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'It's law Jim, but not as we know it': the public law techniques of ungovernance

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ABSTRACT

Ungovernance involves circumnavigating disagreement over the nature and purposes of government itself. Ungovernance, despite its name, does not imply a lack of governance and therefore a lack of law, but requires legal techniques to be enabled. While government requires clear stable rules for making laws that ensure that those laws are in turn open, clear, stable and prospective in application, ungovernance is enabled by legal techniques such as: re-iterated constitution-making; institutionalised strategic dissonance; regime assemblage; legalised reset; and legal postponement or deferment (here termed 'tajility'). This 'new public law' retains the same symbiotic relationship to ungovernance that more traditional public law has to governance. Just as the old public law was bound up with the emergence of the modern concept of statehood, the new public law is bound up with a post-post-modern – or performative – 'fragment statehood'.

KEYWORDS Brexit; constitutional law; Northern Ireland; public law; ungovernance

Introduction and overview

'Ungovernance' captures an understanding of contemporary institutionalisation that views its central project to be that of leaving radical disagreement over the values and purposes of government open, rather than reflecting prior consensus on them. In the words of Deval Desai and Andrew Lang, it is an approximate term coined to describe 'an emerging mode of governance' in which 'the complexity of the institutional form mirrors and acts as a container for the complexity of the disagreement underlying the attempt to govern, rather than reflecting a political agreement as to the project of government'.¹ It is a form of governance which institutionalises transitions. These arguments are still in their infancy and, as Desai and Lang have sketched out, their development requires a number of sub-lines of inquiry, one of which is the practical question of 'how' ungovernance works.

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¹ See further, Deval Desai and Andrew Lang, 'Introduction; Global Un-governance' (2020) 11(3) *Transnational Legal Theory* (this issue).

This article is addressed to this ‘how’ question, and in particular to an examination of the role of law in ungovernance. I set out what I suggest are key public law techniques of un-governance illustrating how they work with particular reference to examples relating to the United Kingdom (UK). I choose the UK because it neatly combines a number of distinct sites of ungovernance: (a) a conflict-affected, sub-state region (Northern Ireland), whose political settlement was produced by a peace process that has delivered an ‘ungovernance’ solution of now twenty years of ‘transition’; (b) a national liberal democratic, parent UK state in its own transitional moment due to its attempt to exit the European Union (‘Brexit’), where radical disagreement over Brexit’s purpose, underlying values, and form is producing ungovernance solutions which illustrate the core legal techniques; (c) and a wider UK political settlement that is increasingly unsettled and in a moment of ongoing transition, within a wider global transitional moment.² Both the Northern Irish peace process and Brexit show the complex relationship of national and local ungovernance solutions to the ungovernance dynamics of global governance that are ever present. In one case study, therefore, the UK allows us to examine multiple types of ungovernance emerging in one state, from different sub-state and national and international global radical disagreements. The UK as a case study also enables examination of the interaction between local, national, and global sites of ungovernance and their associated transitions.

Ungovernance and law: outline argument

My central argument runs as follows. Concepts of law and practices of law-making and legal adjudication understand law as primarily an instrument of territorially bounded states, organised around a group of people with at least a minimal commitment to operate as a political community.³ Fundamental questions as to the concept of law that accompany the modern state remained deeply contested. Whether and how law operates as a distinct register from politics, and whether the concept of law can accommodate more marginal instances of ‘Global Law’ or indigenous law still abound.⁴ Despite this contestation, the concept of law is understood to involve techniques of constitution-making, legal drafting, and interpretation that have an accepted way of doing business that mark them as distinctively *legal* techniques. At heart, law exists to regulate and guide conduct.

² Neil Walker, ‘Our Constitutional Unsettledness’ (2014) 7(1) *Public Law* 529. On the globally unsettled moment see Thomas Carothers and Oren Samet-Marram, *The New Global Marketplace of Political Change* (Carnegie Endowment for Peace, 2015).

³ See generally HLA Hart, *The Concept of Law* (Oxford University Press, 1961).

⁴ See generally Brian Tamanaha, *A General Jurisprudence of Law and Society* (Oxford University Press, 2001) (for a review of these challenges and an alternative concept of law to Hart’s, that might accommodate them).

Public law and the constitutionalisation of power more specifically are understood, in the words of Martin Loughlin, as ‘an exercise in statecraft that functions according to the precepts of the *droit politique*’, or political right.⁵ By this, he means that constitutions as legal documents reflect and respond to what might be understood as the fundamental understandings at the heart of the state that bind it ‘morally and politically, not legally’.⁶ So public law both reflects the fundamental understandings at the heart of the state, and gives effect to them legally and institutionally.

In contrast, I suggest that a quite different use and even concept of public law is evolving as the public law of ‘ungovernance’. In line with the conceptualisation in this volume, ungovernance is understood to involve a new conception of governance, rather than merely ‘a lack of governance’ where law is not absent but is just as necessary for ungovernance as it is for governance. To facilitate ungovernance, law reaches to a core set of legal techniques which seem to be at odds with traditional conceptions of law and its particular relationship to statecraft. I give these legal techniques the names of (a) iterative constitutionalisation, (b) institutionalised strategic dissonance, (c) regime merge, (d) legalised political reset, and (e) tajility, each of which will be explained further below. I argue that the public law of ungovernance is both produced by ungovernance, and enables it, in a similar way as Loughlin suggests public law operates with relation to government.

I first encountered these legal techniques in study of peace processes in conflict-affected states.⁷ These conflicted states have only been able to find ways to stabilise by ‘constitutionalising’ their conflict, and in a sense preserving radical disagreement over the nature of the state, and designing institutions to deal with it.⁸ The project of conflict resolution produces ‘ungovernance’, because it necessarily must fashion a form of governance that can exist without the narrative of consensus that underwrites government in more settled liberal democratic states. Government is created as a form of never-ending transition to some new settled-state destination that can never quite be reached, as described further by Jan Pospisil in this collection.⁹ Following Desai and Lang, ungovernance points to a need for closure while recognising that such closure is impossible in any foreseeable future.

Yet today, it is possible to observe ungovernance and the legal techniques that enable it, even in long established liberal democratic states.

⁵ Martin Loughlin, *The Foundations of Public Law* (Oxford University Press, 2010) 310.

⁶ *Ibid*

⁷ Christine Bell, *On the Law of Peace: Peace Agreements and the New Lex Pacificatoria* (Oxford University Press, 2008).

⁸ Jan Pospisil, ‘The Ungovernance of Peace: Transitional Processes in Contemporary Conflictscape’ (2020) *Transnational Legal Theory* (this issue). See further, Christine Bell and Jan Pospisil, ‘Navigating Inclusion in Transitions from Conflict: The Formalised Political *Un* settlement’ (2017) 29(5) *Journal of International Development* 576; Jan Pospisil, *Peace in Political Unsettlement* (Palgrave Macmillan, 2019).

⁹ *Ibid*

It results when, for context-specific reasons, the political settlements in these states are re-opened and the state institutionalises a form of transition to try to transform them.¹⁰ In the settled contexts of Western liberal democratic states it may be a still-open question as to whether these moments are indeed transitional on route to a tweaked and re-stabilised political settlement, or herald a more permanent ongoing 'transition' whose destination will remain uncertain. I suggest that whether ungovernance is temporary or permanent will depend on how foundational the disagreement producing it is, or whether this disagreement is in fact susceptible to resolution and the rebuilding of some common consensus over the nature of the state and its project of inclusion sufficient to legitimising government. In conclusion, I suggest that ungovernance often tends not to 'resolve' in a government, but creates a new form of 'fragment statehood' which contrasts with unified liberal statehood, with dynamics that tend to be self-reinforcing producing transitional moments that endure indefinitely.

Radical disagreement: a short explanation

If ungovernance is a response to 'radical disagreement', what does that mean? The term is intended to imply disagreement that is so stark that it has no zone of possible reconciliation. The use of the term draws on Oliver Ramsbotham who discusses radical disagreement in the arena of intractable conflict, and attempts to state what makes it 'radical' in ways that are useful to our discussion.¹¹ Ramsbotham views radical disagreement as: 'conflicting perceptions, embattled beliefs, hardened attitudes, opposed truths, segmented realities, contrasting mental worlds, antithetic ideological axioms, incompatible ideological beliefs, alternative mental representations, differing views about reality, divergent discursive representations, different discourse worlds'.¹² The disagreement is radical because it comes from deeply different world views that shape all other vistas, in ways that cannot be bridged. As Ramsbotham writes:

A radical disagreement is not monological, but polylogical. It is not a series of distinct and static 'positions' within a neutral 'third' space, but a

¹⁰ The concept of political settlement is here used in its ordinary sense. For a sense of the controversies over the term and a defence of a definition that has a relatively ordinary meaning relating in the peace process context see further Tim Kelsall, 'Towards a Universal Political Settlement Concept: A Response to Mushtaq Khan' (2018) 117(469) *African Affairs* 656.

