**Research Handbook on Legal Aspects of Brexit**

***Part 4 – Apres Brexit: Consequences for the UK and the EU – Chapter 20***

**‘The UK and parliamentary government after Brexit – A dis-United Kingdom?’**

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Introduction

The United Kingdom’s withdrawal from the European Union has been an immensely divisive event. Every aspect of Brexit – the decision, the process, and the aftermath – has been furiously contested. While disagreement concerning monumental political decisions is inevitable, in relation to Brexit those disagreements have been particularly acute. Division over Brexit defined the nature of UK politics for a number of years, and while it took a global pandemic to push the issue down the political agenda, the cultural realignment of the people along ‘remain / leave’ lines is likely to have major consequences into the future.

The divisions generated by Brexit have not just been political disagreements within the UK’s constitutional system, but also political disagreements about the UK’s constitutional system. Again, to some extent this is not new – the UK’s distinctively ‘political’ constitution means the nature and structure of the legal and political system can (at least in theory) be continuously contested and remade, in contrast with a more fixed set of rules within a legally entrenched, codified, ‘higher’ constitutional text. In that sense, the UK constitution might be seen to facilitate ongoing conflict between competing perspectives – or at least, we might say it is a constitution which makes little effort to try to conceal the inevitable disagreements upon which political systems are based. Yet even in a constitutional system which is already particularly open (and subject) to political disagreement, Brexit has pushed existing boundaries, and heralded a remarkable period in which division was pervasive.

The aim of this chapter is to catalogue the constitutional disagreement over Brexit within the UK, and then to reflect on consequences and implications both for the future of UK parliamentary government, and for the future of the UK itself. Crucially, we can see there were tensions over Brexit on different constitutional levels. First, Brexit caused divisions both within and between the UK's central constitutional actors and institutions, including the UK government, UK Parliament, the courts and ‘the people’ (particularly as manifested in the referendum result). Second, Brexit produced divisions within and between the nations of the UK more generally, most obviously manifested in splits between the UK’s institutions, led by the UK government, and the devolved governments and legislatures in Scotland, Wales and Northern Ireland.

Drawing this distinction between the UK level disagreements and the disputes between the UK’s central and devolved institutions is not intended to suggest a degree of separation between them, or a hierarchy of importance. On the contrary, many of these various disputes have inevitably overlapped and interacted, involving many of the same underlying issues. Moreover, they have all been significant, and to varying extents have shaped the Brexit process. Instead, then, this distinction highlights the fact that it has been the combination of these varied tensions – the simultaneous political disagreements on different planes – which has compounded the challenges posed by Brexit.

 As a result, the UK constitution also faces a number of problems in the wake of Brexit. First, there are the reverberations within the UK’s model of parliamentary government to address. And second, the consequences of the UK’s internal divisions include the possibility that the state in its current legal form could fragment or even disintegrate, as the commitment of its various constituent nations to the idea of the union has been thoroughly tested. As this chapter will argue, these are challenges of political will as much as constitutional design. While there are a range of options and potential outcomes, there is unlikely to be a simple constitutional fix in circumstances of deep-lying political division, because the existence of fundamental disagreement is both a core part of the problem and also an obstacle to achieving any form of resolution. In that sense, whether there is a big bang moment of break-up or reform, or the status quo persists in the face of general dissatisfaction, the legacy of Brexit for the UK’s legal and political system is likely to be felt for a considerable time.

 In section one, this chapter examines the constitutional divisions within and between the UK’s central institutions and actors. In section two, the chapter analyses the disagreements between the devolved institutions and those at the UK level. In section three, these two strands combine to evaluate the future consequences for the UK constitution after Brexit. Ultimately, the chapter argues that there is significant uncertainty and a broad range of possibilities for the UK’s constitutional future. While a reconciliation of the divisions over Brexit seems intensely unlikely, there are also a number of barriers to the break-up of the UK. Yet even in the absence of these more radical outcomes being realised, it is still far from clear that the current constitutional order is becoming any more capable of accommodating or even managing disagreements about or within a ‘dis-United Kingdom’. The UK constitution (and the UK) may, for the time being, have just survived the Brexit process, but it certainly provides a lesson (if one were needed) of the limited capacity that constitutionalism has for controlling momentous political disputes.

1. Disagreements within and between the UK’s central constitutional institutions and actors

There have been disagreements of a very fundamental kind over Brexit, affecting all of the central institutions of the UK constitution: the UK government, Parliament and the courts. There have also been some notable internal disputes within these institutions – especially inside the governments of Theresa May and then Boris Johnson – and also an overarching rupture between the initial preferences of most political actors regarding the continuation of EU membership, and the choice of a majority of voters in the referendum.

(i) UK institutions and the people

The decision to withdraw from the EU was taken at a national referendum.[[1]](#footnote-1) This was only the third UK wide vote of this kind, but the Brexit referendum fits with a modern (although not necessarily consistent) pattern of making major constitutional choices based on the direct will of the electorate.[[2]](#footnote-2) The victory for the ‘Leave’ campaign was close but still decisive – 51.9% for ‘leave’ vs 48.1% for ‘remain’, a margin of 1.25 million votes, on a notably high 72.2% turnout.[[3]](#footnote-3) And while the government was not legally bound to accept the referendum result, the democratic authority of a clear referendum decision is impossible for the UK’s political institutions to ignore. The difficulty, however, is that most members of the political establishment had been in favour of remaining in the EU – the government (eventually and half-heartedly) supported remain, as did the main opposition parties, as did most business and civil society organisations. David Cameron, the Prime Minister who had called the referendum, offered an immediate resignation in recognition of his defeat, and he was replaced by Theresa May, who had also supported remain. May enthusiastically pivoted to implementing the choice of a majority of the electorate, but there remained a fundamental tension at the heart of the Brexit process: a referendum had forced the political institutions to give effect to a major decision to which they had been positively opposed.

 This is an inherent risk of using referendums to settle major political questions – that the government might not get the answer that it wants. Disagreement may be politically inevitable, but it is certainly emphasised and perhaps exacerbated by taking the decision through a one-off direct democratic exercise, rather than managing disagreement through the "normal" rolling process of elections on an ongoing basis. But this reveals a deeper constitutional tension in play – between the regular authority of the standing political institutions like the government and Parliament, and the irregular authority of a singular referendum held at a specific moment in time and treated as a generating a canonical decision. Crucially, while the irregular authority of the decision to withdraw from the EU shaped the entire process, the regular authority of the established institutions was essential to give effect to that choice (and indeed, to make the choice possible to begin with, by proposing and authorising the holding of a referendum).[[4]](#footnote-4)

 This meant the political institutions were bound by the referendum result in democratic terms, despite having largely opposed it, and were also responsible for delivering it. But the basic decision to leave the EU also required interpretation before it could be implemented. The idea of leaving the EU was an incredibly complex undertaking, given the multi-layered nature of membership of the EU, which has economic, constitutional, political, and social dimensions, while affecting ideas of national identity, some of the key rights held by citizens, and levels and perceptions of immigration, among other things. As a result, while constrained to deliver the outcome of the referendum, the UK’s government and Parliament were faced with not one decision, but many – in place of the simplicity of ‘remain v leave’, the political institutions had to determine what kind of relationship with the EU they should seek instead of EU membership.[[5]](#footnote-5) Therefore the referendum was not the conclusion of a binary disagreement between remain and leave, but actually triggered a subsequent series of disagreements which fell to the government and Parliament to resolve, subject to the constraint that in some form the UK had to leave the EU. That the empty and circular rhetoric of ‘Brexit means Brexit’ was the leading official response exposes the struggle the government and Parliament faced in responding to the irregular authority of the referendum.[[6]](#footnote-6)

