Received: 17 January 2022 | Accepted: 17 January 2022

DOI: 10.1111/1758-5899.13064

SPECIAL ISSUE ARTICLE

Brexit and the United Kingdom's Devolutionary Constitution

Roger Masterman

Durham Law School, Palatine Centre, Durham University, Durham, UK

Correspondence
Roger Masterman, Durham Law School, Palatine Centre, Durham University, Stockton Road, Durham DH1, UK.
Email: r.m.w.masterman@durham.ac.uk

Abstract

This piece considers the implications of the Brexit process for the United Kingdom's territorial constitution. It advances two narratives of the devolutionary settlement; one which emphasises the continuing post-devolution influence – and dominance – of the institutions of UK-level government, the other which regards devolution as having engineered a quasi-federal division of powers and having diluted the sovereignty of the Westminster Parliament via expressions of national sovereignty in Scotland, Wales and Northern Ireland. The continuing resonance of the former is addressed across three elements of the Brexit process: (1) the design and outcome of the 2016 referendum; (2) litigation concerning Brexit and devolution; and (3) the legislative process of repatriating competences to domestic institutions from the EU. Seen through these lenses, Brexit is argued to provide ongoing evidence of the democratic deficits that the post-1998 phase of devolution was designed to address, and of an increasingly unstable territorial constitution.

1 | INTRODUCTION

The narrow margin by which the 2016 referendum evidenced a UK-wide preference in favour of exiting the European Union (EU) masked differentiated preferences evident in the UK's constituent countries. While majorities in England (53.3% voting to leave) and Wales (52.5%) indicated a desire to exit the EU, the largest proportion of votes cast in Scotland (62.0% voting to remain) and Northern Ireland (55.8%) were in favour of the UK's continued membership of the Union. At one level of analysis, that the decision to leave should be supported by a majority vote across the entire UK is consistent with the (then) status of the UK as the contracting party to the EU treaties, and with the fact that the importation of EU laws into the UK's legal systems was the consequence of UK-wide legislation. From an alternative perspective however, the referendum obscures the fact that, since 1998, devolution has diluted the unitary narrative of the UK constitution through the introduction of structures of subnational government that have reinforced distinctive claims to self-government in the devolved countries. The Brexit vote therefore – falling between the 2014 referendum on Scottish independence and the 2017 collapse of power sharing arrangements in Northern Ireland – contained significant potential to deepen fissures in the devolutionary constitution, and to diminish the emergent quasi-federal nature of the post-1998 constitutional landscape.

Devolution is an exercise in subsidiarity; an allocation of powers to institutions in Scotland, Wales and Northern Ireland in order that the organs of UK Government in London would be complemented by local legislatures in three of the UK's four component countries. While the continuing sovereignty of the Westminster Parliament remains a hallmark of this constitutional schema, the establishment of devolved institutions amounted to a legal and political step towards a plural domestic constitutional order, introducing a layer

of government that operated within parameters that differed sharply from those governing UK-level institutions. By contrast with the institutions in Westminster and Whitehall, the devolved bodies were to operate within the frameworks established by *written* constitutional instruments, were to be potentially subject to legislative judicial review, were composed on the basis of proportional representation, and were the direct product of exercises of constituent power. At the very least, the advent of devolution augmented territorial *differentiation* in the UK constitution through the introduction of models of constitutionalism divergent from that prevailing at the UK level.

The progress of devolution in the UK since 1998 has evidenced both constitutionally orthodox and constitutionally radical (for the UK, at least) dimensions. This essay will explore the constitutionally formalist and quasi-federal dynamics of the devolutionary constitution, and will argue that the centripetal characteristics of the former have provided the dominant narrative shaping the relationship between devolution and the UK's exit from the European Union. Brexit has exerted a distorting effect on the devolutionary constitution, exposing a series of democratic deficits that run contrary to the quasi-federal account of devolution, and revealing the current constitutional safeguards for shared government to provide only fragile protection for devolved autonomy. While then Prime Minister Theresa May (2017) claimed that Brexit provided an opportunity to 'strengthen the union', this piece positions Brexit as a significant threat to the stability of the devolutionary constitution, and to the Union which that constitution is designed to uphold.

It is recognised that, in one sense, the challenges of the UK's departure from the EU provide only an imperfect – or perhaps overly narrow – representation of the post-1998 experience of devolution in the UK. In spite of this, it is contended here that the experience of Brexit is an important barometer of the position of devolved government within the constitution, providing a politically controversial and potentially destabilising initiative against which the resilience of the UK constitution's accommodation of devolved government can be tested.