¹¹ Oliver Ramsbotham, *Transforming Violent Conflict: Radical Disagreement, Dialogue and Survival* (Routledge, 2010).

¹² *Ibid* 7. The concept of radical disagreements bears some relationship to WB Gallie's idea of 'essentially contested concepts' as 'concepts the proper use of which inevitably involves endless disputes about their proper uses on the part of their users'. See WB Gallie, 'Essentially Contested Concepts' (1956) 56 (1) *Proceedings of the Aristotelian Society* 167, 169.

ferocious battle of claim/counter-claim to occupy the whole of conceptual space.¹³

In this context, attempting to bridge conflict produces further disagreement rather than understanding and compromise. Ramsbotham argues that instead of trying to use dialogue to bridge between groups it is better to work with the grain of the conflict dynamic rather than against it, so as to keep the parties talking in an attempt at ongoing strategic engagement. As Ferguson puts it ‘combative discourse may also offer the opportunity for something to be said that catches the ear of the other and causes an opportunity to further more positive communication’.¹⁴ In practice, peace processes often can only move forward by adopting this approach and institutionalising processes to manage ongoing disagreement. The mediator’s hope is that incremental agreements to replace violence with process will bring incremental peace dividends and at some point, the parties and the wider society will find themselves with a pathway towards reconstructing a more comprehensive social contract. However, in the meantime, the process can only institutionalise ungovernance.

If ungovernance needs institutionalisation, then law is also needed. The Israeli-Palestinian context which generated Ramsbotham’s definition provides a good example. The Oslo Accords of 1993 between the Israeli government and the Palestinian Liberation Organisation provided for an ‘interim settlement’ which postponed all the key controversial issues to ‘final status’ negotiations to create ungovernance arrangements justified in terms of a ‘transition’.¹⁵ These Accords were extended and developed through two decades of new ‘interim’ agreements, to establish a complex institutional apparatus for a form of territorial patchwork of interim Palestinian self-rule, shaped by an Israeli security framework.¹⁶ Final status negotiations proved difficult to take place, much less conclude any final status in, leaving in place a complex ungovernance tapestry of differentiated powers and Israeli-Palestinian relationships in different areas, further complicated by the emergence over time of two different forms of Palestinian government in West Bank and Gaza. Rather than no-government and no-law, the situation is one of an abundance of governance and hyper-legalisation (the

¹³ Oliver Ramsbotham, ‘Is There a Theory of Radical Disagreement’ (2013) 1(1) *International Journal of Conflict Engagement and Resolution* 56, 76.

¹⁴ Neil Ferguson, ‘Oliver Ramsbotham: *Transforming Violent Conflict: Radical Disagreement, Dialogue and Survival*’ (2012) 8(2) *Democracy & Security* 219.

¹⁵ The first full interim agreement alone comes to 190 pages, see, Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (‘Oslo II’) (28 September 1995) and its Annexes, online: www.peaceagreement.org. On these arrangements and ungovernance see further Michelle Burgis-Kathala, ‘States of Failure? Ungovernance and the Project of State-building in Palestine under the Oslo Regime’ (2020) *Transnational Legal Theory* (this issue).

¹⁶ Declaration of Principles on Interim Self-Government Arrangements (‘Oslo Accords’) (13 September 1993) online: www.peaceagreements.org/masterdocument/357.

interim agreements and the legal instruments that flow from them run to hundreds of pages).¹⁷ Despite the twenty-six-year lapse since the Oslo Accords, these arrangements still claim to be interim pending ‘final’ settlement, improbably holding out that a peace process is still in play and will at some point still ‘complete’.¹⁸ Such final ‘resolutions’, as have been offered first through negotiations mediated by US President Clinton in 2000, and more recently in the new President-Trump-era US ‘Peace Plan’, have also incorporated enduring forms of ‘unsettlement’ as part of their proposals, as we will return to.

While the Israeli-Palestinian interim arrangements are charged with many injustices, as an institutional phenomenon ungovernance is best thought of as neither bad nor good. Rather it is ‘just what emerges’ from the balance of power combination between those at different ends of the disagreement coupled with their inability to resolve their radical disagreement on the shape and nature of the state. Governance, too, has its ‘bad’ and its ‘good’ government examples. In other equally complex and conflicted situations to that of the Israel-Palestine conflict, some sort of public good has been argued to be provided by peace process ungovernance, such as is associated with ‘good governance’. Alex de Waal, for example, drawing on the case of protracted social conflict in South Sudan, argues that the institutionalisation of peace processes as ongoing processes can provide ‘a protected political forum, in which belligerents, political parties and civil society actors can engage, debating concepts and policies, and forging coalitions’.¹⁹ He argues that

one of the features of Sudan and South Sudan over the last twenty years has been that such expanded peace talks, including the satellite civil society for a parallel engagement with international sponsors, provide opportunities for open political dialogue at times when such dialogue is impossible internally.²⁰

Like Ramsbotham and Pospisil, de Waal urges an embracing of ungovernance. He suggests that rather than seeking an end-state, we should seek ‘to gradually institutionalise peace negotiations as more long-term structures for managing conflict’, suggesting that ‘[t]hese structures can be used to generate prolonged discussion, debate and collaborative decision-making on key issues in more fluid and flexible ways’.²¹ He suggests that through this process these modes of decision-making may eventually become ‘subsumed

¹⁷ Oslo II (n 15).

¹⁸ In a sense, of course, it carries forward what has always been an unsettledness as to how Palestinian and Israeli radically different claims to territory and government can be mutually accommodated in a clearer governance relationship, tied to states which each would view as legitimate.

¹⁹ Alex de Waal, ‘Sudan’s Comprehensive Peace Agreement: Theories of Change’ in Laura James, Sarah Nouwen and Sarath Srinivasan (eds), *Making and Breaking Peace in Sudan: Ten Years After the Comprehensive Peace Agreement* (British Academy, forthcoming).

²⁰ *Ibid*

²¹ *Ibid*

into wider governance and constitutional arrangements'. The 'good' of ungovernance, however, does not require reaching this destination. Ungovernance produces a 'good' in the moment by providing a relatively peaceful, institutionalised space of ongoing political deliberation over the possibility of a more permanent and fulsome peaceful co-existence, timid and imperfect as this may sound either as a solution to violence or as a satisfactory alternative to good government.

Legal techniques of ungovernance

If ungovernance can be institutionalised – and as the Israel-Palestine context illustrates it not only can but must be – then public law is implicated and present often in abundant and complex detail. How then does public law operate to enable ungovernance?

I suggest five key legal techniques can be seen operating in the public law realm as characteristic of ungovernance. Together they amount to a reshaping of public law in service to ungovernance. For the reasons I set out in the introduction, I illustrate each briefly with respect to the UK, with reference in particular to the peace process in Northern Ireland and the Brexit process. In setting out the key legal techniques of ungovernance, I also hope to provide a deeper explanation of how ungovernance produces and evolves into a complex self-sustaining system in response to what seems to be a moment of widening radicalised disagreement over the pre-conditions of politics.

Iterative constitutionalism

The first legal technique of ungovernance involves legal provision that ensures that the first order (constitutional) rules authorising government and law are constantly in flux. This legal technique involves establishing constitutional foundations to be constantly re-mediated and founded. Constitutions are normally understood to be foundational 'first order' legal documents, based on a minimal consensus to political community and intended to provide a stable legal basis for the political order that puts the legitimacy of government beyond the day-to-day political fray. Constitutions express themselves to be at least once-in-a-generation documents, which express the idea of the nation, and provide a power-map for how the country will be governed.²² In contrast, the constitutional frameworks drafted to give effect to ungovernance see constitutional frameworks that are designed as expressly temporary, with holes which will need to be elaborated in future iterations.²³ These anticipated future iterations reflect the

²² See Vicki Jackson, *Constitutional Engagement in a Transnational Era* (Oxford University Press, 2013).

²³ See further Bell (n 7) Chapter 5, Charmaine Rodrigues, 'Letting Off Steam: Interim Constitutions as a Safety Valve to the Pressure-cooker of Transitions in Conflict-Affected States?' (2017) 6(1) *Global*

iterative nature of the attempt to reach any new political settlement, but also the reality that while the journey towards settlement must be undertaken the destination and whether it can be arrived at, is unclear.

Conflict-affected states seeking to resolve conflict provide many examples. Conflict resolution efforts not only frequently resort to ‘interim constitutions’, but often introduce even more complex iterative processes.²⁴ For example, ceasefire may be achieved by an ‘interim framework agreement’ which sets out ‘interim’ governance arrangements, where typically the erstwhile combatants (state and non-state) agree to share power in a government of national unity in which seats are allocated according to the balance of power rather than on the basis of election. These arrangements are sometimes achieved by formal amendment of the prior constitutional order,²⁵ but more often either co-exist with the prior constitutional order which is implicitly or explicitly declared to be overridden in part,²⁶ or act as if it did not exist.²⁷ Interim arrangements contemplate further iterative constitutional development through interim and revised constitutions. Indeed, they often move through a variety of iterations and names: pre-transitional, transitional, interim. Even when interim arrangements ostensibly ‘land’ in some final status – as in Nepal where after a long interim period a ‘final’ constitution was eventually produced – the ‘final’ constitution can often only be produced if it is promised to be immediately open for revision.²⁸ So even ostensible ‘constitutional settlement’ is crafted as such by announcing an immediate commitment to a new iteration.