This demonstrates that the potential for disagreement over Brexit was at the core of both the people’s decision and the manner of its implementation. However, that does not mean that the matter of EU membership was unsuitable to be addressed at a referendum, nor that referendums are somehow incompatible with the UK’s constitutional model. Rather, it reveals the particular difficulties of the political institutions deploying the referendum as an ad hoc device, which is binding democratically but not legally, and unsettles the status quo while requiring implementation by the same institutions whose preferences have been bypassed. Of course, the referendum result was not accepted by everyone, and there were sustained and vocal campaigns to either ignore the result or hold a second referendum with a view to either reversing or elaborating on the initial choice made by the electorate.[[7]](#footnote-7) Yet it is unclear how a ‘people’s vote’ would have simplified the situation, as opposed to creating another site of irregular authority to clash with both the first referendum result and the instincts of the majority of the political class.

 The tensions over Brexit were therefore not simply a consequence of a sharp divide between leave and remain voters, but had deeper constitutional underpinnings. Rather than treating the referendum decision as the start of a more complex process of leaving the EU, successive governments treated it as the final word and answer to every question. This attempt by the government to take control of the mandate created by the Brexit referendum did not reconcile its irregular authority with the regular authority of the established political institutions – instead the government failed to tame the disruptive potential of the referendum decision, resulting in a major challenge to its authority (and the authority of the legislature) between the general elections of 2017 and 2019. Therefore, it was not merely the fact that a referendum was held which made Brexit so divisive, but the way in which the political institutions engaged with that decision. Ultimately, this produced constitutional disagreement at a very fundamental level, which framed the entire process.

(ii) UK Parliament and government

Against this backdrop, delivering Brexit became a hugely contentious task for the government and Parliament, and there was an unusually high level of division between these two institutions during the process. In the UK’s model of parliamentary government there is normally a ‘fusion’ of power between the executive and the legislature.[[8]](#footnote-8) This follows from the fact that any government is drawn from within Parliament, and depends on commanding a majority in the House of Commons to obtain and retain office. The objectives of the government are therefore usually aligned with those of a majority of MPs in the House of Commons, due to the distorting effects of a first-past-the-post voting system which produces general elections which (in theory) provide a decisive winner.[[9]](#footnote-9) While the government and Parliament perform different constitutional functions, and the legislature is crucially tasked with holding the executive to account, there is both an institutional and an operational unity between a government with a majority and the Parliament within which it exists. Whether this is an ‘efficient secret’[[10]](#footnote-10) or an ‘elective dictatorship’[[11]](#footnote-11) (or neither) is open to debate, but the fusion between the legislature and executive significantly collapsed during (and perhaps also because of) the Brexit process.

 When replacing David Cameron as Prime Minister following the referendum in July 2016, Theresa May initially inherited Cameron’s Commons majority. However, at the early general election held in June 2017, May lost her majority, and was forced to form a minority government underpinned by a ‘confidence and supply’ agreement with the Democratic Unionist Party from Northern Ireland.[[12]](#footnote-12) This radically undermined the ability of the May government to gain the support of Parliament for a withdrawal deal negotiated with the EU – her lack of a majority left the government highly vulnerable to rebellions from within the Conservative party, from those MPs who opposed Brexit entirely, and those who opposed the version of Brexit she had negotiated as being an insufficient disconnection with the EU (and the supremacy of EU law and the jurisdiction of the CJEU in particular). Theresa May’s withdrawal deal was defeated in spectacular fashion on three occasions, including by a historic 230 votes in January 2019. Subsequent attempts to renegotiate her deal made little impact, and May resigned in July 2019 to be replaced as Prime Minister by Boris Johnson.

 The Johnson government had, if anything, a more precarious relationship with Parliament. This was partly because the new Prime Minister’s strategy was to confront the legislature, accuse it of blocking the will of the people as expressed at the referendum, and manufacture either an exit from the EU without a deal, or a general election to obtain a fresh mandate to ‘get Brexit done’. Johnson took a number of steps which actually reduced his control over the House of Commons, including expelling 21 pro-remain MPs from the Conservative Party, making his government even more precarious than that of Theresa May. Eventually Johnson was able to persuade the opposition parties to support another early general election,[[13]](#footnote-13) and at the December 2019 election the era of minority government came to an end, when Johnson won an 80-seat majority. His Brexit deal was duly approved by this new Parliament,[[14]](#footnote-14) and the UK exited the EU on 31 January 2020.

There were a number of innovations in this extraordinary period of conflict at the heart of parliamentary government. On two occasions Parliament enacted legislation against the wishes of the government to force extensions to the time limited process for negotiating EU exit.[[15]](#footnote-15) The second such Act even prescribed the precise terms of the letter which Prime Minister Boris Johnson had to send to the EU under duress, such was the discomfort with suggestions he might ignore his legal obligations and refuse to prolong negotiations. To enact this legislation, MPs in the House of Commons had to seize control over parliamentary business from the government. This was done in preference to removing this minority government through a no confidence vote, because of uncertainty about whether a no deal exit from the EU could happen automatically in the meantime, and also because of the unwillingness of Conservative rebels to create circumstances in which the opposition could form a government. Other innovations included the House of Commons attempting a series of ‘indicative votes’ to try to find a compromise Brexit policy, which failed when all four options were rejected.

But while this was a time of almost unprecedented division between the legislature and the executive, completion of the Brexit process ultimately required joint decisions reflecting the ordinary fusion of powers underpinning the operation of parliamentary government in the UK. The EU (Notification of Withdrawal) Act 2017 was enacted to authorise the start of exit negotiations by the government, and shaped the Brexit process by effectively providing a cross-party parliamentary ratification of the ‘leave’ vote. Further legislation passed under Theresa May to prepare the UK’s statute book for the withdrawal of directly effective EU law was more contentious, but the EU (Withdrawal) Act 2018 again was ultimately passed after concessions were extracted from the government. One key concession was the inclusion of a provision for the House of Commons to have a ‘meaningful vote’ (as it became known in political discourse) giving it the power to approve or reject any exit treaty concluded between the government and the EU (but, crucially, not the power to veto a ‘no deal’ Brexit).[[16]](#footnote-16) This provision gave significant leverage to rebel MPs during the long period of minority government, but was ultimately dispensed with by the EU (Withdrawal Agreement) Act 2020, the legislation passed to implement Boris Johnson’s renegotiated Withdrawal Agreement.

While the unprecedented events of 2017 to 2019 therefore define our experience of the Brexit process to a substantial extent, the conclusion to it was largely orthodox – a government with a majority persuaded Parliament to enact legislation (in this case, pushed through in just over one month) to give effect to its policy choice. This did not eliminate political disagreement, by now deeply entrenched around strong affective voter identities of ‘remainers’ and ‘leavers’.[[17]](#footnote-17) But it did show that while pervasive, disagreement was not infinite, with a form of constitutional resolution (even if still contentious and incomplete)[[18]](#footnote-18) prompted only after a further intervention by the electorate, this time through a general election.