2 | THE DEVOLUTIONARY CONSTITUTION: TWO NARRATIVES

For the Labour administration responsible for initiating the devolution of powers to institutions in Scotland, Wales and Northern Ireland, the overriding objectives of devolution were largely pragmatic. Though the governments of 1997–2001 and 2001–2005 were responsible for driving the most significant programme of constitutional renovations in the modern era, these reforms – which included enactment of the Human Rights Act, 1998, freedom of information legislation and partial reform of the House of Lords – were not underpinned by an overarching, normative, constitutional vision (Masterman, 2022). Devolution was no exception: the establishment of the Scottish Parliament was a response to growing nationalist pressures north of the border; the institutions in Northern Ireland an integral component of the broader peace and reconciliation process; the Senedd Cymru/Welsh Parliament an inevitable effort to provide a degree of parity across the UK's component nations. The absence of a guiding vision for this project has increasingly given rise to concerns relating to the integrity of the constitution and its ability to accommodate multiple sources of legal and political power (Parliament. House of Lords, 2016). While the schemes of devolution to Northern Ireland, Scotland and Wales have to some extent converged since 1999, the fragmentary approach of successive Governments' approaches to devolution (including in England) stands as evidence of the lack of a holistic approach to devolution across the UK as a whole. This charge has gained succour as the powers of the devolved bodies have expanded and the devolved institutions have been recognised as 'permanent' features within the UK's constitutional architecture (Scotland Act, 2016, s.1; Wales Act, 2017, s.1). Post-Brexit, devolutionary asymmetry is further exaggerated by Northern Ireland's membership of the EU's single market for goods and the application of EU customs provisions in order to maintain a 'soft' border between Northern Ireland and Ireland. In the absence of an overarching normative vision for devolution and the Union – and in the light of the anomalous position of England – the task of conceptualising the overall purpose of the devolution project is far from straightforward. The complexities of such a task are compounded by the fact that devolution in the UK remains a work in progress: the process of decentralisation continues to be demand-led, ad hoc, asymmetrical and – in England – incomplete.

It is also a result of the largely pragmatic – perhaps opportunistic – approaches to devolution taken by post-1997 UK governments that the implications of the project for the central institutions of the state remain relatively unexplored. Reform of the UK Parliament in the light of devolution has been limited. The Westminster Parliament simultaneously discharges roles as de facto legislature for England, as sovereign parliament of the UK, and as the potential author of legislative change in devolved fields of competence with no, or only marginal (see the short-lived experiment with English votes for English Laws (EVEL)), amendments to its composition and/or procedures to differentiate the exercise of these distinctive roles.

The same can be said of the consequences of devolution for the nature of the state itself. As such, the House of Lords Select Committee on the Constitution has lamented that the 'reactive and piecemeal approach successive governments have

taken to devolution' has been accompanied by the absence of a 'guiding strategy or framework of principles to ensure that devolution develops in a coherent or consistent manner and in ways that do not harm the Union' (Parliament. House of Lords Select Committee on the Constitution, 2016). Territorial fluctuations have provided a central factor in the shaping of the (now) UK constitution, but are often underexplored in the face of the overweening concept of parliamentary sovereignty. The pre-devolution narrative of the unitary state – in which Westminster and Whitehall stood as bywords for centralised government – masked rather more complex geographical divisions between the component nations and legal jurisdictions within the UK. But as with the introduction of the Human Rights Act, 1998, debates surrounding devolution continued to demonstrate something of a preoccupation with the preservation of sovereignty, rather than addressing the more profound consequences of the establishment of the devolved legislatures. As such, the scheme(s) of devolution implemented across the UK maintained some of the vestiges of the pre-devolution, centralised constitution, with the sovereignty of the Westminster Parliament to legislate in fields of devolved competence explicitly preserved. As a result, the formal allocation of legislative powers to the devolved bodies was not accompanied by a clear expectation that those powers would fall within the *legally exclusive* competence of the devolved institutions. In the absence of a parallel to the legally enforceable safeguards for state or provincial powers to be found in federal systems, the autonomy of the devolved bodies was to be protected as a matter of (ordinarily binding) constitutional convention (Scotland Act, 1998 (as amended), s.28(8); Government of Wales Act 2006 (as amended), s.107(6)). As a result, the devolutionary arrangements preserved the legislative competence of the Westminster Parliament to – in exceptional cases – legislate in devolved areas of competence against the wishes of the devolved institutions.

From this perspective, devolution can be viewed as something akin to a statutory act of decentralisation, through which powers were allocated – by a central, sovereign, institution – to expressly limited, subordinate, institutions. This statutory decentralisation approach does not deny the constitutional importance of establishing devolved institutions, rather it seeks to position those institutions within the existing constitutional framework. As a result, this constitutionally formalist approach to devolution seeks to minimise the effect of devolution on the doctrines and operation of the *UK* constitution (using convention, rather than law, as means of guarding against intrusion by Westminster legislation into areas of devolved competence) and maintains a sovereigntist mindset with regards to the legislative relationships between Westminster and the devolved legislatures (the legislative competence provisions of the devolutionary legislation all clearly countenance the continuing ability of the Westminster Parliament to legislate on devolved matters). On this account, devolution – itself a term with 'top down' connotations (Tierney, 2007, p. 741) – is an initiative which sees powers delegated from a structurally superior body to constitutionally subordinate institutions. The 'conferred powers' model which initially characterised devolution to Wales – under which the powers exercisable by the Senedd were specified in legislation – is a clear reflection of this perspective. The reversions to effective direct rule in relation to the administration of Northern Ireland also adds a degree of practical weight to this vertical account of devolution (though, given the materially different political and structural circumstances between devolved government in Northern Ireland as opposed to Scotland and Wales, the suspension of devolved government in the former cannot fully demonstrate that the statutory decentralisation approach is applicable beyond Northern Ireland without significant qualification). The statutory decentralisation account of devolution can offer only an inadequate explanation of the constitutional shift precipitated by devolution.