Constitutionalism 33, Kimana Zulueta-Fülscher, *Interim Constitutions in Post-Conflict Settings* (International IDEA, 2015).

²⁴ See further Christine Bell and Kimana Zulueta-Fülscher, *Sequencing Peace Agreements and Constitutions in the Political Settlement Process* International IDEA, 2016).

²⁵ For example, the South African Interim Constitution 1993 which was itself a negotiated ‘peace agreement’ was passed as an amendment of the (apartheid era) 1983 Constitution. Constitution of the Republic of South Africa Act no.200 of 1993, online: www.gov.za/documents/constitution/constitution-republic-south-africa-act-200-1993.

²⁶ See, for example, Yemen’s GCC Initiative (2011) establishing an interim transition, which is interestingly constituted by both executive order (Presidential Decree No. 24) and arguably, by UN Security Council (UNSC) Resolution 2014 but leave parts of prior Yemeni Constitution in place. Agreement/Gulf Cooperation Council (GCC) Initiative (23 November 2011) online: www.peaceagreements.org/masterdocument/1401.

²⁷ See for example, Afghanistan 2001; Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions (‘Bonn Agreement’) (5 December 2001) online: www.peaceagreements.org/masterdocument/272. See further, Christine Bell and Robert Forster, ‘Constituting Transitions: Predictable Unpredictability’ in Emanuel HD De Groof and Micha Wiebusch (eds), *International Law and Transitional Governance: Critical Perspectives* (Routledge, 2020) 33–57.

²⁸ A final constitution – the Constitution of Nepal 2015, was passed in September 2015, but almost immediately an amendment was offered to address Madheshi claims, and this amendment was passed in January 2016. The Constitution of Nepal (20 September 2015), online: www.constituteproject.org/constitution/Nepal_2015.pdf. Fresh amendments have been tabled almost every year since. See further, Constance Johnson, ‘Nepal: New Constitution Amended’ (2016) *Global Legal Monitor*, online: www.loc.gov/law/foreign-news/article/nepal-new-constitution-amended/.

If we turn to the UK, Northern Ireland provides a detailed example. The Belfast /Good Friday Agreement in 1998 ('Agreement') was institutionalised in the *Northern Ireland Act 1998* ('NI Act').²⁹ However, over the years this was amended fairly frequently both through formal amendment and through adjudication. For example, in 2001, the two majority and opposing Unionist and Nationalist Parties could not agree to form the required power-sharing Northern Irish Executive by the cut-off time of 6 weeks prescribed by the NI Act, although they did so two days after this period had expired.³⁰ Failure to agree, according to the NI Act, was to be resolved by new elections, but these saw the possibility of the rivals of the majority and pro-Agreement Ulster Unionist Party – the Democratic Unionist Party (DUP), who had withdrawn from both talks and the Agreement – becoming the majority Unionist party on a rejectionist position. Rather than face the collapse of the peace process and the instability of more elections, and given that the formation of the executive had been agreed (albeit outside the statutory time period), the Secretary of State allowed the institutions to be established on this basis rather than call new elections. The breach of the legislative deadline was then challenged in court by the DUP. However, the courts interpreted the purpose of the NI Act to be to implement the peace agreement, and in a moment of interpretive radicalism found a way around the time limit, in what can be argued to be a *de facto* reiteration of the NI Act.³¹ By the time later elections returned the first DUP majority, the party had significantly moved to a reluctant acceptance of the Agreement's framework, albeit with the caveat that it required an element of renegotiation. There are strong arguments that the judicial move importantly bought the Agreement and the political institutions more time in which to stabilise.³²

The eventual entrance of the DUP into government then required the Agreement framework to be further re-worked. In 2006, a new agreement was negotiated primarily between the DUP and Sinn Féin – The St

²⁹ The full name of the Belfast/Good Friday agreement is The Agreement Reached in the Multi-Party Negotiations (10 April 1998) online: www.peaceagreements.org/masterdocument/556; for amended text of Northern Ireland Act 1998 online: www.legislation.gov.uk/ukpga/1998/47/contents.

³⁰ Northern Ireland Act, s16(8). Note that the establishment of government needs majority Unionist and Nationalist consent to the election of a First and Deputy First Minister from each of the main parties (almost certain under current voting patterns to be Unionist and Nationalist, respectively).

³¹ *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32; earlier decision Northern Ireland Court of Appeal 21 March 2002. In a few words, the Court found an interpretive construction that the NI Act was effectively silent on what could happen if the time limit was breached, despite it providing for new elections in this event, based on the need to fulfil the underlying Belfast/Good Friday Agreement, whose clear purpose was to enable government to be established in Northern Ireland.

³² A finding in favour of the application would have meant the elections being called immediately and a possible anti-agreement (DUP) majority, which could have dismantled power-sharing to which they were at that point opposed, instead of the scheduled date of May 2003. The political nature of the decision was noted in the judgement itself at the Northern Ireland Court of Appeal level, by Lord Chief Justice Carswell, *In Re Robinson* [2002] NI 206, 219. See further, Marie Lynch, 'Political Adjudication or Statutory Interpretation: *Robinson v Secretary of State for Northern Ireland*' (2002) 53 *Northern Ireland Legal Quarterly* 327.

Andrews Agreement – which significantly re-shaped devolution, not least by enabling the devolution of justice and policing which had been delayed.³³ Later agreements essentially re-iterated and incrementally modified earlier ones (as will be discussed further below), and led to periodic re-working of the legal framework of government, even as recently as January 2020, when the power-sharing mechanism was significantly revised.³⁴ Constitutional reiteration has therefore been a necessary, regular, although unplanned-for tool of devolution in Northern Ireland, and planned or unplanned has been a feature of many other peace processes.

The quite different context of Brexit illustrates how a more recent but increasingly radicalised disagreement has been managed through the reiteration of the UK's constitutional relationship to the EU. Brexit has been characterised by radical disagreement over the nature of the UK's relationship with the EU, that fits all of Ramsbotham's descriptions and operates at two levels. The first level is internal to the UK, where pro- and anti-Brexit positions operate in the UK almost as an identity politics and signifier of wider differing national and world views on the nature of the UK state, in which any attempt at a middle road accentuates the divisions rather than mending them. The second level of radical disagreement is between the EU and UK government over the possibilities for a future relationship in which each has 'red lines' that it understands as foundational to its own internal political settlement – the disagreement here compounded by the UK's internal disagreement on its own political settlement, that is paralleled by the open texture and unresolved destination of the EU political settlement.

The approach to working through this disagreement at both levels has been to create a staged process that has become further reiterated in development. A two-stage process was established by the EU as its mediation framework.³⁵ However, the first stage has itself required reiteration. Three distinct iterations of a Withdrawal Agreement between the EU and the UK produced three pieces of UK implementing legislation: the *European Union (Withdrawal) Act 2018* followed by the similarly named legislation in 2019, and then a *European Union (Withdrawal Agreement) Act 2020*,

³³ *St Andrews Agreement* (13 October 2006) online: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/136651/st_andrews_agreement-2.pdf.

³⁴ *New Decade, New Approach* (January 2020) online: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/856998/2020-01-08_a_new_decade_a_new_approach.pdf.

³⁵ Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union, ANNEX to Council decision (EU, Euratom) 2017/ ... authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for an agreement setting out the arrangements for its withdrawal from the European Union, 21009/17 BXT 16 ADD 1, Council of the European Union, Brussels (22 May 2017) online: https://ec.europa.eu/commission/publications/negotiating-directives-article-50-negotiations_en.

which repealed the 2019 Act, and amended the 2018 Act.³⁶ These reiterations have reflected internal shifts in the dominant vision of Brexit within the UK government. Indeed, the attempt to pass withdrawal legislation from 2018 on, took reiteration to almost absurdist degrees: daily reiterations and parliamentary votes on the proposed draft legislation did not reflect the normal amendment process of the passage of any Act, but a constitutionally peculiar ‘testing’ support for a range of very different Brexit propositions. Over time almost every possible proposition to transcend ‘radical disagreement’ over the future of the country’s relationship with the EU was presented to Parliament, only to be rejected. All that could be agreed was that nothing could be agreed. The *EU (Withdrawal Agreement) Act 2020* was only passed after elections saw many of those who radically disagreed from within the ruling Conservative party lose their seats, while the party garnered enough votes for a sizeable majority in Parliament.³⁷ Yet, the express purpose of the 2020 Act supported with this majority, is to set in place a ‘transition’ to allow time for negotiations, rather than a new relationship. The outcome of the UK-EU negotiations will require future constitutionalisation of the next iteration of their relationship.