(iii) UK government and the courts

Just as persistent tensions between the government and Parliament came to define the Brexit process, so too did a number of high-profile legal disputes based on challenges to government policy and decision-making relating to withdrawal from the EU. This series of litigation raised fundamental questions about the jurisdiction of the courts to hear challenges to sensitive political decisions by judicial review. In particular, the Brexit process was bookended by the two Miller cases, which concerned the use of royal prerogative powers exercised in practice by the executive. *Miller (No.1)* (brought against Theresa May’s government) concerned the power to notify the EU of the UK’s intention to leave, and therefore begin exit negotiations.[[19]](#footnote-19) *Cherry / Miller (No.2)* (brought against Boris Johnson’s government) concerned the power to prorogue Parliament for five weeks in an attempt to prevent it from obstructing the government’s plan.[[20]](#footnote-20) Both cases generated questions about whether, in hearing these challenges, the courts were simply fulfilling a formal legal function in ensuring the government acted lawfully, or if the courts were being used creatively by litigants to create new barriers to the completion of Brexit.

The Divisional Court judges who decided the first *Miller* case were accused by the Daily Mail of acting as ‘Enemies of the People’, prompting a majority of the Supreme Court to defend its role: the case had ‘nothing to do’ with ‘political issues’ such as ‘the wisdom of the decision to withdraw from the European Union’ or ‘the terms of withdrawal’.[[21]](#footnote-21) The duty of judges was ‘to decide issues of law which are brought before them by individuals and entities exercising their rights of access to the courts in a democratic society’.[[22]](#footnote-22) This defence had shifted somewhat by the time of *Miller (No.2)*, with the unanimous Supreme Court this time acknowledging that ‘most of the constitutional cases in our history have been concerned with politics’, in the sense that ‘almost all important decisions made by the executive have a political hue to them’.[[23]](#footnote-23) Nevertheless, the basic distinction between political questions (which the courts ‘cannot decide’) and questions of law (which ‘[u]nder the separation of powers, it is the function of the courts to determine’) was sustained at a formal level.[[24]](#footnote-24)

Of course, the fact that the Supreme Court had to issue these protestations reveals the extent to which these cases were viewed (by the judges and more widely) as contentious. The reiteration of a basic distinction between law and politics also conceals some of the complexity here – first, there was some disagreement even among the judges, with Lord Reed (in a minority in *Miller No.1)* raising concerns about the risks of ‘the legalisation of political issues’, and a Divisional Court composed of the Lord Chief Justice, Master of the Rolls and President of the Queen’s Bench Division first holding in *Cherry / Miller No.2* that a decision over the length of prorogation was ‘purely political’ and there was ‘no legal measure’ against which the court could assess it.[[25]](#footnote-25)

Second, the issue here is much more nuanced than whether the courts should make political decisions (which obviously they should not), but instead the extent to which political considerations might influence the determination of legal questions. And in that sense, both of the *Miller* decisions show signs of being shaped decisively by wider political context – the intervention in *Miller (No.1)* flowed from the majority’s broad sense that withdrawal from the EU was ‘such a far-reaching change’ to the UK’s constitutional arrangements,[[26]](#footnote-26) and *Cherry / Miller (No.2)* was explicitly described as ‘a “one-off”’ in circumstances which ‘are unlikely ever to arise again’.[[27]](#footnote-27)

Third, there is also tension between the formalist proclamations that a purely legal perspective was being taken by the judges, and the expansive approach actually employed in substance in both cases, drawing on quite vague and contestable constitutional principles. In *Cherry / Miller (No.2)* this included a legalised idea of ‘parliamentary accountability’,[[28]](#footnote-28) and in *Miller (No.1)* a principle concerning the process of changing the UK constitution which despite being ‘long-standing and fundamental’ is never actually named or properly substantiated.[[29]](#footnote-29)

There has been some fallout from these decisions, including prompting the Johnson government to launch a review of administrative law following the 2019 general election.[[30]](#footnote-30) But for all the heat generated, the practical consequences for the Brexit process were limited – in *Miller (No.1)* Parliament promptly passed the EU (Notification of Withdrawal) Act 2017 to authorise the government to begin negotiations without imposing any constraints on that power, and in *Cherry / Miller (No.2)* Parliament had already legislated to obstruct a ‘no deal’ Brexit before it was prorogued.[[31]](#footnote-31) Beyond these headline-grabbing decisions, there were many other cases also brought in this period, which McCorkindale and McHarg have described as a period of ‘hyper-litigation’. [[32]](#footnote-32) Yet as McCorkindale and McHarg show, the vast majority of these cases were unsuccessful.[[33]](#footnote-33) A prominent example is *Wilson v Prime Minister*, in which the Court of Appeal rejected the argument that the decision to begin exit negotiations was unlawful because the referendum decision was based on corrupt and illegal practices, on the basis that judicial intervention would have been ‘a constitutionally inappropriate and unlawful intervention in the due democratic process’.[[34]](#footnote-34)

Even where there were further victories against the government, they tended to be symbolic rather than impactful. For example, in the *Wightman* case, the Inner House of the Court of Session made a preliminary reference to the CJEU concerning the possibility of notification of withdrawal being revoked by the UK, a matter on which Article 50 TEU was silent. This, the court held, was not an academic issue despite the fact that the government’s stated position was that the notification would not be withdrawn, because it might ‘be relevant to the way in which some Members of Parliament cast their votes on a matter of fundamental importance to the future of the United Kingdom’.[[35]](#footnote-35) While the CJEU then decided that unilateral revocation of the Article 50 notice was possible under EU law,[[36]](#footnote-36) this made no substantive difference to the Brexit process, given the UK government had no interest in availing itself of that option. Yet *Wightman* did illustrate a further layer of complexity in this period of disagreement – as in the *Cherry* case, it featured elected Members of the UK and Scottish Parliaments attempting to shape the constitutional process through the courts when they were unsuccessful in doing so in their legislatures. This raises further questions about the ways in which law and politics interacted in this period.

(iv) Internal to the UK government

A final arena in which division and disagreement were rife was within the UK government itself. The standard position as a matter of constitutional convention is that, as part of the doctrine of ministerial responsibility, members of the government must take collective responsibility for policy. This requires ministers to agree to support official government unanimously policy or to resign, while ensuring that internal disagreements are kept confidential.[[37]](#footnote-37) Both of these elements of collective responsibility were strained to an extraordinary degree during the Brexit process. There was a steady flow of resignations from Theresa May’s government on both sides of the Brexit divide – remain supporting MPs such as Philip Lee, Jo Johnson and Sam Gyimah who felt the government’s line in the withdrawal negotiations was too ‘hard’, and leave supporting MPs such as Esther McVey, Steve Baker and Andrea Leadsom who felt the line was too ‘soft’. Other senior ministers – most notably the then Foreign Secretary and future Prime Minister Boris Johnson – remained in government for a considerable period while also publicly challenging government policy, with Johnson eventually resigning over the issue in July 2018. Two Secretaries of State with direct responsibility for Exiting the EU – David Davis and his successor Dominic Raab – also resigned in protest at policies they had played a leading role in developing.

