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Brexit and Devolution: New Frontiers for the UK Union

Stephen Clear¹

I. Introduction

As the UK prepares to leave the EU,² much has been said about the consequences for open borders and EU freedoms.³ After nearly five decades of membership,⁴ the complexities surrounding divorcing UK laws from those intertwined with the EU are, unsurprisingly, fraught with difficulties. However, beyond Brexit, it is often taken for granted that the UK has enjoyed a ‘customs union’, and border-free movement, that has endured far beyond the longevity of the EU, insofar as the UK is a nation-of-nations.⁵ Whilst, post-1998, the UK’s unitary constitutional model of devolution has been fragmented and incremental,⁶ the transfer of powers to the regions has been *largely* based on mutual respect.

Brexit has seen these relationships enter new territory, not least over motions passed by the devolved parliaments under the Sewel Convention, otherwise known as Legislative Consent Motions (“LCM”s). Operating on a convention basis, such motions are based on the political principle that the UK legislature will not normally pass laws that either directly affect a devolved subject matter; or change the competence, or powers, of a devolved legislature or its ministers, without consent to do so. Although the Supreme Court has stated that the devolved legislatures have no legal right of veto over Brexit,⁷ the UK Government, at least at the time, acknowledged that LCMs should be sought from the devolved bodies;⁸ particularly, as Brexit would change areas traditionally of devolved competence.⁹ However, following refusals by Scotland and some Welsh Assembly Members to grant LCMs, there are now greater political points of contention between the regions and Westminster. In the absence of a political solution, the UK Government has had to shift towards an arbitrary reliance

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² Following the referendum facilitated by the European Union Referendum Act 2015.

³ See: Michael Dougan (ed), *The UK After Brexit: Legal and Policy Challenges* (Intersentia, 2017).

⁴ Following the European Union Communities Act 1972 ss.2(1)-(4).

⁵ Act of Union with Scotland 1707, and Act of Union with Ireland 1800.

⁶ Robert Hazell (ed), ‘Devolution and the Future of the Union’ (Constitution Unit April 2015) <<https://www.ucl.ac.uk/constitution-unit/publications/tabs/unit-publications/163.pdf/>>accessed 30 October 2018; and Aled Griffiths, Stephen Clear and Huw Pritchard, ‘Fragmented and Incremental Devolution in the United Kingdom’ (2015) 3 JCLC 74 (India).

⁷ *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

⁸ UK Parliament, ‘Territorial Extent and Application’ (Parliament.uk 13 July 2017) <<https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/en/18005en11.htm>>accessed 30 October 2018.

⁹ EU Withdrawal Bill clause 15, formerly 11.

on Westminster's supremacy. In doing so, socio-political evidence advanced by the regions' political parties shows that the rhetoric is changing, with greater and more frequent references to how disregard for their concerns will lead to renewed calls for independence.

Whilst it is appropriate, within a democracy that follows the tenets of the rule of law, to debate where powers should be vested following Brexit, the strain on the UK's unitary constitutional model needs to be addressed. Scholarship has focused on the UK constitution after *Miller*,¹⁰ but recent signals from politicians suggest that the time is now opportune to also reconsider constitutional patriarchy, the model of Westminster sovereignty, and their effect on the UK Union. Given the concerns of Welsh, Scottish and Northern Irish politicians, and the societies they represent, for the UK Union to survive, asymmetrical quasi-federalism is looking increasingly likely post-Brexit.

II. New Frontiers for Devolution

The UK's constitution has been predominantly recognised as political in nature,¹¹ with the caveat being that what is legally possible may not be practically achievable.¹² Within the context of devolution, the legitimacy of the Scottish Parliament, and Welsh and Northern Irish Assemblies is facilitated via the respective devolution Acts passed by Westminster.¹³ Nonetheless, it is through this recognition of the difference between the theoretical *legal possibilities* (i.e. that the UK Parliament *could* shut down the regions' legislatures), compared to the *political reality* of the situation (that doing so would cause turmoil), that Westminster has sought to maintain a working relationship with the devolved administrations. For example, whilst the Scottish Government wanted to pursue an independence referendum, it did not have the legal competence to do so (as matters pertaining to the UK Union are legally reserved).¹⁴ It was through respect for the will of the Scottish people that the UK Government agreed that the Referendum Act could be an exception to the Scottish devolution scheme.¹⁵

This relationship of mutual political respect has been recognised via LCMs. Whilst such conventions exist politically (and have been recognised within devolution legislation),¹⁶ the agreements are not legally binding. Nor do they limit the sovereign powers of the UK Parliament. Nevertheless, it is rare for the devolved legislatures to refuse Westminster's LCMs, with the Welsh Assembly only refusing such on seven

¹⁰ Mark Elliot and others (eds) *The UK Constitution after Miller* (Hart Publishing, 2018).

