* and the *Peace Process* in Northern Ireland. The EU *Level Playing field* is to be secured through the TCA provisions which scrutinise the economic impact of any retrogression from common trading standards, in which case the *non-retrogression* provisions come into play.[83] As a consequence, great emphasis is placed on dispute resolution in the TCA; in particular on the consultation and arbitration. Ultimately, parties may seek punitive sanctions, which need to be agreed to in the Expert and Specialist Committees.[84]

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[75] *P. Craig/G. de Búrca,* EU Law (2020, 7th Ed. OUP) pp.54-59.
[76] Joint Statement, *Joint Committee on the Implementation of the Withdrawal Agreement*, Brussels, 8 December 2020. https://ec.europa.eu/commission/presscorner/detail/en/statement_20_2346
[77] ibid. '…the UK will withdraw clauses 44, 45 and 47 of the UK Internal Market Bill….' *CMLRev Editorial* (2021) Fn.5. at pp. 9-10.
[78] *Trade and Cooperation Agreement Between The European Union and The European Atomic Energy Community And The United Kingdom Of Great Britain Aand Northern Ireland*, Brussels of 25.12.2020, (2020) OJ L444/14. 857 final.
[79] *EU (Future Relationships) Act 2020* https://publicatons.parliament.uk/pa/bills/cbill/58-01/0236/20236.pdf.
[80] Parliament must continue to scrutinise UK-EU relationship, Final Committee Report, 21 January 2021: (https://committees.parliament.uk).
[81] 'Northern Ireland Assembly votes against Brexit and trade deal', *Irish Examiner,* 30 December 2020.
[82] 'The European Parliament flexes its muscles on the EU–UK trade deal,' *European Policy Centre,* 5 March 2021.
[83] TCA, Fn.78, Part 6, Title 1, p.426.
[84] ibid. Art. 6.4.

The trade in goods, where the UK has a significant deficit with the EU (£-97bn),[85] plays the central role in the TCA.[86] The country of origin principle plays the key role; and customs duties may not be raised on goods originating from the territory of the other jurisdiction.[87] Meanwhile, border fees and charges are to be proportionate and not used as instruments for either indirect protection or taxation.[88] Antidumping measures may be resorted to, so long as they are compatible with GATT provisions, and are arrived at in a fair and transparent manner.[89] In the trade in agriproducts emphasis is placed on Sanitary and Phyto-Sanitary tests (SPS-Tests).[90] With respect to goods, the TCA is to the advantage of EU industry.

Yet with services, where the UK has the surplus in trade with the EU (£+18bn),[91] the TCA is less generous. Whilst business trips,[92] legal advice[93] and trade mark protection[94] enjoy limited protection, other important areas (e.g. *audiovisual services*) are not included.[95] Meanwhile, in such areas as *telephony* the reintroduction of roaming charges is allowed.[96] However, the consequences are greatest in financial services where Brexit has brought an end to the *Passporting* of UK financial services. Here a simple "Framework" for problem solving is provided for in the *Memorandum of Understanding* of 26 March 2021.[97] In services, the TCA is to the detriment of UK industry.

In the broader policy areas, the TCA is designed, from the EU perspective, to secure high levels of protection in areas such as employment law. *Non-retrogression*, should prevent parties from damaging or weakening agreed standards.[98] To this end the TCA[99] provides for penalties.[100] A similar framework is to operate in Consumer and Environmental law.[101] From London's perspective, however, retrogression will be difficult to prove: in each case a *concrete impact* on trade and/or investment must first be established. In the PM's view "Europeans" simply require minimal reassurances.[102] From the UK's perspective, standards are to be much less strictly enforced than the EU anticipates.[103]

