

# Brexit and the territorial governance of the United Kingdom

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## **ABSTRACT**

Brexit presents a major challenge to the territorial governance of the UK. Despite a major overhaul of territorial governance in 1999 when the current devolution schemes were created, and subsequent changes to those schemes, the territorial governance of the UK has not been stabilised. There remained a series of unresolved issues. Eventually, these issues would have to have been faced, but Brexit has not only forced them onto the agenda, it has done so in fraught political circumstances which make them harder to resolve. Brexit highlights already existing tensions in territorial governance, it also creates a new set of problems for the institutions and processes of territorial governance to deal with, including how to implement the changes that Brexit requires in the context of extensive devolution of power. This article, therefore, sets out the difficulties Brexit poses for territorial governance and considers the prospects for resolving them.

**KEYWORDS:** Brexit, constitution, devolution, territorial governance, Wales

## **Introduction**

Brexit presents a major challenge to the territorial governance of the UK. Despite a major overhaul of territorial governance in 1999 when the current devolution schemes were created, and subsequent changes to those schemes, the territorial governance of the UK has not been stabilised. There remained a series of unresolved issues. Eventually, these issues would have to have been faced, but Brexit has not only forced them onto the agenda, it has done so in fraught political circumstances which make them harder to resolve. Not only does it highlight already existing tensions in territorial governance, it also creates a new set of problems for the institutions and processes of territorial governance to deal with, including how to implement the changes that Brexit requires in the context of extensive devolution of power. This article, therefore, sets out the difficulties Brexit poses for territorial governance and considers the prospects for resolving them.

## **Unresolved issues of territorial governance**

I will not explain the historical development of the United Kingdom and its institutions of governance in detail assuming that to be well known. In summary, The United Kingdom is a multinational state and its governance structure has long reflected this although it has done so in different ways both in each of its territories and across time. Its current arrangements for territorial governance are relatively recent but they have their roots in the past, showing clear imprints of the way that the state has developed historically. This structure of governance

developed ad hoc, with no ‘constitutional moment’ at which a set of arrangements crystallised, and the structure is, and always has been, asymmetrical. The result of the EU referendum has delivered a severe constitutional shock to a territorial settlement that had already been destabilised by other political developments and unresolved issues.

There are several reasons why the devolution schemes have not stabilised the territorial governance of the UK. They relate to the incompatible goals of political parties and voters in the UK, the absence of an agreed constitutional narrative for the UK, lack of change at the centre of government, intergovernmental relations, the asymmetry of current arrangements and finance.

### *Incompatible goals*

The most fundamental reason is that different political parties and different voters have continued to hold incompatible views of the desired end state. The nationalist parties of Scotland and Wales continue to campaign for independence from the UK with particularly strong electoral support in Scotland. Sinn Fein supports Northern Ireland leaving the UK and being united with Ireland. Conversely, the Conservative, Labour and Liberal Democrat parties and the Unionist parties in Northern Ireland support the continuation of the UK in its current geographical extent. The strength of nationalist sentiment is such that the break-up of the UK in the not too distant future remains a real possibility.

### *Territorial governance and the contested nature of the constitution*

The second reason – closely linked to the first – is that there is no agreed constitutional narrative explaining the nature of the state that commands widespread assent across the UK. One such narrative is the unitary state narrative. For a long time, the dominant view both in government and academic circles was that the UK was a unitary state. In academic circles, this was largely superseded by the view that the UK is, using Rokkan and Urwin’s typology, a union state (Rokkan & Urwin, 1982). They suggested that there were four models of state: unitary, union, mechanical federal and organic federal. A union state was one formed by the union of formerly separate nations which, rather than becoming fully integrated, retain significant features of the pre-union polities (McEwen, 2006; Mitchell, 1996). More recently, Mitchell has suggested that it is more accurate to describe the UK as a state of unions (Mitchell, 2009) as it was formed from a number of unions each of which has a different history and different characteristics.

Although academics may have discarded the unitary state model, it continues to inform the perceptions of political elites, albeit inconsistently, particularly in England. Within the unitary state narrative, the UK Parliament is seen as the ultimate source of legal and legitimate political authority. That presupposes that decisions about political institutions and processes and about substantive values are taken at the UK level by those elected to represent the people of the UK as whole and the Government they support. On this view, none of the historic nations has, or should have, a veto over any constitutional development, or is entitled to demand any particular constitutional change. That is certainly consistent with the orthodox view of the basic legal principle of the constitution which is that the sovereignty or

supremacy of Parliament is unlimited (Dicey, 1885), meaning that the UK Parliament can pass laws to any effect on any matter, including laws which make fundamental changes to territorial governance.

Alternative conceptions of the UK have been more influential in Scotland, Wales and Northern Ireland. In Scotland, for example, there has been a historically based constitutional argument that the settlement created by the Acts of Union of 1706 and 1707 amounted to a treaty between sovereign states which was a foundational event creating a new polity. The settlement could not be changed unilaterally by one of the parties. This called into question two features of the orthodox view of the UK constitution; namely that it was 'unwritten' and that all Acts of Parliament are of equal weight and all are subject to repeal by the UK Parliament (Tierney, 2004). This view was strongly espoused by a number of Scottish unionists who insisted on the preservation of the union settlement as opposed to further integration (Kidd, 2008). These were legal nationalists but not political nationalists (Farmer, 2001; Kidd, 2008). This older narrative has been supplemented by the idea of popular sovereignty which is based more squarely on democratic and republican theory, and which sees the Scottish people as sovereign and as possessing a right to self-determination (Tierney, 2004). This argument was the mainstay of the campaign for a Scottish Assembly in the 1980s and 1990s. Both historically based and the popular sovereignty arguments see the continuation of the union as being based on the consent of its peoples and so open to renegotiation.

