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Introduction

The policy of exiting the European Union (EU) pursued by the present United Kingdom (UK) government has produced many fraught complexities. Some involve the external orientation of the UK, centring upon but extending well beyond its trade relations. Others pertain to the internal political arrangements of the UK. Falling within this latter category are questions involving the balance of power between the devolved and UK legislatures and executives in the prospective post-Brexit environment, and the place of both within the wider constitutional system of the UK.

The promise of the 'leave' campaign in the lead-up to the EU referendum of June 2016 was that departure offered a means of 'taking back control'. Questions that this claim prompts, and that have recurred following the vote, are: who will assume this repatriated authority, and over what? A connected issue that has not yet received the same level of attention is more fundamental still. Eurosceptic accounts of the EU often depict it as a self-serving entity imposing itself on member states, lacking the legitimacy that can only derive from genuine consent from those countries and their populations to participation in this continental polity. Brexit, according to the logic of such narratives, represents a reassertion of the popular will leading to the recreation of a legal and constitutional order outside the EU, founded in the agreement of the public. A close examination of the handling of UK exit from the EU in relation to the devolved institutions, their authorities and their populations is one way of testing the validity of such a perception. It can

cast light on whether the UK constitution and any new features it is about to take on after Brexit meet the high standards of government by consent to which advocates of Brexit purport to subscribe.

If and when powers are repatriated from the EU, they will need to be wielded at some level in the UK. The UK, Welsh and Scottish governments have agreed in principle that certain responsibilities – including some that might fit within policy areas that are in general devolved – must be exercised centrally, if the coherence of the UK and its single market are to be preserved (though the Welsh and Scottish governments have also expressed a desire to maintain regulatory alignment with the EU single market after departure). In October 2017 the UK, Welsh and Scottish executives issued a statement of their shared outlook, referring to the importance of maintaining the 'UK internal market', the need to comply with 'international obligations', the ability to secure 'new trade agreements and international treaties', the 'management of common resources', the guaranteeing of 'access to justice', and the maintenance of 'security'. However, securing agreement about the precise powers involved, how they should be identified, and who should make such decisions, has proved a difficult proposition. At the centre of the dispute that has arisen has been the European Union (Withdrawal) Bill, completing its parliamentary stages at the time of writing. This paper considers the implications of this controversy for our understanding of the territorial constitution of the UK, and the basis on which it is composed.

The rise of devolution

If Brexit comes about, whatever it entails, it will not amount to a restoration of the UK as it was at the point of accession to the Treaty of Rome in 1973. Changes in the outside world cannot be fully reversed. The UK will have no choice but to continue to engage with the network of trading blocs, supranational institutions and associated rules and procedures that it has helped shape over the past four-and-a-half decades. Nor can post-1973 internal transformations simply be undone. Some of these domestic developments have been a direct consequence of participation in continental integration and the supremacy of European law that it necessitates for Member States. It is a particular irony of the Brexit process that the most consuming legislative challenge it has created for the UK has been the attainment not of a break with the past, but of legal continuity after the point at which UK membership of the EU ceases. Another fundamental shift internal to the UK in the period since 1973 – the rise of devolution in Wales, Scotland and Northern Ireland – was not a direct consequence of participation in the European project. Nonetheless the existence of these tiers of governance creates immense complications for the effort to leave, and simply to disregard it is not politically viable.

Devolution has become an accepted part of the UK constitution. It was introduced to Wales and Scotland – and reestablished in Northern Ireland – from the late 1990s onwards. In each case, the decision to form elected legislatures and associated institutions was approved in advance by referendums held in the territory concerned. In this sense, devolution is grounded in an exceptional form of popular approval (with a further such vote held and won on the extension of devolution in Wales in 2011). Advocates of leaving the EU often refer to the existence of an irresistible imperative created by the referendum of June 2016, to which the structures and rules of our constitutional system are subordinate. Such a premise is hard to reconcile with established principles of representative democracy. Furthermore, even if accepted on its own terms, it faces difficulties. In as far as it impinges upon devolution, this supposed overriding obligation to leave is confronted with sources of legitimacy the same as its own.

The salience of this conflict is magnified by the fact that in two of the devolved territories, Scotland and Northern Ireland, there were ‘remain’ majorities in June 2016. While it is arguable that a referendum of the whole UK might properly take precedence over a popular vote in one of its component parts, UK constitutional thought in this area is not fully developed. Should, for instance, a decision for the whole UK that clearly engages the

interests of devolved systems require more than a simple majority? Should there be a threshold of some kind, such as an absolute majority of the electorate including abstentions supporting a change, or a supermajority of two thirds of those who take part? Ought there to be a vote for change in every sub-unit of the UK, or at least a majority of them? Such issues were certainly not thoroughly investigated or widely discussed in advance of the 2016 EU referendum. There is no ‘written’ UK constitution in which such rules could be included, and none of the referendum results involved had legal force, leaving not only their precise meaning but also their importance relative to each-other obscure.