¹¹ John AG Griffith, 'The Political Constitution' [1979] 42 MLR 1.

¹² Mark Elliot and others (n10), Ch 2.

¹³ Scotland Act 1998 (SA1998), Northern Ireland Act 1998, and the Government of Wales Act 1998/2006; which are all subject to parliamentary sovereignty rules.

¹⁴ SA 1998 (n13), sch.5.

¹⁵ Scottish Independence Referendum Act 2013.

¹⁶ See SA1998 (n13), s.28, as amended by Scotland Act 2016 s.2; and Government of Wales Act 2006 s.108, as amended by Wales Act 2017 s.3. For commentary: TH Jones, 'Wales, Devolution and Sovereignty' (2012) 33 Stat.L.R 151.

occasions since 2011,¹⁷ and the Scottish Parliament only doing so on one occasion other than Brexit.¹⁸ In all previous instances, the result of a region refusing a LCM has been a political compromise between the UK Government and the devolved executives to revise either the Bill itself, or policy or practice.

However, in an unprecedented exercise of constitutional power, the paradigm of mutual respect for the regions has been destabilised in the context of Brexit. When the UK Government sought LCMs from the Scottish Parliament and Welsh Assembly for the EU Withdrawal Bill, they did so against the backdrop of Scotland officially voting remain, and the First Minister claiming that a second independence vote was highly likely. Similarly, Wales, whilst officially voting to leave, still had a 47.5% remain vote (1% more than in England).¹⁹ The primary point of contention over granting LCMs was the ‘devolution insensitive’ clause 15 (formerly 11),²⁰ which enables Westminster to temporarily retain power over some devolved areas, which have traditionally been subject to EU oversight. The UK Government is of the opinion that temporary control is needed in order to ensure regulatory alignment across the whole of the UK, so as to not become a future barrier to international trade via divergence across the regions. Although the Welsh Assembly voted to pass their LCM, some Assembly Members have remained strongly opposed to the Bill, referring to it as a loss of leadership and a farcical weakening of the Welsh Parliament.²¹ By contrast, the Scottish Parliament have refused their LCM, stating that they could not give consent to something that limits the will of the Scottish people, nor limits the powers of their Parliament.²² Instead the Scottish Parliament has attempted to implement its own Continuity Bill, which, whilst set to be challenged in the Supreme Court, proposes that Brexit will not affect any existing, legally recognised, Scottish powers.²³

¹⁷ Welsh Assembly, ‘Legislative Consent Motions’ (2018) <http://www.assembly.wales/en/bus-home/research/bus-assembly-publications-monitoring-services/bus-lcm_monitor/Pages/bus-lcm_monitor.aspx> accessed 30 October 2018.

¹⁸ In relation to the Welfare Reform Act 2012, with the LCM refusal culminating in Scottish Ministers being given competency in administering universal credit and personal independence payment benefits.

¹⁹ The Electoral Commission, ‘EU Referendum Results’ (2018) <<https://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information>> accessed 30 October 2018.

²⁰ Commons Select Committee, ‘Constitutionally Insensitive Clause 11’ (Parliament.UK, 29 November 2017) <<https://www.parliament.uk/business/committees/committees-a-z/commons-select/public-administration-and-constitutional-affairs-committee/news-parliament-2017/devolution-clause-11-report-published-17-19/>> accessed 30 October 2018.

²¹ BBC News, ‘Brexit Bill Deal a Significant Achievement’ (25 April 2018) <<https://www.bbc.co.uk/news/uk-wales-politics-43895350>> accessed 30 October 2018.

²² BBC News, ‘Holyrood Refuses Consent for Westminster Brexit Bill’ (15 May 2018) <<https://www.bbc.co.uk/news/uk-scotland-scotland-politics-44113864>> accessed 30 October 2018.

²³ Scottish Parliament, ‘Legal Continuity (Scotland) Bill’ (2018) <<http://www.parliament.scot/parliamentarybusiness/Bills/107725.aspx>> accessed 30 October 2018.

This recent sequence of events has seen the UK Government depart from its traditional approach to LCMs and, given the result of the EU referendum, the traditional approach of negotiating a political solution to Scotland's rejection appears impossible. Whilst refusal to grant a LCM will not legally prevent the passage of the EU Withdrawal Bill, nor stop Brexit, this reliance by Westminster on the legal possibility over and above the political reality of the situation represents a new frontier in devolution history.

