The impact of Brexit on the UK's devolution settlement: the constitutional implications and pathways to reform

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Abstract

The UK's decision to leave the European Union (Brexit) continues to dominate legal, political, and academic debates. The decision left the UK facing challenges from two unions: the departure from the EU and the future certainty of its own Union. With a particular focus on the latter, questions on the future feasibility of the UK's territorial constitution have become of great concern. Thus, this thesis explores the constitutional implications of Brexit on the internal territorial dynamics within the UK. It will be highlighted throughout the thesis that Brexit has had asymmetrical effects in each territory. More significantly, these effects have been the central catalyst behind the current period of constitutional unsettlement in the UK. In addition, it will also be evidenced within the thesis that the UK Government's attempts so far to mitigate (or often ignore) these effects have thus far failed - demonstrating how difficult it now is to manage internal territorial dynamics within the UK post – Brexit.

Reflecting upon these points, the main research question for this thesis is 'What constitutional implications has the UK's withdrawal from the EU (Brexit) had for the UK's devolution settlement and territorial constitution?' In response to this question, the prevailing argument in this thesis is that Brexit has exposed and exacerbated differential constitutional challenges in each of the UK's territories. Combined, and at times in isolation, these challenges have brought into question the future of the UK's territorial integrity. Thus far, there has been a systematic failure to mitigate these effects, and the continuation of the status quo is increasingly becoming untenable. This, therefore, provides sufficient evidence for the need to start considering alternative means to resolve the current period of constitutional unsettlement and deal with the effects of Brexit. Within the space created for constitutional reform proposals, the thesis argues that one possible way forward is to introduce symmetrical (at the centre) and asymmetrical (among the constituent units) constitutional reforms under a 'hybrid federal' framework. In concluding the thesis, it will be acknowledged that given the many different actors, at different levels, with different objectives, it is challenging to provide universally accepted constitutional reforms and solutions to the problems identified.

Nevertheless, as the 'midwives of constitutional reform', the ultimate decision on whether to change course and what that new course may look like remains with the UK Government. What remains unambiguous for now is that the effects of Brexit have tested the limits of the UK's constitutional order and that maintaining the status quo is increasingly becoming untenable – further edging towards a constitutional crisis. This will only intensify the need for an alternative way forward that could look like the above proposal.

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Introduction

Andrew Schonfield once described the UK's accession into the then European Economic Community as a "journey to an unknown destination."[1] Decades later the UK finds itself undertaking such a journey following the decision to withdrawal from the European Union (Brexit). The decision left the UK facing challenges from two unions: the departure from the EU and the future certainty of its own Union. With a particular focus on the latter, questions on the future feasibility of the UK's territorial constitution have become of great concern. These questions continue to dominate legal, political, and academic debates. Thus, this thesis explores the constitutional implications of Brexit on the internal territorial dynamics within the UK. It will be highlighted throughout the thesis that Brexit has had asymmetrical effects in each territory. More significantly, these effects have exacerbated the UK's state of constitutional unsettlement. The term 'asymmetrical effects of Brexit,' will feature throughout this thesis, and part of this term is taken from the characterisation of devolution as asymmetrical/ uneven. Thus, this term means that Brexit has had unique and unequal effects in each of the devolved jurisdictions.

The term constitutional unsettlement was theorised by Neil Walker when describing the UK's constitutional order. For Walker, a state of constitutional unsettlement is:

> "not, first, a settled constitution, nor is it, secondly, an unsettled constitution, nor thirdly, is it a written constitutional settlement… The UK used to have something like a settled constitution…we then, quite recently, moved into the phase of an unsettled constitution, but one whose terminus has offered neither a return to a settled constitution nor arrival at a new [constitutional settlement]. Instead, the unsettled constitution has become normalized – or at least regularized – as a state of constitutional unsettlement, in which questions of EU membership, of devolution and independence…. etc, are subject to continuous disputation with deeply uncertain long-term consequences, regardless of how they may be resolved in the present tense." [2]

Walker's theory was written in 2014 and at the time the UK's constitutional landscape was very different. For instance, the UK was still an EU member state, Scotland was still in the process of finalising its second wave of constitutional reform, and 'devolution deals' had not yet been established in England, no Ireland / Northern Ireland Protocol, and no UK internal market legal framework.

Walker saw the constitutional questions of EU membership, of devolution and of independence as the central questions that best characterised the state of constitutional unsettlement. As these questions faced long term uncertainty, disputation, and disruption. On EU membership, great uncertainty existed on whether the UK would continue to be a member of the EU, given the concerns on the EU's encroachment on national sovereignty. On questions of devolution and independence, following the Edinburgh Agreement of 2012, the Scottish independence question was about to reach a defining moment. In combination, these questions left the UK

[1] See: Andrew Shonfield, *Europe: Journey To An Unknown Destination* (International Arts and Sciences Press 1974).

[2] Neil Walker, 'Our Constitutional Unsettlement' (2014) 173 Public law 529

facing challenges from two Unions. First, the UK's future in the EU and secondly - Scotland's future within the UK's Unionship. The latter challenge was 'resolved' in September 2014 when the Scottish electorate voted in an independence referendum to remain part of the UK's territorial constitution.[3] By resolving the Scottish question, some 'settling' to the constitution was brought about, which provided to some extent, a contrasting account to Walker's predictions. Similar resolution tactics (holding a referendum) were used in an attempt to conclude the EU membership question. Thus, following the UK's decision to withdraw from the EU (Brexit), many would have predicted that this resolution would have also further 'settled' the constitution. In reality however, the opposite came to fruition. This proved some of Walker's predictions that these questions would face continuous disputation, and uncertain long-term consequences.

Brexit did not only exacerbate the EU membership question, but it also brought back uncertainty and disputation over questions of devolution and independence. Essentially, Brexit left the UK in a position where it faces challenges from two Unions (again!). First the departure from the EU and secondly the future certainty of its own Union. With particular focus on the latter, questions on the future of the devolution settlement and more broadly the unitary nature of the UK have become of great concern. Especially since EU membership was noted as an external support system and stabiliser for the development of the devolution settlement within the UK.[4] By letting go of its external support system, the UK is now experiencing internal constitutional and political turbulence, which has accelerated the 'unsettling' process of the UK's territorial constitution. This then raises an important question over Walker's assertion that the state of constitutional unsettlement can conceivably last for a while or permanently!

From the start, Brexit has exposed and exacerbated the territorial inequality within the UK's constitution. This inequality arises from the UK's constitutional patchwork, which has seen the constitutional positions of each of the UK's territories evolve on an asymmetrical basis. For instance, when devolution was (re)established in 1998, the institutions and powers that were introduced in NI, Scotland, and Wales were unequal - based on bespoke responses to local grievances and aspirations.[5] Moreover, devolution (on a national level) has not been extended to every territory as England is the only territory without devolution and constitutional recognition. Therefore, England remains governed by the central UK institutions - which allows for English constitutional dominance through Parliamentary Sovereignty. As detailed within this thesis, Brexit has had asymmetrical effects in each territory. However, Brexit induces a new type of imbalance in that the effects of Brexit are not just an exacerbation of the asymmetrical nature of the UK's territorial constitution – but rather there is parallel asymmetry of what is at stake in EU membership. Essentially, the asymmetrical effects caused by Brexit are a result of not just one source of asymmetry, rather the asymmetry is cumulative or compounded by the nature of the impact between the two of them. Therefore, as the UK

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[3] Ibid.

[4] As noted in chapter 1, this is a legal view of the state, based on the orthodox doctrine of Parliamentary Sovereignty. Politically, the idea that the UK is a unitary state is increasingly becoming very contested. See for example: Daniel Wincott, Collin Murray and Gregory Davies, 'The Anglo-British Imaginary and the Rebuilding of the UK'S Territorial Constitution After Brexit - Unitary State Or Union State?' (2021) 9 Territory, Politics, Governance 696.

[5] Charlie Jeffery, 'Devolution in The United Kingdom: Problems of A Piecemeal Approach To Constitutional Change' (2009) 39 Publius: The Journal of Federalism 289.

withdraws further from close relations with the EU, the strains within its own Union increase. This is uncovered to some extent in each of the UK's territories. For instance, Brexit has had the effect of reenergising calls for independence in Scotland. This has resulted in the UK's constitutional law clashing with the Scottish Government's democratic mandate for an independence referendum.[6] In Northern Ireland (NI), Brexit resulted in the replacement of the EU's border regime with the Ireland / Northern Ireland Protocol. This new border regime has had the effect of indefinitely paralysing NI's power-sharing devolution settlement. In Wales, Brexit has had the effect of heightening the Welsh Government's calls for the need to further strengthen devolution through radical constitutional reforms. And in England, the effects of the constitutional reforms that have been introduced post Brexit, such as the UK Internal Market Act 2020, have brought the English question back onto the political agenda. In combination (and at times in isolation), these asymmetrical effects have highlighted that the UK's uncodified constitution and political structures are becoming ever more fragmented within this ever-looser Union. More significantly, Brexit has had the overall effect of exacerbating the UK's state of constitutional unsettlement - edging further towards a constitutional crisis.

Thus, this thesis thoroughly explores and examines the constitutional implications, Brexit has had (and will continue to have) for the internal territorial dynamics within the UK. The thesis will also uncover and analyse the approach adopted by UK Government to mitigating these effects and reach to the conclusions that there has been a systematic failure in each jurisdiction (and on a UK wide basis) in dealing with these challenges. This will demonstrate how difficult it now is to manage internal territorial dynamics within the UK post-Brexit.

1. Outline of argument

The central research question for this thesis is 'What constitutional implications has the UK's withdrawal from the EU (Brexit) had for the UK's devolution settlement and territorial constitution?' In response to this question, the prevailing argument in this thesis is that Brexit has exposed and exacerbated differential constitutional challenges in each of the UK's territories. Combined, and at times in isolation, these challenges have brought into question the future of the UK's territorial integrity. Thus far, there has been a systematic failure to mitigate these effects, and the continuation of the status quo is increasingly becoming untenable. This, therefore, provides sufficient evidence for the need to start considering alternative means to resolve the current period of constitutional unsettlement and deal with the effects of Brexit. Within the space created for constitutional reform proposals, the thesis argues that one possible way forward is to introduce symmetrical (at the centre) and asymmetrical (among the constituent units) constitutional reforms under a 'hybrid federal' framework. In concluding the thesis, it will be acknowledged that given the many different actors, at different levels, with different objectives, it is challenging to provide universally accepted constitutional reforms and solutions to the problems identified.

Nevertheless, as the 'midwives of constitutional reform', the ultimate decision on whether to change course and what that new course may look like remains with the UK Government. What

[6] Michael Gordon, 'UK supreme court rules Scotland cannot call a second independence referendum – the decision explained' (*The Conversation, 2022*) <https://theconversation.com/uk-supreme-court-rules-scotland-cannot-call-a-second-independence-referendum-the-decision-explained-194877> accessed 10 December 2022.

remains unambiguous for now is that the effects of Brexit have tested the limits of the UK's constitutional order and that maintaining the status quo is increasingly becoming untenable – further edging towards a constitutional crisis. This will only intensify the need for an alternative way forward that could look like the above proposal.

In presenting the above arguments, this thesis will be divided as follows. The first chapter is a general conceptual chapter, which explores and analyses some of the key principles that apply to the UK's territorial constitution. Chapters 2 to 5 are substantive chapters, each exploring the impacts of Brexit in the different UK territorial jurisdictions. Chapter 5 analyses a Brexit-related UK-wide constitutional issue (the UK internal market) and examines the effects this issue has had on devolution. Chapter 7 then brings together the overarching themes of the thesis and places them on a UK-wide perspective. The thesis will conclude by reflecting on the broader observations derived from the overall arguments developed throughout.

2. Chapter breakdown

In guiding the reader through the thesis, a more detailed breakdown of each chapter is provided below, including each chapter's key arguments and conclusions.

Chapter one introduces and contextualises the key concepts and arguments that will form the main discussions of the remainder of the thesis chapters. This will involve examining devolution's evolutionary and asymmetrical nature and the constitutional understanding(s) of how it affects or fits into the UK's constitution. An analysis of the EU's role as an external stabiliser for devolution in the UK will also be conducted.

In chapter two, the area of focus will be on Northern Ireland (NI). The chapter will analyse how Brexit has resulted in the (re)emergence of the Irish border conundrum and the consequential effects this conundrum has had on devolution in NI. The prevailing argument within the chapter will be that the political process has thus far failed to produce a conclusive and long-term 'imaginative solution' to the Irish border conundrum. At the same time, it has contributed to the current period of constitutional unsettlement in NI. As a result of these implications, the reasonable way forward now seems to be looking at new constitutional ways to approach this conundrum. However, before we can establish a way forward, we must first identify the current challenges that need to be addressed. Subsidiary to this argument will be that one possible way forward could involve introducing constitutional reforms to NI's devolution settlement and the UK's intergovernmental relations (IGR) framework. This will provide a meaningful and direct role and voice for NI's cross-community to be involved in the Irish border conundrum's decision-making process. Ultimately, however, it will be recognised that it will be challenging to realise this proposal under the current constitutional status quo. However, maintaining the status quo will only continue exacerbating the current implications – risking the complete destabilisation of devolution in NI.

In chapter three, the focus will be shifted to Scotland. The chapter will examine how Brexit has raised questions over the future of Scotland's constitutional status within the UK. The prevailing argument within the chapter will be that the UK Government's outworking on Brexit has fuelled political and legal tensions between themselves and their Scottish counterparts. With no signs of the tensions easing, there is now an ever-growing possibility that this could

result in the eruption of a constitutional crisis. Therefore, there is now an increasing need in Scotland for a third wave of constructive constitutional reform. Subsidiary to this, the chapter also argues that this third wave could be realised under two distinct constitutional landscapes; Scottish independence or a new Scottish devolution settlement within the UK. The chapter will conclude by acknowledging that, in the immediate future, the third wave will not be realised just yet. Given the UK Government's approach so far, the most likely situation seems to be the maintenance of the status quo - no referendum and no substantive changes to Scotland's devolution settlement. In the same vein, however, maintaining the status quo will only further exacerbate this current period of constitutional unsettlement, further intensifying the need for a third wave of constructive reform.

In chapter four, Wales will be the subject of focus. The chapter will discuss how Brexit has resulted in 'awakening the sleeping dragon' in Wales. The main argument in the chapter will be that the UK Government's approach to Brexit has had the overall effect of undermining Welsh devolution. This effect has resulted in the Welsh Government calling for the need to introduce radical constitutional reforms that would strengthen devolution and protect the UK's territorial integrity. It will be challenging, however, for the Welsh Government to secure their radical constitutional proposals due to the hegemony of the UK Government and Parliament on constitutional reform. Subsidiary to this, the chapter will also argue that the only way to achieve these proposals in their current form would arguably be through an improbable solution - independence, which the Welsh Government has always been against. However, by revising their proposals, the Welsh Government would place themselves in a better position to realise them by appealing to the UK Government and/ or via Scottish influence and involvement.

Chapter five will investigate how Brexit resulted in the need for the (re)establishment of a UK internal market. The main argument in the chapter will be that the process of (re) establishing the UK internal market offered not only the opportunity for the devolution settlements to become more dynamic but also to improve the already strained intergovernmental relations between the UK Government and its devolved counterparts. In particular, the developments of the UK's common frameworks aided in realising these opportunities. However, these opportunities have been lost following the UK Government's legislative interventions on this matter via several Brexit-related pieces of legislation, including the UK Withdrawal Act 2018 and the UK Internal Market Act 2020. These pieces of legislation have had the overall effect of rolling back devolved regulatory competences and worsening intergovernmental relations in the UK. Arguably, these effects were avoidable, given that the common frameworks programme works effectively to safeguard the UK's internal market. More broadly, however, this exposes the signs of systematic problems in devolution and over the UK Government's constitutional hegemony in intergovernmental relations.

In chapter six, the focus will shift to the final territory in the UK - England. The chapter will discuss how because of Brexit, there has now been a shifting of the narrative concerning the 'English Question.' The chapter will argue that as the UK continues to shape its post–Brexit constitution, the reforms have thus far failed to accommodate England. For instance, both the (re)establishment of the UK's internal market and the changes to the UK's intergovernmental relations have failed to accommodate England. At present, such changes have had a detrimental impact on the devolved territories, and central to this has been the failure to accommodate England within these changes. As a result, the 'English Question' has returned to the political

agenda, with a very different rationale for addressing it – accommodating England in a post-Brexit reformed constitution. Subsidiary to this, the chapter will also argue that one possible way to accommodate England in a post-Brexit constitution would be to expand the current 'devolution deals' system into regionalism. Despite some limited traction on this, it will be concluded that, the UK Government does not seem to have the appetite to realise such reform at the moment. In the same vein, however, the continuation of the status quo will not be feasible in the long term. The continued failure to accommodate England has thus far further exacerbated the current period of constitutional unsettlement. For instance, the Scottish Government are currently utilising the adverse effects of the UKIMA 2020 on devolved competences to further their calls for a second independence referendum.

The arguments in the above chapters will be collated in chapter seven, proving that the systematic failure to address the asymmetrical effects of Brexit has resulted in the need for a new way forward. Thus, the focus of chapter seven will be on evaluating alternative approaches to addressing the challenges of Brexit on the UK's territorial constitution. The overall argument of this chapter will be that, consequential to the systematic failure in resolving the effects of Brexit, there is now a greater need to start exploring alternative ways to mitigate these effects. Moreover, one such alternative proposal is 'hybrid federalism.' In the past, such a solution would have been deemed too radical. However, with the constitutional status quo's continued failure, it is increasingly becoming more practical and plausible. It will be concluded, nonetheless, that this proposal might never be realised. Though, the continued existence of the status quo will only further test the constitutional limits of the UK's territorial constitutional order – edging towards a constitutional crisis. This will only intensify the need for an alternative way forward that could look like the proposal advocated for within the chapter or completely different.

The conclusions of the thesis will be twofold. First, this thesis concludes that Brexit has tested the limits of the UK's constitutional order and that preserving the status quo is increasingly unsustainable - further edging towards a constitutional crisis. Moreover, there is a need for an alternative way forward due to the ongoing failure to resolve these effects. Second, following reflection on the key arguments within the thesis, observations regarding the understanding of constitutional reform proposals and the state of constitutional unsettlement are made.

3. Approach to thesis research

The thesis primarily focuses on UK constitutional legal theory and practice, with reference to the fields of politics and EU law in the chapter discussions. The working theoretical framework for the thesis will be based on investigating the asymmetrical effects of Brexit through the lens of devolution and seeing if these effects can be mitigated. In conducting this analysis, a doctrinal approach will be adopted. Therefore, the thesis engages with various primary and secondary sources. Given the fast-moving nature of the topic under investigation, this thesis has relied particularly on Acts of Parliament, official documents and ongoing new reports/analysis / academic blogs. Furthermore, many of the issues discussed in the thesis are yet to be litigated. Thus the available case law to engage with is very thin.

As a result of the breadth and dynamic nature of the thesis topic, limitations were placed on the period for investigation and the selection of aspects and events within that time frame. The period under examination runs from 1998 up until December 2022, but with a particular focus on 2016 – 2022. Within this time frame, the thesis has covered all critical constitutional aspects and events necessary to answering the research question.

The thesis provides three key original contributions to constitutional studies.

First, the thesis, in a comprehensive manner, has conducted a pan-UK analysis of the impacts of Brexit on the UK's territorial constitution. This has involved analysing cross-UK issues, synthesising the already available territorial-specific perspectives on the challenges of Brexit, and presenting their findings from a UK-wide perspective.[7] The comprehensive analysis generates new knowledge in terms of how we understand the asymmetrical effects of Brexit on the UK's territorial constitution. Moreover, the comprehensive analysis yields specific insights in each chapter of the thesis. For instance, in Scotland it is uncovered that the jurisdiction is undergoing its third wave of constitutional reform. In Wales, for the first time since the inception of devolution, the Welsh Government have departed from its traditional 'good unionist' approach to adopt an approach that challenges fundamental UK constitutional principles. In NI, the UK Government's failure to engage with the cross-community in NI has been a key factor behind the current paralysis of the power-sharing institutions. Moreover, the failure of the UK Government to accommodate England in a post – Brexit reformed constitution, especially in the context of developing the UK internal market through the UK Internal Market Act 2020, has had the overall effect of 'rolling back' devolved regulatory competences.

Secondly, adopting a UK-wide approach to the study of the UK's territorial constitution, this thesis makes a further original contribution to the scholarship on UK constitutional reform. Specifically, it demonstrates the systematic failure in addressing the asymmetrical effects of Brexit on the UK's territorial constitution. As a result of this failure, the thesis identifies space for constitutional reform proposals. Within that space, the thesis develops and evaluates hybrid federalism as one possible solution that could be of value. I hope this analytical approach will influence future investigations into other constitutional issues affecting the UK's territorial constitution, such as the COVID 19 health pandemic.[8]

[7] See for example; Jon Tonge, 'From Sunningdale to The Good Friday Agreement: creating Devolved Government in Northern Ireland' (2000) 14 Contemporary British History 39; John Mawson, 'Devolution And The English Regions' in Gill Bentley and John Gibney (eds), *Regional Development Agencies and Business Change* (Routledge 2000); Richard Wyn Jones, and Roger Scully, *Wales Says Yes* (University of Wales 2012); Nicola McEwen, and Bettina Petersohn, 'Between Autonomy And Interdependence: The challenges of shared rule after the Scottish referendum' (2015) 86 The Political Quarterly 192.