These examples all illustrate a curious self-generating dynamic to ungovernance. Attempts to ‘settle’ the shape of the state that reinforce one side of the radical disagreement often fall apart and add to the imperative to reiterate a constitutional framework capable of recreating a centre that can hold, as opposed to an unstable ‘winner-take-all’ solution. Ungovernance momentum is propelled less by the urgency of a resolution, and more by

³⁶ See first Withdrawal Agreement and Political Declaration on the future relationship between the UK and the EU as endorsed by leaders at a special meeting of the European Council on 25 November 2018 (HMG, 25 November 2018) online: www.legislation.gov.uk/ukpga/2018/16/contents/enacted; implemented by the European Union (Withdrawal) Act 2018, online: www.legislation.gov.uk/ukpga/2018/16/contents/enacted. A second revised agreement between the UK and the EU was agreed in March 2019, see 11 March Withdrawal Agreement and Political Declaration laid before Parliament following political agreement, online: www.gov.uk/government/publications/11-march-withdrawal-agreement-and-political-declaration-laid-before-parliament-following-political-agreement. UK legislation was never successfully passed to implement this. Although a European Union (Withdrawal) Act 2019 was passed - commonly referred to as the Cooper–Letwin Act - this was an Act of the Parliament of the United Kingdom that made provisions for extensions to the period defined under Article 50 of the Treaty on European Union related to the United Kingdom’s withdrawal from the European Union. After a change of Prime Minister, a third iteration of the Agreement between the EU and UK – the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (HMG, 20 October 2019) online: www.gov.uk/government/publications/new-withdrawal-agreement-and-political-declaration (hereafter Withdrawal Agreement), was agreed between the UK and the EU, and implemented in the UK by the European Union (Withdrawal Agreement) Act 2020, online: www.legislation.gov.uk/ukpga/2020/1/enacted/data.htm. This final EU-UK Withdrawal Agreement, 2020 will be hereafter called ‘the Withdrawal Agreement’, and the European Union (Withdrawal) Act, 2018 as amended by the 2020 European Union (Withdrawal Agreement) Act hereafter will be referred to as the ‘Withdrawal Act’.

³⁷ J Adams and Ed Riley, ‘Rout of the Remainer Martyrs: Turncoat MPs Who Rebelled Against their Parties are BOOTED OUT of the Commons’ *Dailymail online* (London, 13 December 2019), online: www.dailymail.co.uk/news/article-7789211/Turncoat-MPs-rebelled-against-parties-BOOTED-Commons.html.

the idea that resolution in one or other ‘default’ constitutional setting is impossible, and so the only possibility for resolution in the moment is to continue on a pathway of contained disagreement.

Institutionalised strategic dissonance: law as placeholder for disagreement

A second key legal technique of ungovernance is the legal institutionalisation of strategic dissonance. Coined here to capture the legal technique, the term ‘strategic dissonance’ finds a similar coinage in business literature which views it as a mismatch between a firm’s strategic intent and its strategic actions, when faced with the need for the firm to transition to deal with the coming apart of its business vision from the realities of a changed operating environment.³⁸ Business books point to the need for the business to ‘adapt or die’ – that is to resolve the dissonance in favour of responding to the new context.³⁹ In the ungovernance legal context, I suggest that institutionalised strategic dissonance is a response to radical disagreement in what seems to be a strangely dishonest use of law.

Institutionalised strategic dissonance involves committing to several political goals that are not mutually compatible, and fashioning a set of implementing legal commitments which ostensibly ‘square the circle’ but in practice will clearly contradict some of the incompatible goals stated. At the level of national law, strategic dissonance can be seen as the almost inevitable by-product of radical disagreement over the nature of the state, because constructively ambiguous language must be found which enables people to understand the state in entirely different and irreconcilable ways. These understandings are then used to underwrite mechanisms which enable them to co-operate the state in the present. To return to the Middle East, the very recent, much derided,⁴⁰ US Peace Plan for the Middle East (‘The Plan’) provides an example of how the fluidity of legal concepts itself can be used to push to an ungovernance solution by institutionalising strategic dissonance through law. Take the Plan’s approach to ‘sovereignty’, where it states:

Sovereignty is an amorphous concept that has evolved over time. With growing interdependence, each nation chooses to interact with other nations by entering into agreements that set parameters essential to each nation. The notion that sovereignty is a static and consistently defined term has been an unnecessary stumbling block in past negotiations.

³⁸ See for example, Robert A Burgelman and Andrew S Grove, ‘Strategic Dissonance’ (1996) 38(2) *California Management Review* 8.

³⁹ *Ibid*

⁴⁰ The plan has been rejected by Palestinian leadership and many other states.

Pragmatic and operational concerns that effect security and prosperity are what is most important.⁴¹

This interpretation of sovereignty lays a foundation whereby a legal institutionalised form of Palestinian sovereign statehood could produce ‘statehood but not as we know it’ for Palestinians, in clumps of territory that might convince Palestinians that it was statehood, and persuade Israelis that it was not (statehood-in-name-only). The strategic dissonance lies in the institutionalisation which is creative in delivering a ‘half-way-house’ sort-of statehood, which can be held out simultaneously to be statehood and not statehood to different audiences.

This type of constructive ambiguity is a common feature of peace plans, which often tap into legal interpretations of sovereignty as always relative. Similar language and institutionalisation were used as a container for the self-determination dispute over whether Northern Ireland would remain in the UK or unite with Ireland, as found in the Belfast/Good Friday Agreement which provided:

it is for the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right of self-determination on the basis of consent, freely and concurrently given, North and South, to bring about a united Ireland, if that is their wish, accepting that this right must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland;

This provision attempts to provide a constructively ambiguous language that acknowledges both ‘self-determination’ (nationalist and republican language),⁴² and ‘consent’ (unionist language).⁴³ However, there is a mismatch or strategic dissonance between this language and the mechanism to implement it, which in practice appears to institutionalise the long-standing majority/Unionist veto on change of sovereignty that has always been at odds with an all-island concept of self-determination. Linguistically, the provisions provide for a dissonance by embracing a concept of an all-island self-determination and appearing to provide for a means to that end, but only by leaving it at best unclear whether and when a vote in the Republic of Ireland matters, and how it is to be reconciled with ‘consent’ in Northern Ireland.

This strategic dissonance carries through to the apparently clear language providing for a border poll in the British–Irish treaty and later the implementing NI Act, in part through what it does not say. Section 1(1) on The

⁴¹ *Peace to Prosperity: A Vision to Improve the Lives of Palestinian and Israel People* (The White House, January 2020), online: www.whitehouse.gov/peacetoprosperty/, 13.

⁴² Christine Bell and Kathleen Cavanaugh, ‘Constructive Ambiguity’ or Internal Self-Determination? Self-Determination, Group Accommodation, and the Belfast Agreement’ (1998) 22 *Fordham International Law Journal* 1345.

⁴³ *Ibid*

Status of Northern Ireland provides that Northern Ireland is part of the United Kingdom, but provides that it can cease to be if a majority in Northern Ireland agree in a poll. Schedule 5 of the same Act provides for when the border poll can be held, giving the power to hold the poll to the Secretary of State for Northern Ireland (a member of the UK government), to be exercised:

if at any time it appears likely to him that a majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland.

However, a closer examination at the provision against the backdrop of radical disagreement indicates the ambiguities in the silences of this provision. Has the Secretary of State been given an unfettered discretion to decide what is the relevant evidence of a shift in views, or is he or she bound to accept particular evidence? What prior consent between the two main political communities to the terms of the poll would be needed, what prior agreements between the UK and Ireland should be in place (the Treaty provisions between the two governments require that any United Ireland have some mechanism to protect minority rights), and what vote would be needed in the Republic of Ireland?⁴⁴ One commentator has described the strategic dissonance and its purpose as follows:

[t]he border poll will not be held until the case for reunification has been proved. But the case for reunification cannot be proved without some sort of poll. This contradiction reflects the overall intention of the Agreement to park this entire discussion.⁴⁵

The UK-EU Withdrawal Agreement for Brexit similarly institutionalises strategic dissonance to square circles. Take the question of the following matters, which logically cannot all be mutually accommodated: no border on the island of Ireland; Republic of Ireland membership of the EU and compliance with EU customs rules; no border between Northern Ireland and the UK; and the UK desire to develop an independent trade policy from the EU. The solution is to affirm these incompatible desires all to be important joint commitments in the preamble of the Withdrawal Agreement Protocol on Northern Ireland.⁴⁶ The substantive provisions of the Protocol then

⁴⁴ See further, Colin Murray and Aoife O'Donoghue, 'Life after Brexit: Operationalising the Belfast/Good Friday Agreement's Principle of Consent' (2019) *Dublin University Law Journal* (forthcoming) author's last version online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3486960.