In Wales too, nationalism is a significant political force although it has never commanded a majority in any UK or Welsh election but there are also many who, whilst not being nationalists, reject the unitary state perspective (Hunt, 2016). In Northern Ireland, of course, there is the additional complication of a deeply divided community. Nationalists and unionists have mutually incompatible views of the nature of their union with the UK. For many nationalists, the UK state lacks legitimacy and the desired end state is separation from the UK and union with Ireland. Unionists insist on remaining part of the UK but also reject assimilation and integration with the rest of the UK. Neither of these perspectives is compatible with the unitary state narrative.

In England, the tendency has been to elide the distinction between the concepts of England, Britain and the UK and to fail to grasp that the nature of the UK is viewed differently by many in the three smaller nations. Interestingly, despite the traditional dominance of the unitary state narrative, UK governments have on a number of occasions either explicitly accepted the core premise of the nationalist narrative (i.e. that the people of the historic nations are entitled to become self-governing if they so choose) or agreed to constitutional processes and changes which are premised on it. Thus, as regards Scotland, since the 1970s successive statements of Conservative Prime Ministers in UK Governments have confirmed that Scotland could leave the union if a majority of Scots voters chose to do so, a position which ultimately led to the agreement to hold the independence referendum of 2014. For Northern Ireland, the Good Friday/Belfast Agreement expressly recognised the legitimacy of whatever choice was freely exercised by a majority of the people of Northern Ireland as to whether to remain in the UK or form part of a united Ireland and section 1 of the Northern

Ireland Act 1998 states clearly that if a majority votes to leave the UK and join a united Ireland, the UK Government will give effect to that wish. The Good Friday/Belfast agreement itself and the measures which followed to implement it are also remarkable in the extent to which they accommodate the nationalists' conception of the state. Not only is Northern Ireland free to leave the UK, but also people living in Northern Ireland may choose whether to identify as citizens of the UK or citizens of Ireland and the whole agreement is underpinned by the British–Irish Agreement, a treaty between the UK and Ireland. Only in respect of Wales has the promise that it can secede from the UK not been clearly articulated. There is, therefore, no settled consensus across the UK on (a) whether the union(s) that form it should continue or the UK should break up, and (b) for so long as the 'state of unions' continues, what some of the basic assumptions of its constitution are or should be.

However, neither the mutually incompatible views of the political parties and voters, nor the lack of an agreed constitutional narrative has prevented major constitutional change from happening. It was not necessary to resolve the conflicting views about ultimate goals and constitutional narratives in order for the devolution schemes to go ahead because each 'side' could see devolution as advancing its aims. Pro-union supporters of devolution hoped that decentralising government power would draw the teeth of the nationalist challenge and be a means of stabilising the union. Conversely, for many (but not all) nationalists, devolution could be accepted as a stepping stone to independence. Similarly, it has been possible to reach agreement on substantial increases in devolved powers beyond those in the original settlements for Scotland, Wales and Northern Ireland because in each case both sides could convince themselves that further devolution was compatible with their ultimate aims.

It did not matter that there was no agreed starting point for working out principles of territorial governance and no shared view of how the territorial constitution should evolve in future (even amongst those who wanted to preserve the unions which comprise the UK) so long as ultimate questions could be postponed. But the strategy of meeting successive demands for more autonomy by further devolution may well be approaching its limits; the more functions that are devolved, the fewer remain as plausible candidates for further devolution and the closer we get to political disagreements about the future governance of the UK that cannot be resolved by compromise.

### *The unchanging centre*

A third reason is the failure of UK governments and political elites to consider seriously the implications for the central government of the extensive devolution put in place in 1999, and to adapt the institutions of central governance in response. Apart from the initial withdrawal of devolved business from the UK Parliament, there was no major change to the UK Parliament's processes because of devolution until October 2015 when proposals to ensure that legislation which affects only England requires the support of a majority of MPs representing English constituencies ('English votes for English laws') were implemented by changes in House of Commons standing orders. Similarly, there was little change to the central executive institutions and processes, including the cabinet and central departments; in both Westminster and Whitehall things carried on much as before. Here, again we can see the

effect of the dominance of the unitary state narrative. The governing assumption appeared to be that there was no need to change things at the centre but this has resulted in the centre being ill-prepared to cope with the fall-out from the EU referendum. It defaulted to unitary state assumptions which got negotiations with the devolved administrations off to a bad start.