[8] Constitutional actors and scholars have increasingly noted the benefits of a UK wide approach, especially on Brexit related matters. See for example; 'House of Lords Select Committee on the Constitution: The Union and Devolution' (*Parliament.uk*, 2016) <https://publications.parliament.uk/pa/ld201516/ldselect/ldconst/149/149.pdf> accessed 20 January 2020 ; Kenneth Armstrong, 'The Governance Of Economic Unionism After The United Kingdom Internal Market Act' (2021) 84 The Modern Law Review 635; Daniel Wincott, Collin Murray, and Gregory Davies, 'The Anglo-British Imaginary And The Rebuilding Of The UK's Territorial Constitution After Brexit - Unitary State Or Union State?' (2021) 9 Territory, Politics, Governance 696; Stuart White, 'Brexit And The Future Of The UK Constitution' (2021) 42 International Political Science Review 359; Michael Dougan and others, 'Sleeping With

The third original contribution is based on the two broader observations from the thesis overall. Firstly, the thesis demonstrates how difficult it is to bring about universally accepted constitutional reforms and solutions to identified problems. This is because there are many different actors, at different levels, with competing objectives, making it nearly impossible to deliver reform that would satisfy all these actors when they disagree. Moreover, due to these competing aims, a perceived need for reform does not correlate with the deliverability of reform. The second observation from the thesis is over the understanding of the state of constitutional unsettlement. As defined by Walker, this constitutional order is perennial and permanent. However, as analysed in this thesis, Brexit induces a new type of instability which has exacerbated the state of constitutional unsettlement to a point whereby it is increasingly becoming untenable – further edging towards a constitutional crisis.

an Elephant: Devolution And The United Kingdom Internal Market Act 2020' (2022) 138 Law Quarterly Review 650.

Chapter 1: The UK's territorial constitution, the EU, and Brexit

Introduction

The United Kingdom of Great Britain and Northern Ireland (UK) is a legal Union and unitary state comprised of four territories: England, Scotland, Wales, and Northern Ireland (NI). Each territory within this Union has its own distinct constitutional and political identity.[1] In the absence of codification, the UK's territorial constitution and political structures have evolved over time through several significant events that have often been marked by the passing of legislation. The process that resulted in the creation of the UK's Union exemplifies this point well. The Acts of Union with Wales 1535 to 1542 provide the genesis of the UK's territorial constitution, as these Acts established one legal jurisdiction for England and Wales. Following this, Scotland was the next territory to join the Union - resulting from the enactments of the Union of Scotland Act 1706 and the Union with England Act 1707. This incorporation established the Kingdom of Great Britain (GB). As a result of Ireland joining in Union with GB in 1800, following the passing of parallel Acts of Union by the legislative bodies of GB and Ireland - the United Kingdom of Great Britain and Ireland was established. Following the enactment of the Government of Ireland Act 1920, changes were made to the territorial structure of this new Union. The Act separated 6 of Ireland's 32 counties, which were assigned to Northern Ireland (NI), leaving Ireland with the remaining 26. The latter went on to gain independence in 1937. Consequently, the Union became known as the United Kingdom of Great Britain and Northern Ireland.[2]

As detailed further in this chapter, other significant shifts to the UK's territorial constitution including joining the European Economic Community (ECC) (now European Union) in 1973, the establishment of modern devolution in 1998, and Brexit in 2016, have followed the same pattern set above. As a result, the overall trajectory of the evolution of the UK's territorial constitution is often themed as a reactive response by the political elites to significant events and developments rather than a proactively agreed plan. Additionally, under the notion of path dependency, which refers to "a legal theory that is used to express the idea that history matters - choices made in the past can affect the feasibility of choices made in the future," [3] a number of these significant events have gone on to influence future ones. The devolution Acts of 1998 exemplify the above points well, as the key motivators behind their enactments were in reaction to a growing number of significant political factors in the late 1990's such as the growth of the Scottish Nationalist Party (SNP) in Scotland, and the need to restore peace in Northern Ireland

[1] Paul Anderson, 'The Covid-19 Pandemic in the United Kingdom a Tale of Convergence and Divergence', in Nico Steytler (ed), *Comparative Federalism and Covid-19 Combating the Pandemic* (Routledge 2022). Pp. 142

[2] David Torrance, 'Scottish Independence Referendum: Legal Issues' (*Researchbriefings.files.Parliament.uk*, 2022) <https://researchbriefings.files.Parliament.uk/documents/CBP-9104/CBP-9104.pdf> accessed 8 December 2022.

[3] Lawrence Solum, 'Legal Theory Lexicon: Path Dependency' <https://lsolum.typepad.com/legaltheory/2018/09/legal-theory-lexicon-path-dependency.html> accessed 3 March 2019.

(NI).[4] Furthermore, in light of the notion of path dependency, the 1972 European Communities Act that enabled UK membership into the ECC, played a significant influence in the developments of the devolution Acts of 1998. As detailed further in the chapter, membership of the EU facilitated devolution developments without compromising the integrity of the UK's internal market.

As a result of the above evolutionary trajectory, the UK's Union is inherently imbalanced. And because of this nature, many constitutional issues that affect the UK's territorial constitution tend to have asymmetrical effects in each of the UK's four territories. For instance, the constitutional approaches to accommodating nationalism in the UK differ between NI, Scotland, Wales, and England. In NI, nationalism was accommodated through establishing constitutional arrangements based on the parity of esteem. In Scotland and Wales, nationalism was accommodated through the establishment of asymmetrical devolved arrangements. And in England, nationalism was accommodated at one point through the (now repealed) parliamentary procedures (EVEL) changes. The asymmetrical character of the devolution settlements best reflects the imbalanced nature of the UK's Union. And as aforementioned, EU membership was arguably a significant influence in establishing these asymmetrical arrangements and their evolution over time. For instance, the doctrine of EU law supremacy, and the existence of the EU's single market and customs union, ensured that the asymmetrical nature of devolution could be accommodated without challenging the UK's unitary nature.

Overall, the above insights explain and contextualise the reasons behind the asymmetrical character of the effects of Brexit on the UK's territorial constitution. Therefore, in this chapter, the above insights will be thoroughly examined. In setting this out, the chapter will be structured into four main sections. Section one will outline the key principles that underpin devolution in the UK. In section two, the chapter will explore the constitutional understanding(s) of how devolution affects and fits into the UK's constitution. In section three, the discussion will examine the role EU membership played in influencing the establishment and evolution of the UK's devolution settlements. The final section will examine the results of the June 2016 Brexit referendum in each UK territory. This will aid in contextualising the substantial differences in identity and interests between the four jurisdictions over Brexit.

1. Devolution in the UK

Devolution refers to the decentralisation of certain powers, and responsibilities, from the central or national authority to the constituent units. It is an ambiguous concept in that it both dispenses power (allowing for autonomy at the constituent level) and retains sovereignty at the centre (the power is reversible; thus, the State remains de jure unitary). Devolution can help balance the need for a strong, centralised state with the desire for regional autonomy.[5] Thus, devolution is often used as a solution to address regional disparities, promote local – decision-making, and accommodate the diverse needs and preferences of different parts of the state.[6]

[4] Alan Trench, *Devolution And Power In The United Kingdom* (Manchester University Press 2007) pp.8

[5] Michael Keating, *State and Nation in The United Kingdom* (Oxford University Press 2021) pp. 50

[6] See: Stephen Tierney, 'Federalism in a Unitary State: A Paradox too far?' (2009) 19 Regional & Federal Studies 237, 238.

The specific legal framework and success of devolution often depend on the unique constitutional histories, and the political and cultural contexts of each state.

In the UK context, devolution refers to the decentralisation of legislative and executive power to Scotland, Wales, and NI, away from the concentrated power vested centrally in Westminster and the UK Government. Devolution has been a transformative and complex process that has reshaped the UK's territorial constitution, and political landscape. The evolution of devolution in the UK has been marked by both successes, such as increased political representation, and tailored policies for the devolved jurisdictions, and challenges, such as increased tensions in intergovernmental relations, and the long (still unfolding) history with nationalism. [7]

As discussed in more detail in the dedicated jurisdictional chapters, the UK's journey toward devolution began in earnest in the late 19th century, owing to a recognition of the need to address Irish nationalism.[8] Considerations for devolution to Scotland and Wales gained significant traction in the later parts of the 20th century, as evidenced by the establishment of the Kilbrandon Commission in 1969. The outcome of this, however, resulted in the failure to introduce Scottish and Welsh devolution in 1979.[9] The pivotal moment for devolution in the UK came following the election of the 'New Labour' Government in 1997. As part of its era of 'constitutional reform,' Tony Blair's Government established devolution in Scotland and in Wales and restored devolved power-sharing in NI. Parallel devolution was not introduced in England, however. Instead, a piecemeal form of regional decentralisation was realised in London following the enactment of the Greater London Authority Act 1999.[10]

1.1 The key principles that underpin devolution in the UK

Devolution in the UK is underpinned by several key principles that provide the foundation for the constitutional framework of devolution. To begin with, the principle of democratic legitimacy is a fundamental concept under the UK's devolution framework. The principle pertains to the idea that the devolved institutions derive their authority and power from the will of the people they represent. The importance placed on this principle is exemplified by the Labour Government's failure to implement devolution in Scotland and in Wales following the 1979 referendums. The 1998 devolution settlements were only established following popularly approved referendums in each of the concerned jurisdictions. This principle has also been placed under statutory footing - section 1 of the Scotland Act 2016 and section 1 of the Wales Act 2017 place referendum locks before devolution in Scotland and Wales can be abolished.

[7] See: Chris McCorkindale, 'Devolution : A New Fundamental Principle Of The UK Constitution' in Michael Gordon and Adam Tucker (eds) *The New Labour Constitution: Twenty years on* (Hart Publishing 2022).

[8] See: Brice Dickson, 'Work in Progress. A Country Study of Constitutional Asymmetry in the United Kingdom' in Patricia Popelier and Maja Sahadzic, *constitutional asymmetry in multinational federalism: Managing multinationalism in multi-tiered systems* (Palgrave Macmillian 2019)

[9] James Mitchell (ed), *Devolution in the UK* (Manchester University Press 2009). Pp 113 – 115.

[10] Daniel Kenealy and others, *Publics, Elites and Constitutional Change in The UK* (Palgrave Macmillan 2017).

The principle of autonomy is another key principle that underpins the UK's devolution settlement. In the context of the UK's devolution system, the principle refers to the ability of the devolved jurisdictions to be able to govern themselves in areas of devolved matters. The application of this principle is primarily seen in the powers and responsibilities granted to the devolved institutions through the Devolution Acts. Power relations under the UK's territorial constitution are primarily based on the reserved powers model. As a result, policy areas that are reserved (and excepted in NI), are the matters solely for the centre (UK Government and Parliament), which include defence, immigration, the constitution, and foreign affairs. The remaining policy areas not reserved or excepted under schedule 2 of the Northern Ireland Act 1998, schedule 5 of the Scotland Act 1998, and schedule 7A of the Government of Wales Act 2006, are policy areas of competence exercised by NI, Scotland, and Wales respectively. Thus, multi-level governance in the UK is primarily based on the boundaries set out in the above-mentioned Devolution Acts, and prior to Brexit, with limitted constitutionalised shared regulatory space for the exercise of UK and devolved competences concurrently.[11]

In addition to the above, the constitutional basis of devolution in the UK is underpinned by statute law. Following the popularly approved referendums, Westminster enacted the Scotland Act 1998, the Government of Wales Act 1998, and the Northern Ireland Act 1998. As aforementioned, these Acts outlined the legal framework of each devolved jurisdiction respectively. This included setting out the institutions, and scope of legislative and executive competencies. For instance, all three Acts established a unicameral legislative body in each jurisdiction, with autonomy in areas such as education, transportation, and health.[12] As shall be explored further in each of the dedicated jurisdictional chapters, whenever changes have been made to the legal framework of a devolved jurisdiction, either amendments have been made to the original 1998 Act (through secondary legislation) or entirely new Acts have been introduced that repeal or amendment the 1998 Act. The most recent such Acts include, for example, the Scotland Act 2016, the Wales Act 2017, and the Northern Ireland (Ministers, Elections and Petitions of Concern) Act 2022.

The devolution settlements that were established by the above-mentioned Devolution Acts, established a highly asymmetrical regime.[13] These Acts provided for differential governance arrangements – the institutions established and the competencies that were granted to each devolved jurisdiction were distinct. For instance, of the three devolved jurisdictions, Scotland received the most power, and Wales the least. Additionally, the institutions established in NI were sui generis as they were based on a power-sharing model between Unionists and Nationalists. A key explanation for the emergence of this asymmetrical regime could be in part that the aim was to accommodate the political atmosphere in each devolved jurisdiction. For instance, in Scotland, the rise in nationalism and push for independence. In Wales, the lack of nationalist sentiments and the absence of a separate legal system.[14] And in NI, the aim

[11] See: Thomas Horsley, 'Constitutional Reform by Legal Transplantation: The United Kingdom Internal Market Act 2020' (2022) 42 Oxford Journal of Legal Studies 1143; Masterman R, 'Brexit and the United Kingdom's Devolutionary Constitution' (2022) 13 Global policy 58

[12] A. W Bradley, K. D Ewing and Christopher Knight, *Constitutional and Administrative Law* (Pearson education 2014) pp. 36

[13] Alan Trench, *Devolution And Power In The United Kingdom* (Manchester University Press 2007) pp.8

[14] Alongside Plaid Cymru, there was a prominent element of the Welsh Labour party that sought for administrative and/or legislative autonomy for Wales. However, due to the long standing divisions within the Welsh labour party between pro and anti-devolutionists, it was difficult to translate this pro devolution agenda to

was to end the 'troubles' and maintain peace between Unionists and Nationalists.[15] As outlined further below, due to the dynamic nature of devolution, some of these asymmetrical differences have been softened over time.

The devolution settlements in the UK are underpinned by the evolutive/dynamic principle. As stated by the then Secretary of State for Wales, Ron Davies, "devolution is a process not an event."[16] The dynamic nature of devolution in the UK involves a process that has seen Westminster continue to enhance the devolution packages first established in 1998 through the transfer of more powers, structural changes, and increasing constitutional recognition. For instance, in the case of Wales, the modest devolution package granted in 1998 has significantly grown over time to mirror, to an extent, that of devolution in Scotland e.g., both are based on the reserved powers model, both have similar institutional set-ups, and both have constitutional permanence clauses. [17] Often, these changes have come about as a response to evolving circumstances in each jurisdiction - demonstrating the fact that devolution in the UK can be revised to better serve the needs of the jurisdictions concerned, as well as the Union as a whole. As shall be explored further in each of the dedicated jurisdictional chapters, the enactments of the Northern Ireland (St Andrews Agreement) Act 2006,[18] the Wales Act 2014,[19] the Scotland Act 2016,[20] exemplify the above point well.

Devolution in the UK is also underpinned by the principles of cooperation and consent – which are key to ensuring coordination and consistency in certain policy areas that require a unified UK approach. These principles are implemented through the UK's intergovernmental relations (IGR) framework, and the Sewel Convention. Regarding the former, the UK's IGR framework is based on a three-tier system of intergovernmental forums. The top tier, known as the 'Prime Minister and Heads of Devolved Governments Council,' is where the heads of the UK's Governments meet, and the PM chairs this. The bottom tier consists of Interministerial Groups (IMGs), which engage in portfolio-level areas of mutual interest, such as the IMG (Trade). With a rotating chair and venue, IMG's are far less hierarchal than the top tier. The middle tier is the Interministerial Standing Committee (IMSC), which considers and resolves any issues that escalate from the lower tier and brings together strategic considerations affecting many different domestic and international portfolios. There is also an independent IGR Secretariat, whose role involves overseeing the dispute resolution procedure. Decisions under this machinery are consensual based and built on the principles of "maintaining positive and

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the electorate, which contributed to the pitiful 1998 settlement. For more on this see: Richard Wyn Jones and Roger Scully, *Wales Says Yes* (University of Wales 2012). Chapters 2 and 3.

[15]David Gow, 'Brexit And Devolution: A New UK Settlement Or The Break-Up Of Britain?' <https://www.socialeurope.eu/wp-content/uploads/2018/05/BP1-Devolution.pdf> accessed 3 December 2021.

[16] See: Noleen Burrows, Devolution (Sweet & Maxwell 2000). Pp. 2

[17] Richard Rawlings 'The Welsh way' in Jeffery Jowell and Colm O'Cinneide (eds) *The Changing Constitution* (9th edn, Oxford University Press 2019). Chapter 11.

[18] See: Brice Dickson, 'Devolution in Northern Ireland' in Jeffery Jowell and Colm O'Cinneide (eds) *The Changing Constitution* (9th edn, Oxford University Press 2019). Chapter 9.

[19] See: Richard Rawlings 'The Welsh way' in Jeffery Jowell and Colm O'Cinneide (eds) *The Changing Constitution* (9th edn, Oxford University Press 2019. Chapter 11.

[20] See: Aileen McHarg, 'Devolution In Scotland' in Jeffery Jowell and Colm O'Cinneide (eds) *The Changing Constitution* (9th edn, Oxford University Press 2019). Chapter 10

constructive relations, based on mutual respect for the responsibilities of the governments and their shared role in the governance of the UK."[21]

Regarding the Sewel Convention, it concerns the relationship between Westminster and its devolved counterparts. The convention was deliberately created after the establishment of devolution in 1998, and it states that Westminster will not normally legislate on devolved matters without the consent of the respective devolved legislature. The convention applies either when the legislation amends the law in a devolved policy area or alters devolved legislative and/or executive competencies. The convention was intended to guide the practices of Westminster concerning devolution and foster a spirit of cooperation between the centre and the devolved jurisdictions. More significantly, the convention was seen as a way to respect the autonomy of the devolved jurisdictions, whilst still recognising the sovereignty of the UK Parliament.[22] As shall be detailed in chapter 3, following the recommendations of the Smith Commission, section 1(2)(8) of the Scotland Act 2016 placed the Sewel Convention under statutory footing. The significance of this provision was dismissed by the Supreme Court in the *R (Miller)* case,[23] however. Thus, given its non–legally binding nature, the Sewel Convention relies on the goodwill of the centre.[24] As described by Chris McCorkindale, pre–Brexit, the convention was:

> "respected on both sides as a constitutional rule that protected devolved autonomy and facilitated shared governance; any decision to withhold consent was the exception rather than the rule but such a decision generated a constructive response from the UK Government."[25]

The most fundamental principle that governs devolution in the UK is that of Parliamentary Sovereignty. This principle entails that there is no shared sovereignty between the centre and the devolved jurisdictions – the centre retains ultimate authority, even on devolved matters. Essentially, the UK Parliament can legislate on any matter, including devolved issues. However, as discussed above, the Sewel Convention expects Westminster to respect the devolved legislatures authority in practice.[26] As shall be explored in the next section of this chapter, various constitutional stakeholders, including the UK Government and their devolved counterparts, disagree heavily on how Parliamentary Sovereignty affects devolution in the UK.

The succeeding chapters of this thesis will evidence that Brexit has tested the limits of, and brought into question, the future of the UK's devolution framework. The thesis will explore

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[21] 'The Review Of Intergovernmental Relations' (*Assets.publishing.service.gov.uk*, 2022) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1046083/The_Review_of_Intergovernmental_Relations.pdf> accessed 2 August 2022.

[22] Paul Bowers, 'The Sewel Convention' (*Parliament.uk*, 2005) <http://researchbriefings.files.Parliament.uk/documents/SN02084/SN02084.pdf> accessed 16 April 2020.

[23] R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5, para 146

[24] Nick Barber, *The United Kingdom Constitution: An Introduction* (Oxford University Press 2021). Chapter 18.

[25] 'The impact of Brexit on devolution' (Constitution, Europe, External Affairs and Culture Committee 2022) <https://sp-bpr-en-prod-cdnep.azureedge.net/published/CEEAC/2022/9/22/1b7a03d8-e93c-45a4-834a-180d669f7f42/CEEACS062022R5.pdf >accessed 21 August 2023

[26] Neil Walker, 'Beyond the Unitary Conception of the United Kingdom Constitution?' (2000) Public Law 384

various elements of the Brexit process including the design and outcome of the referendum, the political clashes between the centre and the devolved jurisdictions, Westminster's Brexit-related pieces of legislation, and the litigations concerning Brexit and devolution. Through these lenses, it will be argued that Brexit has exposed and exacerbated differential constitutional challenges in each of the UK's territories – questioning if the key features and principles that underpin devolution are still fit for purpose. For example, a huge strain has been placed on IGR relations, and the Sewel Convention, and devolved autonomy has been challenged like never before – resulting in the disregard of the principles of cooperation, consent, and autonomy.[27] Additionally, devolved electoral democracy is now clashing with the UK's constitution, and there are now embryonic aspects of federalism emerging within / around existing devolution structures.[28] Overall, Brexit has resulted in the increasing need of rethinking devolution and the Union more broadly.

2. Constitutional understanding(s) of devolution

As pointed out by Mark Elliott, devolution can be understood through two contrasting views concerning how it affects and fits into the UK's constitution. The two views are, first, the traditional understanding of devolution through constitutional theory and, second, the contemporary understanding of devolution through practice and political reality.[29] In this section, each view will be analysed. Ultimately, the analysis will help contextualise the actions taken and arguments put forward by both the UK Government and its devolved counterparts during some of the Brexit-related constitutional clashes and issues that will be explored in the succeeding chapters, such as the row over a second independence referendum in Scotland.