 These resignations inevitably weakened the authority of Theresa May as Prime Minister, and she was also subject to votes of no confidence among Conservative Party MPs in December 2018 and within the House of Commons itself in January 2019. May won both, but this did little to change the underlying precarity of her government, given she had no majority in the Commons for the withdrawal agreement reached with the EU. The weakness of the government in the 2017-2019 period was also evident in the successful House of Commons vote ordering May’s Attorney General, Geoffrey Cox, to disclose in full his legal advice on the impact of the ‘backstop’ arrangements which would operate at the border between Northern Ireland and the Republic of Ireland in the event that no final treaty with the EU could be agreed, despite the fact this would normally be subject to confidentiality rules. The fact that this advice indicated there would be no legal exit from these backstop arrangements was crucial in undermining support for May’s withdrawal deal, and eventually her government.[[38]](#footnote-38) Even when May was succeeded by Boris Johnson, collective responsibility was still strained, with Amber Rudd and Jo Johnson (again) resigning in opposition to the government’s no deal Brexit policy in September 2019.

 The scale of this unwillingness to accept collective responsibility for Brexit policy reflects the intense divisions over the issue within government. In part, the challenges in sustaining a unanimous government flowed from the decision of May’s predecessor, David Cameron, to suspend collective responsibility in advance of the 2016 referendum, allowing cabinet ministers to campaign in favour of ‘leave’ (and against the government’s ‘remain’ position) without resigning from office. Once collective responsibility was suspended in relation to this matter, it was difficult for his successors to re-impose it – especially given the centrality of the issue in UK politics, and the strongly held views on both sides. The inability of May in particular to maintain unity in government was also a consequence of the third element of collective responsibility, which underpins unanimity and confidentiality – the idea that the government must collectively retain the confidence of the Commons to remain in office.[[39]](#footnote-39) The fact that May had no overall majority, and only held the confidence of the Commons with the support of the DUP, meant her ability to enforce the unanimity and confidentiality principles was similarly tenuous.

This internal division in government also manifested in other ways. There was criticism of the civil service, especially those in key Brexit policy roles such as Olly Robbins, Theresa May’s EU adviser. Robbins was the object of hostility of leave supporters, leading to the Cabinet Secretary Mark Sedwill writing a letter to *The Times* (apparently a semi-official source of the constitution) in defence of him and other civil servants.[[40]](#footnote-40) These political divisions were also replicated in the Conservative Party leadership elections held in 2016 and 2019, and in the official opposition, with a series of resignations from the Labour frontbench at key moments in the Brexit process under both Jeremy Corbyn and Keir Starmer.[[41]](#footnote-41) Just as the formal institutions of the UK constitution struggled to manage the disagreements over Brexit, with rules, relationships and authority stretched in novel and significant ways, so too did the political organisations which dominate those institutions and establish the context in which they operate.

2. Disagreements within the UK’s devolution system

In addition to the pervasive divisions at the centre of the UK’s constitutional system, a key feature of the Brexit process was the existence of profound disagreements with the devolved institutions in Scotland, Wales and Northern Ireland. The UK’s modern devolution system was established relatively recently, in 1997 under New Labour,[[42]](#footnote-42) and Brexit arguably offered the first major challenge to the settlement as a whole.[[43]](#footnote-43) There were divisions between the different nations evident in the overall referendum result, as well as disagreements over the need for the consent of the devolved institutions during the Brexit process, and with respect to the level of government to which powers should be returned from the EU.

(i) Leave voting nations – Remain voting nations in the referendum

The basic constitutional framework of the UK is one in which powerful central institutions dictate to relatively weak local authorities, and the key competition to the centre now comes from an asymmetrical devolution system which operates only in particular constituent nations, possessing varying levels of power. International relations, specifically including the relationship with the EU, are explicitly identified as matters reserved to the UK level consistently across all three devolution statutes.[[44]](#footnote-44) The basic expectation, therefore, was that the UK institutions would be the primary decision-makers regarding whether and how to exit the EU.

The referendum reflected this position. It was enacted at UK level, following a manifesto commitment from the UK government, with the result based on a simple majority decision at UK level overall. It did not require positive assent for Brexit in each of the four constituent nations of the UK, nor any other kind of supermajority or turnout condition to be satisfied. The final outcome reflected this, with different results in different nations – in Scotland and Northern Ireland a majority voted for remain, in Wales and England a majority voted for leave.[[45]](#footnote-45) While this left the four nations evenly divided, the lack of a cross-UK unanimity requirement was generally consistent with UK practice, although the previous referendum on EU membership in 1975 was held prior to the introduction of the modern devolution system. Only in the 1979 devolution referendums held in Scotland and Wales was a minimum support threshold required,[[46]](#footnote-46) which operated to prevent a Scottish Assembly being established despite the fact that a simple majority of those voting were in favour of its creation. Yet while a democratically objectionable provision of this kind was avoided in the 2016 referendum, England’s domination of the UK in population terms (amounting to approximately 84% of the UK electorate as of 2019)[[47]](#footnote-47) meant that the distribution of English votes would decisively shape the final result.

While from legal and a constitutional perspective it is unsurprising that the referendum was based on the cumulative result across the UK population overall, given the nature of UK membership of the EU and the status of this matter within the devolution settlement, in political terms an inclusive approach to implementing the result would have been necessary to quell arguments that this was being imposed on Scotland and Northern Ireland in particular. Instead, however, these initial national divisions were exacerbated in the Brexit process, and also reflected in ongoing policy disagreements between the respective governments concerning the devolved preferences for a ‘soft’ rather than a ‘hard’ Brexit, based on greater continuing alignment with the EU, membership of the single market and participation in the customs union.[[48]](#footnote-48)

(ii) Devolved institutions’ lack of consent to withdrawal arrangements

Just as the specific approval of the voters in each distinct nation of the UK was not required in favour of Brexit, so too was the consent of the devolved institutions in Scotland, Wales and Northern Ireland not required to commence or conclude the process of negotiating Brexit. The new arrangements introduced within the UK in consequence of the withdrawal of EU law from the domestic legal system were also not subject to a legal requirement of devolved consent. This is because the devolution system was constructed through an exercise of legislative sovereignty by the UK Parliament, which explicitly retained its sovereign legal power to alter that system, or to enact legislation in areas of devolved competence.[[49]](#footnote-49) However, by constitutional convention – the so-called ‘Sewel convention’– any such UK legislation would ‘normally’ be subject to consent of the relevant devolved legislature(s),[[50]](#footnote-50) something which became a relatively stable part of the domestic law-making process.[[51]](#footnote-51) However, these settled conventions became re-contested as a result of Brexit in two ways.

 First, whether the consent of the devolved institutions was required was subject to litigation. Devolved consent was not required for the EU (Referendum) Act 2015, because relations with the EU are a matter reserved to the UK level, but also since a legally ‘advisory’ referendum would have no binding or direct effect on existing devolution arrangements. Yet as part of the *Miller (No.1)* litigation, the devolved governments argued that if (as the Supreme Court ultimately held) new primary legislation was required to authorise notification of the start of Brexit negotiations under Article 50 TEU, then devolved consent to that legislation was also required. The basis for this argument was that the possibility of automatic exit from the EU after two years of negotiations would have a direct impact on the devolution settlement, which (among other things) included specific prohibitions on legislating in contravention of EU law, with the potential for Brexit to alter (or negate) the impact of these provisions on devolved competence. At this point, following the enactment of the Scotland Act 2016, the Sewel convention had also been ‘recognised’ in statute, and the devolved governments argued this made it open for the courts to enforce.[[52]](#footnote-52) However, the Supreme Court unanimously rejected this argument, holding that this remained a ‘political convention’ which it was not for the courts to adjudicate or enforce.[[53]](#footnote-53) While that seems like the right answer as a matter of statutory interpretation, the wider effect of this litigation was therefore to confirm a limited role for the devolved institutions in the Brexit process from the outset.

