

The Two Unions: Brexit and the Territorial State

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Introduction

The Brexit episode has seen the political system of the United Kingdom subject itself to immense pressures. Politics always involves tension. However, the cross-cutting divisions exposed and widened by the prospect of leaving the EU are of a more fundamental variety. Rather than arising from the regular functioning of a democratic polity in which different organised interests compete with one-another, they involve disputes within the groups taking part in those struggles. Both the main parties at Westminster, for instance, lack internal consensus over the appropriate way forward. Underpinning this dysfunction are deep-lying disagreements about the constitutional system itself. These disputes involve questions of immense importance. What should be the legal and institutional relationship between the UK and the European region of which it is a part? How should major decisions be made, and what are the respective roles for the UK Parliament, the UK executive, and the people? Who, indeed, are the people and how should their will be discerned? Recently, the public focus for such conflict has been at UK level, in Westminster. But there is also a territorial dimension, involving tensions within different parts of the UK, and their relations with each other and the centre. Accordingly, this paper discusses the Brexit experience to date from the perspective of each of the four components of the UK – Wales, Scotland, Northern Ireland and England, and considers the overall implications.

Wales

One of the more surprising outcomes of the referendum of 23 June 2016 was that Wales produced a 'leave' vote, by 52.5 per cent to 47.5. Certain commentators have subsequently expressed bemusement that a territory that is a notable beneficiary of EU subsidies, and is in a relatively disadvantaged economic position, should produce such an outcome. Indeed, it was some of the least privileged areas within Wales that were most supportive of leaving. For instance, Cardiff voted 60 per cent remain, while Ebbw Vale produced a 62 per cent leave result. Those who approve of the overall outcome in Wales might congratulate those Welsh voters who were willing to prioritise the objective of freeing themselves from Brussels dominance over their personal short-term self-interest. Moreover, advocates of this position might go on, there are longer term gains to be had for Wales, as for other parts of the UK, once the post-Brexit reorientation of trading relationships has been achieved. However, it may also be that many voters in Wales, encouraged by 'leave' campaigners, chose to disbelieve the claimed benefits of EU membership, therefore concluding that withdrawal would have no negative impact, and would be followed by an improvement in conditions. If and when they are furnished with definitive proof that they were wrong, it will be too late for them to reverse their decision: a central problem of Brexit. There is evidence, too, that since June 2016 opinion in Wales has shifted away from support for leaving,

but on present political trajectories it will not have the opportunity to express itself in such a way as to affect the outcome.

The Wales result should serve as a reminder that matters other than material self-interest seem to have played a part in the referendum. The basis on which any given individual makes such a decision is a matter for them. However, if voters are willing to choose radical options on a basis of a desire for sovereignty in one instance, they may do so in another. The argument that leaving the EU would be economically harmful and politically disruptive did not prevail in 2016. It could, therefore, also fail to quell secessionism from within Great Britain. This observation seems particularly salient in the case of Scotland at present. But it cannot wholly be excluded that, depending on how events transpire, it could become relevant at some point in the future in Wales also. Moreover, post-Brexit independence advocates will be able to present their movements as offering a path not to isolation, but to incorporation into a wider entity, the EU.

To state that Wales (or the UK) voted to leave is to accept a reductive interpretation of democracy: that a bare majority of those taking part on a given day, in support of an ill-defined proposition, is decisive for the foreseeable future, and that the opposite view, expressed by a slightly smaller number at the referendum, is no longer entitled to any representation, even if there are shifts in public opinion. Yet the Welsh government chose from the outset to accept this particular line, despite having supported the opposite outcome. In doing so, however, it presented the outcome of the Welsh vote, rather than that of the whole UK, as binding it. It might be inferred that, had Wales produced a 'remain' result, then – regardless of the outcome for UK in its entirety – it was not required to depart; a contradiction of the logic advanced by the UK government, with its assertion that the UK result was indivisible.