D. Trade Turbulence as Grounds for Resiling from the TCA?

[85] House of Commons Library, Statistics on UK-EU Trade (2019) 10 November 2020: The UK had a trade deficit of -£79 billion in 2019. A surplus of £18 billion in services, a deficit of -£97 billion in goods.
[86] TCA, Fn.78, Part 2, Title 1 Trade in Goods: pp.19-80.
[87] ibid. Art. ORIG.1., p.42.; Art. GOODS.5 p.34.
[88] ibid. Art.GOODS.7.1.
[89] ibid. Art. GOODS.17, p.38.
[90] ibid. Art. SPS.1, p.58. Sanitary and phytosanitary measures (SPS-Rules).
[91] Fn.85.
[92] TCA, Fn.78, Art. SERVIN.4.1.
[93] ibid. Part II, Title II, Chapter 5, Part 7: pp.140-143. See: Appendix SERVIN-1, p.602 ff.
[94] ibid. IP.7.
[95] ibid. Art. SERVIN.1.1.5.
[96] ibid. Art. SERVIN.5.36.
[97] 'UK and EU reach financial regulation deal in breakthrough on co-operation,' *Financial Times*, 26 March 2021.
[98] TCA, Fn.78, Ch. 6, Art. 6.1. and 6.2, Art. 6.2.2: "A Party shall not weaken or reduce, in a manner affecting trade or investment… its labour and social levels of protection below the levels in place at the end of the transition period…."
[99] ibid. Art. 6.3.
[100] ibid. Art. 6.4.
[101] Ibid. Art. 7.5-7.7
[102] 'Workers Rights after Brexit easily eroded by Brexit trade deal,' *The Independent,* 27 December 2020. PM Johnson: "The UK won't immediately send children up chimneys or pour raw sewage all over its beaches…"
[103] *IPPR Report: 'The Brexit EU-UK Trade Deal: A First Analysis',* 27 December 2020: (www.ippr.org).

The GB-Northern Ireland trading regime which results is controversial: traders fear the increased costs and economists fear the inflationary impact. Long term, should Great Britain move away from the TCA (and Northern Ireland) more radically, the border arrangements will become more invasive still: were GB to succeed in its plan to join the CPTPP (*Common and Progressive Trans-Pacific Partnership*), the Irish Sea border would become an even more important demarcation line. Nevertheless, the most significant aspect of the *I/NI Protocol* remains its overarching role in the *Peace Process*; London and Brussels share responsibilities for guaranteeing that Peace. Yet both EU and UK have already undermined that Peace: first, when the Commission announced (29 January 2021) its plan to trigger border controls under Article 16, *I/NI Protocol*, to prevent the export of Covid-vaccine across the "open" EU-border in Ireland.[104] Even though this plan was swiftly withdrawn, the Commission had crossed the rubicon.[105] While it was open to London to de-escalate,[106] the temptation to stoke the flames of grievance proved too great; Ministers lectured the EU, *inter alia*, on hypocrisy[107] and the need for contractual compliance.[108]

Despite the initiation of talks in the *Partnership Council* to resolve the issues of trade disruption between GB and Northern Ireland, the *Secretary of State for Northern Ireland* then announced the extension of the transition phase from 31 March 2021 to 1 October 2021.[109] Moreover, in its reasoning, the Government cited the *Preamble* rather than any of the *I/NI Protocol's* substantive provisions.[110] Instead of *cooperation*, the UK now faces infringement proceedings[111] and arbitration proceedings.[112] Subsequently, the UK announced its intention to further delay the introduction of import controls on goods entering from the UK from the EU, almost as if the country attached no importance to border controls.[113]

E. Shifting Focus to the *Culture Wars'* Agenda

Brexit points a path to increasing political turbulence, a future in which disagreements with the EU, EU law, the *European Convention on Human Rights* (ECHR) and UN-Norms will need to be carefully choreographed. First, worrying initiatives can be made out in the Government's planned legislation, *inter alia*, the *Nationality and Borders Bill*, the *Police,*