2.1. Constitutional theory

The traditional constitutional understanding of devolution is through the legal doctrine of Parliamentary Sovereignty, which views devolution and its institutions as subsidiary to Westminster.[30]

Parliamentary Sovereignty is a crucial legal doctrine within the UK constitution, which describes the scope of Parliament's (unlimited) power to make statutory law. Despite being a legal principle, the doctrine emerged not from a judicial decision or enactment but rather from the aftermath of the English civil war in the 17th century.[31] Following a victory within the civil war, Parliament asserted its claim to sovereignty over the monarch and courts and further limited royal prerogative powers through the enactment of the Bill of Rights 1689 and Act of

[27] See also: Stephen Tierney, 'The territorial constitution and the Brexit process' (2019) 72 Current Legal Problems 83.
[28] See also: Thomas Horsley, 'Constitutional Reform by Legal Transplantation: The United Kingdom Internal Market Act 2020' (2022) 42 Oxford Journal of Legal Studies 1143; Roger Masterman, 'Brexit and the United Kingdom's Devolutionary Constitution' (2022) 13 Global policy 58

[29] Ibid.
[30] Roger Masterman and Colin Murray, *Constitutional And Administrative Law* (2nd edn, Pearson Education Limited 2018) Pp.131
[31] Ibid. Pp.126

Settlement 1701.[32] Such actions effectively constituted Parliament's claim to have taken sovereignty from the Monarch.[33] During the 19th century, A.V Dicey popularised the understanding of Parliamentary Sovereignty, thus his famous definition is still widely used till today. His definition states that:

> "The principle of Parliamentary Sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament."[34]

There are two elements to his definition - firstly, the House of Commons, the House of Lords and the Monarch can together make or unmake any law. Secondly, nobody and court can override an Act of Parliament.[35] The focus of this section will be on the first element of Dicey's definition, as it is most relevant and applicable to the discussion.

In applying Dicey's definition to devolution, we can constitutionally state that devolution does not "affect the fabric of the constitution in any substantial way."[36] This is because devolution remains inferior and subordinate to Westminster on the basis that, first, as explicitly provided by the devolution Acts, Parliament preserves the power to legislate on devolved matters.[37] Secondly, Parliament can at any time unmake devolution through enactment, the same way it established the settlements. As discussed above, this was exemplified in 1972, when Parliament exercised its sovereignty to abolish devolution in NI. Lastly, Parliament can alter the devolution settlements as it best sees fit. As aforementioned, Westminster has allowed for the devolved settlements to evolve through the decentralisation of more competences.[38]

Overall, the traditional constitutional understanding of devolution clearly highlights the fact that devolution and its institutions are constitutionally not equal to Westminster, as the latter can at any point unilaterally interfere and even quash the former. As put forward by Henry McLeish, a former Scottish First Minister, when discussing Scottish devolution, he stated that:

> "The 1997 White Paper and three Scotland Acts have given Scotland power over certain policies but no significant power over politics, governance, and the constitution, where all roads still lead to Westminster. Power devolved is not power shared."[39]

In addition, Mark Elliott proposes that:

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[32] Ibid

[33] See: Ivor Jennings, *The Law and the Constitution* (5th edn, University of London Press 1959).

[34] Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Macmillan 1915) Pp. 37-38

[35]Michael Gordon, 'Parliamentary Sovereignty And The Political Constitution(S): From Griffith To Brexit' (2019) 30 King's Law Journal 125.

[36] Elliott, Ibid n. 105

[37] Scotland Act 1998, section 28(7), Northern Ireland Act 1998, section 5(6), and Government of Wales Act 2006, section 93(5).

[38]As the devolved settlements have evolved, either amendments have been made to the original 1998 Acts (through secondary legislation) or entirely new Acts have been introduced that repeal/ amendment the 1998 Acts e.g., the Government of Wales Act 2006, the Northern Ireland (St Andrews Agreement) Act 2006, and the Scotland Act 2016.

[39] 'Henry Mcleish: The Trouble With UK Federalism Would Be Overcoming The Absolute Sovereignty Of Westminster' (*The National*, 2017) <https://www.thenational.scot/news/15200687.Henry_McLeish__The_trouble_with_UK_federalism_would_be_overcoming_the_absolute_Sovereignty_of_Westminster/> accessed 3 December 2018.

> "Authority has not been transferred from London to Belfast, Cardiff and Edinburgh. Rather, it has merely… been shared on a non-exclusive basis. Devolved legislatures enjoy law-making autonomy, free from Westminster's interference, not because Westminster cannot unilaterally intervene in devolved affairs, but because it does not."[40]

In all, based on Dicey's definition, Parliamentary Sovereignty means that Parliament has legally unlimited legislative authority, including over the devolution settlements. Nevertheless, as analysed below, Parliament might be legally sovereign, but it is certainly not politically omnipotent.[41]

2.2.Political reality

As mentioned above, Parliament is not politically omnipotent. This is because there are many political and democratic considerations which limit Parliament's law-making powers in practice, and they also ensure that power is not being abused. In democratic terms, Parliament is held accountable by the electorate over its exercise of power through elections, for example. As put forward by Ivor Jennings:

> "If they wish for re-election, they may be called upon to give an account of their actions, they must consider in their actions what the general opinion of them may be. Parliament passes many laws that people do not want. But it never passes any laws which any substantial scion of the population violently dislikes."[42]

Martin Loughlin and Stephen Tierney argue that due to these political limitations (and other factors, including Parliament's delegation of open-ended secondary law-making powers), the understanding of Parliamentary Sovereignty through the Diceyan view should be qualified.[43]

The courts also accept this practical reality of Parliamentary Sovereignty, as Lord Hope in the *Jackson case* stated that:

> "Parliamentary Sovereignty is an empty principle if legislation is passed which is so absurd or so unacceptable that the populace at large refuses to recognise it as law." [44]

In political terms, devolution provides an interesting insight into the importance of the interaction between law and politics in the context of Parliamentary Sovereignty. This is because devolution places a few political limits on Parliament's freedom to exercise its power.[45] This is supported by Vernon Bogdanor who argues that:

> "It is then in constitutional theory alone that full legislative power remains with Westminster. It is in constitutional theory alone that the Supremacy of Parliament is preserved. For power devolved, far from being power retained, will be power transferred;

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[40] Mark Elliott, 'Devolution, Federalism And A New Constitution For The UK' <http://blogs.lse.ac.uk/constitutionuk/2014/01/08/devolution-federalism-and-a-new-constitution-for-the-uk/> accessed 3 December 2018.
[41] Bradley, Ewing and Knight, Ibid n. 6.
[42] Jennings, Ibid n.110. Pp.148
[43] Martin Loughlin and Stephen Tierney ' The Shibboleth of Sovereignty' (2018) 81 Modern Law Review 989.

[44] Jackson v Her Majesty's Attorney General [2005] UKHL 56, para 120
[45] Andrew P Le Sueur, Maurice Sunkin and Jo Eric Khushal Murkens, *Public Law Text, Cases, And Materials* (2nd edn, Oxford University Press 2013). Pp.57

> and it will not be possible to recover that power except under pathological circumstances..." [46]

For instance, legally, devolution could be unilaterally repealed by Westminster, but politically, this would be practically impossible. This is because Parliament enacted devolution following popularly approved referendums in each devolved territory. In addition, section 1 of the Scotland Act 2016 and section 1 of the Wales Act 2017 place referendum locks before devolution in Scotland and Wales can be abolished. Therefore, placing limits on the ability of Westminster to repeal devolution due to the likely political effects that would follow, including the potential of civil unrest for example.[47] Moreover, the Sewel – Convention, which was entrenched into section 2 of the Scotland Act 2016, and section 2 of the Wales Act 2017, also places political limitations on Parliament's exercise of power. It indicates that Westminster will not legislate over devolved matters without the consent of the relevant devolved legislature(s).[48]

Overall, devolution has arguably become deeply rooted as a feature of the UK constitution due to the political limitations it places on Parliament.[49] As rightfully pointed out by Mark Elliott, this reading of the constitution institutes a principle, which is the respect of the autonomy of the individual devolved jurisdictions.[50] However this principle can only be accommodated within the constitution through convention and not through legally- binding means.

In concluding this section, the above analysis has demonstrated that we need to understand the two contrasting views on devolution, to understand the constitutional position and embeddedness of devolution. In the succeeding chapters of this thesis, it will be evidenced that the UK Government and its devolved counterparts differ on which view they subscribe to and that Brexit has made this more pronounced. As explored, the UK Government's actions since Brexit have made it clear that they subscribe to the theoretical view, whilst the devolved Government's actions in opposition to the UK Government have made it clear that they subscribe to the political reality view. In addition to this, often, when clashes have occurred between the two contrasting views, the traditional view has tended to have more leverage. This can be exemplified by the judicial approaches in the *R(Miller)* and the *Scottish Continuity Bill reference* cases.[51] And also by row over a second independence referendum in Scotland. These clashes (detailed further in the thesis) underline that Parliament remains sovereign and devolution subordinate to this. Therefore, the theoretical understating is still very much applicable in contemporaray times.[52]

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[46] Bogdanor, Ibid n.45. Pp.291

[47] Mark Elliottt, 'United Kingdom: Parliamentary Sovereignty Under Pressure' (2004) 2 International Journal of Constitutional Law 545.

[48] Paul Bowers, 'The Sewel Convention' (*Parliament.uk*, 2005) <http://researchbriefings.files.Parliament.uk/documents/SN02084/SN02084.pdf> accessed 3 December 2018

[49] Elliottt, Ibid n. 124.

[50] Elliott, Ibid n. 105

[51] Stuart White, 'Brexit And The Future Of The UK Constitution' (2021) 42 International Political Science Review 359.

[52] See: Gianfranco Baldini, Edoardo Bressanelli and Emanuele Massetti, 'Back To The Westminster Model? The Brexit Process And The UK Political System' (2021) 42 International Political Science Review 329.

3. Devolution and the European Union

As aforementioned, the devolution settlements established in 1998 were framed in the context of EU membership. Following their establishment, EU membership continued to influence the evolution of these devolved settlements.[53] For instance, the legal doctrine of supremacy of EU law was arguably the single greatest facilitator in ensuring the development of devolution without compromising the integrity of the UK's internal market. Given that EU law applied across the whole of the UK, its supremacy prohibited not only Westminster but also its devolved counterparts from passing any legislation that infringed or was deemed incompatible with EU law.[54] This prohibition was explicitly recognised under the devolution statutes; section 29(2)(d) of the Scotland Act 1998, section 6(2)(d) of the Northern Ireland Act 1998, and section 108(6)(c) of the Government of Wales Act 2006. These provisions allowed any court the ability to strike down any legislation that was passed within the devolved territories that infringed the primacy of EU law.[55] By ensuring regulatory harmonisation on key policy fields within the whole of the UK, the EU and its legislation had in effect been the glue holding the UK's internal market together.[56] In addition to this, the supremacy of EU law "permitted a more ample devolution than otherwise might have been possible, because coordination functions and market rules are assured at European level." [57]

The aftermath of the decision to leave the EU further evidenced the above assertions, as challenges to the integrity and stability of the UK's internal market emerged following the cessation of EU law supremacy in the UK's constitutional order. As thoroughly discussed in chapters 5 and 6, the development of common frameworks and the enactments of the EU (Withdrawal) Act 2018 and the UK Internal Market Act 2020 aimed to address these challenges by establishing an internal market that mirrors that of the EU's regulatory framework and single market. However, some of these initiatives have had a negative impact on devolved regulatory autonomy. For example, the EU (Withdrawal) Act 2018 allowed UK Ministers to essentially – reserve' devolved powers, and the UK Internal Market Act 2020 undermines the purposes of devolution. In addition, these effects are further exacerbated by the failure to accommodate England into the new UK internal market arrangements.

EU membership has had a significant, and often asymmetrical influence on the UK's devolution settlements. For instance, in Scotland, EU membership has had (and continues to have) a significant influence over its constitutional evolution. As discussed above, during the second wave of constitutional reform in Scotland, an independence referendum was held in 2014, in which the overall result was a majority against independence. The constitutional landscape of the UK at the time was a key factor behind this result - in 2014, the UK was still a member of the EU, and following the Barroso doctrine, an independent Scotland, would have

[53] 'Brexit: Devolution' (*Publications.Parliament.uk*, 2017) <https://publications.Parliament.uk/pa/ld201719/ldselect/ldeucom/9/9.pdf> accessed 3 December 2018.

[54] Masterman and Murray, Ibid n.107. Pp. 406

[55] Michael Gordon, 'Brexit: A Challenge For The UK Constitution, Of The UK Constitution?' (2016) 12

[56] Ibid n. 130

[57] Michael Keating, 'The Impact Of The United Kingdom's Withdrawal From The European Union On Scotland, Wales And Gibraltar' (The Policy Department for Citizens' Rights and Constitutional Affairs) <http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/583118/IPOL_IDA%282017%29583118_EN.pdf > accessed 3 December 2018.

to reapply for EU membership.[58] Essentially then, EU membership had a significant influence on the overall outcome of the independence referendum. The SNP led Scottish Government acknowledged this, who in the immediate aftermath of the 2016 Brexit referendum, stated that the possibility of a second independence referendum was “on the table” due to “a significant and material change in the circumstances that prevailed in 2014”.[59] Since then, the Scottish Government’s main constitutional objective has been to achieve Scottish independence, with EU membership.[60]As examined in chapter 3, the row between the Scottish Government and UK Government over a second independence referendum, has resulted in fuelling political and legal tensions between the two Governments. With no signs of the tensions easing, there is now an ever-growing possibility that this could result in the eruption of a constitutional crisis.

To further illustrate the influence EU membership has had on the developments of the UK’s devolution settlement, the peace process in NI will be used as an example. As aforementioned, the 1998 Northern Ireland Act that restored devolution to the jurisdiction was heavily based upon the GFA of 1998, which also brought an end to the ‘troubles.’[61] EU membership was arguably influential in accelerating the peace process within NI, as provisions laid out in the GFA relied heavily on the EU’s border regime, which allowed for the free movement of people, goods, services, and capital.[62] As put forward by Jon Tonge, strand two of the GFA:

> “assumes continuing joint UK-Irish membership of the EU and this shared belonging forms part of the background to institutional arrangements. Strand Two pledges that the North-South Ministerial Council, designed to promote and oversee all-island cooperation, will consider the European Union dimension of relevant matters, including the implementation of EU policies and programmes and proposals under consideration in the EU framework.” [63]

It is evident to see then that EU membership played a significant role in restoring peace, and devolution in NI.[64] As a result of Brexit, the UK lost access to the EU’s border regime, and consequential to this was the (re)emergence of the Irish border conundrum. As thoroughly analysed in chapter 2, the Irish border conundrum has brought into question the future of the peace process and the stability of devolution in NI.

In all, it is clear that EU membership managed to create an environment for devolution to develop without fundamentally reforming the UK’s territorial constitution. Essentially, the EU acted as an external stabiliser that allowed the UK to preserve its unitary nature and simultaneously accommodate the asymmetrical devolved arrangements. However, as uncovered in the succeeding chapters of this thesis, the loss of EU membership has left the

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[58] 'Letter From José Manuel Barroso To Lord Tugendhat' (*Parliament.uk*, 2012) <https://www.parliament.uk/documents/lords-committees/economic-affairs/ScottishIndependence/EA68_Scotland_and_the_EU_Barroso%27s_reply_to_Lord_Tugendhat_101212.pdf> accessed 16 April 2020; See also: Michael Keating, ‘The European Dimension to Scottish Constitutional Change’ (2015) 86 (2) Political Quarterly 201

[59] 'Nicola Sturgeon Statement In Full' (*BBC News*, 2018) <https://www.bbc.co.uk/news/uk-scotland-36620375> accessed 16 April 2020.
[60] See for example: 'Scotland’s Place In Europe' (*Gov.scot*, 2016) <http://www.gov.scot/Resource/0051/00512073.pdf> accessed 16 April 2020.
[61] Tonge, Ibid n.15
[62] Hayward and Murphy, Ibid n. 23
[63] Tonge, Ibid n. 15.
[64] Vernon Bogdanor, *Beyond Brexit: Towards A British Constitution* (IB Tauris 2019). Pp. 234

UK's devolution settlements and Union in flux. Moreover, as the UK withdrawals further from close relations with the EU, the strains within its own Union increase - given that each UK territory had its own special stake and unique set of interests in EU membership that need protection.

4. The June 2016 Brexit referendum

A key commitment within the Conservative party's manifesto during the 2015 UK general election was the pledge to hold a referendum on the UK's future membership within the EU by 2017.[65] Following the party's election victory, Parliament enacted the EU Referendum Act 2015, which made provisions for holding the referendum on 23 June 2016. The significance of this decision was made more pronounced given that within the UK, state-wide referendums are very uncommon - this marked the third time ever a referendum was to be held on a state-wide level. The other times were in 1975 on continued EU membership and in 2011 on changing the electoral system to Alternative Vote. Comparatively, eight referendums have been held exclusively in the devolved jurisdictions.[66] England is the only constituent territory in the UK yet to have an exclusive referendum. [67]

The 2016 EU membership referendum asked the electorate whether the UK should remain a member of or leave the EU. The overall result was a slight majority of 51.9%, voting to leave the EU, compared to 48.1% who voted to remain.[68] On a closer inspection of how each jurisdiction within the UK voted, the referendum result provided evidence of a divided Union. Wales was the only devolved jurisdiction to vote majority leave, whilst, in Scotland and NI, the majority voted to remain. Ultimately, however, the overall referendum result was driven by the leave vote in the only non-devolved territory in the UK – England. The differences in the voting outcomes in each jurisdiction were not too surprising, nevertheless, given the differential issues the campaigns in each territory focused on. For instance, in England, the focus was on sovereignty and 'taking back control.' In NI, the focus was on the peace process and the Irish land border. Moreover, in Scotland and Wales, the focus was on economic factors. In the aftermath of the referendum, differential interests over Brexit emerged within each territory, which have thus far resulted in increasing intergovernmental tensions between the UK Government and its devolved counterparts. In further explaining these observations, this section will now move on to adopt a territorialised perspective.

Starting with Scotland, the Brexit referendum marked the second time the jurisdiction got to vote on an important constitutional matter since the independence referendum in 2014. In

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[65] 'The Conservative Party Manifesto 2015' (*Conservatives.com*, 2015) <https://www.conservatives.com/manifesto2015> accessed 3 December 2018.

[66] For a more detailed analysis on referendums in the UK see: Michael Gordon, 'Referendums In The UK Constitution: Authority, Sovereignty And Democracy After Brexit' [2020] European Constitutional Law Review 213.

[67] There has been a few regional referendums within England, most notable, in London 1998 on the creation of the Greater London Assembly (GLA) and a directly elected Mayor. And in the Northwest of England in 2004, over the establishment of an elected Regional Assembly

[68] 'Electoral Commission | EU Referendum Results' (*Electoralcommission.org.uk*, 2018) <https://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information> accessed 3 December 2018

comparison to the rest of the other jurisdictions, the overall result in Scotland produced the highest percentage of votes to remain within the EU (62%).[69] This was unsurprising, however, given that the Scottish electorate, and political establishment, are all majority pro – EU. This was evidenced during the referendum campaign, in which the Scottish Government ran a strong pro – European agenda, which reflected the overall result within the jurisdiction. However, this was insufficient to influence the overall referendum result in Scotland's favour. As detailed in chapter 3, despite the differential outcome in results, the Scottish Government have continued to pursue their pro – European agenda. For instance, in the aftermath of the referendum result, the Scottish Government published a White Paper titled 'Scotland's place in Europe,' which set out a post - Brexit plan that was different to that proposed by the UK Government.[70] In particular, the paper set out the objective of ensuring that Scotland maintained close ties with the EU - ideally as an independent state, with EU membership. As examined in chapter 3, the UK Government and its Scottish counterpart have engaged in numerous political and legal clashes due to these differential interests over Brexit. These clashes have had the overall effect of bringing about the current period of constitutional unsettlement in Scotland.

Like in Scotland, the Brexit referendum result in NI produced a majority remain result (56%).[71] However, unlike the cohesion shown in Scotland, the NI electorate and political establishment were heavily divided during the referendum campaign. These divisions reflected and exacerbated the already existing divisions between Nationalists and Unionists over constitutional preferences linked to the 'national question.'[72] For instance, during the Brexit referendum campaign, the largest Unionist party in NI, the DUP, ran a campaign in favour of leaving the EU. In contrast, the largest Nationalist party in NI, Sinn Féin, campaigned to remain within the EU.[73] This political divide at the elite level was mirrored by the electorate as noticed in the analysis carried out by John Garry, who reported that:

> "Catholics overwhelmingly voted to stay by a proportion of 85 to 15 while Protestants voted to leave by a proportion of 60 to 40. Similarly, two thirds of self – described Unionists voted to leave whilst almost 90% of self – described Nationalists voted to remain."[74]

This divide persisted post-referendum, as evidenced by the immediate reactions of the political parties. For instance, Sinn Féin, in a similar vein to Scottish demands, argued for a border poll on a United Ireland, or alternatively, a 'special status' for NI within the EU, distinct from the rest of the UK.[75] On the other hand, the DUP advocated for a 'hard Brexit' which would see the whole of the UK, including NI, leave the EU with no distinct solution for NI. Their rationale

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[69] Ibid

[70] 'Scotland's Place In Europe' (*Gov.scot*, 2016) <http://www.gov.scot/Resource/0051/00512073.pdf> accessed 3 December 2018

[71] Ibid n.145

[72] Milena Komarova and Katy Hayward, 'The Irish Border As A European Union Frontier: The Implications For Managing Mobility And Conflict' [2018] Geopolitics 1.