Second, there were elements of the Brexit process in which it was accepted the Sewel convention was applicable, and yet when consent was withheld by some of the devolved institutions, the UK decided to proceed with its legislative plans regardless. This was the case in relation to the EU (Withdrawal) Act 2018, which directly amended all three devolution statutes and (as discussed below) established the arrangements for distributing powers returning from the EU which would naturally fall within the areas of competence of the devolved legislatures. A number of concessions were negotiated between the Welsh government and the UK government concerning the structure of these powers, which meant the Welsh Parliament eventually passed a legislative consent motion in favour of the Bill (albeit with little enthusiasm). The Scottish Parliament, in contrast, voted against a legislative consent motion, and the Northern Ireland Assembly could not vote as there was no functioning executive for three years between 2017 and 2020. Yet the UK Parliament enacted the legislation despite this, with the UK government arguing that the circumstances of Brexit were ‘not normal’ and that this was therefore an exception to the operation of the convention. Subsequently, other key pieces of Brexit legislation have also been passed without the consent of all the devolved institutions – the EU (Withdrawal Agreement) Act 2020 was rejected by all three devolved legislatures, the UK Internal Market Act 2020 was rejected by the Scottish Parliament and the Senedd Cymru, and the EU (Future Relationship) Act 2020 was rejected by the Scottish Parliament, while no formal consent votes were held in Wales or Northern Ireland.

The UK government continued to use the justification that the ‘circumstances of EU exit and the imperative of implementing the 2016 referendum constituted circumstances that were not normal’.[[54]](#footnote-54) In contrast, the Scottish government argued that ‘overriding the Sewel convention was not justified’, and shows that the UK government is ‘willing to reshape the devolution settlement, unilaterally and in the most fundamental way, setting aside any rules of the UK constitutional system that it finds inconvenient’.[[55]](#footnote-55) The legitimacy and functionality of the convention has not been entirely destroyed, as further legislative consent motions have been granted in Scotland and Wales on subsequent matters after Brexit.[[56]](#footnote-56) But the use of UK sovereignty to settle these profound disagreements about the existence or extent of limits to the Sewel convention has damaged the ideal of cooperation necessary to make devolution effective.

(iii) Repatriation of powers cutting into devolved competences

Just as consent to law-making related to Brexit was the subject of intense disagreement between the UK and the devolved governments, so too was the substance of the legislation enacted. A particular issue concerned the arrangements for the repatriation of powers to the UK from the EU, and how those powers would be distributed between the devolved institutions and the centre. This was a key challenge given many powers previously exercised by the EU fell within broad existing areas of devolved competence, including topics such as agriculture, fisheries, and the environment. The UK government’s original proposal in the EU Withdrawal Bill was for the devolved legislatures to be expressly prohibited in statute from amending the law in these areas – ‘retained EU law’ would be a new source of domestic rules which the UK Parliament, but not the devolved legislatures, could modify over time, ensuring continued consistency in the application of the rules across the UK.[[57]](#footnote-57) However, this position was strongly criticised, and as part of the package of concessions agreed to obtain consent for the Bill from the Welsh government, the final legislation was altered. Instead, the EU (Withdrawal) Act 2018 gives the UK government a time-limited power to make Regulations freezing retained EU law on a particular topic, such that it could not then be altered by devolved legislation.[[58]](#footnote-58) Regulations of this kind can only be made in the two years after exit day – that is, before 31 January 2022 – and once made will expire automatically after five years.

 The existence of these potential powers to constrain law-making by the devolved legislatures in areas of devolved competence represents, in principle, a challenge to the authority of devolution. Yet in practice these powers have not (yet) been used at all as of August 2021.[[59]](#footnote-59) Instead, the focus has been on the agreement of ‘common frameworks’ with the devolved institutions. These frameworks covered 154 potential areas in which powers returning from the EU cut across devolved competences, and include legislative and non-legislative solutions, although in a significant majority of areas (115) it has been determined that no further action is required.[[60]](#footnote-60) It may be that the legal constraints could still yet be deployed by the UK government, or indeed that the possibility of their imposition has shaped the political negotiation of common frameworks. Yet the fact that these extremely contentious limits on devolved competence were enacted and may never have been required illustrates both the confrontational approach of the UK government to devolved negotiations over Brexit, and also an apparently deep-rooted desire to guarantee the possibility of central control of this process regardless of the ideals which should underpin the devolution system.

 The urge for the UK government to maintain central control despite the consequences for devolved relations has manifested in other areas . The enactment of the UK Internal Market Act 2020 to replicate some functions previously performed by EU law has proven especially controversial. The Act establishes two market access principles of mutual recognition and non-discrimination, defined in broader terms than the equivalent EU law principles. The operation of these principles may in practice restrict the ability of the devolved legislatures to enact future statutes which require businesses to comply with higher standards in Scotland or Wales, if the equivalent standards in England (by far the largest market in terms of GDP) are lower, because the English producers will have guaranteed market access regardless.[[61]](#footnote-61) This legislation was (quite ambitiously) challenged by judicial review by the Welsh government, although permission was denied on the basis that the claim was premature, unless or until devolved legislation which is undermined by the Internal Market Act has been enacted.[[62]](#footnote-62) The difficulties in making a successful legal argument against the Internal Market Act were shown, however, in an earlier Supreme Court decision, on a reference concerning a Scottish Bill designed to ensure continuity with EU law in Scotland after Brexit. The Supreme Court held that so far as this was inconsistent with the EU (Withdrawal) Act 2018, the fact of UK parliamentary sovereignty meant that Scottish Continuity Bill could not lawfully establish competing rules or arrangements concerning the retention of EU law.[[63]](#footnote-63)

 The position of Northern Ireland in relation to the new UK internal market is even more complex, and has been even more contested. The Withdrawal Agreement contains a specific Protocol on Northern Ireland, given the tensions associated with creating a new land border after Brexit with the Republic of Ireland, an EU member state. To facilitate this, in relation to the movement of goods in particular, many elements of EU law remain binding in Northern Ireland, distinguishing it (and potentially formally dividing it) from the rest of the UK. Disagreement about how to resolve the position of Northern Ireland has been one of the most difficult and contentious components of the Brexit process, and this remains the case, with the UK government expressing continuing dissatisfaction with the terms of its own agreed exit deal, and making (likely futile) attempts to push the EU to renegotiate.[[64]](#footnote-64) From a devolution perspective, a key means of attempting to manage the disagreement between unionists and nationalists in Northern Ireland over the terms of the Protocol was to include provisions establishing a ‘democratic consent process’ to give future opportunities (every four years from late 2024 onwards) for the Northern Ireland Assembly to vote to exit or maintain these arrangements.[[65]](#footnote-65) Whether this formalisation of consent will be sufficient to dispel division in the interim remains unclear, as do the practical consequences of a vote to exit the Protocol, given the inherent difficulty of Northern Ireland deviating from EU single market rules in light of its close connection with the Republic of Ireland. Perhaps as much as any other issue, this demonstrates the extent to which seemingly irresolvable disagreements were, and remain, inherent to the constitutional process of UK exit from the EU.