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[104] Fn.5, Art. 16(1) I/NI Protocol: "If the application of this Protocol leads to serious economic, societal or environmental difficulties that are liable to persist, or to diversion of trade, the Union or the [UK] may unilaterally take appropriate safeguard measures..."
[105] Commission Statement on the vaccine export authorisation scheme: https://ec.europa.eu/commission/presscorner/detail/en/statement_21_314 ,Der alte Brexit-Streit um Nordirland spitzt sich wegen der Impfungen neu zu,' *Neuer Zürcher Zeitung (NZZ)*, 5 February 2021.
[106] Fn.5 Art. 16(2) I/NI Protocol: "If a safeguard measure… creates an imbalance between the rights and obligations under this Protocol, the Union or the [UK]… may take such proportionate rebalancing measures as are strictly necessary to remedy the imbalance. Priority shall be given to such measures as will least disturb the functioning of this Protocol."
[107] ''Pandora's box has been opened' Gove warns Article 16 to trigger 'Trojan horse' EU threat,' *The Express*, 8 February 2021.
[108] 'Why are the EU and UK engulfed in a Row over Vaccine Supplies,' *The Independent*, 15 March 2021.
[109] Brandon Lewis MP, Secretary of State for Northern Ireland, Hansard: HC Written Statement, 3 March 2021 Vol 690.
[110] *Preamble:* DETERMINED that the application of this Protocol should impact as little as possible on the everyday life of communities in both Ireland and Northern Ireland,
[111] Fn.5 Art.12 (4) I/NI-Protocol read with Art. 258 TFEU
[112] ibid. Art. 5, *Withdrawal Agreement*, Dispute Resolution: Withdrawal Agreement, Part 6 Title III. Letter from Šefčovič to Frost, 15 March 2021: https://ec.europa.eu/info/sites/info/files/lettre_to_lord_frost_1532021_en.pd
[113] 'UK importers brace for 'disaster' as new Brexit customs checks loom,' *The Guardian*, 8 March 2021.

Crime, Sentencing and Courts Bill, [114] the *Spycops Act*[115] and the *Overseas Operations Act*[116] as well as the priorities set out in the *Queens Speech 2021*. [117] Moreover, the Queen's Speech allocates valuable parliamentary time to a *Dissolution and Calling of Parliament Bill* to revoke the *Fixed-Term Parliaments Act 2011*, while a *Judicial Review Bill* is the government's answer to the *Miller* case-law (above). Meanwhile, an *Electoral Integrity Bill* is to be introduced to deal with the issue of "Voter Fraud" in the UK!

IV. TERRITORIAL POLICY CONTESTATION AND INTEGRITY OF THE UK: THE UK WITHDRAWAL FROM THE EUROPEAN UNION (CONTINUITY) (SCOTLAND) ACT 2021

Northern Ireland may be the most notorious issue regarding the UK's territorial constitution that Brexit has unravelled, but it is most certainly not the only one. Scottish devolution is a further constitutional settlement at jeopardy. It is worth reminding the reader of this book that Scottish devolution was formalised through the Scotland Act 1998, which established the Scottish Parliament and the Scottish Government, providing them with a significant amount of 'devolved' powers, while 'reserving' key areas to the remit of Westminster. The process of devolution eventually led to the 2014 referendum on the independence of Scotland, which was won by the unionist camp by a narrow margin of 55% against independence, to 45% in favour. Opinion polls suggested that the prospect of an independent Scotland becoming a third state having to apply to European Union membership declined the balance towards the unionist camp.

Two years later, the result of the Brexit referendum turned upside down the very premises on which the 2014 referendum had been held. While the overall results in the UK gave 'leavers' a very tight 52% to 48% win in the Brexit referendum, in Northern Ireland and Scotland remain gained the majority of votes. In particular, Scottish electors voted by a 62% in favour of remaining in the EU, against only 38% in favour of leaving. Regardless of the quite significant nuances to the results in the four nations of the UK, PM Theresa May pushed ahead and triggered article 50 TFEU in order to kick off the withdrawal process. As highlighted previously, the Sewel convention may have led to expect from the UK government to seek consent of the devolved governments ahead of triggering article 50 TEU. Not having done so, however, the UK government arguably contributed to spur tensions and reopen political and constitutional questions that were meant to be settled for at least a generation after the 2014 Independence referendum. Serious disagreements carried on between the UK and Scottish Governments in the negotiations of the Westminster Parliament's European Union (Withdrawal) Bill. Eventually, the UK Parliament enacted the EU (Withdrawal) Act 2018 despite the refusal of the Scottish Parliament to grant consent under the Sewel convention. Tensions went even higher when PM Boris Johnson took over

[114] *Police, Crime, Sentencing and Courts Bill 2021*: https://publications.parliament.uk/pa/bills/cbill/58-01/0268/200268.pdf.
[115] *Covert Human Intelligence Sources (Criminal Conduct) Act 2021:* https://bills.parliament.uk/bills/2783
[116] *Overseas Operations (Service Personnel and Veterans) Act 2020-21*: https://bills.parliament.uk/bills/2727: *Triple Lock*: OOA, Section 1(4); OOA Sections 1-3; OOA, Section 5.
[117] Queen's Speech, Fn.42.