The notion of sovereignty, including where power is held, and by whom, has been much debated in recent years.²⁴ However, politically speaking the EU Referendum never asked the question as to where power should be vested once returned from Brussels. One might question whether, given the strong national identities in both regions, Welsh and Scottish citizens who voted in favour of Brexit would also have voted for such powers to be concentrated in London over and above Cardiff and Edinburgh. As can be seen in the discussions below, such disunity is now being capitalised upon by the nationalist parties and devolved administrations to reflect upon the inequalities amongst the different nations within the UK.

III. New Paradigms in the Regions' Responses

As a result of these events, the devolved administrations have raised concerns that the UK Government cannot be trusted to respect the devolution settlements, and that Brexit processes are arbitrarily 'rolling back' responsibilities that have long been devolved.²⁵ Such warnings have also been reflected in the House of Lords, where Lord McNally ironically stated "it is the Conservative and Unionist Party that is overseeing the greatest threat to this Union."²⁶ Furthermore, concerns about the mutual respect and relationships between Westminster and the regions have been exacerbated by studies suggesting, for example, that 59.9% of voters in the UK prioritise Brexit over the UK Union.²⁷ However, perhaps the starkest warnings are coming from the regions themselves.

Hours after the EU referendum result, the SNP were calling for a second independence referendum.²⁸ Similarly Scotland's First Minister claimed that

²⁴ For commentary: M Gordon, 'The UK's Sovereignty Situation: Brexit, Bewilderment and Beyond...' (2016) 27 K.L.J. 333. For sovereignty within context of devolution: for Scotland: Lord Hope in *Axa General Insurance Ltd v Lord Advocate* [2011] UKSC 46, para 46, and Lord Reed, para 145. For Wales: *Re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3.

²⁵ Mark Drakeford, 'Brexit not a vote to roll back devolution' (BBC News, 11 March 2018) <<https://www.bbc.co.uk/news/uk-wales-politics-43362420>> accessed 30 October 2018.

²⁶ House of Lords Hansard, 'Scotland: European Union (Withdrawal) Bill, Volume 791' (14 June 2018) <[https://hansard.parliament.uk/lords/2018-06-14/debates/8A0EE9B9-5132-4BF5-BB80-ACFD3CFB6407/ScotlandEuropeanUnion\(Withdrawal\)Bill](https://hansard.parliament.uk/lords/2018-06-14/debates/8A0EE9B9-5132-4BF5-BB80-ACFD3CFB6407/ScotlandEuropeanUnion(Withdrawal)Bill)> accessed 30 October 2018.

²⁷ Hatty Collier, 'Brexit is more important to voters than keeping the UK together' (Business Insider UK, 18 March 2017) <<http://uk.businessinsider.com/poll-brexit-is-more-important-to-voters-than-keeping-the-uk-together-2017-3>> accessed 30 October 2018.

²⁸ Kevin McKenna, 'Scottish Nationalists Are Already Salivating Over the Spoils of Brexit' (The Guardian, 18 February 2018) <<https://www.theguardian.com/commentisfree/2018/feb/18/scottish-nationalists-salivating-over-brexit-spoils>> accessed 30 October 2018.

Westminster has consistently attempted to ‘grab power back’ over Brexit, which will not be forgotten in the next independence bid.²⁹ SNP disdain over Brexit can be reflected in the guerrilla tactics the party has recently used to disrupt proceedings within the House of Commons, such as walking out during Prime Minister’s Questions.³⁰

Within Westminster, similar statements have been made by Plaid Cymru setting out the Welsh position:

“It is impossible to overstate the seismic implications of Brexit for Wales... We are facing...a vortex of centralisation, a self-affirmation of self-interest in sovereignty by and for Westminster...[M]y party argued in favour of remain...because we believed...small nations like Wales are served better sitting alongside the other...small nations of Europe...as equals. We argued that the inbuilt inequality of the UK would make Wales expendable political collateral to the overriding interests of England...Brexit will be a landmark in the journey Wales takes to our own conclusion...Westminster and its parties will always treat Wales like an adjunct, an afterthought, an inconvenience....All that does is make the case for Welsh political independence.”³¹

Whilst Northern Ireland does not currently have an active Parliament at Stormont (following the collapse of the power-sharing agreement),³² Sinn Féin have similarly called for an independence referendum, claiming that the reunification of Ireland is now needed as ‘Brexit exposes (the) undemocratic nature of partition.’³³

Some may be inclined to dismiss these statements by nationalists as biased, but the cumulative traction of the calls for independence, by all regions, equates to one of the most decisive periods for the UK’s future. Whilst the Prime Minister has refused to allow independence referendums during Brexit negotiations,³⁴ this uncharted move away from seeking political compromise will indubitably lead to future consequences for the UK Union.