Since their foundation, all three devolved institutions have experienced aggregate expansions in their scope for action. Some of the most recent enhancements, for instance those contained in the Scotland Act 2016 and Wales Act 2017, were implemented shortly before or even after the EU vote of 2016 took place. Devolution, therefore, is not only politically entrenched, but is dynamic in nature. It is a force that the present government has to take into account while pursuing its Brexit policy. Indeed, the advent of devolution could be said to have marked a fundamental change in the nature of the UK constitution, in which power is no longer concentrated at the Westminster/Whitehall level, but shared between this tier and its devolved equivalent. The joint intervention by the respective first ministers of Wales and Scotland, Carwyn Jones and Nicola Sturgeon, in opposition to aspects of the European Union (Withdrawal) Bill, to which they proposed a series of amendments, is significant in this regard. It suggested a shared conception of constitutional norms regarding the autonomy of the institutions they represented, that they were asserting against potential encroachments.

In a sense, the UK might be held to have taken on some of the characteristics of a federal system, within which the devolved territories are akin to states, while the governmental bodies based in London resemble federal organs. Indeed, the Welsh government has promoted the idea that the UK constitution should be viewed partially from a federal perspective. The discussion currently taking place about the powers it is necessary to reserve centrally in the UK is the type of debate that might be expected during the formation or recalibration of a federal constitution. Moreover, both the Welsh and Scottish governments are motivated by a European outlook (notwithstanding the ‘leave’ result in the former nation). One of the purposes for which they seek to deploy the powers they hope to obtain at devolved level is to maintain alignment with the Single Market (though how far this stance might prove to be compatible with their commitment to retaining a unified UK market remains to be seen, if the UK government seeks

to diverge from the EU regulatory framework). Once again, a federal perspective is relevant, with two sub-units of an exiting Member State exhibiting an attachment to a wider continental polity – and appearing to prefer compliance with EU law to the prospect of being subject to the Westminster Parliament.

Limitations upon devolution

To some extent circumstances following the 2016 referendum have served to draw attention to the importance of devolution to the UK polity, and the changes to the underlying system it might imply. But this highlighting has come about through the assertion of contrasting, even conflicting, models which – though they are not necessarily compatible with each-other – have impetus of their own, and pose a threat to some aspects of devolutionary governance as it has developed. One challenge is relatively novel in the UK constitutional context. It rests on the view that, through the 2016 referendum, the UK people as a whole made a decision by which they are all bound. That majorities in two devolved territories, Scotland and Northern Ireland (and in London) voted to remain has, on this interpretation, no bearing either on the decision to leave, or even on the type of departure that should be sought. Responsibility for interpreting and implementing this result, according to this school of thought, falls primarily to the UK executive. Unsurprisingly, the main advocates of this outlook are Brexit enthusiasts and UK ministers (some of the individuals concerned fall into both categories, others only one). Over time limited concessions have been made to the UK Parliament and devolved institutions as having a secondary role in shaping the outcome. But this approach leaves no room for meaningful engagement from such groups, that are perceived as a source of unhelpful distraction, or as seeking to dilute or perhaps prevent Brexit.

A second perception – not entirely congruent with the first - that draws attention to the importance of devolution while challenging it, has a longer established place in UK constitutional perception and practice. It is founded in the doctrine of parliamentary sovereignty. The relationship between this theory and the circumstances of Brexit is complex. Throughout its development a core feature of Euroscepticism has been the rhetorical veneration of parliamentary sovereignty, and the claim that it is incompatible with UK participation in continental incorporation, a project that is partly for this reason undesirable.

However, the claimed commitment of those who advocate leaving the EU to the legal supremacy of the UK Parliament has proved inconsistent with their post-referendum attitude

towards Parliament. Eurosceptics exhibited hostility to the idea that express statutory authority from Parliament should be required for the UK government to activate Article 50 of the Treaty on European Union, the act required to instigate the departure process. They preferred the idea that the executive should be able to operate on its own discretion, deriving legitimacy from the exercise in direct democracy of June 2016, rather than the representative institution in Westminster.

Furthermore, supporters of leaving have disparaged the idea that Parliament should be able substantially to alter the negotiating position of the government (for instance, with regard to the Customs Union), or that it should have the opportunity to vote for the UK to seek to prolong or terminate the process of leaving. However, the doctrine of parliamentary sovereignty still has uses from this perspective, for so long as the Westminster legislature is willing to accept the other premise promoted by 'leave' advocates, namely that of its being subordinate to an overriding popular will expressed on 23 June 2016. For it is through the traditional principle that an Act of Parliament is the ultimate source of legal authority that any objections raised from devolved level can, ultimately, be overcome.