[73] Ibid n. 130

[74] John Garry, 'The EU Referendum Vote In Northern Ireland: Implications For Our Understanding Of Citizens' Political Views And Behaviour. Knowledge Exchange Seminar Series Report' (*Qub.ac.uk*, 2016) <https://www.qub.ac.uk/brexit/Brexitfilestore/Filetoupload,728121,en.pdf> accessed 3 December 2018.

[75] Etain Tannam, 'Intergovernmental And Cross-Border Civil Service Cooperation: The Good Friday Agreement And Brexit' (2018) 17 Ethnopolitics 243.

was that a special solution would undermine the UK's territorial integrity.[76] As detailed in chapter 2, these differential interests in border arrangements have been one of the key catalysts behind the current period of constitutional unsettlement in NI.

Regarding Wales, the referendum result produced a small majority leave outcome (52.5%).[77] This was surprising, however, given that the majority of the political establishment within Wales, including the Government and most of the parties within the Senedd, backed the remain campaign.[78] Unlike in Scotland though, the political establishment's arguments failed to resonate well with the now Europhile Welsh electorate.[79] Despite this though, post – referendum, the Welsh Government have continued to push through for its pro – European approach. Additionally, and as explored in chapter 4, the Welsh Government's approach presents a contrasting vision to Brexit than that of the other Governments in the UK. Their approach can be seen as middle ground as they are not advocating for independence nor the maintenance of the status quo. They are the only devolved Government making proposals to further strengthen devolution and preserve the UK's Union.[80]

As aforementioned, the majority leave vote in England (53.4%) ultimately decided the overall UK wide EU referendum result.[81] This referendum marked the first time since the early 1970's in which the English electorate managed to vote on a matter of such constitutional significance. Given this, the referendum was often dubbed as an 'English constitutional moment,' as the overall UK-wide result profoundly reflected the will of the English electorate.[82] As explored in chapter 5, alongside the need to accommodate England in a post – Brexit constitution, this 'constitutional moment' has resulted in the political reawakening of the need to address the English question fully. There is also now an increased importance on this given the current UK political climate, whereby each of the devolved Governments is pursuing its own distinct interests.

In all, it is clear to see that from the genesis of the Brexit process, there has not been a common approach, agreement nor mandate from the UK's four territories over Brexit interests.[83] This has exposed the fact that the UK is a 'Union without uniformity.' In the succeeding chapters, the focus will move on to analyse the asymmetrical effects of Brexit in each of the UK's territories. The analysis in these chapters will provide evidence of a dis-United Kingdom.

[76] Ibid

[77] Ibid n. 145

[78] Rachel Minto, 'EU Referendum: One Year On – Wales And Brexit' <http://blogs.cardiff.ac.uk/brexit/2017/06/23/eu-referendum-one-year-on-wales-and-brexit/> accessed 3 December 2018.

[79]Jo Hunt, Rachel Minto and Jayne Woolford, 'Winners And Losers: The EU Referendum Vote And Its Consequences For Wales' (2016) 12 Journal of Contemporary European Research 824.

[80] See for example: 'Brexit And Devolution' (Government of Wales 2017) <https://beta.gov.wales/sites/default/files/2017-06/170615-brexit%20and%20devolution%20%28en%29.pdf> accessed 3 December 2018.

[81] Ibid n. 145

[82] Tierney, Ibid n.11

[83] Michael Keating, 'Brexit and the Nations' (2018) 90 The Political Quarterly 167.

Conclusion

Through the lens of devolution, this chapter examined the historical and evolutionary nature of the UK's territorial constitution. As a result of this examination, several key observations were made. First, it was observed that owing to the inherently imbalanced nature of the UK's territorial constitution, the historical and evolutionary trajectory of devolution in Scotland differed from that of Wales, which both differed significantly from that of NI. Moreover, it was also uncovered that Brexit has to some extent, provided a platform for the continued realisation of these trajectories. In section two, it was observed that despite the emergence of a more contemporary understanding of how devolution fits into the UK's constitutional order, the traditional 'Diceyan' approach remains dominant. It was also highlighted that due to Brexit, clashes between these two contrasting views have become more common, with the traditional approach often having more leverage. In the third section, the key observation uncovered the role the EU played in creating an environment for devolution to develop without fundamentally reforming the UK's territorial constitution. The implications of Brexit in bringing about instability within the UK's internal dynamics provided evidence of this. The final key observation uncovered within the chapter was that since the genesis of the Brexit process (the referendum campaign), there has not been a common approach, agreement, nor mandate from the UK's four territories over Brexit interests. As demonstrated in the succeeding chapters, the effects of Brexit are asymmetrical too. And more significantly, the systematic failure to address these asymmetrical effects has resulted in exacerbating the UK's state of constitutional unsettlement.

Chapter 2: Constitutional paralysis in Northern Ireland: Brexit, and the Irish border conundrum

Introduction

Following the 2016 Brexit referendum, the UK became a 'third country,' which also shares a land border with an EU Member State (the Republic of Ireland (ROI)). This land border is situated on the island of Ireland, and it separates the two jurisdictions of Northern Ireland (UK) and the ROI (EU). The Irish border conundrum essentially concerns then, the future settlement of this border.[1] As explored in the chapter, the long history of the Irish land border informs us not only how the border conundrum was managed in the past, but also the problems associated with managing it now in the contemporary landscape. As the conundrum has re-emerged and taken a new form in Brexit. In that, there needs to be a border somewhere, but every single possibility is problematic for a variety of reasons. As formulated by Daniel Kelemen, this has now become known as the "Brexit Trilemma,"[2] whereby the three key objectives the UK Government set out to resolve the Irish border conundrum have proved to be incompatible. These objectives were first, leaving the EU single market and customs union. Second, ensuring that they would be no border checks on the island of Ireland. And third, ensuring that there would be no Irish sea border. [3]

The Irish border conundrum raises numerous concerns and difficulties for trade and mobility between GB and NI, and between the UK and the EU. More significantly, the Irish border conundrum is the core source of constitutional instability in NI currently.[4] Inherently, the Irish border conundrum is not a devolution issue (in that whether there is devolution or not, the consequences of Brexit required a border between the EU and the UK), but it can and should, however, be treated as such. As detailed in the chapter, this is because the Irish border conundrum has challenged the future stability of the Good Friday (Belfast) Agreement (GFA), a peace process settlement in NI that also forms the basis of NI's consociational devolution settlement.[5] Moreover, the Irish border conundrum has already had a direct impact on NI's devolution settlement (and will continue to do so), as the power-sharing institutions are currently in paralysis. As explained in chapter 1, in comparison to its counterparts, NI's devolution settlement is complicated and prone to collapse. Therefore, it is reasonable to predict that the continued existence of the Irish border conundrum will serve to further add

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[1] Milena Komarova and Katy Hayward, 'The Irish Border As A European Union Frontier: The Implications For Managing Mobility And Conflict' [2018] Geopolitics 1.

[2] Daniel Kelemen, 'Brexit, Ireland And The Future Of Europe.' (*Dcubrexitinstitute.eu*, 2018) <https://dcubrexitinstitute.eu/wp-content/uploads/2017/12/Kelemen-DCU-Brexit-.pdf> accessed 27 September 2022.

[3] See: 'The Government's Negotiating Objectives For Exiting The EU: PM Speech' (*Gov.UK*, 2017) <https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech> accessed 8 May 2022.

[4] Conor Kelly and Etain Tannam, 'The Future Of Northern Ireland: The Role Of The Belfast/Good Friday Agreement Institutions' (2022) 93 The Political Quarterly 1.

[5] See also: John Doyle and Eileen Connolly, 'Brexit And The Northern Ireland Question', in Federico Fabbrini (ed*), The Law & Politics of Brexit* (Oxford University Press 2017).

constitutional strains on NI's already 'unsettled' devolution settlement, and more broadly the future of the UK's territorial constitution.

Given the political sensitivities in NI, addressing the Irish border conundrum was a central aspect of the Brexit withdrawal negotiations. The various proposed 'imaginative solutions' to the issue and the fear of a 'no deal Brexit' often divided not only the UK and the EU but also Westminster and the main political parties in NI. The polarised approaches to resolving the border conundrum delayed the withdrawal process, which was finally concluded following the enactment of the EU (Withdrawal Agreement) Act 2020. Central to the Act was the Ireland / Northern Ireland Protocol, which established a new border regime in NI. The sustainability of this new border regime as a long-term solution is, however, questioned. This is owed to the combination of first, the Unionist opposition (spearheaded by the DUP) to the Protocol – which has thus far resulted in the stalling of NI's consociational devolution settlement. And second, following several disputes, the weakening of trust and partnership over the implementation of the Protocol between the EU and the UK. In these disputes, the UK were resisting perceived encroachments on its sovereignty, and for the EU, they were resisting what it perceived as the UK seeking unfair access to its internal market. Owing to the combination of these two main challenges, the operation of the Protocol in its current form is increasingly becoming untenable - further increasing the likelihood of the emergence of a hard border in Ireland.

It is key to note from the onset that this chapter aims not to provide a solution to the conundrum by proposing a new border regime. The 'Brexit trilemma' has demonstrated how difficult this is. Instead, the aim is to evidence the need for a new way forward over the current decision-making process over the conundrum. Secondary to this, the chapter also aims to establish how best to manage some of the implications resulting from the conundrum and the current border regime – the Ireland / Northern Ireland Protocol.

Given the above, the main argument of this chapter is that the current decision making process has thus far failed to produce a conclusive and long-term 'imaginative solution' to the Irish border conundrum and, at the same time, has contributed to the current period of constitutional unsettlement in NI. As a result of these implications, the reasonable way forward now seems to be looking at new constitutional ways to approach this conundrum. But before we can establish a way forward, we must first identify the current challenges that need to be addressed. Subsidiary to this argument is that one possible way of addressing these challenges could involve introducing constitutional reforms to NI's devolution settlement and the UK's intergovernmental relations framework. These reforms would provide a meaningful and direct role and voice for NI's cross-community to be involved in the decision-making process surrounding the Irish border conundrum. Ultimately, however, it is recognised that it will be challenging to realise this proposal under the current constitutional status quo. However, maintaining the status quo will only continue exacerbating the current implications – risking the complete destabilisation of devolution in NI.

In presenting the above argument, the chapter will begin by exploring the historical trajectory of devolution in Northern Ireland, highlighting the settlement's sui generis nature. In the second section, an analysis of the border regimes that regulate/d the Irish land border pre – Brexit will be conducted. In doing so, the section aims to demonstrate how the border conundrum has been previously managed and why Brexit has resulted in its re–emergence. In section three, the chapter will analyse the approaches adopted by NI's two main political parties over Brexit and the consequential Irish border conundrum. Illustrating how this has led to some extent, to the

resurgence of identity politics in the jurisdiction. This will also provide some background context behind the Unionist's opposition to the Protocol. In the third section, the discussion will analyse a number of 'borders of political rhetoric' proposed as solutions to the Irish border conundrum, including the agreed Protocol. This section will emphasise the constitutional and political difficulties involved in conclusively resolving the Irish border conundrum. The succeeding section will identify and analyse the challenges surrounding the conundrum that need to be addressed, evidencing the need for a new way forward. The section will then propose one possible way of addressing these challenges, which would involve the UK Government providing the cross-community in NI with a voice and direct and meaningful engagement over the decision-making process surrounding the future of the Irish border conundrum. The chapter will then conclude by acknowledging that NI's devolution settlement cannot be stretched so far to provide for such a solution under the current constitutional status quo. However, the 'realpolitik' remains that the continued failure to recognise and provide for a way forward will only further exacerbate the current implications – resulting in the risk of the complete destabilisation of NI's devolution settlement and / or the UK's territorial integrity.

1. Overview of devolution in Northern Ireland

1.1. Constitutional history

Unlike in Scotland and Wales, New Labour did not establish devolution in NI in 1998, rather it was reinstated. Efforts to introduce home rule/devolution for Ireland were spearheaded by the Liberal party when they returned to Government following the 1880 general election. Their intentions to introduce home rule to Ireland were based on two main reasons; first, there was growing pressure from Irish Nationalists for home rule, which was aided by their electoral domination of Irish seats at Westminster in the latter part of the 19th century. Second, given the political arithmetic at the time, the ruling Liberal Government required Parliamentary support from Irish Nationalists.[6] In order to provide for Irish home rule, in 1886, the Liberal Party introduced the first home rule Bill, which proposed the establishment of an Irish Parliament in Dublin. However, due to schism within the party at the time, the Bill was defeated in the House of Commons. Following the shortcomings of the first, the party introduced a second home rule Bill in 1893. However, this Bill was defeated in the House of Lords.[7] The Liberal Party then introduced a third home rule Bill, which successfully passed through Parliament and became the Government of Ireland Act 1914. Despite its enactment, it never took effect due to Unionist and Conservative opposition and the outbreak of World War I. As a result, home rule in Ireland was effectively neutered.[8]

Following the end of the war, Government efforts to implement Irish home rule were resumed, resulting in the introduction of a fourth home rule Bill, which was enacted as the Government of Ireland Act 1920. However, home rule under this Act was in a different form to that proposed in the previous three Bills. The Act divided Ireland into two - NI and the Irish Free State. For

[6] Herbert McCready, 'Home Rule And The Liberal Party, 1899–1906' (1963) 13 Irish Historical Studies 316.
[7] Jeremy Smith, 'Bluff, Bluster And Brinkmanship: Andrew Bonar Law And The Third Home Rule Bill' (1993) 36 The Historical Journal 161.
[8] Thomas Mohr, 'Irish Home Rule And Constitutional Reform In The British Empire, 1885-1914' (2019) 24 French Journal of British studies 1.

NI, a devolved Parliament in Belfast was established, presiding over six counties. For the Irish Free State, a devolved Parliament in Dublin was established, presiding over the remaining twenty-six counties.[9] However, this arrangement was rejected by Irish Nationalists, who via the Irish Republican Army (IRA) continued to fight on.[10] In order to appease the Irish Nationalists, in 1921 the Anglo-Irish Treaty was established, which offered greater autonomy for the twenty-six counties, but the Irish Free State would still remain as a British dominion. The Dublin Parliament voted narrowly to accept the deal, however the IRA split, and civil war ensued. In 1937 a new state, Ireland, was created, and it formally became the Republic of Ireland in 1949. The constitution of this new state did not recognise NI however, and Articles 2 and 3 referred to the 're-integration of the national territory' as pending.[11]

In relation to the governance of NI in that period (1921-72), the Unionist devolved Government's policies were seen to be riddled with sectarianism against Catholics. [12] For instance, an unfair political advantage was established via altering constituency boundaries and abolishing the propositional representation electoral system, which prevented nationalist parties from entering.[13] Despite the reformist attempts by the new (1963) Prime Minister of NI, Terence O'Neill, the then Home Secretary, Reginald Maudling in 1972 stated that:

> "I do not believe now there is any chance now of getting the minority community, or incidentally the opposition at Westminster, to accept the administration of law and order at Stormont as at present constituted to be impartial"[14]

The Unionist Government in NI subsequently resigned, having effectively been told by the UK Government that its powers were being transferred back to Westminster.[15]Direct rule from London was re -established following the vote in Westminster to suspend the devolved Parliament of NI for one year.[16] Direct rule from London entails the UK Parliament making legislation for NI (often in the form of Orders in Council rather than Acts) and the UK government through the Northern Ireland Office, exercising executive powers. [17] In a published Green paper in 1972, the UK Government outlined its new approach to restoring devolution in NI:

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[9] Brice Dickson, 'Work in Progress. A Country Study of Constitutional Asymmetry in the United Kingdom' in Patricia Popelier and Maja Sahadzic, *constitutional asymmetry in multinational federalism: Managing multinationalism in multi-tiered systems* (Palgrave Macmillian 2019) Pp. 462

[10] Tom Wilson, *Ulster. Conflict And Consent* (Blackwell 1989).

[11] Richard Killeen, *A Short History Of The Irish Revolution* (Gill & Macmillan Ltd 2014).

[12] Brigid Hadfield, *Northern Ireland: Politics and the Constitution* (OUP 1992). Pp. 3

[13] Patrick Buckland, *A History Of Northern Ireland* (Gill and Macmillan 1981).

[14] 'House Of Commons Debate 31 January 1972 Vol 830 Cc32-43' (*Parliament.uk*, 1972) <https://api.Parliament.uk/historic-hansard/commons/1972/jan/31/northern-ireland> accessed 12 October 2020.

[15] For a more detailed discussion on devolution in NI during the 'Unionsit era' of 1921 – 1972, see: Brice Dickson, 'Devolution in Northern Ireland' in Jeffery Jowell and Colm O'Cinneide (eds) *The Changing Constitution* (9th edn, Oxford University Press 2019). Pp. 240 - 245

[16] Claire Palley, 'The Evolution, Disintegration And Possible Reconstruction Of The Northern Ireland Constitution' (1972) 1 Anglo-American Law Review 476.

[17] Brice Dickson, 'Devolution in Northern Ireland' in Jeffery Jowell and Colm O'Cinneide (eds) *The Changing Constitution* (9th edn, Oxford University Press 2019). Pp. 239

"It is therefore clearly desirable that any new arrangements for Northern Ireland should…be, so far as possible, acceptable to and accepted by the Republic of Ireland."[18]

The outcome of this new approach was the 1973 Sunningdale Agreement and the first attempt at devolved power-sharing in NI.[19] Prior to the agreement, Westminster passed the Northern Ireland Assembly Act 1973 and The Northern Ireland Constitution Act 1973, which were enacted with the Sunningdale agreement in mind, and abolished the suspended Belfast Parliament. The Sunningdale agreement was structured under three strands which dealt with 3 sets of relationships; devolved (the NI Assembly), confederal (the Council of Ireland) and intergovernmental (London-Dublin Governments). The primary foundation of the agreement was to avoid the 'evils of the past' by bringing the two communities together.[20] For instance, to prevent Unionist dominance, the agreement enforced power-sharing between Unionists and Nationalists via the creation of a power-sharing Executive. As put forward by Hadfield, the enforcement of power sharing in NI entails no devolution without power-sharing.[21] In addition, there were constitutional guarantees for the status of NI to reassure Unionists as there would be no constitutional change without a border poll.[22] The border poll refers to "the term for a referendum on Irish reunification… which would take place simultaneously in both the Republic of Ireland and Northern Ireland." [23] The participation by the Irish Government via a Council of Ireland was intended to appease Nationalists, as well as the creation of an all-Ireland police authority.

The NI Executive and Assembly began devolved power-sharing in January 1974, but by May of the same year, the devolution settlement had collapsed. This was owed in part to the difficulties of power-sharing for both communities at the time. As evidenced by the resignation of the Unionist PM Brian Faulkner, who resigned in response to the growing Unionist opposition to the new devolved arrangements. Following his resignation, Westminster passed the Northern Ireland Act 1974, which dissolved the Assembly and formally returned direct rule from London.[24]

The road to re-establishing devolution (and peace) in NI resumed in 1993, following the Downing Street Declaration. The Declaration acknowledged that the future of Ireland, North and South, was a matter for all the people of the island. It also indicated that this future would nonetheless be determined by consent on a separate North and South basis. Also, the UK Government confirmed that they had no selfish strategic or economic interest in NI, whilst the

[18] 'The Future Of Northern Ireland: A Paper For Discussion (Green Paper; 1972)' (*ulster.ac.uk*, 1972) <https://cain.ulster.ac.uk/hmso/nio1972.htm> accessed 12 October 2020.
[19] Jon Tonge, 'From Sunningdale To The Good Friday Agreement: Creating Devolved Government In Northern Ireland' (2000) 14 Contemporary British History 39.
[20] Ibid
[21] Brigid Hadfield,'Devolution: A national conversation?' in Jeffery Jowell and Dawn Oliver (eds) *The changing constitution* (7th edn, Oxford University Press 2011). Pp. 231

[22]See: Dermot Quinn, *Understanding Northern Ireland* (Baseline 1993).
[23] 'Irish Reunification' (*The Institute for Government*, 2018) <https://www.instituteforGovernment.org.uk/explainers/irish-reunification> accessed 24 March 2020.
[24] Jon Tonge, 'From Sunningdale To The Good Friday Agreement: Creating Devolved Government In Northern Ireland' (2000) 14 Contemporary British History 39. For some context on how direct rule during this period operated see: Brigid Hadfield, 'Devolution: A national conversation?' in Jeffery Jowell and Dawn Oliver (eds) *The changing constitution* (7th edn, Oxford University Press) Pp. 230

Irish Government conceded that parts of its constitution were deeply offensive to Unionists (particularly Articles 2 and 3 as discussed above).[25] Subsequently, in 1995, the two Governments devised a framework for a new devolution settlement for NI via the 1995 Joint Framework Document. The document set out three strands of institutions in NI (North-South, East-West, North-North) governed by the principles of parity of esteem and consent. In relation to the latter institution, the framework proposed for a 90-member Assembly elected by PR-STV, and a power-sharing Executive. For legislation to pass in the Assembly, a weighted majority of between 65%-75% would be required.[26] The main Unionist parties, the DUP and UUP, which resulted in the Conservative Government quietly abandoning it, opposed the framework. By then, the UK Government were reliant upon Unionist votes in the House of Commons. [27]

1.2. Constitutional form

Talks on the restoration of the peace process and the revival of devolution in NI were resumed following the enactment of the Northern Ireland (Entry to Negotiations etc) Act 1996, which paved the way for the creation of an elected, all-party NI forum for political dialogue. The Good Friday Agreement (GFA) concluded the all-party talks in 1998. The agreement restored devolution to NI and ended the troubles. The 1973 Sunningdale Agreement provided the constitutional architecture for the Good Friday Agreement.[28] As characterised by the former SDLP deputy leader, Seamus Mallon, the GFA was “Sunningdale for slow learners.”[29] Just like Sunningdale, the GFA was structured under three strands which dealt with 3 sets of relationships; devolved (the NI Assembly), confederal (North-South Ministerial Council) and intergovernmental (British-Irish Council).