The devolution of power to institutions in Scotland, Wales and Northern Ireland also amounted to a significant centrifugal reconfiguration of constitutional power, away from Westminster and Whitehall, to three of the component parts of the UK. Devolution facilitated a genuine move towards self-government through the creation of representative legislatures that undoubtedly enhanced the plural dimensions of the UK's constitutional arrangements. An alternative account, therefore, casts devolution as a division of (sovereign?) power, a recognition of self-government, and a recognition of shared investment in a union of states. Such an approach maintains that devolution gives rise to something closer to a federal relationship between the component nations of the UK than would be permitted in a narrative driven by the sovereignty of the Westminster Parliament. The quasi-federal account of the devolutionary constitution emphasises the acts of sovereignty evident in the establishment of legislatures within the nations of the UK, sees the endorsement of the devolved bodies at referendums as exercises of constituent power, and regards the devolved institutions as invested in the shared government of the UK. By contrast with the narrative of devolution as an act of statutory decentralisation, this account positions devolution as a consequence of demand (or sovereign claim) within the UK's component nations. Though primary legislation enacted at Westminster provided the formal means by which devolution in the UK was implemented, as Hadfield has acknowledged, '[d]evolution is not simply a gift from the Westminster Parliament but a reflection of an autochthonous movement' (Hadfield, 2011, p. 233).

The 'reserved powers' model which serves as the template for the allocation of powers to the Scottish Parliament supports this approach through emphasising the autonomy of the devolved bodies by specifying *only* those powers to be retained by the central (Westminster) legislature. Such an approach finds a partial parallel in certain federal systems in which those powers exercisable at the federal (central) level are detailed in the constitution, with the residue falling to be exercised by the states or provinces (for instance the 10th Amendment to the US Constitution). The dynamic nature of the devolution since 1999 has also served to give credence to this reading, through the expansion of those powers within the competence of the devolved institutions and the extension of the 'reserved powers' model to Wales (Wales Act, 2017, Schedule 7A). This significant recalibration of the governing principle of devolution in Wales has repercussions for devolutionary arrangements across the UK as a whole, meaning that 'the reserved powers model is now the constitutionally preferred model for devolution within the UK' (Parliament. House of Commons Public Administration and Constitutional Affairs Committee, 2018, para. 31). Though the Union itself is a reserved matter, the implicit acceptance that the devolved institutions are otherwise invested in the management and operation of the constitution is evident in Schedule 5 to the Scotland Act which explicitly reserves only certain 'aspects of the constitution'.

From this perspective, while devolution offers decentralisation short of federalism, it nonetheless guarantees considerable autonomy to the institutions of sub state government and sees the structural reallocation of power accompanied by a political commitment to self-government. In recognising the sovereign claims from within the UK's component nations the quasi-federal narrative 'cannot help but question, implicitly, the idea of a unitary constitutional order purportedly founded on a single source of national constituent power' (Tierney, 2007, p. 737).

3 | THE EXTERNAL DIMENSION

It would be mistaken, however, to regard devolution as a realignment of power along purely internal lines. Devolution also provided a process through which the UK's international obligations were reflected. Though the powers devolved from Westminster empower the devolved institutions, their obligations to operate within the constraints of EU law (as well as within the scope of activity permitted by the European Convention on Human Rights) partially delineated the regulatory sphere within which the devolved administrations functioned. While the UK Government remains the primary actor on the international stage, the devolved bodies operated within – and held some responsibility for the implementation of – EU laws. As much is reflected in the Scotland Act (as amended) which reserves foreign affairs, defined explicitly to include relations with the EU, while specifying that responsibility for observing and implementing international obligations, including those imposed as a result of EU law, fall to the devolved institutions (Scotland Act, Schedule 5). As Burrows and Fletcher (2017, p. 50) have observed, 'EU law and its respect was designed into the devolution settlement, and thus embedded further into the constitutional landscape of the UK'. The relationship between the devolved institutions and EU laws was not, therefore, to be conducted only through diplomatic and legislative intermediaries in London, but was rather more direct. EU law provided a legal framework that was equally applicable to UK-level institutions as well as those in the devolved countries. As a result, an influential House of Lords Select Committee suggested that – as one of the shared characteristics of the UK's constitutional orders since 1997 – 'the European Union has been, in effect, part of the glue holding the United Kingdom together (House of Lords European Union Committee, 2017, p. 36).'