### *Intergovernmental relations*

A fourth reason – closely linked to the second and third – is the rather limited and informal arrangements for intergovernmental relations that were put in place following devolution. The devolution statutes give UK Ministers certain limited powers of intervention in the legislative processes of the devolved assemblies, but, apart from that, the devolution statutes say nothing about intergovernmental relations. In line with Whitehall tradition, these were constituted informally through a Memorandum of Understanding (MoU) and Concordats (Cabinet Office, 2012) which were not legally binding. Informality fitted well with unitary state assumptions because it left the power to shape intergovernmental relations largely at the centre. The exception to this informality is the British–Irish Council created by the Belfast/Good Friday Agreement package which, consequently, is the forum preferred by the devolved administrations.

The MoU laid down some principles of engagement between the UK and devolved governments and set up a Joint Ministerial Committee (JMC) as a co-ordinating mechanism. The most important principle is the Sewel convention which states that the UK Parliament will not normally legislate with regard to devolved matters except with the agreement of the devolved legislature. The MoU states that the UK Government will proceed in accordance with the convention. However, the principles and procedures set out in the MoU proved to be of limited use in the political circumstances which have emerged in the last few years. The working of intergovernmental relations and the JMC have been heavily criticised both by devolved governments and by commentators (Bingham Centre for the Rule of Law, 2015; PACA, 2014; Trench, 2004) as being one-sided and ineffective. There was an attempt to update these arrangements to take account of the UK's decision to leave the EU; all four administrations agreed that JMC should meet more regularly in plenary session and to create a new JMC Committee on EU Negotiations (JMC (EN)) but this has not been successful in creating more harmonious or productive intergovernmental relations.

### *Asymmetry*

A fifth reason for instability is the asymmetry of current arrangements. Asymmetry of governing institutions is not in itself a defect in a system of government. If we look around the world, we can see a number of examples of asymmetries in territorial governance and, in specific contexts, there are arguments of both principle and practicality to support such structures. At the risk of sounding tautologous, asymmetry in the governance of a state is not a problem, unless it is widely perceived as such. In the United Kingdom, asymmetries have existed for very lengthy periods without becoming politically salient. Various asymmetries did become both more pronounced and more visible as a consequence of the 1999 devolution schemes, for example, the differences between the powers devolved to Scotland, Wales and

Northern Ireland and the absence of devolution to England. One of the most discussed asymmetries was the ‘West Lothian Question’. The question arose because the UK Parliament continued to operate after devolution as the legislature both for UK matters and England-only matters even though this created an apparent anomaly whereby MPs representing seats in Scotland and Northern Ireland could vote on legislation that affected only England (for example, legislation related to the NHS in England), but could not normally vote on legislation on the same subject as regards Scotland and Northern Ireland, these being devolved matters.

In the first few years after 1999, the asymmetries created by or consolidated by devolution were not seriously problematic. Politicians may have complained about them but this did not lead to popular discontent. Various factors contributed to this including the fact that from 1999 to 2007 the same party, Labour, formed the UK Government, Scottish Government and Welsh Government either alone or in coalition with the Liberal Democrats (Scotland 1999–2007; Wales 1990–2013), public spending was buoyant and economic circumstances generally favourable (Brouillet & Mullen, 2018). However, asymmetry has recently become more politically salient, particularly in England. For some time, it had been apparent that resentment was building up in England, particularly in less affluent regions because of the perception that the Scots and Irish had something they did not have, i.e. substantial decentralisation of powers and finance supervised by powerful elected bodies. This coupled with the regional distribution of public spending (see below) seems to have encouraged perceptions of unfairness and to have stimulated demands for devolution of further powers to the regions of England. At the same time, specifically English nationalism has appeared to become an increasingly visible phenomenon. UK Governments have begun to address these concerns with some decentralisation of power via city deals and related mechanisms (Ward, 2017) and the introduction to the UK Parliament in October 2015 of a version of ‘English votes for English Laws’. However, it is doubtful if these changes have had much effect on public perceptions, and the distribution of votes in the EU referendum, particularly the concentration of votes to leave in the North and Midlands of England and Wales is consistent with this assumption.

### *Devolution finance*

A sixth reason is finance. Initially devolved government was financed largely by block grants from the UK exchequer with a small contribution from local taxation. It is only recently that this has begun to change because of tax devolution. The amounts of grant for each part of the UK have been since the late 1970s determined by the Barnett formula. For many years the operation of the formula caused little political difficulty but the formula has tended to result in significantly higher public expenditure per head in Scotland and Northern Ireland than in England and Wales even though on average Scotland and Northern Ireland are more affluent than Wales or the North of England. Public spending has thus become more politically salient with both politicians and voters in Wales and in England, particularly Northern England, arguing that the regional distribution of public expenditure is unfair to their areas.

It is doubtful if resolution of these issues could have been postponed indefinitely; all of them would have had to be addressed at some point and, even before Brexit entered the equation, further change seemed more likely than maintenance of the status quo. But Brexit has focussed attention on them and highlighted anew the question whether the UK can continue to be governed in a way that satisfies the competing claims and aspirations of the territories and peoples which compose it. On the one hand, Brexit has made the task of managing the tensions of territorial governance and dealing with the unresolved issues of that governance much harder than they already were. On the other, it has become clear that issues of territorial governance are making Brexit even harder to implement than it would have been anyway.