Strand one established a NI Assembly (Stormont) with primary legislative power (Acts of the Assembly) consisting of 108 MLA’s elected via PR – STV. The Assembly would be headed by a power-sharing Executive consisting of a First Minister and deputy First Minister, formed from the parties with the most seats from either community. As identified by Lijphart, an integral feature of consociationalism is the existence of a mutual veto between the divided groups.[30] Strand one established this feature in NI, by providing for the cross-community support decision-making process. The overarching rationale behind this decision-making

[25] 'The Joint Declaration Of 15 December 1993 (Downing St. Declaration)' (*Dfa.ie*, 1993) <https://www.dfa.ie/media/dfa/alldfawebsitemedia/ourrolesandpolicies/northernireland/peace-process--joint-declaration-1993-1.pdf> accessed 15 October 2020.

[26] Ronald Christaldi, 'The Shamrock And The Crown: A Historic Analysis Of The Framework Document And Prospects For Peace In Ireland' (1995) 5 Journal of Transnational Law & Policy 123.

[27] Jon Tonge, 'From Sunningdale To The Good Friday Agreement: Creating Devolved Government In Northern Ireland' (2000) 14 Contemporary British History 39.

[28] Hadfield, B, ‘The Belfast Agreement, Sovereignty and the State of the Union’ (1998) Public Law
[29] Jon Tonge, 'From Sunningdale To The Good Friday Agreement: Creating Devolved Government In Northern Ireland' (2000) 14 Contemporary British History 39.
[30] See: Arend Lijphart, *Democracy In Plural Societies* (Yale University Press 1977).

process is that cross-community support is necessary for certain decisions to be legitimate.[31] This decision-making process is embedded under the Northern Ireland Act 1998 (section 4(5)), which is the domestic legal outworking of the GFA. As provided by paragraph 5(d) of the GFA, only 'key decisions' are to be taken on a cross-community basis – this involves the support of a majority of all those voting, including a majority of both designated Unionists and designated Nationalists) or weighted majority (60% of those voting, including a minimum 40% of designated Unionists and 40% of designated Nationalists. These 'key decisions' are at times specified in advance under the Northern Ireland Act 1998—for example, the election of the speaker and deputy speakers, the adoption of Standing Orders, and approval of the budget.[32] Alternatively, as section 42 of the same Act provides, a cross-community vote can be triggered following a petition of concern being raised by at least 30 MLA's. It is key to note that the requirement to secure cross community consent only applies to matters within the devolved competences of Stormont (as stipulated under Schedule 2 of the Northern Ireland Act 1998). Thus, any new proposed border regime, including the Protocol, would not be subjected to these cross-community consent provisions. As detailed further in the chapter, the failure to attain cross-community support for the Protocol has been one of the critical challenges behind its current downfall. Also of importance in the GFA was the continued recognition of NI as part of the UK's Union, subject to a border poll.[33]

Before the provisions within the Agreement could be realised, referendums were held in both NI and the ROI (on changes to Articles 2 and 3 of the constitution). The results in both were majority in favour of the provisions – in NI this was 71.1%, and in the ROI there was a greater majority result of 94.4 %.[34] Thus, in the ROI, amendments were made to Articles 2 and 3 of the Irish constitution, to respect the agreed constitutional status of NI. And in the UK, Westminster enacted the Northern Ireland Act 1998 – the "statutory fruit of the Belfast Agreement 1998."[35]

The first election for the new Assembly was held in June 1998 and resulted in the UUP and the SDLP forming a power-sharing devolved Executive. However, their term was short-lived as between 2000 – 2002, the power-sharing Executive and Assembly were suspended three times, and indefinitely in October 2002, amid allegations of an IRA spy ring at Stormont.[36] The Assembly was not restored until 2007, following the 2006 St Andrews Agreement.[37] Amongst many other things, the St Andrews agreement included a new mechanism for appointing the First and deputy First Minister. The largest party in the largest designation (Unionist,

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[31] Alex Schwartz, 'How Unfair Is Cross-Community Consent? Voting Power In The Northern Ireland Assembly' (2010) 61 Northern Ireland Legal Quarterly.

[32] Brice Dickson, 'Devolution in Northern Ireland' in Jeffery Jowell and Colm O'Cinneide (eds) *The Changing Constitution* (9th edn, Oxford University Press 2019). Pp. 252.

[33] See: Austen Morgan, The Belfast Agreement: A practical legal analysis (The Belfast Press Limited 2011)

[34] 'Analysis Of Voting In The Good Friday Agreement Referendum In Northern Ireland' (*Wesleyjohnston.com*, 1998) <http://www.wesleyjohnston.com/users/ireland/today/good_friday/polls.html> accessed 24 March 2019.

[35] Brigid Hadfield,'Devolution: A national conversation?' in Jeffery Jowell and Dawn Oliver (eds) *The changing constitution* (7th edn, Oxford University Press 2011). Pp. 230

[36] For a more detailed analysis on the constitutional developments of devolution in Northern between 1900 to the early 2000's see Brigid Hadfield, ' The United Kingdom as a territorial state. In Vernon Bogdanor (ed) *The British constitution in the twentieth century* (Oxford University Press 2003).

[37] Roger MacGinty and others, 'Northern Ireland's Devolved Institutions: A Triumph Of Hope Over Experience?' (2010) 13 Regional & Federal Studies 31.

Nationalist or other) would provide the First Minister. There would also be a need for fresh Assembly elections.[38] The proposals in the St Andrews agreement were enacted via the Northern Ireland (St Andrews Agreement) Act 2006, which also makes several amendments to the Northern Ireland Act 1998. The first Assembly elections following the restoration of devolution were held in 2007 and resulted in the DUP and Sinn Féin forming the power-sharing Executive. In the succeeding Stormont and Westminster elections thus far, Sinn Féin has been the most successful Nationalist party, and the DUP, the most successful Unionist party in NI. [39]

In terms of its evolution, NI's devolution settlement of 1998 has been modified several times. For instance, following the St Andrew's Agreement of 2006, as discussed above. Moreover, in 2010 following the Hillsborough Castle Agreement, and the passing of the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010, responsibility for policing and justice was devolved to NI. This resulted in the establishing the Police Service Northern Ireland (PSNI). [40]The settlement was also modified following the Stormont House Agreement of 2014. The Agreement devolved some fiscal powers over corporation tax and reduced the number of MLAs in Stormont from 108 to 90.[41] At the time of writing, the most recent substantive modification of NI's devolution settlement came in February 2022, following the enactment of the Northern Ireland (Ministers, Elections and Petitions of Concern) Act 2022. The Act grants legal effect to some of the proposed changes to the operation of the NI devolved institutions, noted in the 'New decade, New Approach' Agreement of 2020.[42] This includes, for example, extending the period by which nominations for First and Deputy First Minister can be made following Stormont elections, from 6 weeks to four consecutive 6 week negotiation periods (so a total of 24 weeks).[43] In the instance that no nomination has been approved, the Secretary of State (SoS) for NI is required to set a date for new Stormont elections. The rationale behind this extension was to bring about greater stability to NI's devolution settlement.[44] As shall be discussed further in the chapter, the purposes of this legislation were tested following the May 2022 Stormont elections, whereby the DUP refused

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[38] 'The St Andrews Agreement, October 2006' (*gov.uk*, 2006) <https://assets.publishing.servicackermanov.uk/Government/uploads/system/uploads/attachment_data/file/136651/st_andrews_agreement-2.pdf> accessed 15 October 2020.

[39] Brigid Hadfield,'Devolution: A national conversation?' in Jeffery Jowell and Dawn Oliver (eds) *The changing constitution* (7th edn, Oxford University Press) Pp. 231

[40] Brice Dickson, 'Devolution in Northern Ireland' in Jeffery Jowell and Colm O'Cinneide (eds) *The Changing Constitution* (9th edn, Oxford University Press 2019). Pp. 256 – 260.

[41] 'Stormont House Agreement' (*gov.uk*, 2014) <https://assets.publishing.service.gov.uk/Government/uploads/system/uploads/attachment_data/file/390672/Stormont_House_Agreement.pdf> accessed 15 October 2020.

[42] 'The New Decade, New Approach Deal' (*gov.uk*, 2020) <https://assets.publishing.service.gov.uk/Government/uploads/system/uploads/attachment_data/file/856998/2020-01-08_a_new_decade__a_new_approach.pdf> accessed 15 October 2020.

[43] Jon Tonge, 'How Have Parties Responded To The Northern Ireland Protocol?' (*UK in a changing Europe*, 2022) <https://ukandeu.ac.uk/how-have-parties-responded-to-the-northern-ireland-protocol/> accessed 16 June 2022.

[44] David Torrance, 'Northern Ireland Elections: How Will An Executive Be Formed?' (*parliament.uk*, 2022) <https://commonslibrary.parliament.uk/northern-ireland-elections-how-will-an-executive-be-formed/> accessed 16 June 2022.

to form an Executive, resulting in the statutory deadline running out, and the enactment of the Northern Ireland (Executive Formation etc) Act 2022, which extended the period the SoS may call for an Assembly election.

Overall, as highlighted in this section, devolution in NI has been characterised by division, instability, and political sensitivity.[45]As put forward by Dickson "Northern Ireland's experience of devolution during the past 98 years has been very troubled. Brexit, alas, seems unlikely to make it less so in the years ahead." [46]As shall be evidenced in this chapter, driven by the effects of Brexit, since 2016, devolution in NI has entered into paralysis on more than one occasion - reaffirming Dickson's above characterisation.

2. Ireland / Northern Ireland border regimes pre - Brexit

As discussed in the first chapter, the Government of Ireland Act 1920 implemented the first border on the island of Ireland as a solution to the struggle for Irish 'home rule.' The border separated six of Ireland's thirty- two counties which were assigned to NI, leaving Ireland with the remaining twenty - six. Initially, the border was intended to serve as an internal border between the United Kingdom of GB and Ireland but developed into a permanent international frontier that divided the Island into two separate jurisdictions.[47] Over time, the 310-mile-long border, which cuts through, towns, villages and local communities, has operated under several border regimes.[48]

Border regimes are systems of rules and practices that define and regulate a borders functions, governance and degree of openness.[49] The border regimes that have operated on the Irish land border emerged in light of significant constitutional and policy developments, and they include the CTA, EU membership and the 1998 GFA. The combination of these regulative regimes facilitated and maintained the existence of a frictionless border within the island of Ireland, an enormous positive given the historical context of ethno – national conflict on the island.[50] In the section below, the discussion will explain the contribution each of these border regimes provided in maintaining the seamless nature of the Irish land border and discuss the early concerns that were raised in regard to their future feasibility following the Brexit referendum result.

[45] Mary Murphy and Jonathan Evershed, 'Contesting Sovereignty And Borders: Northern Ireland, Devolution And The Union' [2021] Territory, Politics, Governance 661.
[46] Brice Dickson, 'Devolution in Northern Ireland' in Jeffery Jowell and Colm O'Cinneide (eds) *The Changing Constitution* (9th edn, Oxford University Press 2019). Pp. 239

[47] James Anderson and Liam O'Dowd, 'Imperialism And Nationalism: The Home Rule Struggle And Border Creation In Ireland, 1885–1925' (2007) 26 Political Geography 934.

[48] James Anderson, 'Ireland's Borders, Brexit Centre-Stage: A Commentary' (2018) 22 Space and Polity 255.
[49] For a thorough analysis on border regimes, see: Eiki Berg and Piret Ehin, 'What Kind Of Border Regime Is In The Making?' (2006) 41 Cooperation and Conflict 53.
[50] Milena Komarova, ''Now You See It, Now You Don'T'... And Now You Do Again. Brexit And The In/Visible UK-Irish Land Border ' (2017) 12 The Journal of cross border studies in Ireland 11.

2.1. The Common Travel Area (CTA)

When the Irish Free State was established, the first border regime to emerge on the island of Ireland was the CTA in 1922. The CTA serves as a formal agreement between the British and Irish Governments, developed with the purpose and understanding of the need to minimise the disruption to free movement.[51] The CTA sets out rules and practices that allow British and Irish citizens to "move between the two jurisdictions, and thereby reside and work in either jurisdiction, without the need for special permission."[52] The CTA's guiding principle is based upon the equal treatment and reciprocal citizenship benefits of British and Irish nationals in each other's jurisdictions. In practice, the CTA provides arrangements for nationals of both countries to travel 'passport free', allowing for a great degree of openness to the border. This arrangement is similar to the EU's border-free area, the Schengen zone, to which neither the ROI nor the UK is a party to. The UK has remained reluctant to be part of this zone since its establishment, resulting in the ROI having no choice but to 'follow suit' and opt–out in efforts to maintain the feasibility of the CTA. The regime of the CTA is recognised under statute via section 1(3) of the Immigration Act of 1971. It is also recognised within the EU's legal framework, most notably under protocol 20, article 2 of the Lisbon treaty.

Following the Brexit referendum result, concerns were raised about the feasibility of maintaining the CTA and its associated rights. Given the loss of shared EU status between the UK and the ROI, it was perceived that stricter monitoring of migration controls and customs policing would have to be implemented on this route between Europe and the UK via the ROI.[53] This went against the spirit of the CTA which, as mentioned above, provides arrangements for the seamless movement between the two jurisdictions for the nationals of the ROI and the UK. Nonetheless, as detailed below, the Protocol on Ireland/Northern Ireland finally clarified the matter, allowing the CTA to continue operating post-Brexit.

2.2. European Union membership

The ROI and the UK joined the European Economic Community (now EU) in 1973, a membership that defined the emergence of an additional common border regime between the two jurisdictions. The shared subscription by the two countries to the EU's four freedoms of movement (goods, people, capital, and services) allowed for greater openness to the Irish border. For instance, goods that move within the EU are not subject to customs checks, which allows them to move freely.[54] Overall, through EU membership, the Irish border acted as a further enabler rather than a barrier to movement.[55]

The UK's decision to leave the EU resulted in the loss of the UK and the ROI's shared status as EU members. More significantly, this also meant that the two countries lost their shared

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[51] Bernard Ryan, 'The Common Travel Area Between Britain And Ireland' (2001) 64 Modern Law Review 855.

[52] Komarova, Ibid n. 9

[53] Doyle and Connolly, Ibid n.5

[54] Mary Murphy and Jonathan Evershed, 'Contesting Sovereignty And Borders: Northern Ireland, Devolution And The Union' [2021] Territory, Politics, Governance 661.

[55] David Phinnemore, 'Northern Ireland: A 'Place Between' In UK–EU Relations' (2021) 25 European Foreign Affairs Review 631.

membership of the EU's single market and customs union. This created implications for border management on the Irish land border. This loss was significant because it resulted in the default position (in the absence of any agreed future relationship with the EU) of the return of a 'hard border' partitioning the island of Ireland, not seen since the 'troubles' in NI.[56] As Michael Keating put forward at the time, NI's inability to be in the Union- ships of both the UK and the EU simultaneously post – Brexit made "the various middle grounds and third ways that were previously canvassed more difficult."[57]

As discussed further in the chapter, the border regime established by EU membership has, to an extent, been replaced by the Protocol on Ireland/Northern Ireland, which, de facto, places NI (but not GB) into the EU's customs and regulatory territory.[58]

2.3.The 1998 Good Friday (Belfast) Agreement

As detailed in the first chapter, the GFA of 1998 was a ground-breaking part of the NI peace process as it resulted in the formal ending of the 'troubles' in NI. The legal outworking of the GFA was the Northern Ireland Act of 1998, which formally restored and provided the legal framework of devolution in NI. The GFA was intended to:

> "decommission the mind – set of political division and also take the border out of Irish politics, as a progressive means of lowering the political temperature in Northern Ireland and the fashioning of a new modus vivendi on the island." [59]

A number of important elements within the GFA ensured that the above intentions were realised. For example, the GFA resulted in the removal of security installations on the Irish land border, stemming largely from the period during the 'troubles.' Thus, the GFA cemented the border's openness "not only symbolically and politically but also socially."[60] Also important was the establishment of the right for citizens of NI to identify themselves as British or Irish and hold British or Irish or both citizenships, irrespective of NI's constitutional status.[61]Another key element of the GFA was the establishment of cross-border bodies. For example, strand two of the GFA dealt with North–South dimensions on the island. A number of institutions were established to deal with North–South issues. This included the North/South Ministerial Council, a body responsible for North-South cooperation across various policy areas of mutual interest, such as transport and tourism.[62] Strand three dealt with East–West affairs. Institutions between GB and Ireland were established, including the British – Irish

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[56] Jon Tonge, 'The Impact And Consequences Of Brexit For Northern Ireland' (The Policy Department for Citizens' Rights and Constitutional Affairs 2017) <http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/583116/IPOL_BRI(2017)583116_EN.pdf> accessed 3 March 2019.

[57] Michael Keating, 'Where Next For A Divided Kingdom?' <https://ukandeu.ac.uk/where-next-for-a-divided-kingdom/> accessed 13 March 2019.

[58] John Garry and others, 'The Future Of Northern Ireland: Border Anxieties And Support For Irish Reunification Under Varieties Of Ukexit' (2020) 55 Regional Studies 1517.

[59] Cathy Gormley-Heenan and Arthur Aughey, 'Northern Ireland And Brexit: Three Effects On 'The Border In The Mind'' (2017) 19 The British Journal of Politics and International Relations 497.

[60] Komarova, Ibid n. 9

[61] Annex 2 of the Good Friday Agreement 1998

[62] 'About Us - North South Ministerial Council' (*northsouthministerialcouncil.org*, 2021) <https://www.northsouthministerialcouncil.org/about-us> accessed 24 March 2021.

Council, whose purpose is to promote and create common policies, cooperation and understanding within the British Isles.[63]

The GFA was agreed upon with EU membership in mind, which arguably allowed for the peace process in NI to accelerate quicker.[64] The reliance on the EU's legal frameworks such as its citizenship rights, customs union and single market, helped enable the transition back to a 'soft border' in Ireland and its continuation. For example, the GFA defines citizenship and rights for all persons born in NI under the guiding principles of non – discrimination and equality between Irish and British citizens in either jurisdiction. These rights were also provided for on an equivalent level by the EU's citizenship legal framework. Moreover, the North – South Ministerial Council was established in mind that it would operate in an EU context where regulations on issues of mutual interest such as water quality and animal health were "framed by EU policy and that these policy areas would be the 'matters' around which cooperation would take place."[65] Furthermore, paragraph 17 of strand 2 to the GFA makes references to the EU, and the EU also continues to fund the peace process in NI through its programme for 'Peace and Reconciliation in Northern Ireland.'[66]

As mentioned above, the GFA enabled the political discourse on the border to be nuanced and less important, but the effects of ending the EU's border regime, following Brexit, have made the discourse on the border more salient.[67] This is because in the absence of any long term viable solution to the Irish border conundrum, the legal default position would entail the potential for the re- imposition of a hard border partitioning the island of Ireland, through customs posts and security instillations. This would be something not seen since the 'troubles,' and would certainly undermine the progress that was achieved by the GFA.[68]

Several significant security risks are associated with returning to a hard border. For instance, returning to customs policing through physical means could reignite tensions within NI. Owing to the sensitivities and unpopularity of a hard border, the substantive reality of what physical structures such as customs checkpoints and infrastructure represent could arguably motivate and direct violence towards these physical manifestations. As they could easily become 'targets' for Nationalist paramilitaries in their re–run for the IRA's 'border campaign'. Given this, it would be unsurprising for Unionist paramilitaries to reactivate and 'defend Ulster'.[69]This argument may be deemed over–inflated as we are unlikely to see the full return of the troubles. Still, it cannot be ignored as a hard border will jeopardise and threaten peace in the territory.[70]

Overall, because of Brexit and the consequential Irish border conundrum, there is now a significant risk to the GFA and peace in NI – which would also translate to the destabilisation

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[63] 'About The British-Irish Council' (*britishirishcouncil.org*, 2021) <https://www.britishirishcouncil.org/about-council> accessed 24 March 2021.
[64] Katy Hayward and Mary Murphy, 'The EU'S Influence On The Peace Process And Agreement In Northern Ireland In Light Of Brexit' (2018) 17 Ethnopolitics 276.
[65] Doyle and Connolly, Ibid n.5
[66] Hayward and Murphy, Ibid n. 23
[67] Gormley-Heenan and Aughey,Ibid n. 18
[68] Tonge, Ibid n.15
[69] Anderson, Ibid n.7
[70] 'Mandelson: EU Exit Risks Peace Process And Return To Violence' (*Newsletter.co.uk*, 2016) <https://www.newsletter.co.uk/news/mandelson-eu-exit-risks-peace-process-and-return-to-violence-1-7278793> accessed 24 March 2021.

of NI's fragile devolution settlement. As detailed further in the chapter, the Protocol's border regime has failed to mitigate this risk. Instead, it has been the central cause behind the current paralysis of NI's power-sharing institutions.

In concluding this section, it is essential to reemphasise that the different border regimes introduced above have each "created a interweaving tiers of economic, political and social cross – border relationships which have together contributed to the land border's invisibility and openness."[71] This degree of openness (enabled by the CTA, EU membership and the GFA) on the land border in Ireland closely mirrored the UK's own internal borders. However, following the Brexit referendum, doubts were raised over the continuation of this seamless border. Thus, in efforts to protect the continuation of relationships, normality and peace on the island of Ireland, all parties to the Brexit withdrawal negotiations realised, from the onset, the vital importance of maintaining the status quo of the Irish land border. However, as analysed further in the chapter, ensuring the maintenance of this seamless border post – Brexit has proved to be very difficult.