⁴⁵ Brendan Heading, 'Assorted Thoughts on the Realities of Border Polling and Reunification' *Sluggar O'Toole* (1 February 2020) online: https://sluggarotoole.com/2020/02/01/assorted-thoughts-on-the-realities-of-border-polling-and-reunification/?fbclid=IwAR1JaADd2WK20-62W8PZa_GiTY8D32Ecc28V4gHaOeQNMDNoFzhX7ghUoq8.

⁴⁶ Protocol on Ireland/Northern Ireland, EU-UK Withdrawal Agreement, Protocol on Ireland/Northern Ireland, online: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12020W/TXT#d1e32-102-1, 287>.

pragmatically provide for something that is at odds with the stated joint commitments. It provides a set of processes that permit forms of customs differentiation and forms of checks between the UK and Northern Ireland, and a form of possibly flexible enforcement that could mitigate the administrative impact for Northern Ireland.⁴⁷ In the meantime, the strategic dissonance institutionalised enables the UK and the EU to proclaim converse positions that checks will not take place, and will take place between UK and Northern Ireland, and Northern Ireland and the Republic of Ireland. However, in an example of ‘tajiility’ or delay – as will be discussed below – the provisions leave the detail which will determine the reality of the impact of these provisions on Northern Irish businesses, to be worked out by a Joint Committee mechanism which is responsible for ‘implementation and application’ of the Agreement.⁴⁸ The example therefore also illustrates the interaction between different public law techniques of ungovernance.

Constructive ambiguity is often used in international legal texts to reach an agreement to sign-off on the text.⁴⁹ While it can operate to bridge disagreement in the moment because it lets each party present the outcome as a ‘win’, this carries the price that it postpones disagreement to a later stage of implementation. However, institutionalised as strategic dissonance, constructive ambiguity is enabled to continue by establishing processes that attempt to institutionalise compromise between incompatible positions, which are asserted still to be preserved in their entirety: the stated intent or vision, and the proposed implementing action are in conflict. This legal drafting technique both creates and epitomises ungovernance as it creates ‘non-agreement’ as apparent agreement, enabling not a clear outcome, but a down-the-line process of seeking agreement on what could not be agreed in the present.

Regime merge: law as assemblage

The transitional contexts of ungovernance often also produce and require new forms of legal assemblage. That is, forms of law that operate across regimes, to create new legal hybrids or even ‘trybrids’ (merging of more than two regimes).⁵⁰ These ‘regime-merge’ regulatory approaches both enable and are produced by ungovernance, because existing regimes often

⁴⁷ *Ibid*

⁴⁸ Article 164, Withdrawal Agreement (n 36).

⁴⁹ The term ‘constructive ambiguity’ is often attributed to Henry Kissinger, and has been noted as a technique used in international legal drafting to bridge disagreement by a large number of scholars and observers, see for example, Michael Byers, ‘Agreeing to Disagree: Security Council Resolution 1441 and Intentional Ambiguity’ (2004) 10 *Global Governance* 165.

⁵⁰ Christine Bell, ‘*Ius Post Bellum* and *Lex Pacificatoria*: What’s in a name?’ in Carsten Stahn, Jennifer S Easterday and Jens Iverson (eds), *Ius Post Bellum: Mapping the Normative Foundations* (Oxford University Press, 2014) 181–206, 190–2.

do not clearly ‘fit’ or provide resources for resolving the dilemmas of transition management.

International cross-regime assemblage, for example, has been a developing feature of international law’s attempts to ‘regulate’ peace negotiations within states.⁵¹ Elsewhere I have illustrated how the lack of ‘fit’ between an international law designed for inter-state relationships, and international intervention in conflict resolution within states, has produced forms of ‘regime merge’.⁵² Fragmented regimes of international criminal law, human rights law, and humanitarian law, none of which were designed for transitions from conflict, are often drawn from eclectically to provide ‘principles’ which assert a legalised force with which the design of peace agreements are then expected to comply – what I have termed a ‘*lex pacificatoria*’ or law of the peacemakers, less as a regulatory form of law and more as a set of ‘legal expectations’.⁵³ Approaches to amnesty, the inclusion of women, the inclusion of children, the return of refugees and displaced persons, are all now subject to considerable soft law standards and principles, and even UN Security Council Resolutions, that cut across different Treaty standards.⁵⁴ At the domestic level, too, peace process implementation bodies, such as peacekeeping forces, and mechanisms to deal with accountability for conflict violence (such as Truth Commissions), are often given a hybridised international-national mandates, membership, and accountability mechanisms. In these contexts, regime merge provides a way for domestic actors and international supporters of the process to reach pragmatic solutions against the backdrop of apparently contradictory norms which all can claim application, and where the choice of applicable law will itself be a part of the contest over which political outcome will prevail.

The Belfast/Good Friday Agreement provisions provide an extended example of how intricate and complex law as assemblage can be, and how it can also cut across international and domestic legal standards. The example also illustrates how legal assemblage is produced as a response to radical disagreement. A section of the Agreement provides for rights, and begins by ‘affirming’ eight key rights, in a context where rights were viewed as a sectarianised issue. Anecdotal evidence of how these rights were drafted have indicated that essentially each party picked their ‘favourite’ rights provision, and the rights chosen would seem to accord with key parties ‘pet’ rights.⁵⁵ This is a concept of rights drafting as literal ‘political assemblage’ that sits at odds with a concept of rights as general and universal.

⁵¹ *Ibid*

⁵² *Ibid*

⁵³ Bell (n 7).

⁵⁴ *Ibid*

⁵⁵ Agreement (n 29), Section on Human Rights, Rights, Safeguards and Equality of Opportunity.

However, as the list has no apparent legal consequence, standing merely as an ‘affirmation’ of the parties, it is reduced to a symbolic joint statement – another strategic dissonance.

Later, the Agreement provides more concretely for the incorporation of the European Convention on Human Rights – pre-committed to by the UK government at that point in any case – and for a new Northern Ireland Human Rights Commission (‘NICHHR’) which is:

to consult and to advise on the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience. These additional rights to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem, and – taken together with the ECHR – to constitute a Bill of Rights for Northern Ireland.⁵⁶

The Bill of Rights itself is therefore to be an explicit assemblage of the ECHR and ‘Northern Ireland-specific rights’, a concept that itself implicates the need to somehow ‘disassemble’ those rights from rights that might also be claimed elsewhere in the UK.⁵⁷ The difficulties of implementation illustrate the ways in which constitutional ambiguity, legal assemblage, and constitutional iteration work together.

This Agreement wording reflected and incorporated disagreement between Unionist and Nationalist positions on rights, in particular: a minimal approach to any expansion in Northern Ireland of rights beyond those agreed for the UK as a whole, which constituted the Unionist position; and a Nationalist and non-aligned position that wanted a Northern-Ireland dedicated solution to addressing rights deficits which had underpinned the conflict. The tensions in these positions were to become more fraught in the implementation stage post-Agreement. Any sense that the wording had captured a compromise between the broadly Unionist position of ‘no bill of rights beyond the ECHR’, and the broadly Nationalist and civil society position of ‘a full dedicated Northern Irish Bill of Rights addressing issues at the heart of the conflict’⁵⁸ was soon lost. This left consecutive NIHRs with a difficult implementation task and the UK Government, facing a lack of cross political consent, reluctant to legislate. The decades after 1998 saw draft

⁵⁶ *Ibid*, Section on United Kingdom Legislation.

⁵⁷ Nationalist/ Unionist and UK government disagreement as to what ‘particular circumstances of Northern Ireland’ was to mean, plagued and prevented implementation of this provision’, see further Colin Harvey and Alex Schwartz, ‘Designing a Bill of Rights for Northern Ireland’ (2009) 62(1) *Northern Ireland Legal Quarterly* 181.

⁵⁸ For a detailed account of these very summarised broad positions and how the political party positions of nationalist and unionist parties to a bill of rights have changed over time, see, Anne Smith, Monica McWilliams and Pryamvada Parnell, *Advancing a Bill of Rights For Northern Ireland* (Belfast: Transitional Justice Institution, University of Ulster, 2014), online: www.ulster.ac.uk/__data/assets/pdf_file/0005/58271/Advancing_a BOR_NI.pdf.