Given this, and the extent to which legal and political powers had been recalibrated along territorial lines more broadly, 'it might be held that the UK constitution has developed to a point where … the devolved institutions have a right to participation in key decisions with major political consequences for the UK as a whole' (Blick, 2016). This conception of a shared interest in many governmental decisions – regardless perhaps of their formal status as reserved, devolved or excepted matters – is a recognition of what Trench refers to as the 'logic of devolution', under which:

> Two governments each acting directly on the citizen, neither subordinate to the other in any practical way, with a clear and active role for the UK tier across the union.
>
> (Trench, 2014, p. 123)

In the light of the structural role accorded to EU law in the devolved frameworks, Brexit was predicted to be 'transformative' of the relationships between the governments of the devolved countries and UK-level administrations (Jones, 2018). Yet it is difficult to discern – in the various steps taken to initiate and achieve Brexit – a sense that this notion of a shared interest in the future direction of the union, in which all four nations are equally invested, has effectively displaced the orthodoxies of the UK as a unitary state.

4 | THE BREXIT REFERENDUM

The House of Lords European Union Committee observed that the impact of the UK exiting the EU on the

substance and politics of devolution provided 'one of the most technically complex and politically contentious elements of the Brexit debate (House of Lords European Union Committee, 2017).' Little of this complexity was considered in the inititation of the 2016 referendum. Notwithstanding the territorial distinctions highlighted (and indeed compounded) by devolution, the European Union Referendum Act 2015 set out that the Brexit referendum would take the form of a simple majority vote across the UK.

The Brexit referendum was – in both electoral and party political terms – a proposed solution to a distinctively *English* problem (McHarg, 2018). In electoral terms, the broad Euroscepticism to which demands for Brexit gave voice was less pronounced in Northern Ireland, Scotland and Wales than in England. As a matter of party politics, the groupings through which those anti-EU views were primarily reflected – the Conservatives and UKIP – were minority presences in the devolved countries. Ironically perhaps given the direct relationships between the competences of the devolved bodies and EU norms, the potential impact of Brexit on the government and governance of England could be said to be less pronounced, or at least less immediate, given the absence of any comparable strata of government in England. But, as McHarg (2018, p. 297) has observed, 'the Conservative government's political incentive [in holding the 2016 referendum] was to respond to its political base in England, even if that led it in a direction which was difficult to reconcile with its avowed stance as a unionist party'.

The Scottish Government's proposal for a 'double majority' provision to be included in the European Union Referendum Act 2015 – as a result of which a vote to leave would only have been effective if endorsed by: (1) a majority of voters in the UK as a whole; *and* (2) a majority of voters in each of the component parts of the UK – reflected this continuing concern (Sturgeon, 2015). The fear of the Scottish (and Welsh) administrations was that the views of their respective electorates would be drowned out by virtue of the sheer volume of English voters. The then Prime Minister David Cameron summarily rejected the double majority proposal (HC Debs, Vol.587, Col.301 (19 Oct 2014)). But the fears of the devolved bodies were subsequently vindicated by the results of the 2016 referendum, in which the 5,096,581 votes cast in the devolved nations are something of a footnote by comparison with the 28.5m votes of the English electorate. The dominance of England within the UK is frequently presented as an insurmountable obstacle to the UK's adoption of an explicitly federal solution to issues of territorial governance. However, the process and outcome of the Brexit referendum illustrates that the dominance of English interests and votes may already be evident in decisions with a significant bearing on all component nations of the UK. Considered from this perspective the referendum vote indicates that the union of *equal* states, which is often argued to underpin the UK, may be more of a rhetorical device than binding commitment in relation to decisions concerning the future of the UK's component nations (Table 1).

TABLE 1 Votes cast in the 2016 Brexit Referendum, by country

Country	Total votes cast
England	28,455,402
NI	790,149
Scotland	2,679,513
Wales	1,626,919

While the advent of devolution was premised on addressing the considerable democratic deficits resulting from unitary government, responses to the EU referendum have laid bare further deficits. The most obvious issue is the ease with which the Scottish and Northern Ireland majorities in favour of remain were sidestepped. If we accept the narrative of the UK as the relevant actor as (then) member of the EU, and that the conception of the unitary state and government retains purchase in the UK, then the UK-wide vote in favour of leave can be seen as compelling. But assessing the Brexit vote on such a narrow basis obscures two further constitutional exercises, each with their own claim to democratic legitimacy. The first of these is the 2014 referendum on Scottish independence, and the second the endorsement – also via referendums – of the schemes of devolution in Northern Ireland, Scotland and Wales in 1997/1998. As to the first, in the lead up to the 2014 referendum on Scottish independence a vote against independence was presented – including by members of the then UK Government – as a vote for stability both within the UK and, by extension, within the EU. Perhaps more importantly, majorities voting in referendums in 1997 and 1998 approved each devolutionary scheme. The results of both decisions are unsettled by Brexit. The position is perhaps most stark in Northern Ireland, as de Mars et al. have written:

> The GFA [Good Friday Agreement] was endorsed by popular referendum in two jurisdictions [Northern Ireland and Ireland] and, as such, has as much legitimacy as the Brexit vote. It envisaged Northern Ireland as being in the EU, even if it was not explicitly defined in terms of EU membership.
> (de Mars et al. 2018, p. 155)

Though the political context between the devolved nations is undoubtedly different, similar could be said of the referendums in Wales and Scotland held in 1998, both of which endorsed models of devolved government in which EU law was to provide a core regulatory tool, and

EU membership was to provide a pillar of the national and international governmental context within which the devolved bodies were to operate. The consistent tenor of the 1997/1998 and 2014 votes was both supportive of EU membership, and widely treated – pre-2016 – as being constitutionally definitive.