3. A divided territory: Northern Ireland and Brexit

The difference in votes within the territorial jurisdictions of the UK during the 2016 Brexit referendum result provided evidence of a divided Union. Further divisions were also evidenced in NI. Despite the majority 'remain' result (56%),[72] the referendum reaffirmed the existing political divisions within the territory. The NI vote essentially reflected the constitutional preferences on the 'national question' of whether NI should remain part of the UK or form part of a United Ireland.[73] A study by the Northern Ireland Assembly Election Study found that the majority of self-defined Nationalists voted to remain, whilst a majority of self-defined Unionists voted to leave during the Brexit referendum.[74] The electorate's voting behaviour reflected the positions of the two main political parties (Sinn Féin and the Democratic Unionist Party (DUP)) on EU membership during the referendum campaign.[75] The main issues the campaigns focused on were very different to those the rest of the UK was debating over. For instance, rather than debating on 'sovereignty,' the main issues in NI primarily focused on the consequences Brexit would have on NI concerning the peace process, the future feasibility of the CTA, and trade matters resulting from the customs union and single market exit.[76]

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[71] Komarova, Ibid n. 9

[72] 'Electoral Commission | EU Referendum Results' (*Electoralcommission.org.uk*, 2018) <https://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information> accessed 3 April 2021

[73] Doyle and Connolly, Ibid n.5

[74] John Garry, 'The EU Referendum Vote In Northern Ireland: Implications For Our Understanding Of Citizens' Political Views And Behaviour' (*Qub.ac.uk*, 2016) <https://www.qub.ac.uk/brexit/Brexitfilestore/Filetoupload,728121,en.pdf> accessed 2 March 2021.

[75] Murphy and Evershed, Ibid n. 13

[76] Mary Murphy, 'The Brexit Referendum In Northern Ireland: Political Duplicity And Legal Loopholes' (2021) 20 Election Law Journal: Rules, Politics, and Policy 70.

The largest nationalist party Sinn Féin, ran a campaign in favour of remaining within the EU, despite being historically Eurosceptic.[77] For the party, Brexit would have severe negative impacts in NI on the issues listed above. For example, their campaign stated that Brexit would undermine the peace process, create negative economic consequences, and restrict cross-border mobility. The party also argued that "the possibility that a part of our nation could end up outside the European Union while the other part stays in is not a situation that will benefit the Irish people."[78] Sinn Féin were also aware of another possibility whereby NI votes majority to remain, but the UK-wide vote is to leave. These possibilities allowed the party to push for their manifesto agenda for Irish (re)unification.[79]This is because if the scenarios were to manifest, the party proposed a 'border poll' to determine the territorial future of NI, as a (re)unified Ireland would keep the North within the EU, avoiding the problems associated with Brexit. The EU confirmed and formalised this assumption that NI, if it were to become part of a United Ireland, would get automatic EU membership following negotiations with the ROI in April 2017.[80] This confirmation arguably made Sinn Féin's proposal for a United Ireland more desirable in the event of a border poll. In the aftermath of the referendum, the party has been focused on bringing about its proposal for a border poll. On the assumption that a democratic mandate exits for the poll "to provide Irish citizens with the right to vote for an end to partition and to retain a role in the EU."[81] Alternative to the border poll, Sinn Féin has been advocating for a 'special status' for NI within the EU distinct from the rest of the UK, which also implies a special constitutional status within the UK.[82] Elements of the special status include placing a border in the Irish sea to maintain a frictionless border on the island of Ireland.[83] These arrangements are similar to, but not the same as, what is provided by the Ireland / Northern Ireland Protocol (which will be discussed further in the chapter). Unsurprisingly then, Sinn Féin has been very supportive of the Protocol.

Sinn Féin's approach to Brexit has received heavy criticism from the largest Unionist party in NI, the DUP, who predictably campaigned to leave during the Brexit referendum, given their Eurosceptic nature.[84] In its leave campaign, the party engaged with the UK – wide Brexit debate over sovereignty, arguing that "Northern Ireland and the United Kingdom as a whole should take back control."[85] The party also rejected any ideas of a 'special status' for NI post – Brexit. For the DUP, a special status would isolate NI from the rest of the UK and undermine NI's constitutional position in the UK while strengthening the potential for Irish (re)unification.[86]

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[77] Agnès Maillot, 'Sinn Féin's Approach To The EU: Still More 'Critical' Than 'Engaged'?' (2009) 24 Irish Political Studies 559.
[78] Doyle and Connolly, Ibid n.5. Pp. 143
[79] Gormley-Heenan and Aughey,Ibid n. 18

[80] Denis Staunton and Pat Leahy, 'Brexit Summit: EU Accepts United Ireland Declaration' (*The Irish Times*, 2017) <https://www.irishtimes.com/news/world/europe/brexit-summit-eu-accepts-united-ireland-declaration-1.3066569> accessed 4 October 2021.

[81] Siobhan Fenton, 'Northern Ireland's Deputy First Minister Calls For Poll On United Ireland After Brexit' (*The Independent*, 2019) <https://www.independent.co.uk/news/uk/politics/brexit-northern-ireland-eu-referendum-result-latest-live-border-poll-united-martin-mcguinness-a7099276.html> accessed 2 March 2021.
[82] Gormley-Heenan and Aughey,Ibid n. 18
[83] Nigel Morris, 'Sinn Féin Calls For Northern Ireland To Have 'Special Status' Within EU' (*inews.co.uk*, 2017) <https://inews.co.uk/news/politics/sinn-fein-calls-northern-ireland-special-status-within-eu/> accessed 2 March 2021.
[84] Joe Tambini, 'Brexit News: What Does The DUP Want To Happen When The UK Leaves The EU?' (*Express.co.uk*, 2017) <https://www.express.co.uk/news/politics/888417/Brexit-news-DUP-what-want-European-Union-EU-Arlene-Foster-UK-Northern-Ireland> accessed 2 March 2021.
[85] Gormley-Heenan and Aughey, Ibid n. 18
[86] Anderson, Ibid n. 7

As highlighted further below, post – Brexit, the DUP have continued to reject any proposals that differentiate NI from the rest of the UK. As a result, the DUP has staunchly rejected the border regime established by the Ireland / Northern Ireland Protocol.

Post – Brexit referendum

Different to the other devolved territories, for an extended period during the Brexit negotiation process, there was an absence of a functioning NI devolved administration articulating the will of the people of NI. This was due to the collapse of the NI power-sharing Executive in January 2017 amid a domestic political scandal.[87] This void was worsened, given that there was an evident resurgence of identity politics highlighted by the contrasting campaign approaches of the two main political parties in the jurisdiction, who both have separate conflicting identities.[88] As put forward by Paul Whitely:

> "Identity politics involves disagreements over national, cultural, religious and ethnic differences. It can easily produce zero-sum games with one side winning and the other losing. The question of what to do about the Irish border after Brexit is a clear example of identity politics." [89]

As aforementioned, devolution in NI was collapsed during most of the Brexit withdrawal period. As a result, no NI Executive provided a voice and upheld NI's Brexit interests – similar to the role played by the other devolved Governments. Instead, influence over NI Brexit interests was exerted through Westminster. As Sinn Féin do not take their seats in Westminster, the DUP during this period was arguably the better-placed political party in NI – on the basis of exerting influence and upholding their interests on behalf of NI. In addition to this, the DUP signed a Confidence and Supply Agreement with the minority UK Government led then by Theresa May, which stipulated that the DUP would agree to "support the Government on legislation pertaining to the United Kingdom's exit from the European Union" for the period and "duration of this Parliament." [90] However, the DUP later breached this agreement and withdrew support for the UK Government within Westminster following the introduction of the Irish backstop plan.[91] As detailed later in the chapter, the party was highly critical of the backstop plan because it placed NI under a 'special status' with no time limit and a unilateral ending. At the time, the party's then-leader Arlene Foster stated that "we will not accept any form of regulatory divergence which separates Northern Ireland economically or politically from the rest of the United Kingdom."[92] Since then, the DUP has continued to reject any

[87] Murphy and Evershed, Ibid n. 13
[88] See also: Amanda Sloat, 'Explaining Brexit And The Northern Ireland Question' (*Brookings*, 2019) <https://www.brookings.edu/blog/order-from-chaos/2018/10/15/explaining-brexit-and-the-northern-ireland-question/> accessed 2 March 2021; Gormley-Heenan and Aughey, Ibid n. 18

[89] Paul Whiteley, 'Brexit And Identity Politics: The Only Way Out Is To Drop The Backstop' (*The Conversation*, 2019) <http://theconversation.com/brexit-and-identity-politics-the-only-way-out-is-to-drop-the-backstop-111394> accessed 18 March 2021.
[90] 'Confidence And Supply Agreement Between The Conservative And Unionist Party And The Democratic Unionist Party' (*GOV.UK*, 2019) <https://www.gov.uk/Government/publications/conservative-and-dup-agreement-and-uk-Government-financial-support-for-northern-ireland/agreement-between-the-conservative-and-Unionist-party-and-the-democratic-Unionist-party-on-support-for-the-Government-in-Parliament> accessed 11 April 2021. See also: Brice Dickson, 'Devolution in Northern Ireland' in Jeffery Jowell and Colm O'Cinneide (eds) *The Changing Constitution* (9th edn, Oxford University Press 2019). Pp. 264
[91]Michael Kenny and Jack Sheldon, 'When Planets Collide: The British Conservative Party And The Discordant Goals Of Delivering Brexit And Preserving The Domestic Union, 2016–2019' (2020) 69 Political Studies 965.
[92] Tambini, Ibid n. 43

proposals to the Irish border conundrum that would essentially place a border between GB and NI. As the Protocol places a border in the Irish sea, the DUP refused to offer support for it in Stormont and Westminster.

The DUP's influence during most of the Brexit withdrawal period was made controversial given that NI voted majority to remain but was now being represented by a party that campaigned to leave the EU.[93] Fortunately, tensions were partly eased following the restoration of the Executive and Assembly in January 2020. However, as detailed further in the chapter, this was short-lived, as the division over the Protocol resulted in the stalling of NI's devolution settlement. There is now a real possibility that this could end in a full collapse of NI's devolution settlement and/ or the potential for the destabilisation of the UK's Union via Irish (re)unification.[94] Undoubtedly for both sides, the opposing consequence (for the DUP, this would be Irish (re)unification, and for Sinn Féin, this would be the return to direct rule from London) is far worse than maintaining the current consociational arrangements, which provide for a 'middle ground' compromise.

Overall, Brexit and the consequential Irish border conundrum have proved to be highly continuous issues within NI – resulting in the resurgence of identity politics. Despite this, though, and as discussed further in the chapter, the UK Government has made no attempts to provide the cross-community in NI with any meaningful engagement over the matter. Instead, the UK Government, in its negotiation approach with the EU, has treated the Irish border conundrum for the most part as an exclusively UK and not a NI devolved matter. In addition, when devolved input has been sought (namely through the consent mechanism under Article 18 of the Protocol), there has been no requirement for (exclusively) cross-community consent. In all, the UK Government's approach thus far over the Irish border conundrum seems to cut across the institutionalised idea that cross-community consent is necessary for certain decisions to be legitimate in NI. As demonstrated below, the consequence of this approach has resulted in establishing a border regime (the Protocol) that has negatively impacted the stability of NI's devolution settlement.

4. In search for a new Ireland/ Northern Ireland border regime

Maintaining the status quo of the seamless Irish border was central to the Brexit withdrawal process. The two parties to the negotiation process agreed against a 'hard land border' in Ireland emerging after Brexit, with the EU first articulating this approach: "the unique circumstances on the island of Ireland require flexible and imaginative solutions...including with the aim of

[93] Etain Tannam, 'Intergovernmental And Cross-Border Civil Service Cooperation: The Good Friday Agreement And Brexit' (2018) 17 Ethnopolitics.

[94] The DUP (and the other Unionist parties) staunchly oppose the Protocol and are prepared to destabilise the devolved power-sharing in opposing the protocol. Whilst Sinn Féin (and the other Nationalist parties) support the Protocol but also continue to call for a border poll. See: Jon Tonge, 'Northern Ireland' (2022) <https://ukandeu.ac.uk/wp-content/uploads/2022/02/UKICE-British-Politics-after-Brexit.pdf> accessed 15 March 2022.

avoiding a hard border."[95] In similar vein, the UK Government called for: "devising new border arrangements that respect the strong desire…to avoid any return to a hard border and to maintain as seamless and frictionless border as possible."[96]

Alongside this, two other crucial objectives were at the centre of resolving the Irish border conundrum. The first objective was set by the EU, which was that any solution to the Irish border conundrum had to respect the integrity and indivisible nature of the EU's single market's four freedoms of goods, services, persons, and capital. The second objective was set by the UK Government, which entailed that any solution to the conundrum would have to respect the UK's territorial integrity. This objective was akin to the DUP's objective, in that NI would not be treated differently to GB, whether constitutionally or economically. Notably, the UK Government's objective was not influenced by or communicated to NI's cross-community. Rather, this objective was set in light of managing internal party-political disputes.[97] Moreover, during the negotiation process over resolving the border conundrum, the UK Government failed to engage meaningfully with the cross-community in NI. The UK Government's overall approach thus far in dealing with this issue has had detrimental impacts on NI's devolution settlement, as examined further below.

In attempts to meet the above objectives, the EU and the UK proposed several 'imaginative' solutions during the Brexit withdrawal process. From the onset, however, it became apparent that there was a significant contrast between the two objectives set by either side. For instance, in its 2018 Brexit White Paper , the UK Government tabled its first comprehensive solution – the Chequers plan.[98] The plan was advertised by the then PM Theresa May as a compromise middle position between and combining a 'hard and soft Brexit.' This is because the plan proposed a facilitated customs arrangement with the EU post – Brexit (soft) and the ending of the free movement of people, giving back the UK 'control over its borders'(hard). The UK Government formulated the Chequers plan without any consultation with the key political actors within NI. And the main motive behind the plan was to unite the two Brexit wings within May's party (unsuccessfully).[99] Nevertheless, the EU rejected the Chequers plan on the grounds that the UK's proposals to stay within the single market for goods only would go against the indivisibility nature of the EU's single market and its four freedoms.[100]

The EU's rejection of the Chequers plan highlighted the difficulty of resolving the Irish border conundrum. Thus, faced with the uncertainty over finding a feasible solution and the real threat

[95] Preben Aamann, 'European Council (Art. 50) Guidelines For Brexit Negotiations - Consilium' (*Consilium.europa.eu*, 2017) <https://www.consilium.europa.eu/en/press/press-releases/2017/04/29/euco-brexit-guidelines/> accessed 16 April 2021.

[96] 'Northern Ireland And Ireland Position Paper' (*gov.uk*, 2017) <https://assets.publishing.service.gov.uk/Government/uploads/system/uploads/attachment_data/file/638135/6.3703_DEXEU_Northern_Ireland_and_Ireland_INTERACTIVE.pdf> accessed 16 April 2021.

[97] See: Rob Howse, 'The Protocol On Ireland / Northern Ireland' in Federico Fabbrini (ed), *The Law & Politics of Brexit* (4th edn, Oxford University Press 2022).

[98] 'The Future Relationship Between The United Kingdom And The European Union (Chequers Plan)' (*GOV.UK*, 2018) <https://www.gov.uk/Government/publications/the-future-relationship-between-the-united-kingdom-and-the-european-Union/the-future-relationship-between-the-united-kingdom-and-the-european-Union-html-version> accessed 16 April 2019.

[99] Nikos Skoutaris, 'The Irish Border Conundrum' in Marcello Sacco (ed) *Brexit: A Way Forward* (Vernon Press 2019)

[100] Kat Hopps, 'Theresa May Brexit Deal: Why Has The EU Rejected The Chequers Plan?' (*Express.co.uk*, 2018) <https://www.express.co.uk/news/politics/1021017/theresa-may-brexit-deal-no-deal-news-EU-chequers-plan-northern-ireland-hard-border> accessed 16 April 2021.

of a hard border via a no–deal Brexit, the Irish backstop plan was proposed as an ‘insurance’ guarantee for ensuring the status quo of the Irish border – post-Brexit. The backstop plan was first detailed in the December 2017 joint report, which the UK agreed to sign to move negotiations forward, as the EU required sufficient progress on the withdrawal process.[101] The joint report set out a number of UK commitments which included: “Avoidance of a hard border, including any physical infrastructure or related check and controls,” and also “protecting the 1998 Agreement and its cross – border arrangements.”[102]

To ensure the UK met these commitments, the report set out a three-stage approach:

> “(1) through the overall EU – UK relationship, failing this (2) through specific solutions to address the unique circumstances of the island of Ireland, if not then (3) through full alignment with those rules of the internal market and the customs union which, now or in the future, support North – South cooperation, all – island economy and the protection of the 1998 Good Friday Agreement.”[103]

With the first two stages thus far failing, the focus shifted towards the last stage, which became known as the Irish backstop plan.[104] In its published draft Withdrawal Agreement (February 2018), the EU Commission proposed that for the backstop to be workable, NI would need to fully align with the block’s rules on the internal market and customs union, with the exemption of the rest of the UK.[105] This would mean shifting the border to the Irish sea for customs policing. This proposal was, however, rejected by the UK Government (with the strong support of the DUP) because:

> “[the proposal] would undermine the UK common market and threaten the constitutional integrity of the UK by creating a customs and regulatory border down the Irish sea, and no UK Prime Minister could ever agree to it.”[106]

Following on from this rejection, and in an attempt to overcome the impasse, both the UK and the EU put forward revised proposals of the backstop plan. The UK Government, for instance, proposed a backstop plan that would apply to the whole of the UK, which was described as a ‘single customs territory.’ The EU agreed to this proposal, and it was formally noted within the draft Brexit Withdrawal Agreement (November 2018).[107] An additional key feature of the new agreement was that once the backstop was implemented, it would only end once a future deal

[101] 'Joint Report From The Negotiators Of The European Union And The United Kingdom Government' (*europa.eu*, 2017) <https://ec.europa.eu/Commission/sites/beta-political/files/joint_report.pdf> accessed 16 April 2021.
[102] Ibid
[103] Ibid.
[104] Fabrizio Buonaiuti and Filippo Caffarelli, 'Brexit And The Irish Border Issue' (*Voxeu.org*, 2019) <https://voxeu.org/article/brexit-and-irish-border-issue> accessed 16 April 2021.
[105] 'European Commission Draft Withdrawal Agreement On The Withdrawal Of The United Kingdom Of Great Britain And Northern Ireland From The European Union And The European Atomic Energy Community.' (*Ec.europa.eu*, 2018) <https://ec.europa.eu/Commission/sites/beta-political/files/draft_withdrawal_agreement.pdf> accessed 16 April 2021.
[106]Elizabeth Piper, 'May Says EU Draft Legal Text Would Undermine The UK' (*Reutures*, 2018) <https://uk.reuters.com/article/uk-britain-eu-may-text/may-says-eu-draft-legal-text-would-undermine-the-uk-idUKKCN1GC1SA> accessed 16 April 2021.
[107] 'Agreement On The Withdrawal Of The United Kingdom Of Great Britain And Northern Ireland From The European Union And The European Atomic Energy Community' (*gov.uk*, 2018) <https://assets.publishing.service.gov.uk/Government/uploads/system/uploads/attachment_data/file/759019/25_November_Agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union_and_the_European_Atomic_Energy_Community.pdf> accessed 16 April 2021.

is agreed upon that maintained the status quo of the Irish border. Its ending could not be done unilaterally by either the UK or the EU.[108] Nonetheless, these new proposals failed to gain support within the UK Parliament, which then mandated the Government to renegotiate the backstop plan with the EU in the hope of passing the agreement through Westminster.[109]

In its approach to renegotiating the backstop plan, the UK Government set out a few proposals; a legal time limit for the backstop plan (12 months) and the ability for the UK to unilaterally exit from the backstop – concessions the DUP and the 'Brexiters' in the Conservative party supported. The EU's initial position was to indicate its unwillingness to reopen negotiations on the Withdrawal Agreement and in particular, the backstop plan.[110] However, in what can be described as an 'eleventh-hour move,' the EU offered the UK Government new proposals over the backstop plan. Most notable of the new proposals was the unilateral exit clause. The clause allowed on the one hand the ability for GB to unilaterally exit from the single customs territory. But on the other hand, continued operation of the backstop plan in NI, until the commitments the UK signed up to in the December 2017 joint report were met.[111] Unsurprisingly, the UK Government rejected the EU's proposals (supported by the DUP), as they believed that these proposals were not new but marked a "return to old arguments."[112] Their rationale was that the new proposals allowed the potential for the emergence of a NI-only backstop, which would result in a border in the Irish sea.