Bills of Rights assembled by the NIHRC, disassembled by government consultations, and reassembled, in forms of attempted constitutional reiteration.⁵⁹ The most recent January 2020 ‘New Decade, New Approach’ Agreement to restore the institutions in Northern Ireland reinstates the Bill of Rights process for the first time in 11 years. However, it institutes not resolution of the strategic dissonance of the original Agreement’s provision, but more strategic dissonance in the form of a new process for supposedly resolving it: the Bill of Rights process is now to be given to an ‘Ad Hoc Committee’ of the Northern Ireland Assembly (its legislature) who are to work together with a panel of five ‘experts’.⁶⁰ Together they are to ‘consider the creation of a Bill of Rights’⁶¹—arguably making the task even more ambiguous than the original agreement construction (with all its ambiguities discussed) while asserting that the task is to remain ‘faithful to the stated intention of the 1998 Agreement’.⁶² The process is to begin with the external panel advising the Ad Hoc Committee on ‘what constitutes our “particular circumstances” drawing upon, but not bound by, previous work on a Bill of Rights’, thus tendering out the resolution of the dissonance and the regime merge task, to this group.⁶³

Hybrid legal assemblage is also illustrated by the transitional arrangements to the UK’s European Union (Withdrawal) Act 2018 as amended by the 2020 Act. The task of assemblage is a central reason for the Act and daunting in its scale and nature because provision for a transition period in which the UK will leave the EU but stick to EU rules requires complex legislation as to what EU law will apply in the UK as a matter of UK law, and exactly how it will apply. In its early sections, the Withdrawal Act both formally repeals the *European Communities Act 1972* but saves it, and laws passed under it, in key respects for the transitional (or ‘implementation’) period.⁶⁴ The Act, in providing for transition, must provide legally for a complex assemblage of EU law, UK law, and an imagined/anticipated ‘Separation Agreement’ law that will reflect the agreement reached at the

⁵⁹ Consecutive NIHRC’s produced draft bills of rights, after copious consultation see for example Northern Ireland Human Rights Commission, *Making a Bill of Rights for Northern Ireland* (Belfast: Northern Ireland Human Rights Commission, September 2001); and *Advice to the Secretary of State for Northern Ireland: A Bill of Rights for Northern Ireland* (Northern Ireland Human Rights Commission, 10 December 2008) online: <https://www.nihrc.org/publication/detail/advice-to-the-secretary-of-state-for-northern-ireland>. The government further consulted on these, accepted and rejected aspects, and then consulted further on their result, leading to ongoing repetitive consultation, less designed to improve proposals, and more designed to try to build delay and brokerage (although little went on).

⁶⁰ *New Decade, New Approach* (n 34) paras 5.26–5.29.

⁶¹ Withdrawal Act (n 36) Sections 1–5.

⁶² *Ibid*

⁶³ *Ibid* 5.26

⁶⁴ *Ibid*. The terminology of ‘transition period’ and ‘implementation period’, itself speak to the different presentational issues of the UK and EU. The UK prefer the term ‘implementation’ because they wish to emphasise that Brexit has had a form of completion with the exit date that marks the start of the ‘transition’, and therefore want to talk of the initial agreement being ‘implemented’, while the EU view this agreement as only transitional to an agreement that would re-institutionalise the trading relationship.

end of the transition period. The Withdrawal Act sets out in 12 complex and long articles how this assemblage is to be achieved, in provisions that would be difficult to coherently explain, much less summarise.⁶⁵ Inevitably, the task of assemblage will also require to be developed ‘on the go’ as it were, by judges. But on what basis? The instruction to judges is complex. Section 6 of the Withdrawal Act on Interpretation of Retained EU Law provides that during the implementation period, lower UK Courts are to decide the validity, meaning or effect of questions relating to any retained EU law still in force at that point, ‘*in accordance with any retained case law and any retained general principles of EU law*’ (*emphasis added*); that is, decisions of the EU Courts decided prior to the UK leaving. The Supreme Court and, for the most part, the High Court of Justiciary,⁶⁶ as higher courts are not bound by these decisions but, ‘in deciding whether to depart from any retained EU case law by ... must apply the same test as it would apply in deciding whether to depart from its own case law’, (even though that test is one fashioned for existing precedent and has been different from how UK judges have reasoned to apply EU law that is directly applicable).⁶⁷

These provisions are, in part, so complex because they attempt to institutionalise a strategic dissonance for the UK Government determined to reconcile its commitments in the Withdrawal Agreement that the UK comply with EU law for the transition period, with its domestic political commitment to ensure that UK laws are supreme and UK courts are ultimately in sole charge of interpretation of EU law post the UK Brexit date, without reference to EU courts.⁶⁸ In essence, the judges are therefore tasked with a new interpretative task of ‘ongoing legal assemblage’ which must also fill in the ambiguities and contradictions of the Withdrawal Act and work through its complexity. The results could see courts reading down retained EU law much as they did EU before,⁶⁹ and perhaps even referring to new EU decisions as a matter of interpretive aid; or something more unpredictable. Either way, we just do not know how adjudication will be reassembled: law produces ungovernance produces law.

Together these examples show that just as *sui generis* institutionalisation is produced to effect ungovernance, *sui generis* forms of law have to be pulled eclectically from a grab bag of legal sources and assembled, disassembled, and reassembled.

⁶⁵ Withdrawal Act (n 36) Articles 1–9.

⁶⁶ For the High Court of Justiciary, there are exceptions pertaining mostly to devolution issues.

⁶⁷ Withdrawal Act (n 36) Article 6.

⁶⁸ Significantly these provisions modify the previous draft Act formulation that post implementation courts were to pay ‘due regard’ to EC decisions prior to implementation – a phrase with legal meaning which would largely have left in place modes of application of EC law that were in place.

⁶⁹ *R (Factortame Ltd) v Secretary of State for Transport* [1990] UKHL 7.

Legalised ‘political reset’ moments: law enabling *deus ex machina*

A fourth key legal technique of ungovernance is to provide political ‘reset buttons’. Political reset is a key requirement of ungovernance because attempting to administer a country while engaging in ongoing negotiation as to what the terms of existence of the state and the nature of its governance will be, will always get stuck in ways that plain old ‘governing’ does not. In a more traditional account of government, forms of political override are understood to be permitted if conducted according to the lawfully authorised rules, for example by constitutional amendments, or permissible derogations from portions of the constitution in times of national emergency. It has also been long acknowledged that political orders may face moments of overthrow, where political reset just happens, but outwith the legal order.⁷⁰

Ungovernance, however, involves legal provision, or post-hoc legal permission, for forms of political override that were not anticipated and therefore not provided for by the legal order, while avoiding any suggestion that the legal order is not applicable or has been overthrown in any sense. To emphasise, the political reset buttons of ungovernance operate so that what appear to be ‘*deus ex machina*’ moments that operate outwith the law are sanctioned or at least not undone by law. Political override therefore is not viewed as providing evidence of a legal vacuum, or failure of law, or overthrow of the legal order; it is an accepted way of doing business which law accommodates.

This legal technique again both reflects and further produces ‘ungovernance’, because allowing moments of political override implicate first order political questions as to what the fundamental rules of the state are. Take for example the suspension of the political institutions involving override of the NI Act, in Northern Ireland in 2001, discussed above. Law in the form of a judgment permitted the UK government to press the reset button to deal with an unaccounted-for circumstance of political disagreement, at least on the reading of the majority of judges. Yet, many more reset moments were to be required. As noted, the Belfast Agreement later had to be amended by the St Andrews Agreement (2006),⁷¹ and then the Hillsborough Castle Agreement (2010),⁷² The Haas ‘Proposed Agreement’ (abortive) (2013),⁷³ the Stormont House Agreement 2015,⁷⁴ the ‘A Fresh Start’

⁷⁰ See for example, Hans Kelsen, *General Theory of Law and State* (Russell & Russell, Anders Wedberg trans 1961) 117–8, 368–9.

⁷¹ St Andrews Agreement (n 33).

⁷² Hillsborough Castle Agreement (5 February 2010) online: www.peaceagreements.org/masterdocument/764.

⁷³ Haass Report – Proposed Agreement (31 December 2013) online: www.northernireland.gov.uk/publications/haass-report-proposed-agreement.

⁷⁴ Stormont House Agreement (23 December 2014) online: www.peaceagreements.org/masterdocument/903.

Stormont House Implementation Plan, 2015,⁷⁵ and the New Decade, New Approach agreement of 2020,⁷⁶ and there have been smaller issue-based agreements between some of these.⁷⁷ In fact, Northern Ireland's government has been very much a stop-start affair, the last breakdown lasting three years from 2017–2020. Each of these major 'resets' have required the politicians and British and Irish governments to move outside the NI Act completely, into mediated peace process mode, often complete with an international mediator. The resultant Agreements have often effectively amended the Belfast/Good Friday Agreement, and then required legal amendment of the NI Act. In this, they have further built the 'iterative constitutional framework'.

The names of each agreement are almost risible in their desperation to justify 'override': 'freshness' and 'newness' are used in their titles, without self-irony, and point to the converse reality that political override of the constitutional order is not exceptional but a key part of the governance-ungovernance framework. What is being provided is 'ungovernance', because the constitutional framework is not all that there is. As soon as one side or the other withdraws consent to the framework, it does not 'govern' politics in the normal sense but requires a political 'reset' button to be pushed for the legal order to continue.