Moreover, the Welsh government argued (without success) in favour of a variety of Brexit that it felt protected the particular interests of Wales, preserving participation in the Single Market and Customs Union. The Labour administration, in conjunction with the nationalist opposition party Plaid Cymru, also used the prospect of Brexit to re-promote its pre-existing agenda for the UK constitution: that it should take on quasi-federal characteristics. Within its model, the sub-components of the UK would be provided with a more formal role in determining decisions taken on behalf of the whole, in contrast to the consultative arrangements provided for under the devolution Memorandum of Understanding (MOU) and the Joint Ministerial Committee. This agenda can be seen in part as a means of promoting

the importance of Wales within the UK. But it should not be interpreted and dismissed purely on this basis. Of the different UK polities involved in the response to Brexit, only Wales has advocated a set of systemic changes that accept the logic of fundamental changes to the UK constitution in the post-devolution era; but are intended to apply to the whole Union, rather than dealing mainly with the relationship between it and the UK centre; and that are not part of a strategy of secession from the UK. The Welsh government is, after all, under the control of a party, Labour, that operates across the whole of Great Britain. Wales is the nation of the UK in which Labour consistently enjoyed the most success. However, this connection to a larger entity has not substantially assisted the Labour Welsh government in securing its goals in relation to Brexit.

Scotland

In Scotland, the 2016 referendum took place less than two years after a vote on independence. In September 2014, by a margin of approximately 10 per cent, a majority of participants chose to remain within the UK. Though secession was averted, the episode was not interpreted at the time as an indicator of or contributor to stability on the part of the Union. The result was closer than many had anticipated at the time it was first called; and one opinion poll shortly before the vote had shown a narrow majority for independence. Furthermore, in the UK parliamentary election that followed, in May 2015, the pro-independence Scottish National Party (SNP) won nearly every Scottish House of Commons constituency. Though it lost seats at the June 2017 General Election, the SNP remains the largest Scottish party at Westminster and has held office continuously since 2007 at devolved level.

The 2014 referendum provides an important context for an understanding of that of 2016 and its aftermath. It suggested that the status quo position does not necessarily enjoy the inbuilt advantages sometimes attributed to it in such votes. Moreover, a useful contrast can be drawn regarding the way in which the referendums were run. In 2014, EU citizens and those aged 16 and 17 were allowed to take part. In 2016, despite calls for this more expansive approach to be taken, they were excluded. Had these groups been permitted to participate, it is reasonable to assume that the outcome would at least have been closer, or possibly different. The only extension in 2016 to the usual franchise employed for elections to the UK Parliament was the inclusion of voters in Gibraltar and members of the House of Lords. While Gibraltarians proved resoundingly to favour continued EU membership, and Peers probably did also, they were

not numerically as large as those left out by the decision not to follow the 2014 precedent. This discrepancy in the franchises used between the 2014 and 2016 referendums could be noted by any critic wishing to query the strength of the obligation created by the 'leave' result. But it was most obviously apparent in Scotland, where the earlier vote had actually been held.

A key argument advanced by the 'Better Together' campaign in favour of the continuation of the Union in 2014 was that to leave the UK would be detrimental since Scotland would as a consequence cease to be a member of the EU, and that a swift reincorporation into this supranational entity was unlikely. Aside from the debates about the veracity of this claim and the legal and diplomatic issues it engaged, the political message it presented was important. Membership of the EU was desirable, and by extension so was Scottish participation in the UK as the only means of securing the former good. The 2016 referendum reversed this premise. In Scotland, remain won by 62 per cent to 38 per cent, with every single counting area producing a remain majority. Yet the UK government was determined that the simple majority of those voting across the whole UK should be treated as decisive, regardless of territorial divergences. This circumstance created an obvious opening for the SNP – that supported EU membership for Scotland outside the UK – to revive the Scottish independence issue, and demand a further referendum sooner than might previously have seemed plausible. One of the main arguments in favour of the Union had now been removed. The will of Scotland, it could be held, was being overridden by that of the UK – and in particular, England. The only possible means of securing continued, or restored, EU membership in this context was secession.

However, though the rhetorical opportunities were appealing, the political realities were a challenge. The extent to which members of the public relished the proposition of yet another turbulent referendum campaign was unclear. Furthermore, in the months following 23 June 2016, definite evidence of a rise in the desire for independence was lacking. It seemed to remain at a similar level to that demonstrated by the 2014 vote – that is, roughly in the mid-40s. Opinion research on the way in which people who took part in both referendums had voted suggested that the SNP faced a complex task. The core upon whom the SNP could presumably rely were the 21 per cent who had backed independence and EU membership. But more support would be needed. The least fertile ground would be the 16 per cent who had voted to remain within the UK, but leave the EU; while the most hopeful group, from a pro-independence perspective, was the 28 per cent who

had opted for 'no' (to Scottish secession) in 2014 and supported 'remain' in 2016. However, while targeting these voters there was a danger of alienating the 14 per cent who had chosen both Scottish independence and Brexit.