The necessary amendment to the devolutionary schemes which would result from Brexit should have – if the quasi-federal account of Brexit held sway – prompted some central reflection on the consequences of the will of the people (UK version) requiring interference with (or rejection of) the will of the people (Scottish/Northern Ireland variants). If the influence of the central state had been effectively diluted by devolution, the sovereign decisions of the peoples of Northern Ireland and Scotland would not so easily have been trumped by that of UK Parliament (itself arguably in thrall to the 'will of the people' as expressed in June 2016). Despite such territorial and democratic concerns, the response of the centre was muted. The Public Administration and Constitutional Affairs Committee report into lessons learned from the EU referendum contained no discussion or analysis of the territorial dimensions of the 2016 vote (Parliament. House of Commons Public Administration and Constitutional Affairs Committee, 2017).

5 | CONVENTION AND LITIGATION

The second lens through which the devolutionary constitution can be viewed in the light of Brexit is provided by the litigation initiated in the aftermath of the 2016 vote. The most significant adjudication in this regard gave rise to the UK Supreme Court decision in *R (Miller) v Secretary of State for Exiting the European Union* (2017). The primary focus of the *Miller* litigation was whether (as the UK Government argued) the power to initiate the Article 50 process was to be found in the foreign affairs prerogative, or – as a result of the necessary diminution in rights and freedoms which would be the result of exiting the EU – could only be authorised by specific allocation of such a power by statute. By a majority, the UK Supreme Court determined that the power to trigger Article 50 required the passing of primary legislation conferring such power on ministers. (In turn, this power was duly allocated by the EU (Notification of Withdrawal) Act, 2017).

Arguments raised in *Miller* in relation to devolution issues in the UK Supreme Court pursued a series of distinct claims, a number of which were rendered otiose by the finding that primary legislation would be required to facilitate the intended notification under Article 50. Two of the remaining claims are worthy of note. The first of these, that Brexit would precipitate a constitutional 'change of circumstances' in Northern Ireland so significant as to frustrate the operation of s.1 of the Northern Ireland Act, 1998 had previously been rejected by the Northern Ireland High Court (*McCord's Application for Judicial Review* [2016] NIQB 85) and the Supreme Court did not engage with it in detail. The majority found that the guarantee that Northern Ireland would remain a part of the UK until a referendum indicated a preference for a united Ireland was unaffected by any other 'change in the constitutional status of Northern Ireland' that might result from Brexit.

The second was that, if primary legislation was required to bestow upon UK ministers the power to initiate Article 50, the Sewel convention in turn required that the consent of the devolved legislatures be a necessary precursor to Westminster enacting the authorising legislation. Though operational from the establishment of the devolved institutions, the Sewel convention has enjoyed a statutory underpinning since the amendment of the Scotland Act, 1998 by the Scotland Act, 2016 (and is recognised in substantially similar terms in the Wales Act, 2017). The text of s.28(8) Scotland Act provides that '*it is recognised* that the Parliament of the United Kingdom *will not normally* legislate with regard to devolved matters without the consent of the Scottish Parliament (emphasis added).' Consideration of the Sewel convention by the UK Supreme Court in the *Miller* decision provided an opportunity to gauge the influence of this legislative recognition. Though the effect of the Scotland Act, 2016 included provision to emphasise the permanence of the devolved structures in Scotland, and as such undoubtedly strengthened arguments in favour of a quasi-federal UK, discussion in the Supreme Court focused more clearly on the enforceability of the convention as a matter of law. Consistently with the tenor of the Supreme Court's decision more broadly construed (Poole, 2017), the Court's treatment of Sewel (on which the justices were unanimous) tended towards the support of orthodox constitutional principles.

The Supreme Court recognised the established position that constitutional conventions are not judicially enforceable, finding that the coercive effect of the Sewel convention was 'a political restriction on the activity of the UK Parliament' (*R (Miller) v Secretary of State for Exiting the European Union*, 2017, para. 145). Judges – the justices found – 'are neither the parents nor the guardians of political conventions; they are merely observers … they can recognise the operation of a political convention in the context of deciding a legal question … but they cannot give legal rulings on its operation or scope, because those matters are determined within the political world' (*Miller*, para. 146). Though 'legislative recognition' of Sewel had the effect of entrenching its status as a 'convention' (*Miller*, para. 149), it did not – given the qualified language of s.28(8) – 'convert [the convention] into a rule which can be interpreted, let alone enforced, by the courts' (*Miller*, para. 148). In sum, Sewel was regarded as a

political 'means of establishing cooperative relationships between the UK Parliament and the devolved administrations' (*Miller*, para. 136) rather than a stronger regulatory tool capable of protecting devolved interests from central incursion. Accordingly, the Supreme Court found that the UK Parliament was subject to no justiciable/enforceable obligation resulting from the Sewel convention.

