

Commentary

Brexit and Devolution in the United Kingdom

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Abstract

Devolution in the United Kingdom is deeply connected to United Kingdom membership of the European Union, which provides an external support system for the internal settlement. Exit from the European Union destabilizes the internal settlement and raises a series of major constitutional issues.

Keywords

Brexit; devolution; Europe; United Kingdom

Issue

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The United Kingdom (UK) has, in the last twenty years, been transformed from a unitary state into a complex, multilevel polity, through a process of asymmetrical devolution. Scotland, Wales and Northern Ireland now have their own executive and legislative institutions, while England continues to be governed directly from the centre. This pattern has allowed devolution to be developed without a fundamental reform of the UK constitution itself, leaving major questions such as the locus of sovereignty and the entrenchment of the new institutions in abeyance.

One factor making this possible is that devolution evolved since 1999, entirely during UK membership of the European Union (EU) and has been shaped by it. The EU has provided a framework for the new constitutional settlement and has helped keep the UK's own union together. Brexit puts that union in question.

The primacy of EU law (and also the European Convention on Human Rights) is embedded in the devolution acts, so that devolved legislation can be struck down by any court for infringing it. Indeed, most challenges to the competences of the devolved legislatures have been under European rather than UK law. At a minimum, Brexit will require the removal of the relevant clauses from the devolution acts.

EU membership has also allowed a more expansive form of devolution than otherwise might have been pos-

sible, since the EU secures the UK as well as the EU single market, regulating competition and dealing with the external effects of policies. Agriculture, the environment, regional policy and aspects of justice and home affairs are not reserved to the UK level (and are therefore devolved) but are also EU competences. There are no UK frameworks or ministerial departments in these fields (the Whitehall departments are mostly for England) so that coordination comes through EU policy-making, where the home nations must agree a common line before negotiating in Europe.

More broadly, the EU provides a discursive framework of ideas of shared and divided authority or 'post-sovereignty', which are at the heart of management of the plurinational state that is the UK. The Northern Ireland settlement requires a suspension of disbelief in traditional ideas of sovereignty and allows citizens to express multiple identities and loyalties. This is given more concrete expression in cross-border cooperation and in all-Ireland and UK-Irish institutions such as the British-Irish Council (including the UK and Irish governments, the three devolved governments and the Channel Islands and Isle of Man). In Scotland, too, it has favoured ideas of multiple levels of government. As in other parts of Europe, it provides an external dimension to devolution. The Scottish National Party (SNP) favours Scottish independence, but within the EU, which provides an ex-

ternal support system and qualifies the idea of unfettered sovereignty. Surveys regularly show that, far from wanting to take back sovereignty in a simple manner, most Scots are happy with the idea of multiple layers of government.

Brexit thus poses major challenges to the constitutional settlement of the UK, exacerbated by the fact that Scotland voted by 62 per cent to remain. All the parties represented in the Scottish Parliament were for Remain, although since the election of May 2016 and the June referendum, a small number of Leave supporters has emerged on the Conservative Labour and even SNP benches. Northern Ireland voted 56 per cent to remain but this disguises a serious division between the two communities. Nationalists were massively for remain while unionists were divided. The two governing parties (until the collapse of the Executive) were seriously at odds (Sinn Féin for remain and the Democratic Unionists for leave). Wales voted for leave in much the same proportion as England.

There are some common concerns among the devolved territories. There is strong support in Scotland and Wales for remaining in the Single Market, and in Northern Ireland for keeping an open border with the Republic of Ireland (which implies staying close to the Single Market). There is support in Wales and (especially) Scotland, for retaining free movement of labour. The idea of the UK staying in the Single Market appears to have been closed off by the Prime Minister's Lancaster House speech and the subsequent UK Government White Paper, although it is far from clear just what the relationship with the Single Market and Customs Union will be.

The Scottish Government's second preference is for a differentiated Brexit, which would allow Scotland to remain within the Single Market (although remaining in a customs union with the UK) even after the UK leaves it. It would also retain freedom of movement for workers between Scotland and the EU27 as well as with the rest of the UK. The framework would be the European Economic Area. Scotland would be given the additional competences required to transpose and implement Single Market regulations. This would present numerous practical difficulties and great political ones, as the UK would have first to agree and then to incorporate it into its negotiating proposals with the EU. The UK Government has not rejected the proposals formally but has said that it does not accept a territorially differentiated Brexit, as opposed to some sectoral arrangements.