In bringing about an intersection between competing constitutional norms, the UK government policy of leaving the EU has revealed much about devolution and its position within the wider system, and will continue to do so. The UK government has felt it necessary to negotiate with the devolved executives through the specifically established machinery of the Joint Ministerial Council on European Negotiations. It has also made various concessions to them. Crucially, it has introduced amendments to the European Union (Withdrawal) Bill that have the effect of reversing a key presumption in its handling of the distribution of powers between the devolved and UK legislatures. The initial provisions, contained in clause 11 of the bill, created an assumption that a repatriated power resided with the UK Parliament unless express provision was made to the contrary. The objection to this proposal was that it contradicted the reserved powers model, under which the only powers located at the centre were those specifically allocated to it. Clause 15 of the amended European Union (Withdrawal) Bill now gives expression to the principle that the default position is the devolution of a law-making power.

In pursuing their opposition to aspects of the Bill, the Welsh and Scottish governments, alongside the use of coordinated joint public intervention, deployed two tools: the threat of withholding 'legislative consent' to the Bill; and the introduction of bills into their own legislatures, that would provide legal continuity in terms they deemed

acceptable (though there are differences between the devolved bills). Clearly these approaches have purchase within the UK political and constitutional environment. That a UK government has had to contend with and make concessions to outside forces demonstrates how much the UK constitution has changed in the past two decades.

However, the experience since June 2016 has also revealed the limitations to which this transformation is subject. The devolved systems and their powers may be politically entrenched, but they lack any special legal protection. The Scotland and Wales Acts of 2016 and 2017 respectively contained commitments to the principle that the existence of the devolved institutions in the nations concerned could only be revoked following consent through referendums in the territories involved. They also included the undertaking, previously existing only as a political understanding or convention, that the UK Parliament would 'not normally legislate with regard to devolved matters without the consent of the' devolved legislature concerned. However, in the Article 50 judgement of January 2017, the Supreme Court went out of its way to note that it did not regard these provisions as being enforceable in a court, and stressing that the commitments they described were only political in nature, despite their being included in statute. Ultimately, the UK government, provided it has the consent of the UK Parliament, can overrule its devolved equivalents. Indeed, UK ministers have been careful throughout their negotiations with the devolved executives to reserve their position, allowing for the possibility they will, if necessary, proceed without approval from devolved level. At the time of writing, while the Welsh executive has— while expressing reluctance about doing so — obtained legislative consent to the European Union (Withdrawal) Bill, the Scottish Parliament has withheld it. Parliament is therefore on the brink of passing an Act notwithstanding the objections of a devolved legislature demonstrating where the ultimate authority still resides.

The legal and constitutional imbalance between the devolved and UK tiers is further emphasised by the handling of the continuity bills introduced to the Welsh and Scottish legislatures. Though passed by the legislatures concerned, they were both referred by the UK government to the Supreme Court to decide whether they fall within the competence of those legislatures. Under this procedure bills do not become law unless the legislation concerned is deemed to be within the devolved remit. There is no corresponding means of challenging the constitutionality of an Act of the UK Parliament (the closest equivalents being the review of compatibility with European law and with the European Convention on Human Rights). The challenge to the Welsh continuity legislation has been dropped in accordance

with an agreement formed between the Welsh and UK governments over amendments to the European Union (Withdrawal) Bill and associated commitments. However, Supreme Court hearings regarding the European Union (Legal Continuity) (Scotland) Bill are scheduled for 25-26 July. Assuming no agreement is reached between the respective governments in the interim, if the bill is found to be within the powers of the Scottish Parliament, the possibility remains that the UK Parliament can legislate to supersede the Scottish law with its own Act. To do so will be in some respects politically unappealing. But to do otherwise might create other political difficulties. It could also undermine the existing policy of exit followed by the negotiation of new trade agreements. On the other hand, if the Supreme Court rules the bill outside the powers of the Scottish Parliament significant limitations upon the Scottish Parliament will have been made explicit in a different way.

The combination of the Welsh and Scottish governments during 2017 to present a united opposition to the UK government proposals as encapsulated in the European Union (Withdrawal) Bill was a significant event from the perspective of the politics of the UK constitution. But the extent to which it suggested the pursuit of a shared vision of the UK polity should not be overplayed. The Cardiff-Edinburgh alliance has been partly one of temporary convenience. The ultimate goals of the Labour executive in Wales and the SNP administration in Scottish diverge. The former seeks a more federal structure for the UK; the latter retains the objective of leaving the UK altogether. The engagement of the Scottish government, in collaboration with the Welsh government, in discussion and negotiation about the future constitution of the UK was arguably in large part a tactical matter. It coincided with an apparent loss of political and electoral momentum for the cause of Scottish independence. To be seen to have tried to engage in good faith with the UK government, but to have been treated in an unfair, overbearing fashion, might open the way for a revival of the independence option. That, ultimately, the Welsh came to terms with the UK government, while the Scottish — as yet — have not done so is evidence of their divergent perspectives.