### **The UK's post-Brexit relationship with the EU**

The most immediate impact of Brexit on territorial governance will be changes in the scope of devolved powers but there are also likely to be longer-term impacts. The following two sections will discuss both of these but first it is necessary to consider briefly how the impact of Brexit on territorial governance may be affected by the larger question of the UK's future relationship with the EU. The question of territorial governance cannot be considered apart from the larger question both because territorial issues are affecting the negotiating stances of the UK Government and of the EU and because the outcomes of negotiations may have differential effects on the historic nations that comprise the UK.

As the question had been a simple 'stay' or 'leave', the referendum result gave the UK Government a mandate to negotiate exit from the EU but little guidance as to the nature of our future relationship with the EU. It was unclear what it was necessary to do to respect the popular will expressed in the referendum; yes to Brexit – but what kind of Brexit? The actual argument about what the future relationship should be came to be conducted in terms of 'hard Brexit' (a looser relationship with the EU) or 'soft Brexit' (a closer relationship), although clearly there was not a binary choice as there could be many different models and degrees of connection. The argument was also just as fractious as the pre-referendum debate had been and disagreement cut across party lines. The Conservative party remains badly split on the issue, the Labour party somewhat less so.

There have also been major differences of view between the UK Government and some of the parties in power in the devolved institutions as to what the outcomes of the Brexit process should be. The UK Government's initial statement of objectives as set out in the Prime Minister's Lancaster House speech in February 2017 (PM, 2017) amounted to a fairly hard Brexit. That position was, in summary, for the UK to leave the existing customs union and the single market and have complete control of its immigration policy whilst also having '... the greatest possible access' to EU markets 'through a new, comprehensive, bold and ambitious free trade agreement'. The Government's 'red lines' included not being subject to the jurisdiction of the Court of Justice of the EU in respect of future trade and other relationships and not having to pay large amounts into the EU budget in future. By contrast, Sinn Fein, the SNP, the Labour party in Wales and Plaid Cymru all wanted their respective

territories to remain in the customs union and the single market and so have argued for a soft Brexit for the UK and/or special arrangements for their territories (See e.g. Scottish Government, 2016).

As the negotiations have proceeded, the UK Government's position has shifted considerably – see, for example, the PM's Mansion House speech on 2 March 2018 (PM, 2018) – but the differences of views on the future relationship with the EU have added to the tensions between the Governments. Meanwhile the EU27 have insisted that Brexit that they will not accept any outcome which results in a hard border on the Ireland. The UK Government has also committed to this aim but has found it difficult to come up with a solution to the border problem that is compatible with its general negotiating objectives, acceptable to the EU27 and acceptable to the key domestic players, particularly the Conservative party and the Democratic unionist party. These issues are discussed further below.

At the time of writing, the latest development is that, following a 'summit' at Chequers on 6 July 2018 intended to settle once and for all arguments about the Government's negotiating strategy, the cabinet announced what purported to be an agreed position. This was essentially to keep one of the 'four freedoms': free trade in goods between the EU and the UK, but not free movement of services, persons and capital. This was followed within three days by the resignation of both the Secretary of State for Exiting the European Union and the Foreign Secretary after which cabinet unity appeared to be restored at least temporarily.

But, it would be rash to assume that the future UK/EU relationship will take this form. It has still to be negotiated with the EU which has consistently maintained that the four freedoms are indivisible and so must be accepted or rejected as a package. In addition, it is not clear that the Government can hold on to enough MP's votes to ensure its approach is endorsed by the House of Commons, although it can probably rely on the votes of some Labour MPs to offset those of Conservative rebels.

The situation remains fluid and unpredictable. We do not know what the long-term relationship of the EU to the UK will be. We do not even know whether the transitional period running to the end of 2020 which has already been agreed in principle, and during which, although the UK will no longer be a member of the EU, the obligations of membership will in general continue to apply to the UK will actually take effect. The EU27's position is that nothing is agreed until everything is agreed. This makes predicting the long-term effects of Brexit on territorial governance very difficult. Equally, a territorial issue, the Irish Border question is having a major impact on the negotiations and making the prediction of even short-term consequences difficult.

### **The impact of Brexit on territorial governance: repatriation of devolved powers**

The original devolution statutes provided that the devolved assemblies and executives had no power to legislate or act incompatibly with EU law even where the subject matter was otherwise within their competence. This severely restricted their ability to engage in

independent policy-making in a number of areas including agriculture, fisheries and the environment. Brexit, therefore, had the potential to give the devolved institutions greater freedom to diverge from the rest of the UK because of the removal of the EU law constraints.

However, the European Union (Withdrawal) Act 2018 (EUWA) which received royal assent on 26 June 2018 provides for the return of some competences to UK level. Section 12 of the Act amends each of the devolution statutes to say that the devolved assemblies have no competence to modify any aspect of 'retained EU law' (a term which covers existing laws that implement EU obligations) which is specified in regulations by a UK Minister. In effect, power to change laws which are necessary to comply with EU obligations will be reserved to Westminster in specified policy areas. Regulations reserving powers cannot be made unless a draft of the regulations has been laid before the relevant devolved assembly and voted on. The relevant devolved assembly is guaranteed the opportunity to give its views but does not have a veto; UK Ministers may make the regulations despite consent having been refused.