The delineation of the (distinct) legal and political spheres of the *Miller* dispute provides something of a *leitmotif* of the Supreme Court's decision (as indeed it had earlier in the decision of the Divisional Court). This is, in a sense, unsurprising: the majority decision was both largely supportive of constitutional orthodoxy and alert to the prospect of inflaming an already incendiary public debate surrounding Brexit. The compartmentalising by the majority of the legal and the political elements of the decision – with only the former for the court for determine – therefore provided insulation in substantive and procedural terms. The institutional position of the Supreme Court may also provide some explanation for its failure to fully account for the complexities of the interplay between the forces of devolution and those of Brexit. While it is true to say that the Supreme Court exercises constitutional functions in relation to human rights adjudication and consideration of devolution issues, for instance, it is not *explicitly* a 'constitutional court'. Instead, the court – in cases with constitutional implications – adjudicates in relation to disputes which intersect law *and* politics (Masterman & Murkens, 2013), and its findings may tend towards emphasising the requirements of *the law* when confronted with circumstances with a particularly clear (and perhaps singularly controversial) political flavour.

But in failing to fully articulate the constitutional limitation imposed by Sewel, the Supreme Court also provided a narrow view of the constitutional dynamics of the *Miller* decision – dynamics which blend the legal and political in ways which defy neat categorisation – and as such provide only a partial reflection of the complexity of decision making in a multilayered constitution. Resolution of the substantive issue relating to Article 50 rendered it unnecessary to fully unpack those arguments pertaining to the UK's devolutionary arrangements. Though convention may play a role in regulating central and devolved relations, this role is neither fully articulated, nor for the court to determine. The somewhat myopic view of the constitution provided shows that – despite suggestions that devolution has transformed the UK Supreme Court into a de facto constitutional court (Hale, 2018) – the court carries the baggage of a system constitutionally dominated by the sovereignty of a centralised legislature. As McCrudden and Halberstam have commented:

> The devolution aspects of the Supreme Court's judgment in *Miller* will come to be seen as a significant misstep, in that it failed to live up to the challenge of becoming a truly constitutional court for the UK as a whole.
>
> (McCrudden & Halberstam, 2017)

The decision therefore represents both an orthodox and unitary vision of the constitution which, in its legalistic focus, shows little of the capacity of Supreme Courts elsewhere which are able to recognise that the constitution is greater than the sum of its enforceable components.[1.]

6 | REPATRIATING COMPETENCES / LEGISLATION

If we accept the narrative of the UK as the relevant actor as member of the EU, and accept that the conception of the unitary state and government retains purchase in the UK, then the UK-wide vote in favour of leaving the EU should be seen as compelling. Nonetheless, it is less straightforward to assume that the *process* of leaving should have been managed in the same way. As the former Prime Minister Theresa May indicated however:

> Because we voted in the referendum as one United Kingdom, we will negotiate as one United Kingdom, and we will leave the European Union as one United Kingdom. There is no opt out from Brexit. And I will never allow divisive nationalists to undermine the precious union between the four nations of our United Kingdom.
>
> (May, 2016)

May's language is telling. It is not the language of compromise and of dialogue, but of a decision taken by the people of the UK, to be managed by the UK Government alone. The nationalist threat referred to came from Scotland, where in the aftermath of the 2016 referendum the First Minister suggested that the material changes in Scotland's circumstances that would be the result of the UK exiting the EU against the wishes of the Scottish electorate would provide grounds for a second referendum on independence. The Prime Minister's response was to not to ameliorate concerns relating to Brexit's impact on the devolved bodies, or to engage with them, but to suppress their critical voices.

The political distance between the Conservatives and Scottish National party (SNP) provides context to this particular point, but May's comments are characteristic of the UK Government's approach; little evidence can be found of post-referendum attempts to produce a Brexit which enjoys a broad territorial acceptance. The speed with which constructive suggestions from

the devolved bodies were rejected by London suggests that views from the constituent nations remain subject to those of the centre. Options for a differentiated Brexit – under which Scotland would retain closer alignment with the EU (see Scottish Government, 2016) – or for the 'soft' Brexit otherwise favoured by the administrations in Scotland and Wales were swfitly rejected (HM Government, 2017). Rhetorical support for cooperation between the centre and the devolved bodies continued, and commitments to 'work closely with' the devolved administrations peppered the July 2018 White Paper (HM Government, 2018). Such assurances increasingly rang hollow in the devolved countries where UK Government statements on close cooperation and consultation were not matched with practical steps to collaborate (Wincott, 2018).