With the continued impasse over the Irish backstop plan and the absence of any alternative comprehensive future customs agreement with the EU, PM Theresa May duly resigned in July 2019. Her successor, Boris Johnson, pledged to scrap the backstop.[113] In a letter to the EU, he cited that the backstop plan was "anti-democratic", "inconsistent with the UK's final destination" and risked "weakening the delicate balance of the Good Friday Agreement." [114]

5. The Protocol on Ireland / Northern Ireland

The new UK Government conducted further negotiations with the EU. The output was the new Protocol on Ireland/Northern Ireland (the Protocol), attached to the revised Withdrawal Agreement in October 2019 (the Agreement).[115] To give legal effect to the Agreement, and in line with the requirement of Section 13 of the EU Withdrawal Act 2018,

[108] Michael Keating, 'Beyond The Backstop' <https://www.centreonconstitutionalchange.ac.uk/blog/beyond-backstop> accessed 16 April 2021.
[109] Buonaiuti and Caffarelli, Ibid n. 66
[110] Guntram Wolf, 'The Implications Of A No-Deal Brexit: Is The European Union Prepared?' (*Aei.pitt.edu*, 2019) <http://aei.pitt.edu/95645/1/PC-2019-02-140119.pdf> accessed 16 April 2019.
[111] Laura Hughes, 'EU Offers New Brexit Backstop Plan' (*Financial Times.com*, 2019) <https://www.ft.com/content/048107c6-41bc-11e9-b896-fe36ec32aece> accessed 16 April 2019.
[112] Jon Stone, 'EU Says Britain Can Leave Backstop But Northern Ireland Must Stay' (*The Independent*, 2019) <https://www.independent.co.uk/news/uk/politics/brexit-deal-eu-offer-uk-vote-northern-ireland-a8814491.html> accessed 19 June 2019.
[113] See: David Phinnemore, 'The Protocol On Ireland/ Northern Ireland: A Flexible And Imaginative Solution For The Unique Circumstances On The Island Of Ireland?' in Martin Westlake (ed) *Outside the EU: Options for Britain* (Agenda Publishing 2020). Pp. 168 – 169.

[114] 'Irish Backstop' (*The Institute for Government*, 2020) <https://www.instituteforGovernment.org.uk/explainers/irish-backstop> accessed 24 February 2021.

[115] Ibid n. 69

Westminster passed the EU (Withdrawal Agreement) Act 2020. However, Stormont refused to grant legislative consent for the Act.[116] In addition, none of the MPs representing NI constituencies voted in support of the Act.[117] This essentially meant that the concerns being voiced by the majority in NI were largely ignored by the Johnson Government, who no longer needed the support of the DUP in Westminster.[118]

The preamble of the Protocol outlines its purposes and aims, which are essentially (given the political sensitivities in NI) to ensure the status quo of the seamless land border on the island of Ireland after Brexit.

Concerning the movement of goods, the starting point in the Protocol is that, under article 4, NI is de jure part of the customs territory of the UK. In addition, article 6 protects the UK internal market by allowing unfettered trade for goods moving from NI to other parts of the UK's internal market. Moreover, article 7 provides that the lawfulness of placing goods on the NI market shall be governed by UK law. Prima Facie, these arrangements suggest that there would be no border between GB and NI.[119] However, given the explicit and extensive obligations contained in the Protocol and EU law made applicable to NI, the above initial propositions become contested.

Therefore, de facto, the Protocol effectively places NI (but not GB) into the EU's customs and regulatory territory.[120] For instance, the Protocol provides for the continued application in NI (on a dynamic basis) of swathes of EU law, listed in Annex 2 of the Protocol.[121] The application of these is to ensure that NI is sufficiently aligned to the acquis of the EU's internal market, thus providing for the maintenance of a seamless land border on the island of Ireland.[122] These arrangements are very similar to what was provided by the UK Government's 2018 Chequers plan for 'a combined customs territory' between the EU and the UK.[123] However, the Protocol provides that the EU Commission and the European Court of Justice will have jurisdiction in NI to enforce EU law. As a result of these arrangements, trade between GB and NI cannot be unfettered as provided by Article 6 of the Protocol, thus essentially creating a border in the Irish sea. In particular, goods moving from GB to NI would be subject to customs and other regulatory checks. In addition, formalities that apply to EU goods entering third countries will also apply to goods moving from NI to GB. This includes completing an exit declaration as provided by Regulation 952/2013 on the EU Customs Code. Ultimately, these arrangements treat NI differently from GB.[124] These arrangements came at a price for both the EU and the

[116] Emma Dellow-Perry and Raymond McCaffrey, 'Legislative Consent Motions' (*Niassembly.gov.uk*, 2020) <http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2017-2022/2020/procedures/5920.pdf> accessed 8 July 2021.

[117] Phinnemore, Ibid n. 14

[118] Phinnemore, Ibid n. 75

[119] Stephen Weatherill, 'The Protocol On Ireland / Northern Ireland: Protecting The EU'S Internal Market At The Expense Of The UK'S' (2020) 45 European Law Review 1.

[120] Garry and others, Ibid n.17

[121] Michael Dougan, 'So Long, Farewell, Auf Wiedersehen, Goodbye: The UK'S Withdrawal Package' (2020) 57 Common Market Law Review 631.

[122] Weatherill, Ibid n. 81

[123] Ibid n. 60

[124]Weatherill, Ibid n. 81

UK Government. Both sides had to make concessions on their previous red lines. For the EU, this was over their 'indivisible Heimatmarkt,'[125] and for the UK Government, acceptance for a border in the Irish sea.

Regarding the movement of people on the island of Ireland, as aforementioned, given the loss of shared EU status between the UK and the ROI, concerns arose about the future operation of the CTA and its associated rights.[126] These concerns were addressed following the agreement between the EU and the UK to allow the CTA to continue operating post-Brexit, which was recognised under Article 3 of the Protocol. Essentially, this article provides for the continuation of the CTA insofar as it does not conflict with the ROI's obligations under EU law. Aside from this, the article, however, falls short in terms of mandating how the CTA will fully operate.[127] Instead, some clarity over how the 'new' CTA will operate is provided by a combination of a binding bilateral agreement and a number of political commitments signed between the Irish and UK Governments. This includes the Convention on Social Security (concerning the coordination of social security benefits) signed in February 2019,[3] the Memorandum of Understanding (concerning the CTA and associated reciprocal rights and privileges) concluded in May 2019[128] the Memorandum of Understanding (concerning the CTA and associated reciprocal rights and privileges) concluded in May 2019,[129] and the Memorandum of Understanding (concerning the Education Principles associated with the CTA) concluded in July 2021.[130]

In relation to its applicability, the Protocol automatically entered into force at the end of the transition period (1 January 2021). Moreover, under article 13(8), the Protocol can only be superseded (in whole or part) following any subsequent agreement between the EU and the UK Government. In addition, under Article 18, the devolved institutions in NI will periodically be asked to consent to the arrangements of the Protocol (particularly Articles 5 to 10) for as long as they still apply. This is known as the consent mechanism.[131] The first time NI will be asked to consent to the Protocol's border regime will be at the end of 2024 (four years from the date

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[125] 'Speech By Michel Barnier On German Employers' Day (Deutscher Arbeitgebertag) 2017' (*Europa.eu*, 2017) <http://europa.eu/rapid/press-release_SPEECH-17-5026_en.htm> accessed 16 April 2021.

[126] Imelda Maher, 'The Common Travel Area', in Christopher McCrudden (ed), *The Law And Practice Of The Ireland-Northern Ireland Protocol* (Cambridge University Press 2022). Pp. 173

[127] Sylvia de Mars and Collin Murray, 'With Or Without EU? The Common Travel Area After Brexit' (2020) 21 German Law Journal 815.

[128] 'Convention On Social Security Between The Government Of The United Kingdom Of Great Britain And Northern Ireland And The Government Of Ireland' (*gov.uk*, 2019) <https://assets.publishing.service.gov.uk/Government/uploads/system/uploads/attachment_data/file/778087/CS_Ireland_1.2019_Soc_Sec.pdf> accessed 22 July 2021.

[129] 'Memorandum Of Understanding Between The Government Of The United Kingdom Of Great Britain And Northern Ireland And The Government Of Ireland Concerning The Common Travel Area And Associated Reciprocal Rights And Privileges' (*gov.uk*, 2019) <https://assets.publishing.service.gov.uk/Government/uploads/system/uploads/attachment_data/file/800280/CTA-MoU-UK.pdf> accessed 22 May 2021.

[130] See 'Irish Government Press Release 14 July 2021' (*Gov.ie*, 2021) <https://www.gov.ie/en/press-release/f107e-ministers-foley-and-harris-welcome-uk-secretary-of-state-williamson-to-dublin/> accessed 22 January 2022.

[131] Gordon Anthony, 'The Protocol in Northern Ireland Law', in Christopher McCrudden (ed), *The Law And Practice Of The Ireland-Northern Ireland Protocol* (Cambridge University Press 2022). Pp. 124

the Protocol took effect). The Protocol also provides that it is for the UK Government to unilaterally seek consent. As a result, the UK Government published a declaration highlighting how the consent procedure would operate. The declaration states that consent will be provided if a simple majority of the MLAs in Stormont vote in favour. This will allow for an extension of four years before another vote. If consent is granted on a majority cross-community basis, then consent will only be sought again after eight years. If consent is not provided, the Protocol's border regime will cease to apply after two years, in which the EU and the UK through the Joint Committee (JC) established by the Agreement, will propose alternative solutions.[132] The legal outworking of the declaration is the Protocol on Ireland/Northern Ireland (Democratic Consent Process) (EU Exit) Regulations 2020, which amend the Northern Ireland Act 1998, by inserting a new schedule - schedule 6A.

Article 16 can also alter the application of the Protocol. This provision provides both the UK and the EU the power to take temporary unilateral measures known as 'safeguards' in the event that the Protocol will give rise to serious economic, societal or environmental difficulties that are liable to persist or to diversion of trade. The scope of the unilateral measure(s) taken is limited to address specific issues and not unrelated ones. Annex 7 of the Protocol outlines the process of what happens in the instance that a safeguard measure has been taken. Before the measure is taken, without any delay, the UK or the EU should notify the other through the JC. Immediate talks between the two parties will begin, with the view of finding a commonly acceptable solution. Subject to exceptional circumstances, a safeguard measure cannot be enacted until either the talks are concluded or not after one month from the date of notification. If the safeguard measure is adopted, it will be subject to a 3-month interval JC review, with the intention to cease its application. Article 16 also provides for the EU or the UK to take proportionate rebalancing measures if one party adopts a safeguard. These measures are also reviewed every 3 months by the JC.[133]

In relation to the future of devolution in NI, the arrangements within the Protocol have the potential to establish a problematic asymmetrical regime. For instance, the protocol provides for the continued application in NI (on a dynamic basis) of swathes of EU law. Given this, the Protocol offers the potential for NI's devolution settlement to become more dynamic since competences might have to be devolved to Stormont to ensure that NI keeps pace with EU law developments. In efforts to maintain and protect a GB internal market, Wales and Scotland face barriers to exercising similar powers, as evidenced in chapter 6. The Protocol also has the potential to result in the complete destabilisation of NI's devolution settlement, given the lack of cross-community support. A more detailed analysis on this will be discussed in the next section of this chapter.

Overall, the Protocol ensures the maintenance of the seamless nature of the Irish land border and, therefore, can be regarded "as a flexible and imaginative solution to address the challenges posed by the UK's withdrawal from the EU to the 'unique circumstances' on the island of

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[132] 'Declaration By Her Majesty's Government Of The United Kingdom Of Great Britain And Northern Ireland Concerning The Operation Of The 'Democratic Consent In Northern Ireland' Provision Of The Protocol On Ireland/Northern Ireland' (*gov.uk*, 2020) <https://assets.publishing.service.gov.uk/Government/uploads/system/uploads/attachment_data/file/840232/Unilateral_Declaration_on_Consent.pdf> accessed 8 March 2021.

[133] Claire Rice, 'Article 16 Of The Northern Ireland Protocol' (*UK in a changing Europe*, 2021) <https://ukandeu.ac.uk/explainers/article-16-of-the-northern-ireland-protocol/> accessed 8 July 2021.

Ireland."[134] However, as analysed below, this solution bears great implications that question its long-term viability.

5.3. The need for a way forward: Challenges to the longevity of the Protocol

The EU has long stressed that the border regime established by the Protocol should be treated as permanent.[135] However, the Protocol faces two main challenges that bring into question, its longevity. These challenges are, first, the weakened relationship of trust and partnership between the EU and the UK over the implementation of the Protocol. And second, the lack of cross community support in NI for the Protocol. In this section, these challenges will be contextualised through the exploration of several episodes. Through this exploration, the section will come to a conclusion that these two challenges provide strong evidence that the current status quo is increasingly becoming untenable, therefore, there is now a need to recognise and adopt a new way forward in regard to addressing the Irish border conundrum.

The weakening of trust and partnership between the EU and the UK.

Trust and partnership between the EU and the UK over the implementation of the Protocol were first undermined when the UK Government introduced the UK Internal Market Bill (now UK Internal Market Act 2020). This Bill challenged the longevity of the Protocol before it even came into force.[136] As detailed in chapter 6, the Bill set out, amongst other things, the legal framework of the UK internal market after the end of the transition period, based on the trade law market access principles of mutual recognition and non – discrimination. When introduced, part 5 of the Bill touched upon the interaction of the UK internal market and the Protocol. Clauses 44, 45 and 47 were controversial because they allowed the UK Government to breach the Protocol unilaterally.[137] For example, through secondary legislation, clauses 44 and 45 empowered UK Ministers to make regulations that waive customs procedures and state aid rules, which could potentially apply in NI through the Protocol. Clause 47 asserted that regulations made under clauses 44 and 45 were immune from any legal challenge, as they would have effect notwithstanding any incompatibility with other domestic law or international law (including the Protocol).[138] The SoS for NI, in an address to the HoC, confirmed that the provisions within the Bill breached international law but characterised the breach as "only in a

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[134] Phinnemore, Ibid n. 75

[135] 'Remarks By Chief Negotiator Barnier At The Press Conference On The Commission Recommendation To The European Council To Endorse The Agreement Reached On The Revised Protocol On Ireland/Northern Ireland And Revised Political Declaration' (*European Commission*, 2019) <https://ec.europa.eu/Commission/presscorner/detail/en/SPEECH_19_6125> accessed 8 July 2021.

[136] Daniel Wincott, Collin Murray and Gregory Davies, 'The Anglo-British Imaginary And The Rebuilding Of The UK'S Territorial Constitution After Brexit - Unitary State Or Union State?' (2021) 9 Territory, Politics, Governance 696.

[137] Federico Fabbrini and Giovanni Zaccaroni, 'The Future EU-UK Relationship: The EU Ambitions For A Comprehensive Partnership' (2020) 11 Brexit Institute Working Paper Series.

[138] Kieron Beal, 'The UK'S Withdrawal From The EU And The UK'S Internal Market Bill' (*Just Security*, 2020) <https://www.justsecurity.org/72970/the-uks-withdrawal-from-the-eu-and-the-uks-internal-market-bill/> accessed 8 July 2021

specific and limited way."[139] The UK Government justified these provisions on the basis that they were more of an insurance policy/safety net. The UK Government also took the opportunity to confirm that they would use similar tactics to disapply elements of the Protocol in the Taxation Bill.[140] The EU Commission President von der Leyen considered the Bill to be in breach of international law, as it betrayed the principles of good faith listed under Article 5 of the Agreement.[141] As a result, the EU launched legal proceedings against the UK Government.[142] Following this episode, questions arose about the viability of implementing the Protocol after the transition period, considering the UK's willingness to breach it. Nonetheless, tensions between the UK and the EU on this matter were soothed following an agreement reached by the JC.[143] The significant outworking of the agreement involved the UK Government dropping the controversial clauses above from the UKIM Bill and the commitment not to introduce similar provisions in the Taxation Bill. Essentially, the agreement allowed for the implementation of the Protocol to be realised after the end of the transition period.

The longevity of the Protocol was also threatened following the EU's intentions to invoke Article 16 of the Protocol, and introduce controls (hard land border) on Covid vaccines entering NI from the EU. The EU's rationale behind the need to introduce this safety measure was to avoid "serious societal difficulties due to a lack of supply threatening to disturb the orderly implementation of the vaccination campaigns in the Member States." [144]

In setting out its intentions to trigger Article 16, the EU failed to respect or follow the process stipulated under Annex 7 of the Protocol. Which, in this instance, would have required the EU to have given prior notification to the UK Government through the JC which they failed to do. In addition, they acted without consulting the Irish Government.[145] In a rare feat, there was a united front to oppose the EU's intentions to trigger Article 16 by both Nationalist and Unionist parties in NI and the UK and ROI Governments. The then DUPs leader, and NI's First

[139] 'Northern Ireland Protocol: UK Legal Obligations - Volume 679: Debated On Tuesday 8 September 2020' (*Parliament.uk*, 2020) <https://hansard.Parliament.uk/commons/2020-09-08/debates/2F32EBC3-6692-402C-93E6-76B4CF1BC6E3/NorthernIrelandProtocolUKLegalObligations> accessed 7 December 2021.

[140] Katy Hayward, 'The Internal Market Bill And Northern Ireland: Where It Comes From And What It Might Mean.' (*UK in a changing Europe*, 2020) <https://ukandeu.ac.uk/explainers/the-internal-market-bill-and-northern-ireland-where-it-comes-from-and-what-it-might-mean/> accessed 8 March 2021.

[141] Katy Hayward, 'How Does The UK Internal Market Bill Relate To Northern Ireland?' (*LSE Brexit*, 2020) <https://blogs.lse.ac.uk/brexit/2020/10/19/how-does-the-uk-internal-market-bill-relate-to-northern-ireland/> accessed 8 July 2021.

[142] 'Withdrawal Agreement : European Commission Sends Letter Of Formal Notice To The United Kingdom For Breach Of Its Obligations' (*European Commission*, 2020) <https://ec.europa.eu/Commission/presscorner/detail/en/ip_20_1798> accessed 8 July 2021.

[143] 'Joint Statement By The Co-Chairs Of The EU-UK Joint Committee' (*European Commission*, 2020) <https://ec.europa.eu/Commission/presscorner/detail/en/statement_20_2346> accessed 8 March 2021.

[144] John Campbell, 'Brexit: EU Introduces Controls On Vaccines To NI' (*BBC News*, 2021) <https://www.bbc.co.uk/news/uk-northern-ireland-55864442> accessed 8 July 2021.

[145] Jess Sergeant, 'The Article 16 Vaccine Row Is Over – But The Damage Has Been Done' (*InstituteforGovernment.org.uk*, 2021) <https://www.instituteforGovernment.org.uk/blog/article-16-vaccine-row> accessed 8 March 2021.

Minister, Arleen Foster, described the EU's intentions as an "incredible act of hostility."[146] As a result of this joint condemnation, the EU soon backtracked on its intentions to invoke Article 16, stating that it was an oversight and "leaving only embarrassment for the Commission and a general sense of Europe's lack of goodwill and insensitivity to Ireland."[147] Despite the row being concluded, the damage had already been done – it was now clear that both sides did not trust each other over implementing the Protocol.

In December 2020, the EU agreed to the UK Government's request to "temporarily suspend the full application of EU law to NI that mandated checks and controls in several parts of the Protocol." [148] The short-term relaxation of some rules meant to apply in NI under the Protocol are often referred to as grace periods. In March 2021, the UK Government announced that they would be unilaterally extending the grace period for health certificates for animal products moving from GB to NI. Since then, the Government have continued to extend the deadlines for every grace period thus far unilaterally.[149] Their objective seems to be to extend these grace periods indefinitely – which would effectively reduce the 'hard sea border' part of the Protocol. With each unilateral extension, trust and partnership over the protocol have been further diminished. For example, when the UK extended the grace periods in March 2021, the EU stated that this marked the second time the UK was set to breach the principles of good faith listed under Article 5 of the Agreement (thus breaching international law). The EU also confirmed that they would launch legal proceedings against the UK.[150] In addition to this, the EU Parliament decided to postpone the ratification of the EU-UK free trade agreement – the Trade and Cooperation Agreement (TCA), which was concluded and then ratified by the UK in December 2020 (under the European Union (Future Relationship) Act 2020).

Beyond the unilateral extensions, the UK Government have increasingly become more explicit in their opposition to the Protocol in its current form, deeming it 'unsustainable.'[151] This was evidenced in July 2021, when the UK Government published a command paper titled 'Northern Ireland Protocol: the way forward.'[152] The two central arguments against the Protocol in the paper were, first, the Protocol in its current form was straining community relations in NI. In this instance, the UK Government was referring to the Unionist's opposition to the Protocol. The second objection was based on the assumption that the EU played a significant role over

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[146] Jamie Pow, 'The DUP And The Protocol' (*UK in a changing Europe*, 2021) <https://ukandeu.ac.uk/the-dup-and-the-protocol/> accessed 8 March 2021.

[147] Howse,Ibid n. 59

[148] John Curtis, 'Northern Ireland Protocol: Implementation, grace periods and EU – UK discussions (2021 – 22)' (*parliament.uk*, 2022) <https://researchbriefings.files.parliament.uk/documents/CBP-9333/CBP-9333.pdf> accessed 10 December 2022.

[149] David Torrance and others, 'Northern Ireland Protocol' (*parliament.uk*, 2022) <https://commonslibrary.parliament.uk/research-briefings/cbp-9548/> accessed 16 June 2022.

[150] 'Statement By Vice-President Maroš Šefčovič Following Today's Announcement By The UK Government Regarding The Protocol On Ireland / Northern Ireland' (*European Commission*, 2021) <https://ec.europa.eu/Commission/presscorner/detail/en/STATEMENT_21_1018> accessed 8 July 2021.