This is the first time that the scope of devolved powers has been reduced rather than increased and has proved extremely controversial but the argument has largely been between the UK Government on one side and the Scottish and Welsh Governments on the other. The issue has generated less overt controversy in relation to Northern Ireland for several reasons. The devolved institutions have been suspended since January 2017, Sinn Fein MPs do not take their seats in the House of Commons and the UK Government has been engaging primarily with the DUP on Brexit and depends on them for their Commons majority. The DUP are not in any event opposed to the powers in question returning to Westminster. In one sense, the controversy has been settled by section 12 of EUWA, but it is worth examining because of its implications for the future of territorial governance.

The UK Government originally proposed (Department for Exiting the EU, 2017) that there should be reserved to UK level the power to change laws that were necessary to implement EU obligations across all devolved areas, although UK Ministers would have power at some unspecified time in the future to 're-devolve' particular competences by secondary legislation. It sought to justify this by arguing that the EU law constraint had ensured harmonisation of laws across the UK in many devolved areas and that this ought to continue. Common UK frameworks would be retained after Brexit where they were necessary to protect the freedom of businesses to operate across the UK single market so that '... no new barriers to living and doing business within our own Union are created as we leave the EU'. In pursuance of that view, when the European Union (Withdrawal) Bill (EUWB) was published in July 2017, its Clause 11 reserved powers to change all laws required for compliance with EU law.

This was denounced as a 'power grab' by the Scottish and Welsh Governments which said that enacting these provisions without devolved consent would be contrary to the Sewel convention. Their objections prompted discussions during which the UK Government made compromise proposals which would have reduced the number of areas in which powers were reserved. While discussions continued, both the Welsh Government and the Scottish Government produced their own 'continuity' bills for giving continuing effect to EU-derived

laws (Scottish Parliament, 2018; Welsh Assembly, 2018). The Scottish Bill is currently subject to a legal challenge by the UK Government which will be heard by the Supreme Court in July 2018. Eventually, the Welsh Government broke ranks with the Scottish Government, announcing on 24 April 2018 that it had reached agreement with the UK Government on amendments to Clause 11. The accompanying Intergovernmental Agreement (Cabinet Office, 2018) indicated that the two governments agreed on 24 policy areas in which legislation might be required to maintain or create common framework (as opposed to reserving all powers relating to EU obligations) and a process for approving such measures via secondary legislation which is now set out in section 12 of EUWA for all three devolution schemes.

The Scottish Government maintained its opposition and the Scottish Parliament (SP) voted to refuse consent for the Bill by 93 votes to 30 with the Conservatives being the only party to vote for consent. Nonetheless, the UK Parliament proceeded to enact the Bill. There is no doubt that, the devolved institutions have no legal power to prevent the UK Government agreeing, or the UK Parliament endorsing, an agreement with the EU27 which they do not like. Nor do they have any legal power to prevent their policy competence being curtailed in the way that EUWA has done. Therefore, the enactment of EUWA is perfectly lawful, but this does not dispose of the constitutional argument because there is also the Sewel convention to consider.

There is some difficulty in deciding whether the Sewel convention has been breached. There is no agreed statement of what counts as an exceptional situation which would justify the UK Parliament's legislating without consent. Nor is there much guidance from practice. Occasions when consent has been refused have been rare and none has been on an issue of comparable importance. Nor is there any independent mechanism for giving an authoritative ruling on the meaning and application of the convention. The Supreme Court made it clear in the Miller case (*R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5) (i) that the courts should not express a view on what conventions mean or require, and (ii) the statutory statement of the Sewel convention in the Scotland Act 2016 was not legally enforceable and there is no other institution which can adjudicate authoritatively questions of the observance of conventions. Consequently, the UK Government – although it is one of the parties to the dispute – is effectively able to act on its interpretation of the convention and claim to be acting consistently with it. It is only political difficulties that could stop the government overriding the refusal to consent.

But these uncertainties do not mean that the question whether the UK Government was justified in proceeding without consent cannot be answered. We can reason from the purposes of the convention. Originally, the convention applied only to UK legislation on topics falling within devolved competence, but it has been extended to include legislation which changes the legislative competence of the devolved legislatures (Cabinet Office, 2013) and the UK Government accepted that votes on consent motions in the devolved assemblies were necessary for EUWA. In order to justify changing the competence of the SP without its consent, the UK Government has had to argue that the 'normally' exception to the convention applies. However, the argument based on the need for common UK frameworks in certain

policy areas post-Brexit does not by itself justify the legislation as both Scottish and Welsh Governments made it clear that they accepted the need for common UK frameworks in some areas of policy. Their position was that these should be negotiated between the devolved and the UK governments rather than simply imposed by the latter. Therefore, the UK Government had to explain why the necessary common frameworks could not be achieved by negotiation.

Its argument on this point has been rather thin and its position not entirely clear. It has referred to the current situation being exceptional and the need to give effect to the outcome of the referendum and ensure an orderly exit from the EU which is in the interests of the UK as a whole. But, as McHarg has pointed out (McHarg, 2018a), it cannot be sufficient merely to say that the situation is abnormal and that the UK Government has tried to reach agreement with the Scottish Government but has failed. This would be to reduce the convention to a procedural obligation, i.e. the UK Government should try to reach agreement with devolved governments but if it cannot do so, it is entitled to proceed without their consent. Instead, it is necessary to explain why making an exception to the consent requirement is consistent with the purposes of the convention or to demonstrate that another important constitutional principle takes priority over the convention. McHarg has suggested two possible substantive constitutional justifications for dispensing with devolved consent, the first being cases of necessity and the second being where a devolved legislature is abusing its power but both arguments are highly problematic (McHarg, 2018b).