The legislative management of the processes of repatriation of competence from the EU institutions displayed further centrist tendencies. Despite calls – made forcefully by the Scottish Government – that the repatriation of powers from the EU should be achieved consistently with those areas of competence already held by the devolved institutions, the European Union (Withdrawal) Bill as introduced in 2017 would have rendered the management of *all* retained EU law the responsibility of the Westminster Parliament in order to ensure regulatory alignment within the UK's internal market. Unsurprisingly, claims by the Scottish and Welsh Governments of a Westminster 'power grab' swiftly followed. The bill was subsequently amended to stipulate that the devolved administrations are precluded from amending retained EU law in fields of devolved competence only to the extent specified in regulations by UK ministers. Any regulations limiting devolved competence in this regard must be preceded by consultation with the relevant devolved institution(s). On this basis, the legislative consent of the Senedd was secured, but due to the continued threat of unilateral restriction of the devolved bodies by UK Government *ministers* (as opposed to the UK Parliament), the Scottish Parliament emphatically withheld its support (by 93 votes to 30) in May 2018. The European Union (Withdrawal) Act 2018 nonetheless received royal assent in June 2018.

Though there is flexibility (perhaps imprecision) in both the language of the Sewel convention – as enshrined in the Scotland and Wales Acts – and in the operation of conventions more broadly construed, the episode further illustrates the comparative weakness of Sewel as a substantive limitation on the legislative capacity of the UK Parliament. While the case may be made that Brexit offered up a set of issues that fell outside the 'normal' institutional relations envisaged by the convention, the statutory delegation and quasi-federal accounts of devolution provide differing responses to the obligation imposed by Sewel. On the former, Sewel's ability to manage interparliamentary relations is dependent upon process; the obligations imposed by Sewel are arguably discharged through the act of consultation and by seeking of consent from the devolved administrations. On the latter, quasi-federal, account it is the grant (or refusal) of legislative consent that is material. On this account the denial of consent should be regarded as imposing a restriction that – though falling short of imposing an enforceable limitation – should nonetheless be difficult to circumnavigate. However, even the subsequent withholding of legislative consent – in January 2020 – by *all three* devolved administrations in relation to the EU (Withdrawal Agreement) Bill failed to obstruct the bill's progress onto the statute book (European Union (Withdrawal Agreement) Act 2020).

Attempts by the Scottish Government to independently address the difficulties of the Brexit process were also met with central opposition. The Scottish Government's response to the provisions of the Westminster legislation governing withdrawal and the future effects of EU law came in the form of the Withdrawal from the European Union (Legal Continuity) (Scotland) Bill.[2.] The bill was introduced in order to ensure legal stability in fields of devolved competence in light of the Scottish Government's opposition to the terms of the European Union (Withdrawal) Bill introduced at Westminster. The Continuity Bill was passed by the Scottish Parliament in March 2018, and subsequently referred to the Supreme Court by the UK Government's law officers under s.33 of the Scotland Act, 1998. The Supreme Court delivered its decision in December 2018, finding that one provision of the Continuity Bill was outside the legislative competence of the Scottish Parliament at the point it was passed, and that a range of additional provisions had been rendered outside of competence by the intervening enactment of the EU (Withdrawal) Act 2018 by the UK Parliament (*UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill Reference* [2018] UKSC 64). But in the light of previous discussion, it is perhaps the symbolism of the UK Government referring this matter to the courts that most strongly resounds: 'this struggle consume[d] considerable UK Government attention at a key stage in the Brexit process … threaten[ing] to create an image of Scotland being bullied into Brexit' (de Mars et al. 2018, p. 125).

Rejections of a 'territorially inclusive approach' (McHarg, 2018) can in part be attributed to the peculiar politics of Brexit in which superficially definitive but vacuous soundbites – such as 'Brexit means Brexit', and more recently, 'Get Brexit done' – have been routinely employed to either divert attention from or deny the genuine polycentricity of the issues at stake. But it is also difficult to resist the conclusion that the failure to construct a Brexit which seeks to accommodate and reflect the priorities of the UK's component nations is driven by the continued resonance of centralised governance, and has been facilitated by a constitutional

framework which provides flimsy protection to devolved autonomy in the face of Westminster and Whitehall incursion. The approach of successive UK Governments speaks to the UK's failure to establish a post devolution system of intergovernmental (or interparliamentary) relations that is neither executive led nor intimately linked to party political positions. UK Governments' essentially platitudinous approach to territorial participation in the processes of Brexit is a politically short sighted approach to the management of a once-in-a-generation constitutional change which can only serve to increase the likelihood of significant, and potentially long lasting, collateral constitutional damage (Masterman & Murray, 2016). The enactment of the UK Internal Market Act 2020 provides a further case in point. Though designed by the UK Government to replace EU laws relating to free trade it has been accused of unpicking the devolution settlements by 'undermining powers that have belonged to Wales, Scotland and Northern Ireland for over 20 years' (Mark Drakeford (First Minister of Wales), quoted in Parliament. House of Commons Library, 2020). The Internal Market Act 2020 was also passed without obtaining the legislative consent of the Scottish Parliament and Senedd.