The limitations upon devolution as a harbinger of a new constitutional model for the UK, perhaps federal in its potential, are illustrated in another fashion. It is uneven in application. A third devolved territory, Northern Ireland, has been absent from negotiations (aside from the presence of official observers), because its executive is not presently operative. What policy the Northern Ireland Executive would be able to form in this area, were it functioning, and whether and how far it would align itself with Wales and Scotland, is unclear. Further differentiation manifests itself in the way that all three devolved systems function differently to each-other, and

the remainder of the UK, that is to say England, where the majority of the UK population lives, lacks any form of devolved legislature at all (though there is limited devolution to London and to some local authorities – or combinations thereof – in England). The asymmetrical nature of devolution in the UK makes claims about the emergence of a comprehensive system difficult to assert. Furthermore, unlike under many federal constitutions, the territories are not formally incorporated into the legislative process. The Joint Ministerial Committee is a non-statutory body that does not take binding decisions. If it is an embryo for some kind of federal council or chamber, it is in a very early stage of gestation.

Implications for the future

On the basis of this discussion, certain conclusions can be advanced. The UK is in the process of refounding its legal and constitutional order, to accommodate Brexit. The central government claims to be the custodian of an irresistible obligation to implement a particular response to the referendum of 2016, that legitimises its plans for changes impacting upon the fields of operation of the devolved institutions. The UK executive is willing, in the last resort, to draw upon the legislative supremacy of the ‘sovereign’ Westminster Parliament to impose measures it judges to be appropriate. Whatever arrangements are established may be presented as only provisional in nature. However – as those supporters of Brexit who fear the adoption of ‘backstop’ customs arrangements know – that which is devised as temporary can prove to be enduring. The UK could, therefore, be in the process of a fundamental constitutional reconfiguration that partially reverses devolutionary patterns of development of the preceding two decades. This project is taking place in a fashion that is not wholly consensual, and involves the UK government deploying, or at least threatening to deploy, parliamentary sovereignty for purposes of legal coercion.

Such an approach could be seen to be in accordance with the UK constitutional tradition. The Union has never been a partnership of equals, and at every stage of its creation, England was clearly the preeminent force. Thus while the UK is sometimes depicted as an unexceptionally stable state, it is also characterised by internal tensions, involving the places of Ireland, Scotland and Wales within it. Brexit has already exacerbated some of these tendencies and raised renewed doubts about the future of the Union. To impose a post-Brexit arrangement in the face of present objections seems, even from the point of view of the narrow self-interest of the UK executive and the governing Conservative and Unionist Party, a questionable act. The system itself will be vulnerable to

the charge that it is inherently flawed and lacking in democratic legitimacy.

Moreover, arguments currently taking place are likely to recur in some form in the future, on occasions when – assuming Brexit goes ahead – the UK government wishes to diverge from EU law in a way to which one or more of the devolved executives object. Constitutional arrangements after exit could consequently create a particularly unstable dynamic. It is already clear that, in the short term, the judgement that a referendum on EU membership might resolve controversy over the issue was mistaken, and that the opposite has proved to be the case. Even if the UK is outside the EU, it is likely that it will need to make regular decisions about its relationship with this organisation and the regulations it produces, and that consensus about the appropriate approach will be absent. One, but surely not the only, source of such disagreement will be the devolution dimension.

However, it remains possible that the UK will not leave the EU at all. It is also plausible that the UK will depart on terms that make meaningful divergence from European law difficult or impossible; or that any theoretical discretion the UK possesses will be rarely if ever applied in practice. In such circumstances the current disputes about where to locate repatriated powers will come to resemble a dispute between relatives over an inheritance that ultimately amounts to little. Like such a disagreement, it will have been revealing regarding the nature of the relationship between those involved, and will have been damaging to it.

A post-Brexit constitutional system founded on an imbalance of power and the use of legal compulsion, thereby incorporating instability, would be in keeping with the history of the UK political system and in this sense would represent a promotion of the traditional constitutional values that advocates of Brexit often claim to support. For those who prefer a different approach, a federal system merits consideration. It could be of particular value because of the potential to encompass not only the dispersal of power, but the incorporation of the territories into central decision making, preferably through their inclusion in a federal chamber in the legislature. This presence would give material grounding to some of the ideas of shared sovereignty that may seem implicit in devolution but are not yet fully realised. Brexit has exposed gaps and tensions in the UK system. It has also demonstrated that in certain areas, despite the development of devolution, the UK is far from a fully federal system. A more decisive shift in this direction could be a means of addressing some of the problems connected to Brexit.