In fact, the main reason for the UK Government's reluctance to leave it to negotiations to produce the common frameworks is the conspicuous lack of trust between the two governments that has been evident for several years; the UK Government does not trust the Scottish Government to negotiate in good faith and thinks it might seek confrontation rather than resolution in any such negotiation in order to advance the cause of independence, and thus might refuse to agree reasonable proposals. In the background, but also important is the fact that the negotiation route would have to be attempted with all three governments and the government has exactly the same concern that Sinn Fein would seek confrontation rather than resolution. A further background concern is the desire to ensure that any new post-Brexit trade agreements which affect currently devolved areas can be implemented. But suppositions of this nature do not justify breach of the convention. The path of seeking negotiated agreements on the relevant topics should have been tried first. If it had failed, the UK government could then have reviewed the situation and decided whether circumstances justified such a serious step as legislating without the consent of the devolved institutions.

In any event, as a matter of practical politics, the UK Government may have less to fear than it thinks from leaving competences as they are now. There is probably little risk that the Scottish Government would seek to erect barriers to intra-UK trade after Brexit. Such measures would be likely to be far more damaging to the Scottish economy than to that of the rest of the UK and, with the possible exception of the fishing industry, we can expect the Scottish Government to come under very strong pressure from industry and other interest groups to maintain the existing regulatory alignment in the areas covered by EU law. Trying to pick a fight over common frameworks might not work to the SNP's advantage. Clearly,

Northern Ireland is a different matter but here too nationalist refusal to negotiate might backfire politically.

In summary, attempts by the UK Government to force through the changes to devolved competence have increased political tension and worsened intergovernmental relationships which were already characterised by low levels of mutual trust. Although partly explicable by short-term political pressures to deliver on promises made about Brexit, and concerns about nationalist parties trying to obstruct the implementation of Brexit and the implementation of future trade agreements, the proposal to cut down devolved powers may also represent the re-emergence of the unitary state narrative as the underlying assumption of UK central government both at ministerial and official level. Whilst successive UK Governments have, at least in their public pronouncements, accepted the right of the peoples who constitute the UK to leave it, they have seemed more reluctant to guarantee the extent of their autonomy within the UK. Brexit demonstrates anew what was already apparent: (i) that the British state at the centre has not adapted its assumptions and ways of thinking to the quasi-federal state that the UK has become, and (ii) that the failure to pay sufficient attention to intergovernmental relations over the years has made it difficult to cope with serious disputes when they arise. There are no agreed principles available to resolve disputes about territorial government beyond what the UK government wishes to impose and no mechanisms for dispute resolution which enjoy the confidence of both the devolved governments and the UK Government.

### **The impact of Brexit on territorial governance: the four nations**

The impact of Brexit on the territorial government of the UK plays out differently in each of the four nations and so we must consider each of the historic nations separately.

#### *England*

Brexit has been propelled by English votes. So, arguably, the majority of voters in England have got what they wanted. Does that mean that, there will be no pressure from England for change? That would perhaps be an over-optimistic conclusion. There is little prospect of further substantial reform to regional government in the near future given the amount of ministerial and official time and energy that is being consumed by Brexit, but in the longer-term some of the same discontent that fuelled the vote to leave the EU might be channelled into renewed demands for regional autonomy. This is more likely if, in a few years' time, the perception in areas that voted most strongly for Brexit is that Brexit has not delivered enough change of the right type and that not enough has been done to reduce their relative disadvantage.

#### *Wales*

The situation in Wales represents the most modest threat to the stability of current arrangements. Nationalism has been a less powerful force in Wales than it has been in either Scotland or Northern Ireland. Opinion surveys have consistently recorded much lower levels

of support for independence than in Scotland. Public opinion was also more lukewarm about the prospect of devolution with it being approved by a very narrow majority of 50.3% in the 1999 referendum. Since then, however, public opinion has swung behind the principle of devolution and the continuation of devolution for Wales within the United Kingdom is the most popular option for the future of Welsh governance.

In the EU referendum, Wales returned a majority for leave of 52.5%, close to the national average but, contrasting with the majority view of Welsh voters and the UK Government's negotiating position, with both the Welsh Government (Welsh Labour and the Welsh Liberal Democrats) and Plaid Cymru favouring remaining in the single market. Although the Welsh Government originally made common cause with the Scottish Government to oppose the proposals for reduction of devolved competence in the EUWB, it was not surprising that it was willing to reach a deal with the UK Government rather than pushing the constitutional dispute further given that there was a popular majority for Brexit in the referendum in Wales and that the both parties in the Welsh Government, unlike the SNP support Wales staying within the UK.