office from PM Theresa May given his new approach to leave behind his predecessor's Checkers plan. This latter move made clear PM Johnson's intentions to abandon both the Single Market and the Customs Union, hence paving the ground for regulatory divergence and competition with the European Union post-Brexit. In contrast to PM Johnson's approach, the SNP backed Scottish Government of FM Nicola Sturgeon had consistently relied on the results of the 2016 Brexit referendum in Scotland in order to salvage regulatory alignment between Scotland and the EU within the remit of devolved powers.

In view of the serious disagreement between the Scottish and the UK Parliaments regarding in particular the role of subordinate legislation made by Ministers in the UK Government with respect to devolved matters, in order to ensure legal continuity after exiting the European Union, the former pressed ahead in 2018 passing the UK Withdrawal from the European Union (Legal Continuity)(Scotland) Bill.[118] The Attorney General and the Advocate General for Scotland referred the bill to the UK Supreme Court in order to ascertain whether the so-called 'Continuity bill' was within the competence of the Scottish Parliament in accordance with the Scotland Act 1998.

In its judgment of 13 December 2018,[119] the Supreme Court saw no merit in the UK Government's argument that the entire 'Continuity bill' was beyond the Scottish Parliament's legislative powers.[120] Crucially, however, it found that section 17 of the bill – which required for Scottish Ministers' consent to subordinate legislation enacted by UK Government Ministers containing devolved provisions modifying or otherwise affecting the operation of retained (devolved) EU law – implicitly amended section 28(7) the Scotland Act 1998. The Supreme Court therefore found section 17 to be outside the Scottish Parliament's powers.[121] However, the Supreme Court also found that, while not exceeding the legislative powers allocated to the Scottish Parliament under the Scotland Act, a significant number of additional operative provisions in the 'Continuity bill' amounted to modifications of the UK Withdrawal Act 2018, which was in turn protected against modification under its Schedule 4.[122] In legal and in practical terms, the Supreme Court's judgment crippled the 'Continuity bill', forcing the Scottish Government to withdraw it and explore alternative approaches.

In June 2020, however, the Scottish Government introduced into the Scottish Parliament a substantially reworked UK Withdrawal from the European Union (Continuity)(Scotland) Bill. This 'second Continuity bill' rescues elements from the first Continuity bill that the Supreme Court had left alive,[123] and addresses some of the most significant gaps that Brexit had left in

[118] See C. McCorkindale and A. McHarg, 'Continuity and Confusion: Legislating for Brexit in Scotland and Wales (Part I)', U.K. Const. L. Blog (6th Mar. 2018) (available at https://ukconstitutionallaw.org/); and C. McCorkindale and A. McHarg, 'Continuity and Confusion: Legislating for Brexit in Scotland and Wales (Part II)', U.K. Const. L. Blog (7th Mar. 2018) (available at https://ukconstitutionallaw.org/).
[119] [2018] UKSC 64.
[120] Ibid, paras. 26-33.
[121] Ibid, para 52.
[122] Ibid, para 99.
[123] C. McCorkindale, A. McHarg and T. Mullen, 'The Continuity Bill is Dead; Long Live the Continuity Bill – Regulatory Alignment and Divergence in Scotland Post-Brexit', U.K. Const. L. Blog (30th July 2020) (available at https://ukconstitutionallaw.org/).

environmental governance,[124] one very relevant devolved matter in which the Scottish Government has persistently outperformed other territories in the UK. However, as highlighted by McCorkindale, McHarg and Mullen, 'the second Continuity Bill is as much a piece of political rather than technical law-making.'[125]

Part 1 of the (in the meantime) UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 (hereinafter, WEUCA) provides Scottish Ministers with power to make provision corresponding to EU law with the political aim of keeping up regulatory alignment with the EU within the confines of devolved powers. In turn, Part 2 of the WEUCA sets out the constitutional framework for environmental governance in Scotland, filling the gaps left after Brexit. Section 13 writes into Scottish law the principles of EU environmental law as enshrined in articles 11 and 191(2) TFEU. However, in contrast to the equivalent piece of legislation for England – the UK Environment Bill 2020 – the 'European' genealogy of these principles is explicitly acknowledged in section 13(2). Most significantly for the overarching objective of 'keeping pace' with EU environmental law developments, its binding nature is formulated in clear and concise terms, and its interpretation is expressly linked to that of the Court of Justice of the European Union over time.