To mount a drive for independence in the context of Brexit, therefore, was more complex a proposition than it might seem superficially. Just as the surprising outright victory in the Scottish Parliament elections of 2011 had presented the SNP with both an opportunity and a threat, so did Brexit. It gave the SNP a new opening that might be helpful to it in sustaining progress towards, or even directly attaining, its long-term objective. The SNP had little choice but to seek to exploit this position, and to be seen by its supporters to do so. But there was a risk of failure, either if the idea of another referendum met with strong public resistance, or if such a vote was held and produced defeat for the SNP.

The Scottish government therefore proceeded with relative caution. At first it pressed for special opt-outs and privileges within the Brexit process that – even if they were practicable, which is far from clear – were not likely for political reasons to be provided. It insisted, for instance, that no new barrier should appear between it and the EU; and between it and the UK, even if the UK left both the Single Market and Customs Union (a familiar concept to the observer of UK-EU negotiations over the status of Northern Ireland). Unlike the Welsh Government, the initial focus of the Scottish Government was bilateral more than multilateral in nature, emphasising the relationship between Scotland and the UK, and insisting that Scotland should possess a veto on key decisions. The UK government has, as expected, not conceded to these demands, enabling the Scottish government to assert that it is being forced to call for a further independence referendum. Whether it takes place, and if so what the outcome might be, is partly contingent upon the course of the Brexit process. Overall, it seems the experience will either prove to have contributed to a break-up of the UK, or entrenched the views of the sizeable minority in Scotland who are discontent with membership of the Union. There was a reasonably high level of agreement within Scotland about EU membership. But the determination of the UK government to leave regardless could mean that this point of relative consensus will become a basis for aggravating a pre-existing fundamental division within the Scottish polity.

Northern Ireland

The Brexit episode has taken place in parallel with a distinct but related period of difficulty in the Northern

Ireland peace process, with devolution suspended. Had the Northern Ireland executive not ceased to function for other reasons, the prospect of leaving the EU would surely have caused it serious problems. Overall, there was a 'remain' result in Northern Ireland, by 55.8 per cent to 44.2. The vote was particularly divisive because it reflected and aggravated the existing cleavage in the territory. Of those raised as Catholics, there was an 85 per cent vote for remain, and only 15 per cent support for leave. Among Protestants, on the other hand, 40 per cent voted remain and 60 per cent leave. A second way of viewing this apportionment of support, closely associated with the first, is through the prism of the view a particular individual took on constitutional arrangements. Among those who were favourable to Northern Ireland being under direct rule within the UK, 40 per cent were remain while 60 per cent were leave. Supporters of devolution within the UK split 58 per cent for leave and 42 per cent for remain. Those who wanted Northern Ireland to be incorporated into the Republic of Ireland were 85 per cent remain supporters, while 15 per cent voted leave.

The magnification of longstanding divisions in this territory is one of the most malign aspects of the Brexit experience. This regrettable outcome is compounded because of the implications for the Belfast or 'Good Friday' Agreement of 1998, a key element in the peace process. While the text does not expressly state that it is incompatible with the UK leaving the EU, it does not need to because the assumption that both the Republic and the UK will remain within the EU together is clearly fundamental to it. It might be held that both the Catholic nationalist and Protestant unionist communities in Northern Ireland have a shared interest in avoiding the possible return of conflict and the economic, social and political disruption that would be attendant upon an abrupt departure from the EU, with the appearance of barriers across the island of Ireland. However, the Democratic Unionist Party (DUP), currently the largest single representative of the Protestant community, is an enthusiastic supporter of leave, and of a variety that maximises discontinuity, even while it recognises the problems that would arise from the appearance of what is labelled a 'hard border' and insists that it wishes to avoid it. Furthermore, the DUP was opposed to the Belfast/Good Friday Agreement when introduced, and may not regard threats to this accord in the negative light that others do.