²⁹ Stewart Ward, ‘First Minister says Scotland ‘Won’t Forget’ Today’ (The National, 12 June 2018) <http://www.thenational.scot/news/16286036.First_Minister_says_Scotland__won_t_forget_today_as_power_grab_vote_passes/> accessed 30 October 2018.

³⁰ Anne Perkins, ‘SNP promise more guerrilla tactics over Brexit powers’ (The Guardian, 14 June 2018) <<https://www.theguardian.com/politics/2018/jun/14/snp-promises-more-guerrilla-tactics-over-brexit-powers>> accessed 30 October 2018.

³¹ Liz Saville Roberts, ‘Sewel Convention Volume 643’ (House of Commons Hansard 18 June 2018), available online: <<https://hansard.parliament.uk/Commons/2018-06-18/debates/1D1AC068-4583-41A9-978E-2678E2EB9901/SewelConvention#contribution-696153D2-6E75-4D8A-A6D0-ACF7B6AEF9A1>> accessed 30 October 2018.

³² BBC News, ‘Power-sharing talks collapse at Stormont’ (BBC, 14 February 2018) <<https://www.bbc.co.uk/news/uk-northern-ireland-politics-43064009>> accessed 30 October 2018.

³³ Michelle O’Neill, ‘Sinn Féin urges unity referendum within five years’ (Irish Times, 1 April 2018) <<https://www.irishtimes.com/news/politics/sinn-f%C3%A9in-urges-unity-referendum-within-five-years-1.3447391>> accessed 30 October 2018.

³⁴ Heather Stewart and others, ‘Theresa May rejects Nicola Sturgeon’s referendum demand’ (The Guardian, 16 March 2017) <<https://www.theguardian.com/politics/2017/mar/16/theresa-may-rejects-nicola-sturgeons-scottish-referendum-demand>> accessed 30 October 2018.

Whilst those consequences are yet to be realised, perhaps a more measured view of what could happen comes from the current Welsh First Minister:

“There will need to be change...[T]he UK’s constitution has come to the end of its ability to deal with devolution...It’s...a question of putting in place a constitution where it is understood what the different levels of government do. Does that mean an end of parliamentary sovereignty? Well I’m afraid it does.”³⁵

The Welsh First Minister was discussing federalism prior to the EU referendum result, but the divisiveness of Brexit, and the concerns raised by the regions over perceived ‘London-centric power grabs’, strengthens such proposals for revising devolution settlements within the UK.

IV. Concluding Thoughts

Legally, independence from the UK Union cannot be sought without Westminster approval. The UK’s unitary constitutional model, and the devolution Acts, make it clear that such matters are reserved for London alone. Furthermore, the Prime Minister has made it explicit that none of the devolved administrations will be granted an independence referendum until after the Brexit negotiations have concluded.

Nonetheless, Brexit has led to new strains on UK devolution relationships. Politically, if there is a will amongst the region’s societies to pursue independence it would be difficult for Westminster to morally enforce its supremacy. Whilst the UK Government has now departed from its traditional paradigms over LCMs, the consequences of trying to exert legal sovereignty via constitutional patriarchy, rather than pursue political compromise with Scotland, appears to be serving the ambitions of nationalist political parties in their pursuit of independence.

For the UK Union to survive, asymmetrical quasi-federalism is looking increasingly likely.³⁶ The post-Brexit challenge for the UK Government will be the territorial distribution of power amongst the devolved regimes, particularly in light of the new powers that will return from Brussels. The need to consider a basic territorial duality of the Whitehall machine is now needed if the UK Union is to endure and prosper post-Brexit.³⁷ As a minimum, owing to the views of the regions’ societies, the UK may inevitably have to move towards an even looser State of Union, particularly as demands to rework traditional London-centred conceptions of the executive grow.

³⁵ Mark Elliot, ‘Why Carwyn thinks we’re moving towards federalism’ (IWA, 23 January 2014) <<http://www.iwa.wales/click/2014/01/why-carwyn-thinks-were-moving-towards-federalism/>> accessed 30 October 2018.

³⁶ See further: Akash Paun and others, ‘Governing after the Referendum’ (Institute for Government, 2014) <<https://www.instituteforgovernment.org.uk/sites/default/files/publications/Scenarios%20paper%20-%20final%20APJR.pdf>> accessed 30 October 2018.

³⁷ For expanded view: Rick Rawlings, ‘A Coalition Government in Westminster’ in Jeffrey Jowell and others, *The Changing Constitution* (8th edn OUP 2015) Ch.7.