Should Scotland not get a differentiated deal, the Scottish Government reserves the right to call another independence referendum. It acknowledges that this would require the consent of Westminster, since the constitution is reserved. If this were not forthcoming, there could be a constitutional deadlock. Independence under Brexit would be a more difficult proposition than the independence that was offered in the Scottish referendum of 2014. In that case, it was assumed that both Scotland and the rest of the UK would be in the EU, with open

trade, movement of people and no hard border between them. With the UK outside the EU and the Single Market, this would be more difficult. Scotland does four times as much trade with the rest of the UK as it does with the EU27. In 2014 the Scottish Government proposed to share the Pound sterling after independence. This was contested at the time by the UK Government. With the UK outside the EU, it would be even more difficult. The concession that David Cameron gained in his renegotiation that the EU is a multi-currency zone, lapsed after Brexit.

The Northern Ireland peace agreement is not formally part of the EU structures but it is deeply embedded in European assumptions about mixed sovereignty. Cross-border cooperation is facilitated by the EU Single Market and the ease of travel. Brexit threatens many of these gains. It has widened differences between the two communities, since there will be no neutral European ground between the two national aspirations and sovereignty claims, and because the two communities voted in different ways. It risks putting an EU border between the two parts of the island, undermining efforts to bring them together. UK ministers have insisted that some solution will be found and that there will be no hard border. That depends on what is meant by a border. It might be possible to avoid a physical border and to retain free movement at least for Irish and British citizens, building on the old Common Travel Area, which predates the EU. With Ireland in and the UK out of the single market, however, there will be differences in product standards for goods, environmental regulations and rules on trade in services. There will be rules of origin on goods moving between the EU and UK customs unions. So there will have to be a border between the two parts of Ireland, albeit a virtual one, policed unobtrusively and without a visible presence.

Immediately after the referendum, voices on the Irish nationalist side called for a referendum on uniting the two parts of Ireland (which is provided for in legislation). This, however, would not be acceptable to the unionist community and in recent years polls have shown that there is no majority for Irish reunification even among Catholics, as long as the alternative is the current power-sharing arrangement—but this of course includes an open border and cross-border cooperation. Just as Brexit puts a border between the two parts of Ireland, Brexit plus Irish unity would put a border between Northern Ireland and Great Britain.

Brexit has put into question the evolving understandings about the constitutional standing of the devolved legislatures. These had been evolving in a 'federal' direction, as the institutions bedded down and were recognized as a permanent part of the constitution, albeit not entrenched in a legally binding way. According to the Sewel Convention established in 1999, Westminster will normally ask for consent of the devolved bodies before legislating in their fields of competence; later this was extended to changing their competences themselves. The

Convention was incorporated into law in the Scotland Act (2016) and the Wales Act (2017). The Scottish and Welsh governments have argued that, as Brexit does invade their competences, it should be subject to legislative consent motions. On this basis, they joined the case in the Supreme Court about whether the consent of the Westminster Parliament is needed to trigger Article 50 and start the Brexit process. The UK Government response was that this is a reserved matter so that Sewel does not apply. They might have added that it was not a 'normal' situation but went even further, insisting that Sewel, as a mere 'political' convention, has no binding force in any circumstances. The Supreme Court, in accepting this argument, has in effect reversed the 'federalizing' tendency in the UK, in which the devolved institutions were coming to be accepted as a permanent part of the constitution and the conventions that protected them as being as strong as other, well-established conventions. There will probably be further challenges about the role of the devolved legislatures in the Great Repeal Bill and legislation to repatriate competences from Europe as some of these are not reserved.

If nothing else is done, then those competences currently shared between the EU and the devolved legislatures will revert to the latter. Yet the division will not be clear cut, as the external dimension will still be reserved, including agricultural trade, international environmental policy and fisheries negotiations. There may also be a need for UK-wide frameworks to ensure fair competition and deal with externalities. Funding for agricultural support and regional policy will not automatically come back to the devolved level along with the responsibility. There

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are various options for this, including a needs-based formula with common criteria; per capita funding; or incorporation into the Barnett Formula. Barnett would see the devolved governments getting their current levels of funding, with any increase or decrease in the corresponding English spending allocated according to population. This would leave them vulnerable to cuts in English programmes, and force them to decide whether to maintain these programmes out of their own resources, under the pressure of competing priorities.

Some Scottish Conservatives and a few Labour and SNP politicians have seen the repatriation of powers as an opportunity for more policy autonomy and divergence. The Welsh Government, on the other hand, wants to retain UK-wide frameworks, but with a stronger role for the devolved governments in setting these. Alternatively, stronger powers to set policy frames may be imposed by Westminster. So Brexit may give a decentralizing or a centralizing impetus to the devolution settlement.

The EU served an important role in underpinning the UK's own union. After Brexit it will be much more difficult to hold that together.

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Conflict of Interests

The author declares no conflict of interests.