3. Consequences for the future of the UK

The depth and breadth of the divisions, disagreements and disputes generated by Brexit, operating on multiple constitutional levels, is therefore clear. In a period of such change and uncertainty, the consequences for the future of the UK, and its model of parliamentary government, are difficult to predict. Yet the scale of the impact suggests that Brexit will inevitably have significant implications for what has been a dis-United Kingdom. In this section I will focus on three themes emerging in the aftermath of Brexit.

(i) Back to constitutional normality with a vengeance

The institutional divisions which were a key feature of the 2017-2019 period have dissipated since the completion of Brexit. The broader legacy of this period, in which the UK constitution was critically overloaded, will take longer to ascertain. It does seem clear that the consequences will be varied. Some power has been strengthened – in particular that of the UK government, which now has a clear majority in Parliament, and policy responsibility for determining the content of ‘retained EU law’. Other power has been fractured – many of the cross-party Brexit rebels in the House of Commons lost their seats, and faced with a government with a strong hold on the confidence of the lower house, and a more conventional Speaker implementing the Standing Orders, the means and opportunities to challenge the government in Parliament are diminished. The power of the courts is also under active scrutiny, and the Supreme Court has experienced a rapid turnover of judges, in particular under the leadership of a new President. The significance of the referendum decision has also faded, given its mandate has been fulfilled.

Is this a return to constitutional normality? In some ways it is – a majority government commanding confidence of the Commons, led by a PM with authority to ensure collective responsibility in Cabinet. Brexit was a product of exceptional circumstances, a perfect storm of political tensions where the constitution overloaded and then stalled in responding to a complex problem under the time pressure imposed by Article 50 TEU. This was a challenge to the constitution, but also an indication of the limited ability of constitutions to control generational political disputes or eliminate disagreement. This does not to mean that reform post-Brexit is unnecessary, but rhetoric about constitutional crisis may misdiagnose the problems. The disagreement over Brexit was acute and paradoxical – to some extent it was exacerbated by the power of the central institutions (to call this referendum and consistently overrule the devolved institutions), to some extent it was exacerbated by the weakness of the centre (in grappling with a minority government responding to a contrary referendum result and an unyielding legislature). Proposals for reform must reflect this complexity, rather than providing generic and reductive alternatives, or attempting to reverse engineer a different result to the referendum.

Yet if this has been a return to greater constitutional normality (although the impact of the coronavirus pandemic has meant an altered conception of what is normal) there have still been significant political consequences: the ability of the Conservative Party to win significant backing from Brexit supporters in parts of northern England in 2019, the strengthening of incumbent devolved governments in Scotland and Wales in the 2021 devolved elections, the continuing splits in the DUP in Northern Ireland over the Protocol making devolved government there precarious.At the UK level reform is planned to the process for calling elections after the Brexit stalemates, empowering the Prime Minister at the expense of Parliament,[[66]](#footnote-66) and also to the power of the courts, although seemingly relatively narrow in scope and effects.[[67]](#footnote-67) From this perspective the legacy of the Brexit process reinforces the idea that the operation of the UK’s parliamentary system of government is a function of the politics of the moment, defined by the results of one referendum and two general elections, showing the institutional divisions exhibited especially between 2017 and 2019 can disappear as decisively as they emerged. However, a return to the prior status quo at the UK level is only likely to exacerbate tensions with the devolved institutions, given the detrimental impacts of Brexit on the devolution settlement.

(ii) Realignment of the state

The tensions between the UK and the devolved institutions during the Brexit process have reignited debates about the future viability of the state in its current form. In Scotland, the SNP government argues that Brexit has been a material change of circumstances which justifies an urgent second independence referendum since the first in 2014.[[68]](#footnote-68) In Northern Ireland, the changed relationship with the Republic of Ireland (and indeed, with the rest of Great Britain by virtue of the Withdrawal Agreement Protocol) may shift opinions on the desirability of reunification, with the potential for a border poll to be held under the existing devolution settlement.[[69]](#footnote-69) And in Wales, the Labour government now promotes the idea of shared sovereignty within the UK, using this rhetoric in support of a vision of the union which sees greater power and autonomy passed to governments and legislatures within the constituent nations.[[70]](#footnote-70) To varying degrees, therefore, the devolved institutions reject the current devolution arrangements, with the possible dissipation of the UK a much more real prospect than prior to withdrawal from the EU.

 However, there are some significant barriers to the break-up of the UK. One is the very nature of devolution as a legal structure. The system is based on the sovereignty of UK Parliament not that of the devolved institutions, and this means in effect there are legal limits on independence. In Scotland, authority to hold the 2014 independence referendum was explicitly negotiated with, and conferred by, the UK government.[[71]](#footnote-71) There are debates about whether a consultative referendum could be called unilaterally by Act of the Scottish Parliament, although the Inner House of the Court of Session has appeared to suggest this would be a legislative long shot.[[72]](#footnote-72) In Northern Ireland the standing power to hold a referendum on reunification is vested in the UK Secretary of State, yet the Northern Ireland Court of Appeal has held there is no legal requirement to publish a policy on when that discretion might be exercised.[[73]](#footnote-73)

 There is much uncertainty, but any shifts here would require political rather than legal solutions. Yet this seems unlikely when the current UK government is pursuing a strategy of ‘muscular’ or tone deaf unionism, whether by ruling out authorising a second independence referendum in Scotland (despite pro-independence parties winning a majority of seats in the 2021 Scottish Parliament elections) or creating powers to fund major development projects in these nations while bypassing the devolved institutions.[[74]](#footnote-74) The UK government is gesturing (albeit pretty slowly) at modest reforms to the machinery for intergovernmental engagement, but still stopping short of proposing a model of decision-making which places the devolved institutions on an equal footing to those of the UK.[[75]](#footnote-75) The devolution settlement may therefore provide the basis for continued division between the institutions of government in the UK, Scotland, Wales and Northern Ireland, while also failing to offer a framework which meets the aspirations of many in the devolved nations for their post-Brexit governance.

(iii) Constitutional restructuring

A final consequence of Brexit may be renewed attention for constitutional reform to the UK’s internal arrangements in general. The most elaborate proposals for a major restructuring of the UK constitution would involve codification of constitutional rules and federalisation of the devolution settlement.[[76]](#footnote-76) Whether such things would have prevented Brexit, or ensured a less divisive withdrawal process, is doubtful. Yet even putting scepticism aside, any such major reform seems very unlikely for now – there is clearly no political will for this under the current UK government, and it is difficult to see how a federal model would satisfy pro-independence parties in Scotland, bypass divisions between unionists and nationalists in Northern Ireland, or cope with the absence of national government in England. It is perhaps no surprise that the Welsh Labour unionist government is the clearest advocate, given the comparative weaknesses of Welsh devolution even after the Wales Act 2017.

There might be scope for more modest reform. The long-delayed Dunlop review of UK (produced in 2019 but published in 2021) recommended a new UK Intergovernmental Council to replace the existing Joint Ministerial Committee structures, with a clear dispute handling process – yet Lord Dunlop did not favour formalising such a Council in statute, and emphasised that this approach to intergovernmental relations would still be about working towards consensus, rather than introducing firm guarantees for devolved consent.[[77]](#footnote-77) A further option would be to pursue House of Lords reform, using the upper chamber to provide specific regional representation.[[78]](#footnote-78) Also possible, and yet also unlikely, would be more comprehensive devolution for England. However, the abandonment of the ‘English Votes for English Laws’ procedure within the UK Parliament is more likely to be taken as a sign that the ‘English Question’ is unresolvable, rather than prompting new ambitious attempts to fill the devolution gap in England. There has been media speculation about renaming or reconstituting the UK Supreme Court, with the intention of downgrading it following its conspicuous interventions during the Brexit process.[[79]](#footnote-79) But whether this or reform to the Human Rights Act 1998 (currently the subject of another technical review)[[80]](#footnote-80) would substantially alter judicial power is very much open to debate.