Brexit and the 2020 Withdrawal Agreement and Act also have some similar reset buttons. Most notably, the Withdrawal Agreement provides that the UK government and EU can agree to extend the transition period, essentially 'resetting' the transition period itself – something that would require a further EU-UK negotiation, discussed further below.⁷⁸ More discretely, the Northern Ireland Protocol provides a reset button in providing for a possible Northern Irish referendum on whether to stick with the Protocol arrangements, should they continue post transition. Although, if Northern Ireland said no, it is unclear what exactly would happen next and inevitably a new negotiation over how to reconcile borders and trade would be required.⁷⁹

Interestingly, however, the Withdrawal Act itself acts to politically override and reset the relationship between the UK parliament and the devolved parliaments in ways that fuel the unsettlement of the UK's already-malleable constitution – itself in a process of never-ending transition whose

⁷⁵ A Fresh Start: The Stormont Agreement and Implementation Plan (17 November 2015) online: www.peaceagreements.org/masterdocument/1435.

⁷⁶ *New Decade, New Approach* (n 34).

⁷⁷ See Pa-x peace agreement database for a full list of agreements, online: https://www.peaceagreements.org/search?SearchForm%5Bregion%5D=&SearchForm%5Bcountry_entity%5D=104&SearchForm%5Bname%5D=&SearchForm%5Bcategory_mode%5D=any&SearchForm%5Bagreement_text%5D=&SearchForm%5Border%5D=date_signed&s=Search+Database.

⁷⁸ Withdrawal Agreement (n 36) Article 132.

⁷⁹ Protocol on Ireland/Northern Ireland (n 47) Article 18.

destination is uncertain.⁸⁰ The *Scotland Act*, for example, had been amended after the Scottish independence referendum as a consequence of a UK-campaign promise to devolve more powers to Scotland if the referendum for independence was defeated. A post-referendum Commission made proposals to this end,⁸¹ namely an amendment to the *Scotland Act* to provide a legislative basis for the ‘sovereignty’ of the Scottish Parliament, and also to put the so-called ‘Sewel Convention’ that provides that the UK cannot ‘normally’ pass law in devolved areas without the consent of the Scottish parliament, onto a legislative footing.⁸²

Yet, the Withdrawal Act had legislative consent withheld by all the devolved legislatures, mainly because it reclaims devolved power to the central government, in part due to a need to have a mechanism to ‘fill in’ gaps in UK law that cannot be fully predicted and filled-in until post transition and the new EU-UK relationship is known; a form of legal postponement, which is another legal technique of ungovernance as discussed below. As regards the *Scotland Act* provisions on sovereignty and consent, the validity of the Withdrawal Act to effect this type of override is justified on the basis that this is an extraordinary UK-wide situation and so within the exception implied by the word ‘normally’ applies.⁸³

The use of political reset moments is a feature of ungovernance and the public law of ungovernance enables these buttons to be legally built in to the political system, either by expressly providing for them, or by legal techniques of post-hoc justification of their use.

Law and tajiity: legal connivance with postponement, delay and black holes

A fifth legal technique of ungovernance is to enable postponement of disagreement and delay of resolution. The word tajiity has been taken from the context of Sudan, where De Waal has adapted it to describe a key feature of Sudanese peace making.⁸⁴ It comes from Arabic use of ‘Tajil’, which can be defined in terms of a number of English words: delay, postponement, adjournment, deferment, respite, reprieve, procrastination,

⁸⁰ Cf Neil Walker (n 2).

⁸¹ See further, The Smith Commission, *Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament* (27 November 2014) online: https://webarchive.nationalarchives.gov.uk/20151202171029/http://www.smith-commission.scot/wp-content/uploads/2014/11/The_Smith_Commission_Report-1.pdf.

⁸² Articles 1–2, Scotland Act 2016, online: www.legislation.gov.uk/ukpga/2016/11/contents/enacted.

⁸³ A Brexit-related decision of the UK court, found that these provisions were not enforceable legally but only politically, see *R (Miller) v Secretary of State for Exiting the European Union*; *In re McCord*; *In re Agnew* [2017] UKSC 5, [2018] AC 61.

⁸⁴ De Waal (n 19).

prorogation, continuation, carry over.⁸⁵ I adopt it here because these multiple possible translations beautifully capture the variety of political delay which characterise ungovernance and must find legal instantiation. Also, tajility has a ring to it that conjures up ‘agility’, even though the etymological roots are quite different.

Legal provision for tajility can again be illustrated using the different transitions in play in the United Kingdom, and the ungovernance turn that characterises the public law that results. In Northern Ireland, tajility was first introduced by an explicit conditioning of devolution on progress in implementing the Agreement, using a range of mechanisms. Section 3 of the NI Act provided that the commencement order which would bring it into force would only be laid ‘If it appears to the Secretary of State that sufficient progress has been made in implementing the Belfast Agreement’. Commencement itself then established the institutions, but to run in shadow form for over a year. Further, the Belfast Agreement and NI Act also tendered out key elements of ongoing elaboration and implementation of the Agreement, and therefore the devolution framework to future conflict resolution to processes. Policing, criminal justice, and the above discussed Bill of Rights, were all left unresolved and their resolution postponed by agreeing to broad principles and institutions to take the project of brokering agreement forward. Tajility was also enabled by legal post-hoc authorisation of the suspension of the political institutions even in ways not contemplated by the NI Act, as discussed. At each point delay was resorted to, to avoid the destruction of such contingent political and legal consent as had been built.

Even the latest New Decade, New Approach (2020) agreement provides for tajility more than for resolution of the issues that collapsed the institutions three years earlier. Some of the key yet controversial implementation processes of the agreement are left unresolved and sent back out to new or revised mechanisms for resolution. The Bill of Rights is given a new process; the ‘legacy’ issue of how to deal with the past receives a commitment to legislate without indicating how the legislation is to resolve past controversies. These are all rights issues that reflect continued radical disagreement on the nature of the state and the history of the conflict that the ungovernance framework has set aside, meaning that they are therefore not easily susceptible to resolution from within that framework leading to techniques of postponement. As De Waal notes, processes can create useful forums to continue to disagree in ways that the dealmakers clearly hope will enable the political institutions to function in the meantime.⁸⁶ So the postponement of resolution enables governance as ungovernance. In some of these areas it

⁸⁵ See Word Hippo ‘What does تَأْجِيل (tajil) mean in Arabic?’, online: <https://www.wordhippo.com/what-is/the-meaning-of/arabic-word-7e06d6132fb1aa6a2173a5e139d3f45d7ab8d8ae.html> Cf also Pospisil (n 8).

⁸⁶ De Waal (n 19).

is, of course, possible that a moment may arise when further compromise on substance can occur, but only if ungovernance enables the uncertainty of when and how to continue.

On occasion, tajility can also require law to find ways to ‘turn a blind eye’ so as to not call time on moments of political pause used as a creative political practice; but that creates legal black holes. In Northern Ireland, this has happened through forms of ‘half-way house’ between direct rule (direct Westminster legislation for Northern Ireland), and devolution which have been created for moments of the Assembly’s collapse, some of which have walked a fine line between legality and illegality.⁸⁷ Continuity of administration has been achieved, even for the astonishing period of three years during the most recent collapse of government institutions. However, fudging between ‘no government/no direct (Westminster) rule’, has produced and required some legal black holes. In order to avoid the appearance of a completely failed peace process, which any return to direct rule would have signified, in-effect retroactive legalisation to enable the technocratic decision-making of civil servants were ultimately required.⁸⁸

As regards Brexit, the Withdrawal Agreement and Withdrawal Act are legal documents whose purpose is to make legal provision for tajility: centrally they provide for a transitional (or ‘implementation’) period. In so providing, they enabled a postponement of non-agreement between the UK and the EU, buying time for further negotiations, rather than terminating the negotiation process or resolving it in agreement. Deferment of disagreement in place of agreement: classic ungovernance. The Withdrawal Agreement writes-in mechanisms to enable further delay – an extension provision of 1–2 years which can be agreed by the Joint Committee, as mentioned above.⁸⁹ However, in an interesting move, the Withdrawal Act tries to legislatively self-tie the hands of the UK government to ask for this extension.⁹⁰ In essence, this puts a (domestic) legal time-limit on ‘transition’, although in the UK system this can be easily overwritten, legally if not politically, at least. Such time limits are a regular feature of transition management, and can be seen for example, in Nepal and South Sudan. Experience in those

⁸⁷ See eg, *In Re Buick's Application* [2018] NICA 26 where the court found that a civil servant making a decision designated in the legislation to be for a Minister was unlawful, even though it was only the final sign-off of the decision that needed implemented. However, during the period in which the NI institutions had collapsed there was dubious legal authority for many key decisions.

⁸⁸ The UK government eventually moved to provide legislative grounds for civil servants to make decisions in section 3, Northern Ireland (Executive Formation and Exercise of Functions) Act 2018, online: <https://www.legislation.gov.uk/ukpga/2018/28/contents>. While they did not make this explicitly retroactive, the legislation provided that decisions could be essentially ‘re-taken’ under the legislation, providing a form of de facto retroactivity (*ibid* section 3(6)).

⁸⁹ Withdrawal Agreement, (n 36) Article 132.