### *Scotland*

The Scottish situation is very different. A nationalist party, the SNP, has been in government continuously since 2007 and although the Scots voted against independence in the 2014 referendum, the margin of victory – at 55.3% to 44.7% was uncomfortably narrow for supporters of the union. Rather than settling the question of Scotland's future in favour of the status quo, the aftermath of the referendum suggested that the future was very much up for grabs. The SNP won an unprecedented landslide in the 2015 UK General election taking 56 out of 59 seats. It looked as if the independence show was still on the road and, although the referendum had been described by Alex Salmond, then leader of the SNP and First Minister as 'a once in a generation opportunity', his successor, Nicola Sturgeon said that a second referendum would be justified much sooner if the UK electorate as a whole were to vote to leave the EU, but the majority of Scots chose to remain. This is exactly what happened in the EU referendum; 62% of Scots voted for the UK to remain a member of the EU. However, the Brexit dividend that the SNP seemed to have expected in this scenario did not appear. According to opinion polls, support for independence has not appreciably increased since the referendum and although the First Minister said in March 2017 that she would ask for a second independence referendum to be held between autumn of 2018 and spring 2019, following a poor result in the 2017 election in which a second referendum had been an issue, in June 2017 she announced she would 'reset the plan' for a second referendum so there is now no definite commitment as to when a second independence referendum might be held.

However, although the result of the EU referendum has not decisively changed public opinion on independence at least in the short term, the UK Government's approach to implementing Brexit has been very controversial and there has been a bitter dispute over the UK Government's decision to return currently devolved powers to UK level as described above. But, although elected politicians have repeatedly described the dispute over devolved powers as a 'constitutional crisis', that crisis seems to have had little impact on public

opinion. In addition to the fact that support for independence seems not to have risen greatly since the EU referendum (Curtice, 2018a), it also seems as if the opinions of Scottish voters on the consequences of Brexit for UK governance differ from those of the Scottish Government. A recent survey (Curtice, 2018b) found that most Scots voters do not agree that Scotland should have a closer trading relationship with the EU (67% against) than the rest of the UK or have a more liberal immigration policy for EU migrants (63% against). Thus far, therefore, we have no clear evidence that the either Brexit vote itself or its possible policy consequences for Scotland has made a decisive to voters' attitudes to remaining in the union or their views of the level of autonomy Scotland should enjoy. Whilst it may have made a difference for some voters, there appear to have been shifts in different directions which cancel each other out. In any event, the EUWA has been enacted by the UK Parliament despite the SP's voting to refuse consent. It seems that a UK Conservative leadership increasingly focused on English concerns has concluded that it can safely ignore any push-back from Scottish politicians, especially given the outcome of the 2017 UK election which may have convinced it that the threat of independence has retreated.

However, Brexit may have longer-term consequences on Scottish public opinion. If the economy contracts, as many experts predict, there is likely to be a squeeze on public expenditure in Scotland with much of that spending being dependent on decisions taken with respect to England the effects of which are then translated to Scotland via the Barnett formula. This will have a major impact on public services which have already felt the impact of several years of austerity. Meanwhile, Brexit has highlighted major tensions in UK territorial governance. The combination of the two might fuel a rise in nationalist sentiment which leads to a second independence referendum in much less than 'a generation'.

### *Northern Ireland*

Northern Ireland presents the greatest threat to the stability of current arrangements for territorial governance. It is faced with greater objective difficulties than any other part of the UK in adapting to Brexit. The current situation is that, although the border between Ireland and Northern Ireland is an international border, for all practical and for many legal purposes it is an open border in consequence of a combination of (i) the EU's free movement and free trade rules, (ii) the older institution of the Common Travel Area which comprises Great Britain and the Island of Ireland, (iii) the cross-border governance arrangements established by the Belfast/Good Friday Agreement and (iv) the privileged positions given to citizens of Ireland by UK law and to citizens of the UK by Irish law.

Brexit was bound to present major challenges in the Northern Ireland context. Firstly, as well as defeating the expectations of a clear majority of voters in Northern Ireland (55.8% for remain), the result of the referendum has highlighted differences between the nationalist and unionist communities (Garry, 2017). Secondly, it has the potential to threaten the operation of a wide range of institutions and processes that currently work on an all-Ireland basis or over the whole of the Isles, particularly those which are contingent on the 'soft' border between Ireland and Northern Ireland. Thirdly, and most seriously, it has the potential to threaten the peace process in Northern Ireland.

Membership of the EU has facilitated the peace process through the direct financial and political support it has provided for it and indirectly by providing a legal environment conducive to an open border. Recognising that, all of the parties and governments directly interested and the EU have declared their commitment to the peace process and to avoiding the creation of a hard border between Ireland and Northern Ireland. But this has proved far easier to promise than to deliver.

Firstly, there is no consensus among the Northern Ireland political parties as to how to avoid a hard border. Sinn Fein has advocated that Northern Ireland could be given special status within the EU after Brexit effectively remaining in the customs union and single market, but the DUP is resolutely opposed to this and to any form of barrier, such as customs checks or controls on the movement of persons, being imposed between Northern Ireland and the rest of the UK.