So under the Johnson government, constitutional reform does not seem likely to be extensive, and is certainly focused on other priorities than UK disunity. For while Johnson’s government, like May’s before it, was initially frustrated by divisions, it eventually exploited and profited from them, gaining a decisive electoral mandate to complete the Brexit process. Reforms which displace some of those prior obstacles are therefore likely to proceed, such as such as repeal of the Fixed-term Parliaments Act 2011. But this is focused on consolidating the gains of the 2019 election, which is a very different aim to healing constitutional divisions.

In the general absence of explicit reforms there are two more obscure issues to monitor. First, how existing powers relating to retained EU law and the development of the UK’s internal market are used. Those frameworks which arrogate power to UK government are already a source of tension, but there is scope for those tensions to be either minimised or exacerbated depending on how powers are deployed. Second, whether there any deeper shifts in practices of parliamentary accountability – for example, regarding the effectiveness of Select Committees, or the rebelliousness of backbenchers – which might be sustainable.

However, ultimately the idea of grand constitutional restructuring post-Brexit is shaped by a crucial irony: the divisive nature of Brexit reveals many avenues for potential constitutional improvement, but it has simultaneously sapped energy for any major reform programme, given the likelihood of that too being defined by new and continuing unresolvable disagreements.

Conclusion

Just as EU membership reshaped the UK constitution, so too has Brexit. The acute divisions exhibited during the Brexit process were in part a consequence of the changes the UK has experienced since 1972, shifting from a unitary to a more complex devolved state, with a greater role for the judiciary and a legislature with the potential to be more assertive. In many ways, it was inevitable that a decision of the magnitude of exiting the EU would prompt severe political disagreements. But while these disagreements occurred on a number of constitutional levels, they also were a product of fundamental political circumstances: the weakness of the government, the difficulty of the task, the pressure of limited time, and a referendum result which confounded their expectations.

 The consequences for the UK’s constitutional future are incredibly difficult to predict – they could range from the break-up of the state through separation referendums in Scotland and Northern Ireland, to greater formalisation of constitutional norms, including those which frame the devolution settlement. At present, in the aftermath of Brexit-induced constitutional overload, it appears that we have regressed to the mean: a UK government with a majority in Parliament pursuing only reforms which serve its interests. This starkly unitary vision of the constitution seems, if anything, more likely to exacerbate than remedy the deep political divisions which brought that government into power in a dis-United Kingdom.

1. European Union (Referendum) Act 2015. [↑](#footnote-ref-1)
2. See eg L Trueblood, ‘Referendums and New Labour’s Constitutional Reforms’ in M Gordon and A Tucker (eds), *The New Labour Constitution: Twenty Years On* (Hart, 2022). [↑](#footnote-ref-2)
3. See https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/elections-and-referendums/past-elections-and-referendums/eu-referendum/results-and-turnout-eu-referendum. [↑](#footnote-ref-3)
4. See M Gordon, ‘Referendums in the UK Constitution: Sovereignty, Authority and Democracy After Brexit’ (2020) 16 *EuConst* 213-248, 234-235. [↑](#footnote-ref-4)
5. See eg J Owen, A Stojanovic and J Rutter, *Trade After Brexit: Options for the UK’s Relationship with the EU* (Institute for Government, 2017). [↑](#footnote-ref-5)
6. See eg M Mardell, ‘What does “Brexit means Brexit” mean?’, *BBC News* (14 July 2016): https://www.bbc.co.uk/news/uk-politics-36782922. [↑](#footnote-ref-6)
7. For an overview, see H Mance, ‘How the People’s Vote fell apart’, *Financial Times* (7 August 2020): https://www.ft.com/content/e02992f6-cf9e-46b3-8d45-325fb183302f. [↑](#footnote-ref-7)
8. See W Bagehot’s classic 1867 text, *The English Constitution* (OUP, 2001) 11. [↑](#footnote-ref-8)
9. See eg J Curtice, ‘A Return to Normality at Last? How the Electoral System Worked in 2019’ (2020) 73(1) *Parliamentary Affairs* 29-47. [↑](#footnote-ref-9)
10. Bagehot (n.8). [↑](#footnote-ref-10)
11. Lord Hailsham, *The Dilemma of Democracy: Diagnosis and Prescription* (Collins, 1978). [↑](#footnote-ref-11)
12. Conservative–DUP confidence and supply agreement (June 2017): https://www.gov.uk/government/publications/conservative-and-dup-agreement-and-uk-government-financial-support-for-northern-ireland [↑](#footnote-ref-12)
13. Early Parliamentary General Election Act 2019. [↑](#footnote-ref-13)
14. EU (Withdrawal Agreement) Act 2020. [↑](#footnote-ref-14)
15. EU (Withdrawal) Act 2019. [↑](#footnote-ref-15)
16. EU (Withdrawal) Act 2018, s.13. [↑](#footnote-ref-16)
17. See eg B Duffy, ‘Is Britain Really a Divided Nation?’ (2020) 11(3) *Political Insight* 22-25. [↑](#footnote-ref-17)
18. The incompleteness is evident from the fact this was simply an agreement for withdrawal – the terms of a future ‘Trade and Cooperation Agreement’ were not concluded until December 2020, at the end of an 11-month transition period, and implemented by the EU (Future Relationship) Act 2020. Aspects of the Withdrawal Agreement are still politically contested, especially the Northern Ireland Protocol. [↑](#footnote-ref-18)
19. [2017] UKSC 5. [↑](#footnote-ref-19)
20. [2019] UKSC 41. [↑](#footnote-ref-20)
21. [2017] UKSC 5, [3]. [↑](#footnote-ref-21)
22. Ibid, [3]. [↑](#footnote-ref-22)
23. [2019] UKSC 41, [31]. [↑](#footnote-ref-23)
24. Ibid, [31], [36]. [↑](#footnote-ref-24)
25. [2019] EWHC 2381 (QB), [56]. [↑](#footnote-ref-25)
26. [2017] UKSC 5, [81]. [↑](#footnote-ref-26)
27. [2019] UKSC 41, [1]. [↑](#footnote-ref-27)
28. Ibid [46]-[48]. [↑](#footnote-ref-28)
29. [2017] UKSC 5, [81]. [↑](#footnote-ref-29)
30. See the report of the *Independent Review of Administrative Law* (2021, <https://www.gov.uk/government/consultations/judicial-review-reform>) and the subsequent Judicial Review and Courts Bill. [↑](#footnote-ref-30)
31. European Union (Withdrawal)(No.2) Act 2019. [↑](#footnote-ref-31)
32. C McCorkindale and A McHarg, ‘Litigating Brexit’ in O Doyle, A McHarg and J Murkens (eds), *The Brexit Challenge for Ireland and the United Kingdom* (CUP, 2021). [↑](#footnote-ref-32)
33. Ibid. [↑](#footnote-ref-33)
34. [2019] EWCA Civ 304, [49]. [↑](#footnote-ref-34)
35. [2018] CSIH 62, [58]. [↑](#footnote-ref-35)
36. Case C-621/18. [↑](#footnote-ref-36)
37. Ministerial Code (2019), para 2.1. [↑](#footnote-ref-37)
38. See https://www.gov.uk/government/publications/exiting-the-eu-publication-of-legal-advice. [↑](#footnote-ref-38)
39. See G Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (OUP, 1984) 55-56. [↑](#footnote-ref-39)
40. See https://www.civilserviceworld.com/professions/article/civil-service-chief-sedwill-slams-brexiteer-sniping-at-olly-robbins [↑](#footnote-ref-40)
41. See eg R Hayton, ‘Brexit and Party Change: The Conservatives and Labour at Westminster’ (2021) *International Political Science Review* 1-14. [↑](#footnote-ref-41)
42. Although there have also been various periods where devolved government was in operation in Northern Ireland, dating to the Government of Ireland Act 1920. [↑](#footnote-ref-42)
43. The Scottish independence referendum held in 2014 was clearly also a major event, made possible by the existence of the devolved institutions, but its impact was focused on the relationship between Scotland and the UK, rather than the UK and the devolution system in general. [↑](#footnote-ref-43)
44. Scotland Act 1998, Schedule 5, para 7(1); Government of Wales Act 2006, Schedule 7A, para 10(2); Northern Ireland Act 1998, Schedule 2, para 3. In the case of Northern Ireland, these are technically referred to as ‘excepted matters’. [↑](#footnote-ref-44)
45. 62% for remain in Scotland and 55.8% for remain in Northern Ireland, contrasted with 53.4% for leave in England and 52.5% for leave in Wales; see https://www.bbc.co.uk/news/politics/eu\_referendum/results. [↑](#footnote-ref-45)
46. At least 40% of the eligible voting population were required to vote in favour; Scotland Act 1978, s.85(2). [↑](#footnote-ref-46)
47. The total UK population is 66.8 million; of that, England’s population is 56.3 million, Scotland’s is 5.5 million, Wales is 3.2 million, and Northern Ireland is 1.9 million. See https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/articles/overviewoftheukpopulation/january2021. [↑](#footnote-ref-47)
48. See eg Scottish Government, *Scotland’s Place in Europe* (20 December 2016); Welsh Government, *Securing Wales’ Future* (23 January 2017). [↑](#footnote-ref-48)
49. Scotland Act 1998 s 28(7); Northern Ireland Act 1998 s 5(6); Government of Wales Act 2006 s 107(5). [↑](#footnote-ref-49)
50. *Devolution: Memorandum of Understanding and Supplementary Agreements* (October 2013)