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Just as the external potential of Brexit has been presented as harking back to a bygone age ('empire 2.0'), its internal management reflects a centralised/unitary vision of UK Government that was supposedly jettisoned by the advent of devolution. Centralised rule from London (under successive Conservative administrations) provided the conditions in which momentum towards devolution developed up to 1999. In seeking to insulate the domestic from the external influences of the EU legal order, Brexit amounts to a step away from a plural constitutional order. On that basis, it could be suggested that the reassertion of the central authority of Westminster and Whitehall in the devolutionary context is a further manifestation of a retreat to unitary government. Brexit has certainly exposed the absence of a federal – or quasi-federal – mindset within the UK Government, and has seemed to prompt a phase of post-devolution in which structural decentralisation has been accompanied by a resurgence of centrist management tendencies. Theresa May's rhetorical support for the 'precious union' has not been matched – by her, or her successor – with practical steps to engage the devolved governments in the processes of managing Brexit. Indeed, the UK Government's 2020 White Paper on the UK Internal Market – though acknowledging 'powerful devolved legislatures' – otherwise characterises the UK, straightforwardly, as a 'unitary state' (HM Government, 2020). In one sense this is a party political issue: the geopolitical divisions between the centre and the devolved nations are far more obvious than they were at the turn of the century and – during the crucial 2017–19 period – the UK's Conservative Government was tied to the particular species of unionism espoused by Northern Ireland's Democratic Unionist Party. But the lack of a UK level 'federal' approach to governance is also evidence of the continuing allure of the centralised state, and a failure to recognise that the maintenance of the union is now – perhaps more than ever before – an occupation shared. The absence of a formal structure of intergovernmental and interparliamentary cooperation – 'crucial component[s] in any credible decentralised model' (Tierney, 2007, p. 744) – have ensured that the political processes surrounding Brexit have been both oppositional and undeniably weighted in favour of UK level institutions. Developments both prior to, and following, the Brexit referendum illustrate that the institutions and mechanisms of the centrist state retain considerable influence, and that – on the basis of this illustration at least – the promise of a quasi-federal UK constitution remains elusive.

It is clear that the process and management of Brexit has unsettled the internal dynamics – and relative stability – of the devolution project. The House of Lords European Union Committee predicted that 'Brexit will remove one of the foundations of the devolution settlements, with potentially destabilising consequences' (Parliament. House of Lords European Union Committee, 2017, para. 2). The view of the Scottish Government was less cautious:

> The Scottish Parliament was established in 1999 to enable the government and laws of Scotland to reflect the values, needs and priorities of the people of Scotland in a context underpinned by EU law. As a result of the EU referendum the assumptions underlying devolution no longer hold.
>
> (Scottish Government, 2016, para. 173)

Such a view – even if we acknowledge it to come from a governing party whose raison d'etre is independence for Scotland – is perhaps unsurprising. But from the Scottish perspective it is relatively straightforward to portray the road to Brexit as a denial of democratic government. It is an implicit rejection of the 2014 independence vote to remain in the EU as a part of the UK, it is a rejection of the will of the Scottish electorate as expressed in 2016, and the subsequent failures to secure legislative consent in relation to the progress of core pieces of Brexit legislation amount to a rejection of the expressed views of the Scottish Parliament. As a result, from the quasi-federal perspective on devolution, the principles of direct and representative democracy have both been compromised by the UK Government and UK Parliament's inexorable push towards Brexit.

For all the discussion of a decentralised, quasi-federal state in which subsidiarity provides an underpinning principle of the constitution (Bingham, 2002), Brexit has clearly exposed that the orthodoxy of centralised government – most clearly manifested in a sovereign central institution – remains the dominant vision of the UK constitutional state. The preservation of the legal primacy of the UK Parliament stands in opposition to the divisible sovereignty underpinning federal systems. The hierarchical approach to constitutional ordering engendered by the concept similarly presents an obstacle to a realistic appreciation of shared competences and provides a basis of constitutional principle from which policy opposition in the devolved bodies can be silenced through legislative action at Westminster. Devolution has done much to emphasise the status of the UK as a union of states, but the heritage of centralised governance and the pressure of Brexit have combined to ensure that the diverse voices of the union are subject to the continued direction of the centre.

Devolution was intended to diminish the sense that Scotland, Wales and Northern Ireland lay on the peripheries of the UK. The processes which delivered Brexit have served to confirm the hierarchical nature of the UK's territorial constitution, and the deficiencies of its mechanisms for protecting the interests of its devolved component nations. Brexit was conceived of as a project designed to safeguard the constitutional integrity of the UK constitutional order and to protect it from the supposed threats of the external. Its delivery may come to be seen as opening fissures within the union which might not be closed.

ORCID

Roger Masterman https://orcid.org/0000-0002-6942-5598

ENDNOTES

1. For instance *Reference Re Secession of Quebec (Supreme Court of Canada)* [1998] 2 SCR 217.
2. A similar measure was enacted in Wales: the Law Derived from the European Union (Wales) Act 2018 (repealed by the Law Derived from the European Union (Wales) Act 2018 (Repeal) Regulations 2018 following enactment of the EU (Withdrawal) Act 2018).

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AUTHOR BIOGRAPHY

Roger Masterman is Professor of Constitutional Law at Durham Law School. He is Joint General Editor of *Public Law* and a Member of the Executive Committee of the UK Constitutional Law Association.

How to cite this article: Masterman, R. (2022) Brexit and the United Kingdom's Devolutionary Constitution. *Global Policy*, 13(Suppl. 2), 58–68. Available from: https://doi.org/10.1111/1758-5899.13064