⁹⁰ Withdrawal Act (n 36) Article 15A, which somewhat ambiguously (in terms of what it requires to achieve an extension), provides that ‘A Minister of the Crown may not agree in the Joint Committee to an extension of the implementation period.’

countries, however, point to the risk of needing more time, and therefore to create further institutionalised strategic dissonance to achieve them when the legally stipulated time limit cannot be met.

Even if the transition is not extended, a book could be written on the various ways in which the Withdrawal Agreement points towards processes of the endurance of forms of issue-by-issue ‘micro transition’, that herald the possibility of a further delay to postpone disagreement on a range of issues even beyond the transitional period. For example, the rights of EU citizens in Europe have a range of extension possibilities for future agreements;⁹¹ so, too, do issues relating to medicinal product certificates.⁹² European Court of Justice decisions can linger and continue in some respects, potentially for decades after the transition period. Similarly, the Joint Committee can modify many arrangements, including the complex customs arrangements to implement the Protocol on Northern Ireland, which also have their own special committee for implementation.⁹³ The vocabulary of tajiility – delay, postponement, prorogation, respite – have been a part of the daily political language of Northern Ireland and the Brexit landscape, and have depended on legal connivance to be actualised.

Utterly changed or legal business as usual?

So far, I have set out an account of the legal techniques of ungovernance, suggesting that a fundamentally different approach to public law underlies them. However, are these techniques really so new? Have they not always been present somewhere in law’s repertoire? The answer of course is yes.

Accepted legal techniques of law as a ‘tool’

First, all of the techniques of law have been observed well before the contemporary moment in ways that I have touched on throughout. Constructive ambiguity, for example, has long been a drafting technique in international treaties, where it can enable the postponement of disagreement sufficient to get the parties to a common text to be signed, in the hope that disagreement can be resolved as a matter of implementation. At the domestic level constitutions have similar techniques at their disposal, none more so perhaps than the UK’s unwritten and supremely flexible constitution. Cass Sunstein’s account of ‘incompletely theorised agreement’ as a technique to deal with controversial issues such as reproductive rights, or McCrudden’s account of the role of the concept of ‘human dignity’ in enabling deliberation over

⁹¹ Withdrawal Agreement (n 36) Article 18.

⁹² *Ibid* Article 60

⁹³ Withdrawal Agreement, Protocol on Ireland/Northern Ireland (n 47).

how universal rights should apply in context, point to the ways in which agreement achieved through constitutional language of broad principle, can become a ‘placeholder’ for ongoing disagreement to be worked out through later processes, such as court cases.⁹⁴ Legal techniques of strategic dissonance take this a step further by firmly institutionalising clearly irreconcilable commitments, and setting out a course of legal action that does not square fully with any of them.

As regards ‘political reset’, law of course can also always provide for moments of political override as noted above, through provision for states of emergency,⁹⁵ constitutional amendment or replacement. As regards regime merge, fragmentation of legal regimes, and forms of regime collapse have been long observed in international law, and to a lesser extent domestic law.⁹⁶ And as regards delay, law often provides for conditioning law’s application on future processes, even by simple mechanisms for providing later dates at which laws which are passed are to come into force.⁹⁷

What is new, is the way in which collective use of these techniques enables a quite different form of governance – termed here ‘ungovernance’. Legal techniques of ungovernance work collectively to assist attempted political transitions whose destination cannot be agreed: they both create the conditions of ungovernance and respond to them to address situations where the legitimacy of what is being transitioned from and to remains deeply contested.

In the past, the legal dynamics of ungovernance were viewed as marginal instances of law and to have a limited place in enabling government that was for the most part enabled by clear authority for law-making. Legal drafting focused on guiding conduct proactively and implementing the goals of government.⁹⁸ In contexts of transition management, the alternative legal techniques of ungovernance outlined above take centre stage as a way to manage ongoing processes of disagreement relating to the authority, nature and goals of government (termed here ungovernance). These legal techniques were once the exceptions which proved the rule that stable, clear, and prospective law-making, promulgated under constitutions reflecting a political settlement, enable a polity to function in the present. When we turn to

⁹⁴ Cass R Sunstein, ‘Incompletely Theorized Agreements Commentary’ (1994) 108 *Harvard Law Review* 1733; Christopher McCrudden, ‘State Architecture: Subsidiarity, Devolution, Federalism and Independence’ in Mark Elliott, and David Feldman (eds), *The Cambridge Companion to Public Law* (Cambridge University Press, 2015) 193–214.

⁹⁵ See Fionnuala Ní Aoláin and Oren Gross, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press, 2006).

⁹⁶ See for examples, United Nations, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi, International Law Commission (13 April 2006) UN Doc A/CN.4/L.682.

⁹⁷ See for example the UK’s Human Right Act 1998, which provided that it would mostly come into force in 2000.

⁹⁸ See detailed discussion in introduction, also: Hart (n 3); Tamanaha (n 4).

ungovernance, the opposite techniques outlined in this article are front, back and centre. Law's value for ungovernance lies not in its association with 'the political right' and the rule of law, but in what it can offer in terms of pure legal technique, which at heart is clever wordsmithery and ability to provide sequencing of transition. Yet paradoxically, the very continuities in legal technique most point to the importance of law for ungovernance. It is precisely because of its 'not new' quality that law can give ungovernance its being in legally persuasive ways, even though offering only its tool-like qualities shorn of any more normative agenda. In so doing, law offers up its time-honoured associations with the right and the good, the predictable and stable, in service of ungovernance.

Recognisably performing as public law performs

These public law techniques are also recognisable in a second sense. The functions provided by the public law that emerges in response to ungovernance are similar to those that our more traditional concept of public law offers governance. This new public law mimics the public law of modernity, because in a deep sense it retains its connection to the project of enabling government, but in its 'ungovernance' incarnation. If public law as we know it is intimately and irrevocably tied to the very concept of government in the liberal nation state, then the public law of ungovernance is irrevocably tied to a very different concept of administration and statehood in times of transition, and necessary to its emergence and existence. This is a project in which fashioning any sort of governmental functionality requires finding ways to live with radical disagreement that cannot be politically resolved.

The associated project of public law is to enable that form of statehood to exist and function. This statehood is achieved by creating forms of temporary constitutional order, founded in ambiguity over the nature of the state, and enabled by indefinitely postponing the state's arrival in any more steady-state form. If we were to sketch it, the new public law of ungovernance could be thought of in terms of an isometric graph where the parabolic line of the law of ungovernance comes ever closer to the line of 'normal public law', and travels alongside it as if pulled by it, while never quite touching or converging with it. It is 'old-public law-like', but works to fundamentally different ends. Rather than working to bind together the state in the unity of liberal statehood, in a sense ungovernance creates a 'fragment state' that is profoundly disunited. This public law creates different governance and ungovernance pockets, defined in terms of different geographies, different identity and epistemic communities, some of which operate transnationally, and all of which influence each other, ever increasing the unpredictability and complexity of the system interactions across the state as a whole.

Whereas government presumes to operate within a polity as a whole, ungovernance often operates with a sense of the polity as fragments which can come together in forms of consensus and fall apart in dissensus, in projects of control and projects of resistance. The public law of ungovernance involves a form of 'statecraft', but the state being crafted is not the modern state but a state of constant creation and dismantling and recreation in the face of incapacity to reach the agreement necessary to the modern state. As the word 'mimicry' alludes to, I suggest that in a sense this new public law retains its conventional relationship to statecraft, but only if we understand states and global governance to be in a moment of active re-shaping. This is post-post modern public law for the post-post modern state or, to find a better term, it is performative public law for the performative state.⁹⁹ In mimicking its modern form, the public law of ungovernance provides a statement that the state is indeed a 'normal' state, whose institutions go by the same names, but operate quite differently to enable the state's literally 'post-modern' features to perform like a state. This development at the level of states is paralleled by the relationship of asserted public law in the global realm, where constitutionalism can only 'mimic' state forms, and any concept of Global Law remains 'intimated' and 'immanent': always in the process of arriving, but never finding a clear landing zone.¹⁰⁰ Indeed, what is perhaps critical to understand is the way in which domestic and international ungovernance influence and shape each other.

What therefore is different and 'new' is that there is no cross-polity narrative of the ends of government that law is to serve. Rather there is a narrative of law serving creative solutions to contain disagreement, and never-ending transitional journeys in which the destination is unknown unless and until it can be agreed along the way.

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⁹⁹ I term it 'post-post modern', because it is enabled not just by post-modernity, but by reactions to it, which seek to reinforce traditional concepts of the state, which are curiously enabled by the ways in which post-modernity reifies the relativity of all positions and truths. So, within the fragment state the concept of the 'liberal state' can also exist but becomes yet another fragment, often figuratively but also literally in central government projects that do not reach beyond capital cities or even zones of them.

¹⁰⁰ See, Neil Walker, *Intimations of Global Law* (Cambridge University Press, 2014).

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