Part 2 also addresses governance gaps arising out of the loss of the hard enforcement edge provided by the European Commission – CJEU tandem. Chapter 2 of Part 2 establishes a public body – Environment Standards Scotland (ESS) – with monitoring and enforcement functions similar to those formerly held by the European Commission.[126] Accordingly, ESS is endowed with ample and robust investigative powers, [127] as well as managerial and enforcement powers which range from serving improvement reports conducive to improvement plans,[128] to the issuance of compliance notices.[129] These monitoring and enforcement powers are held vis-à-vis public authorities that have failed to comply with, make effective, or implement or apply environmental law effectively. Under section 38 WEUCA, moreover, ESS has the power to refer a public authority's conduct to judicial review or interviene in judicial proceedings, when it considers that (a) the conduct constitutes a serious failure to comply with environmental law, and (b) it is necessary to make the application to prevent, or mitigate, serious environmental harm.

The functions and powers allocated to ESS are clearly destined to buttress the Scottish Ministers capacity to enact secondary legislation in order to keep track with (environmental) legal developments in the EU over time and maintain regulatory allignment. The WEUCA features some remarkable elements that aim at protecting devolved environmental legislation from non-consented interference from the UK Parliament and Ministers of the Crown. In that sense, and to borrow again McCorkindale's, McHarg's and Mullin's accurate wording, the

[124] L. Austin, A. Cardesa-Salzmann, C. Gemmell, J. Hughes, & A. Savaresi, *Environmental Governance in Scotland on the UK's Withdrawal from the EU. Assessment and Options for Consideration: A Report by the Roundtable on Environment and Climate Change* (Scottish Government, 2018). See also Colin T. Reid, 'The future of environmental governance' (2019) 21 *Environmental Law Review*, 2019-225.
[125] McCorkindale et al (n 6).
[126] UK Withdrawal form the European Union (Continuity) (Scotland) Act 2021 (WEUCA), s 20.
[127] WEUCA, ss. 24 and 25
[128] WEUCA, ss. 26 to 30.
[129] WEUCA, ss. 31 to 37.

WEUCA is therefore as much a political, as it is a technical piece of legislation. It seeks to write into the Scottish statute book the political aim of keeping track with environmental legal developments in the European Union, in stark contrast to the political agenda pursued by the UK Government under PM Boris Johnson. It remains to be seen, however, the extent to which Scottish Ministers will be capable of living up to this expectation in view of legislative developments in the Westminster Parliament, such as the UK Internal Market Act, which is capable of undermining regulatory alignment with EU environmental law in Scotland in such sensitive areas as the regulation of chemicals, pesticides, or climate adaptation, just to mention a few. Overall, one may conclude that the Scottish Government and Parliament are willing to counter the UK Government's agenda for waging cultural wars, waging in turn a constitutional war over highly sensitive policy areas, such as environmental protection, were public opinion may side them in their aspiration for higher levels of autonomy, if not independence.

V. CONCLUSIONS

Brexit has exposed the vulnerability of the UK's "unwritten" constitution to manipulation; and this can be seen in the resort to the Royal Prerogative and Prorogation in the Brexit process; the shift to Executive Sovereignty and the declining influence of Parliament and Judiciary; the hollowing-out of the Sewel Convention; the suspension of the Ministerial Code; and the redefinition of the role of the PM. In theory, the "unwritten" UK constitution has the advantage of flexibility over "hard" law Constitutions. Yet the "unwritten" constitution is open to abuse by the unscrupulous populist to whom the path to an elective dictatorship is opened. As this paper has established, this has implications not simply for the path of future EU/UK relations, seen, *inter alia*, in the instrumentalisation of the withdrawal arrangements, but also, for the territorial coherence of the UK and the contestation of policy within what has become an increasingly "Disunited" Kingdom.