Secondly, the manner in which the UK Government has pursued Brexit negotiations has made meeting these challenges more difficult. Initially, its negotiating position was premised on the UK being outside both the customs union and the single market. That suggested that there would have to be significant border controls. In addition to any economic costs that border controls might cause, if there were border posts or any physical infrastructure at the border, there would be a risk that these would become a target for dissident paramilitaries resulting in violence. The UK government began by claiming that a hard border could be avoided by a flexible approach including extensive use of IT. Subsequently, it has considered other ideas such as the EU's suggestion of a common regulatory area which would maintain equivalence on customs duties coupled with close alignment with single market regulation across the island of Ireland. Most recently it has been considering two options for the UK as whole which it hopes might solve the Irish border problem, these being a customs partnership with the UK and 'maximum facilitation' (known as 'max-fac' for short). Under the former, the UK would collect duties on imports ultimately destined for the EU on behalf of the EU and pass them on. Under the latter, there would be highly streamlined customs arrangement with a number of elements including extensive use of technology. Thus far, the EU has rejected all of the UK's proposals as being unconvincing so, currently, there is no agreement between the EU and the UK as to what will be done to avoid a hard border.

Part of the discussion between the EU and the UK has concerned a 'backstop' in the case of failure to reach agreed solutions to the border problem. The EU negotiators proposed that if no specific solution could be found, there would be established a common regulatory area comprising the European Union and Northern Ireland and Northern Ireland would remain in the EU customs territory. The PM rejected this proposal saying that it creates a customs and regulatory border down the Irish Sea, something no UK prime minister could ever agree to. The latest UK proposal following the Chequers summit of 6 July 2018 is the EU-UK area of free trade in goods described above. Whilst this might allow the government to keep its promises and to satisfy the concerns of the DUP it is not clear that it will be acceptable to the EU. On 8 June, Michel Barnier, the EU's chief Brexit negotiator, stated that the backstop proposal could not apply to the whole of the UK as this amounted to allowing the UK to pick and choose between the four freedoms which the EU regarded as indivisible.

Thirdly, after losing their majority at the General Election of May 2017, the Conservatives negotiated a ‘confidence and supply’ agreement with the DUP in order to get a working majority in the UK Parliament. This has in effect given the DUP a veto over the UK Government’s negotiating position and narrowed the range of possible solutions. That was confirmed in December 2017 when the UK Government and EU negotiators had apparently come very close to agreement on a compromise proposal for regulatory alignment but the DUP intervened after seeing a draft of the agreement, stating that it was unacceptable to them. In effect, the UK Government has taken sides in the internal politics of Northern Ireland which undermines trust both between nationalist politicians and the UK Government and between unionist and nationalist politicians. That, coupled with the fact that the Northern Ireland Assembly and Executive have been suspended since January 2017, makes it very difficult for the UK Government to broker any compromise between Northern Ireland’s parties.

For most of the time since the UK Government formally notified its intention to leave the EU, the promise not to harden the border has been more wishful thinking than workable proposal. The Chequers proposal is at least serious and workable although it will not result in a wholly frictionless border but as noted above, it contradicts the EU position because it applies to the whole UK. The consequences of failure to agree a solution to the border problem go far beyond Northern Ireland. The EU has made clear both that ‘nothing is agreed until everything is agreed’ and that a solution of the border problem is fundamental to the withdrawal agreement. No doubt the EU and the UK will work hard to avoid this, but it must be considered a significant possibility that the impasse over Northern Ireland could prevent an agreement on the future relationship of the UK and the EU being made at all leading to a chaotic Brexit.

As for Northern Ireland, the ill-will created by the Brexit process couple with demographic changes in Northern Ireland, particularly if there are adverse economic circumstances for Northern Ireland, could within a few years lead to demands for a referendum which those campaigning for uniting with Ireland might well win. Brexit would then have led to the break-up of the UK.

## **Conclusions**

It had become clear by the time of the EU referendum that although there had been major developments in the UK’s territorial governance, these had not settled down into a stable quasi-federal system of government. The unresolved issues of territorial governance might well have been forced on the political agenda at some point but Brexit has certainly served to emphasise them and forced the UK to confront them all at once, in fraught circumstances and under serious time pressure.

Developments over the next few years, never mind in the longer-term, are very difficult to predict. One possibility is that the UK breaks up with either Scotland or Northern Ireland separating from rUK. As yet, there is no sign in the opinion polls of a critical shift of mood amongst the Scottish public, but if Brexit is seen to have adverse economic consequences and relations between the devolved and UK governments continue to be poor, the picture may be different in a few years' time. The fact that Brexit has apparently deepened the divisions between the communities of Northern Ireland coupled with the unique vulnerability of Northern Ireland to disruption by Brexit means that here too a majority for leaving the UK might emerge within a few years. The likelihood of these possible outcomes will be increased if the EU and UK fail to make any agreement on their future relationship.

If on the other hand the UK is not to break up, it seems unlikely that the UK's arrangements for territorial governance can remain unchanged indefinitely. If political discontents in the different nations of the regions of the UK are not to multiply and become more deep-rooted, the need for change must be addressed. Brexit may turn out to be a catalyst for a rethinking of territorial governance in which UK political elites adopt a quasi-federal interpretation of the UK constitution and consider carefully what institutions and processes that implies. That would not necessarily mean adopting a codified constitution; the obstacles to that happening are formidable. However, there might be scope for less dramatic developments which could include more specific statements of constitutional principles, even if these are not made legally binding, and revised processes for engagement. Having said that, the prospects of such constitutional rethinking within the next few years seem slight and, if UK political elites continue to default to the unitary state perspective and to hoard power at the centre, that will probably increase the likelihood of disintegration in the longer term.

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