para 14; Department for Constitutional Affairs, ‘Devolution Guidance Note 10 – Post-Devolution Primary Legislation Affecting the Scottish Parliament’(November 2005), para 4.3. [↑](#footnote-ref-50)
51. See eg the statistics showing regular use of LCMs compiled by the Institute for Government; ‘Sewel Convention’ (8 December 2020): <https://www.instituteforgovernment.org.uk/explainers/sewel-convention>. [↑](#footnote-ref-51)
52. Scotland Act 2016, s.2. [↑](#footnote-ref-52)
53. [2017] UKSC 5, [144]-[151]. [↑](#footnote-ref-53)
54. Cabinet Office, Written Statement, *Hansard,* Vol.687(HCWS730, 21 January 2021). [↑](#footnote-ref-54)
55. Scottish Government, *After Brexit: The UK Internal Market Act and Devolution* (8 March 2021) [53]. [↑](#footnote-ref-55)
56. For example, on the Trade (Disclosure of Information) Bill in December 2020 and the Counter-Terrorism and Sentencing Bill in January 2021. [↑](#footnote-ref-56)
57. EU (Withdrawal) Bill, clause 11. [↑](#footnote-ref-57)
58. EU (Withdrawal) Act 2018, s.12. [↑](#footnote-ref-58)
59. Cabinet Office, *The European Union (Withdrawal) Act and Common Frameworks*: *26 December 2020 to 25 March 2021* (11th statutory report, 20 May 2021) para 1.46. [↑](#footnote-ref-59)
60. *Frameworks Analysis* (2020): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\_data/file/919729/Frameworks-Analysis-2020.pdf. [↑](#footnote-ref-60)
61. See eg S Weatherill, ‘Will the United Kingdom Survive the United Kingdom Internal Market Act?’ (*UK in a Changing EU*, Working Paper 03/2021). [↑](#footnote-ref-61)
62. *Counsel General for Wales v Secretary of State for Business, Energy and Industrial Strategy* [2021] EWHC 950 (Admin), [32]. [↑](#footnote-ref-62)
63. *The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill—Reference by the Attorney General and the Advocate General for Scotland* [2018] UKSC 64. [↑](#footnote-ref-63)
64. Lord Frost, Statement on Northern Ireland Protocol, *Hansard*, HL Deb Vol.814 cols.258-260 (21 July 2021). [↑](#footnote-ref-64)
65. The Protocol on Ireland/Northern Ireland (Democratic Consent Process) (EU Exit) Regulations 2020; Northern Ireland Act 1998, Schedule 6A. [↑](#footnote-ref-65)
66. Dissolution and Calling of Parliament Bill. [↑](#footnote-ref-66)
67. Judicial Review and Courts Bill. [↑](#footnote-ref-67)
68. Scottish Government, *Scotland’s Right to Choose: Putting Scotland’s Future in Scotland’s Hands* (December 2019). [↑](#footnote-ref-68)
69. Northern Ireland Act 1998, s.1. [↑](#footnote-ref-69)
70. Welsh Government, *Reforming Our Union: Shared Governance in the UK* (October 2019). [↑](#footnote-ref-70)
71. The Scotland Act 1998 (Modification of Schedule 5) Order 2013/242. [↑](#footnote-ref-71)
72. *Keatings v Advocate General* [2021] CSIH 25, [63]-[66] [↑](#footnote-ref-72)
73. *Raymond McCord’s Application: Border Poll* [2020] NICA 23. [↑](#footnote-ref-73)
74. UK Internal Markets Act 2020, s.50. [↑](#footnote-ref-74)
75. *Progress Update on the Review of Intergovernmental Arrangements* (2021): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\_data/file/972983/Progress\_update\_on\_the\_review\_of\_intergovernmental\_relations.pdf [↑](#footnote-ref-75)
76. See eg V Bogdanor, *Brexit and Our Unprotected Constitution* (Constitution Society, 2018). [↑](#footnote-ref-76)
77. Lord Dunlop, *Review of UK Government Union Capability* (November 2019) esp ch.4. [↑](#footnote-ref-77)
78. See eg Labour proposals for a Senate of the Nations and Regions under Ed Miliband: https://www.bbc.co.uk/news/uk-politics-29857849. [↑](#footnote-ref-78)
79. ‘Supreme Court to be overhauled to curtail its constitutional powers’, *Sunday Telegraph* (14 November 2020): <https://www.telegraph.co.uk/politics/2020/11/14/britains-supreme-court-faces-overhaul-concerns-us-style-election/>. [↑](#footnote-ref-79)
80. The Independent Human Rights Act Review commenced in December 2020, with a report due in summer 2021. [↑](#footnote-ref-80)