The DUP outlook has taken on disproportionate significance since the General Election of June 2017, a political disaster for Theresa May that has left the Conservative government dependent upon DUP support in the Commons. Observers of the Northern Ireland political scene have noted that the DUP contingent at

the Westminster Parliament constitutes a unyielding bloc even within its own party, perhaps less directly connected to the territory it represents by being based partly in London. It is pressure from this faction within the DUP that helped force the UK government to maintain the seemingly impossible negotiating position of leaving the Customs Union and Single Market; avoiding a 'hard border' in the island of Ireland; and not allowing any new regulatory divergences to open up between Northern Ireland and Great Britain. The DUP has converged with Brexit enthusiasts within the Conservative Party who profess devotion to the indivisibility of the union, and regard the EU as mendaciously exploiting the Irish question as a negotiating tactic, rather than addressing genuine concern. Even without the Northern Ireland issue, May faced an immense challenge in delivering on the expectations she wilfully generated regarding the Brexit process. But, at the time of writing, it seems possible that this dilemma will be the central reason for the collapse of her programme.

England

In a sense, Brexit is an English project. England voted by 53.4 per cent to 46.4 per cent to leave. Opinion research shows a clear link between individuals identifying themselves as English rather than British and being likely to vote for departure from the EU in 2016. For those taking such a perspective, that Brexit has proved a source of instability for the Union might not be a particular concern. But England is not homogenous. In Greater London – with a larger population than any of the components of the UK discussed above – 59.9 per cent of those who took part supported remain, with 40.1 per cent voting to leave. Of 33 London boroughs, only 5 did not yield remain results. Brexit, therefore, is territorially divisive not only for the UK, but for England. Furthermore, England has no voice of its own in the Brexit process, beyond having delivered the votes that prompted the adoption of this policy. There is no English legislature or executive; and the institutional sub-units within it do not have the same status as the devolved institutions of Wales, Scotland and Northern Ireland. It is in effect subsumed within the UK. This conflation of England with the UK is a central feature of the Brexit experience, as is explored in the following section.

The United Kingdom

The general approach taken to Brexit at UK level has been to insist that the result of the 2016 referendum, despite lacking legal force, and regardless of the relative narrowness of the result (51.89 per cent to 48.21 per

cent), means that the UK must leave the EU. The May government has insisted that territorial discrepancies, with 'remain' results in Scotland and Northern Ireland (alongside Greater London), are not relevant and that the UK should be considered as a single homogenous unit. Moreover, the UK administration has posited itself as the interpreter and custodian of the referendum outcome. It has been willing only to consult with the devolved executives over the essentials of policy, and has ultimately pursued its chosen path. Only reluctantly did the May government concede to Parliament its so-called 'meaningful vote', and has done its best to ensure that its meaningfulness is kept to a minimum.

Faced with this determination at UK level, the options available to those devolved executives that are operative, in Wales and Scotland, have been limited. The Supreme Court judgement of January 2017 may have seemed unhelpful to the May administration. It insisted that statutory authorisation was required from the Westminster Parliament for the UK to proceed with the Brexit process by initiating Article 50 of the Treaty on European Union. Yet Parliament proved reluctant meaningfully to deploy its revealed power; providing the Prime Minister with the authority to commence without attaching any conditions. Furthermore, as an aside to its main judgement, the Supreme Court stressed that protections against interference from the centre in areas within the scope of the devolved legislatures were not justiciable. This weakness in their constitutional status would become significant.

For a time, an alliance formed between the executives in Cardiff and Edinburgh over the way in which Brexit should be legally implemented. The combined political pressure they exerted forced the government in London to negotiate with them over this issue. Ultimately, concessions were made, allowing a greater role for the devolved institutions in the European Union (Withdrawal) Act 2018 and associated protocols than the UK government had initially envisaged. While the government in Wales accepted the terms that were on offer, the Scottish executive did not. The Scottish Parliament expressly withheld approval for the law through voting down a Legislative Consent Motion. However, the UK government asked the Westminster Parliament to proceed with passing the Bill anyway. It obliged. The Supreme Court statement of 2017 suggested that, though such a move was exceptional, there was no legal means by which it could be prevented. Whether or not a constitutional convention had been violated was a matter of opinion. The judiciary did not want to be drawn into ruling on any such dispute.

Ultimately, within the context of the UK constitution, a determined executive in Whitehall with the compliance

of the Westminster Parliament can impose itself. This power balance is significant from the point of view of the way in which the UK constitution might be configured post-Brexit, and the division of authorities between the centre and the territories. There seems likely to be a disposition in favour of the former. But with regard to the position of Northern Ireland, the UK authorities found themselves negotiating with a force more powerful than themselves: the EU. Northern Ireland had no executive to represent it, and how effective it would have been over this issue had it been functioning is questionable. But the solidarity that the EU has shown to date with the Republic, and with those in Northern Ireland who do not wish to see the peace process and the benefits associated with it compromised, has proved a far more effective source of resistance. As the UK continues to pursue, of its own volition, a potentially perilous course of action, it can expect more pressure upon it from the EU, perhaps undermining its continuing existence as a state.

Conclusion

Brexit has aggravated existing disputes between those who support the continuation of the Union in its present form and those who wish to leave it. It has provided rhetorical ammunition to the latter. In the case of Northern Ireland, it presents in some sense prospects for the attainment of the long term goal of the nationalists. The island of Ireland could become more integrated and more separate from Great Britain. But there are other possible outcomes, including a deterioration in the peace process. Were the devolved system of government not already in suspension in Northern Ireland, Brexit would have taxed its ability to continue to operate in a satisfactory fashion. In Scotland too, a new potential path to independence has been opened by Brexit, but this raising of the stakes brings with it the threat of defeat as well.

The position of Wales is complex. While the governing (and non-secessionist) Labour Party (and, among others, Plaid Cymru) supported a 'remain' vote, 23 June 2016 produced the opposite result in this nation. Subsequently, the Welsh executive has used the circumstance of Brexit to press its already existing commitment to what it depicts as a quasi-federal constitutional approach for the UK, in which the sub-components of the Union are more fully incorporated into the taking of important decisions. It has achieved some success, but of a limited nature.

To consider England and Brexit is to reveal some of the central paradoxes of the UK constitution and of the Brexit process. Those who purport the greatest commitment to the Union often seem curiously unable to

distinguish between England and the UK, treating them as interchangeable, emphasising the qualities of one or the other entity as suits the needs of the occasion. The overall 'leave' result for the UK rested on English votes. Among the three other components of the UK combined, there was a 'remain' majority, with Scotland and Northern Ireland producing decisive votes in favour of continued membership (and Wales voting 'leave'). From the outset the UK government has been insistent that this divergence should have no significance to the interpretation of the outcome. Yet it is not clear that England necessarily benefits from this apparent privileging of its status. For the purposes of intra-UK discussions pertaining to Brexit, it has no representation of its own separate from that provided by ministers who act on behalf of the UK executive. Furthermore, opinion within England itself is heterogeneous. London produced a large remain majority in 2016; and while there were leave results in all other English regions, there were divergences of opinion within them.

From a federal perspective, certain observations present themselves. While democratic autonomy has been granted to parts of the UK, it has not been balanced by the inclusion of those territories in central decision making, or a recognition that they have a significance that cannot simply be overwhelmed by the numerical superiority of England. Equally, England has been neglected in the process of devolution. Its very size relative to the whole is the chief reason that the establishment of a legislature for the whole of England would probably deliver significant difficulties and few gains. Logic suggests that regional devolution on a comparable scale to that provided to the other parts of the UK, recognising the wide internal diversity of England, would be an appropriate response to the anomalies revealed by Brexit. The English regions might then be incorporated into federal mechanisms alongside Wales, Scotland and Northern. Furthermore, Brexit has demonstrated that protections for the status of the devolved institutions, if Parliament wishes to interfere with them in some way or to alter the overall system, are weak. They rest in conventions that are open to divergent interpretation or indeed to simply being discarded. Under a federal arrangement, the position of all the units would be set out in a constitutional text. It would be subject to alteration only by adherence to a special, inclusive constitutional procedure, in contrast to the 'unwritten' constitution of the UK, which can be altered unilaterally by Parliament using regular legislative processes. The courts would be responsible for discerning the respective powers of the state and territorial institutions, and Parliament would no longer be the umpire in a game in which it is also a participant.

But a more immediate issue, that might forestall the pursuit of such reforms, involves the stability of the Union. The divisiveness of Brexit has two aspects in this regard. First, it has created opportunities for those seeking to secede from the UK, providing them with credible grievances and openings to act upon them. There is some congruity of outlook between this group and those who identify themselves as 'English' rather than British, who – according to opinion research – were far more likely to vote leave in 2016. A commitment to Englishness above all is possible to reconcile with a disregard for the continuation of the UK. But of equal significance are the divisions between those who present themselves as supporters of the Union. Among their number are both supporters of EU membership who hope at least to minimise the impact of leaving, and some of the most enthusiastic advocates of exit. Within this latter group there is a reluctance to accept the implications of their dislike of one Union for the integrity of the other, to which to they profess the strongest of attachments.