[151] Christopher McCrudden C, *The Law And Practice Of The Ireland-Northern Ireland Protocol* (Cambridge University Press 2022). Pp. Xlii

[152] 'Northern Ireland Protocol: The Way Forward' (*gov.uk*, 2021) <https://assets.publishing.service.gov.uk/Government/uploads/system/uploads/attachment_data/file/1008451/CCS207_CCS0721914902-005_Northern_Ireland_Protocol_Web_Accessible__1_.pdf> accessed 7 December 2021.

the Protocol through the ECJ's enforcement role and the application in NI (on a dynamic basis) of swathes of EU law. Overall, for the UK Government, both objections undermined UK sovereignty. Thus, to overcome these objections and make the Protocol more 'sustainable,' the paper sets out the UK Government's vision for the way forward. The key proposals in the paper included the request (via an agreement with the EU) to implement a 'standstill' on the arrangements that existed at the time such as maintaining the grace periods. This was part of the overall UK Government objective of removing the burdens of trade in goods within the UK. As put forward by the paper, these burdens, which include the 'diversion of trade' (disruption of trade between GB and NI and the significant increase of trade on the island of Ireland), provide reasonable grounds for unilateral action and the use of Article 16 (hence why the grace periods should be maintained to avoid this). The paper also proposed enhancing the consultative role of the NI administration, civic society and businesses in a rebalanced settlement. For the UK Government, these proposals would help mitigate the first objection. To mitigate the second objection, the paper proposed removing the European Court of Justice's (CJEU) enforcement role and the request to pause the existing legal action over the Protocol. Overall, these proposals essentially sought fundamental changes to be made to the Protocol, which the UK Government deemed required renegotiation, without presenting evidence as to why other resolution mechanisms were inadequate such as the JC. Thus, despite the titular 'way forward,' the paper seemed to be taking giant steps back to the negotiating table.[153]

In response to the command paper, the EU decided to honour the UK Government's request to halt legal proceedings on the basis of creating "necessary space" to "consider any proposals that respect the principles of the deal." Furthermore, the EU also offered the UK Government some concessions that would reduce checks on the Irish sea border.[154] However, for the UK Government, these concessions did not go far enough to meet the objectives set in the command paper. As a result, negotiations reached an impasse.

Given the fruitless negotiations with the EU, the UK Government decided to take matters into its own hands in June 2022, when it introduced plans for domestic legislation that would bring some unilateral changes to the operation of the Protocol as enacted under the EU (Withdrawal Agreement) Act 2020. This proposed legislation, the Northern Ireland Protocol Bill (as introduced), provided that large and significant parts of the Protocol were to be treated as excluded provisions, which means that that these provisions have no domestic legal effect. This included, for instance, the movement of goods between GB and NI (clause 4), state aid rules (clause 12), and the jurisdiction and enforcement role of the CJEU (clause 13). Moreover, clauses 5,6 and 9 of the Bill empowered UK Ministers to pass secondary legislation they consider appropriate in connection with the Protocol, including in place of excluded provisions. In addition, Clause 15 empowered UK Ministers to make changes to and exceptions from excluded provisions. As a result, a UK Minister could make any provision within the Protocol

[153] Katy Hayward, 'Protocol On Ireland/Northern Ireland And The New Command Paper' (*UK in a changing Europe*, 2021) <https://ukandeu.ac.uk/command-paper/> accessed 9 December 2021.
[154] 'Protocol On Ireland/ Northern Ireland Position Paper On Possible Solutions' (*Ec.europa.eu*, 2022) <https://ec.europa.eu/info/system/files/protocol_on_ireland_northern_ireland_-_position_paper_on_possible_solutions_-_customs.pdf> accessed 16 June 2022.

an excluded provision.[155] Furthermore, the UK Minister could exercise this power whenever they deemed it necessary for any of the 'permitted purposes,' which included:

'15(1)(a) safeguarding social or economic stability in Northern Ireland; (b) ensuring the effective flow of trade between (i) Northern Ireland and another part of the United Kingdom, or (ii) a part of the United Kingdom and anywhere outside the United Kingdom; (c) safeguarding the territorial or constitutional integrity of the United Kingdom;(d) safeguarding the functioning of the Belfast Agreement.'

As outlined by the abovementioned provisions, the Bill has the overall effect of amending and overriding significant parts of the operation of the Protocol as enacted under the EU (Withdrawal Agreement) Act 2020. The proposals in the Bill also contradict Article 4 of the Withdrawal Agreement, which states that UK domestic law must be in compliance with the Agreement/ EU law. Despite this clear breach of international law, the UK Government argued that this Bill could be justified under two legal basis - article 16 of the Protocol and the doctrine of necessity found in customary international law.[156] As thoroughly analysed by Araujo, the UK Government's justifications are difficult to validate. For instance, concerning the first justification, Araujo argues that the Bill would not satisfy the conditions for invoking Article 16. To support this, he points out that given that the Bill unilaterally removes the central components of the Protocol, it would be very difficult for any adjudicative body to conclude that the Bill's regulatory framework would constitute "the least restrictive means to remedy the economic and societal difficulties which result from the checks on East – West trade in goods." He further adds that some of the changes envisioned by the Bill do not link to any of the grounds under article 16, such as the state aid rules and the removal of the CJEU's enforcement role.[157] Moving on to the UK Government's second justification, as provided by Article 25 of the International Law Commission's 2001 Articles on State responsibility:

> "Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (*a*) is the only way for the State to safeguard an essential interest against a grave and imminent

[155] For a more detailed analysis of the Bill, see; Dheemanth Vangimalla, 'The Northern Ireland Protocol Bill: Delegated Powers' (*Hansard society*, 2022) <https://assets.ctfassets.net/n4ncz0i02v4l/1CsSPKO7FU7cSlQoaZGsuc/29e3be7273456aa79c41f602a25c744e/Hansard_Society_Northern_Ireland_Protocol_Bill_Briefing_June_2022.pdf> accessed 27 June 2022 ; Mark Elliottt, 'The Northern Ireland Protocol Bill' (*Public Law for Everyone*, 2022) <https://publiclawforeveryone.com/2022/06/13/the-northern-ireland-protocol-bill/> accessed 16 June 2022; Katy Hayward, 'The Northern Ireland Protocol Bill : "By Necessity"' (*UK in a changing Europe*, 2022) <https://ukandeu.ac.uk/northern-ireland-protocol-bill/> accessed 16 June 2022.

[156] 'Northern Ireland Protocol Bill: UK Government Legal Position' (*Gov.uk*, 2022) <https://www.gov.uk/government/publications/northern-ireland-protocol-bill-uk-government-legal-position/northern-ireland-protocol-bill-uk-government-legal-position> accessed 16 June 2022.

[157] Billy Araujo, 'An analysis of the UK Government's defence of the Northern Ireland Protocol Bill under international law' (2022) 73 Northern Ireland Legal Quarter 89, 103.

> peril; and (*b*) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole."[158]

In light of the above, the necessity doctrine seems to set a very high threshold. Both Araujo,[159] and Elliott [160] agree that the Bill falls short in meeting this high threshold, especially since the Bill "hollows out much of the Protocol and replaces it with an entirely different regulatory framework…. [essentially] the Bill seems like an attempt by the UK to unilaterally rewrite its international obligations under the pretext of necessity." [161]

Nevertheless, there is still the possibility that the Bill will not be enacted. Similar to the abovementioned provisions of the UKIMB, this Bill may be no more than a threat in the hope that the EU will make substantive concessions rather than a foregone conclusion. In response to the Bill, the EU stated that it would not renegotiate the Protocol and that the proposed legislation raised significant concerns. Moreover, the EU noted that it would respond to this unilateral action in a 'proportionate manner.' Thus far, the EU has 'unfrozen' the infringement procedure it launched against the UK in March 2021 and launched two new infringement procedures against the UK.[162] Additionally, given that the Withdrawal Agreement was a pre-condition for the negotiation of the TCA, the EU could suspend the TCA through Article 521 or scrap the agreement entirely through Article 779.[163] Regardless of the measure(s) the EU decides to adopt, this episode exacerbates the constitutional, political and economic uncertainty in NI. [164]

The lack of cross community support in NI for the Protocol.

As aforementioned above, the Irish border conundrum resulted in the resurgence of identity politics in NI. [165]This was further evidenced, to some extent, following the introduction of the Protocol. The Nationalist parties in NI, including Sinn Féin, support this border regime. Whilst the DUP, and other Unionist parties staunchly oppose it. As highlighted by the episodes below, the Unionist opposition to the Protocol, which the DUP has spearheaded, has consistently challenged the longevity of the Protocol and more significantly, the stability of devolution in NI.

In most of these episodes, Unionist opposition to the Protocol has focused mainly on applying pressure on the UK Government to revert the Protocol. For instance, following the intentions

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[158] 'Yearbook Of The International Law Commission, 2001, Volume II' (*UN.org*, 2001) <https://legal.un.org/ilc/publications/yearbooks/english/ilc_2001_v2_p2.pdf> accessed 16 June 2022.

[159] Araujo, Ibid n. 119

[160] Mark Elliottt, 'The Northern Ireland Protocol Bill' (*Public Law for Everyone*, 2022) <https://publiclawforeveryone.com/2022/06/13/the-northern-ireland-protocol-bill/> accessed 16 June 2022

[161] Billy Araujo, 'An analysis of the UK Government's defence of the Northern Ireland Protocol Bill under international law' (2022) 73 Northern Ireland Legal Quarter 89.

[162] Ibid n. 120

[163] 'Statement By Vice-President Maroš Šefčovič On The UK Government's Decision To Table A Bill Disapplying Core Elements Of The Protocol On Ireland/Northern Ireland' (*EU Commission*, 2022) <https://ec.europa.eu/commission/presscorner/detail/en/statement_22_3698> accessed 16 June 2022.

[164] Katy Hayward, 'The Northern Ireland Protocol Bill : "By Necessity"' (*UK in a changing Europe*, 2022) <https://ukandeu.ac.uk/northern-ireland-protocol-bill/> accessed 16 June 2022.

[165] Whiteley, Ibid n. 48

of the EU to invoke Article 16 of the Protocol, the DUP intensified their requests to the UK Government to either invoke Article 16 or remove the Protocol entirely. They also published a five-point plan in an attempt to undermine the Protocol.[166] The plan, amongst other things, reminded that the Protocol was not approved by most NI politicians, both in Stormont and Westminster. In addition, the plan proposed that the UK Government should free NI from the Protocol and its problems by replacing it or unilaterally triggering Article 16 of the Protocol to ensure unfettered GB – NI trade.[167]

The sustained Unionist pressure did work to some extent, as exemplified by the UK Government's continued unilateral extensions of the grace periods. And more explicitly, through the UK Government's command paper published in July 2021, which aimed to appease the Unionists in NI. As previously mentioned, central to the command paper's proposals was improving community relations in NI, which would involve overcoming some of the Unionist's red lines, which included removing the 'hard border' between GB and NI. The command paper's proposals did not go far enough to convince the Unionists. In reaction to the paper, the leaders of the four main Unionist parties in NI (the DUP, UUP, PUP, and TUV) signed a declaration affirming their opposition to the Protocol and the need to replace it entirely. Their reasoning behind signing the declaration was that the Protocol does not respect NI's position as a constituent part of the UK.[168]

Another significant episode occurred in early February 2022, when the DUP agriculture minister, Edwin Poots, unilaterally halted agricultural food checks on the Irish sea border – effectively breaching the Protocol. This episode was stark, as it marked a diversion from the common Unionist practice of applying pressure on the UK Government from a 'passive' to a more 'active' role. In the immediate aftermath of the declaration, a legal question arose over whether the Minister had the competences to act in such a way. The UK Government's stance on this was that the declaration fell within the Minister's legal remit. [169] The EU disagreed with the UK Government's position, arguing instead that the UK Government have full responsibility to ensure that the obligations under the Protocol are being fulfilled.[170] The rationale for the EU's position stems from the reading of section 26 of the NI Act 1998, which provides that international treaties and obligations are a matter for the UK Government. Thus, when a NI Minister proposes an action that goes against international obligations, the SoS should nullify the action. In addition to this, under Article 5, paragraph 2 of the Withdrawal Agreement, the UK Government is responsible for ensuring that the obligations under the

[166] John Curtis, 'Northern Ireland Protocol: Article 16' (*Researchbriefings.files.Parliament.uk*, 2021) <https://researchbriefings.files.Parliament.uk/documents/CBP-9330/CBP-9330.pdf> accessed 12 December 2021.

[167] 'DUP - free us from Protocol' (*DUP*, 2021) <https://mydup.com/news/dup-free-us-from-protocol> accessed 8 July 2021.

[168] 'Joint Unionist Declaration In Opposition To The Northern Ireland Protocol' (*DUP.com*, 2021) <https://mydup.com/news/joint-Unionist-declaration-in-opposition-to-the-northern-ireland-protocol> accessed 9 December 2021.

[169] 'Lewis: UK Will Not Get Involved In Halting Brexit Agri-Food Checks' (*ITV*, 2022) <https://www.itv.com/news/utv/2022-02-02/poots-orders-halt-to-brexit-agri-food-checks-at-ni-ports> accessed 16 June 2022.

[170] This episode added a further blow to the already fractured relationship of trust and partnership between the EU and the UK over the implementation of the protocol, as the UK Government were allowing for the breach of international law (again!).

Protocol are being fulfilled. When the High Court of NI heard the question of whether Poots' declaration was within competence, an interim order was issued, suspending Poots' decision. In December 2022, the High Court issued its final decision, stating that Poots had acted unlawfully. As the Minister and his department are under a legal statutory obligation to implement the checks, as provided under section 7a of the EU Withdrawal Act 2018 read with the provisions of the Protocol and Regulation (EU) 2017/625.[171]

Soon after Poots' decision, DUP First Minister Paul Givan resigned in protest against the Protocol. This then put into question the functioning of the devolved institutions in NI. In particular, the NI shared Executive, as Givan's resignation automatically translated into the removal of Michelle O'Neil as deputy First Minister – bringing a collapse to the Executive. The NI Executive remained collapsed heading into the May 2022 Stormont elections.

Arguably, the most significant episode thus far (in terms of implications on devolution) came following the historic May 2022 Stormont elections, whereby a Nationalist party, Sinn Féin, for the first time ever, returned as the largest party at Stormont with 27 MLA's. This meant that Sinn Féin could nominate a candidate for First Minister, and the DUP, who came second, could nominate a candidate for deputy First Minister. In the immediate reaction to the election result, the DUP stated that they would continue to impose a block on forming a new Executive until their concerns over the Protocol were resolved. As a result, the devolved political institutions in NI became paralysed, as no business could be conducted.[172] As laid out by the provisions within the Northern Ireland (Ministers, Elections and Petitions of Concern) Act 2022, the SoS for NI must call for an election in the event whereby, following four six-week periods since an election, there has been no Executive formed. As a result of the DUP's refusal to form an Executive, the 24–week statutory deadline ran out on the 24th of October 2022. Rather than calling for an election, in December 2022, the Northern Ireland (Executive Formation etc) Act 2022 was enacted to extend the period the SoS may call for an election – the 19th of January, 2023. It is expected that this time period will run out too. When an election is finally called, it could be predicted that the election campaign will only serve to deepen divisions further. The DUP have voiced that any new election will be used as a way to refresh and renew their mandate to continue blocking the formation of an Executive.[173] Ultimately then, devolution in NI is heading towards indefinite paralysis, with no clear end in sight. In addition, this episode also highlights that the continued DUP and Unionist opposition to the Protocol has a great potential to result in the full collapse of devolution in NI - reaffirming the unstable character of devolution in the jurisdiction.

The above episodes provide strong evidence for the need for a new way forward, as the operation of the Protocol in its current form is increasingly becoming untenable – risking the potential for the emergence of a hard border in Ireland. The episodes have also revealed that the EU and the UK seem to be in a vicious cycle where an absence of trust encourages a combative approach, and that combative approach helps undermine trust. What is then left is

[171] In the matter of an application by JR181(3) and in the matter of decisions made by the Minister for the department for Agriculture, Environment, and Rural affairs.

[172] For a thorough analysis of the election, see: Jon Tonge, 'Voting into a void? The 2022 Northern Ireland Assembly Election' (2022) 93 The Political Quarterly 524.

[173] Christopher Leebody, 'DUP will fight looming election to 'renew mandate' over replacing the Northern Ireland Protocol' (*Belfast telegraph*, 2022) <https://www.belfasttelegraph.co.uk/news/politics/dup-will-fight-looming-election-to-renew-mandate-over-replacing-the-northern-ireland-protocol-42097086.html > accessed 20 December 2022.

the contrasting objectives of the UK (defend its Sovereignty) and the EU (preserve the internal market) clashing within ‘the crucible of NI.’[174] Ultimately, trust and partnership over the implementation of the Protocol have certainly been destabilised. If the Protocol is to survive, the trust and partnership must be rebuilt, especially because other challenges and issues over the Protocol are to be expected. For instance, NI is required by the Protocol to keep pace with EU law developments, but complications over this will arise over time as the EU and UK statute books diverge.[175] With the continued scrutiny over the functioning of the Protocol and the need to avoid a hard border, the EU and the UK might need to soon source for a new ‘imaginative’ border regime in Ireland. In a few years, NI will vote on the Protocol’s continued operation under Article 18. However, given the current political climate, whereby there is no cross-community support for the Protocol in NI, it wouldn’t be surprising if Stormont chooses not to consent. More significantly, given the continued DUP resistance to the Protocol, there is a great risk that devolution in NI could have collapsed by the time of the vote – raising further constitutional questions.

5.4. Crossing divides: A potential way forward of addressing the challenges to the Protocol

As discussed above, if the Protocol is to survive long term, then two challenges need to be addressed - first, the weakening of trust and partnership between the EU and the UK over implementing the Protocol. And secondly, the lack of cross-community support in NI for the Protocol, as the two main political parties are divided over its operation – resulting in the current paralysis of NI’s power-sharing devolved institutions. A strong argument exists in proposing that one possible way of addressing both challenges is to establish a direct and meaningful role and voice for the cross-community in NI over the implementation and operation of the Protocol and, more broadly, the negotiations surrounding the future of the Irish border. In this instance, a ‘direct and meaningful role’ refers to the ability to participate in the decision-making process. Domestically, the UK Government control the decision-making process over the Protocol. Therefore, through intergovernmental channels, the NI Executive would be responsible for exercising this direct and meaningful role. In this instance, the ‘voice for the cross community’ refers to providing formal and procedural mechanisms in which the thoughts of all communities in NI over the Protocol are debated and considered, hoping to secure cross-community support. These mechanisms fit in with the key functions of Stormont; therefore, this institution would be tasked with this role. As analysed further below, this solution would allow for a reset of relations between the EU and the UK with regard to the Protocol and (attempt to) secure cross-community support over this conundrum. Achieving this, however, would require constitutional reforms to be made to the IGR framework within the UK and NI’s devolved competences.

[174] Sydney Nash, 'Forging A New Relationship In The Crucible Of Northern Ireland: Why The UK Needs The EU To Trust It' (*LSE Brexit*, 2021) <https://blogs.lse.ac.uk/brexit/2021/03/10/forging-a-new-relationship-in-the-crucible-of-northern-ireland-why-the-uk-needs-the-eu-to-trust-it/> accessed 11 March 2021.

[175] This policy divergence would generate more extensive trade barriers between GB and NI. See for example: Jess Sergeant, 'The Article 16 Vaccine Row Is Over – But The Damage Has Been Done' (*InstituteforGovernment.org.uk*, 2021) <https://www.instituteforGovernment.org.uk/blog/article-16-vaccine-row> accessed 8 March 2021.

Both the EU[176]and the UK Government [177] have voiced their willingness to enhance the consultative involvement of the devolved institutions in NI (and other stakeholders in NI) in shaping the Protocol. In particular, regarding the legislation that would be applicable in NI as a result of the Protocol. This willingness has, in part, been provided under the Protocol, which allows the NI devolved authorities to be invited to and participate in the JC and the Joint Consultative Working Group (JCWG) meetings. Article 15 of the Protocol establishes the latter body, which is comprised of representatives from both the EU and the UK, including NI authorities. Its purpose is to 'serve as a forum for the exchange of information and mutual consultation'. Unlike the JC, the JCWG provides NI authorities with much more direct involvement. The platform allows them to directly share, exchange, and consult information with the EU, specifically on newly proposed EU laws relevant to the Protocol. However, in contrast to the JC, the JCWG cannot make legally binding decisions. Therefore, it acts simply as a forum in which NI authorities can report their interests directly to the EU.[178] Therefore, if the NI Executive/authorities are to have any real influence over the operation of the Protocol, then they need direct and meaningful involvement in the JC. Allowing for this, however, is primarily down to the UK's constitutional order, as the UK Government have complete responsibility for coordinating the work of the JC on the UK's part.[179]

As examined in greater detail in chapter 7, intergovernmental interactions in the UK occur in a number of formal and informal structures and processes for bilateral and multilateral agreements at both vertical (involving the centre) and horizontal (between the constituent units) levels. Examples of these channels of interaction include the Prime Minister and Heads of Devolved Governments Council, Interministerial Groups (IMGs), Finance Ministers Quadrilateral, and the British – Irish council.[180] For the most part, vertical interactions on matters of mutual interest between the UK Government and a specific devolved jurisdiction often occur through bilateral agreements. Often these agreements result in the enhancement of devolved competences as evidenced by the various bilateral agreements the UK Government has with its devolved counterparts in Scotland,[181] Wales,[182] and NI.[183] Therefore, under the

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[176] 'Protocol On Ireland And Northern Ireland - Non Paper - Engagement With Northern Ireland Stakeholders And Authorities' (*Ec.europa.eu*, 2022) <https://ec.europa.eu/info/system/files/attachment_iv_ni_participation_non-paper.pdf> accessed 29 June 2022.

[177] Ibid n. 114

[178] Katy Hayward and David Phinnemore, 'The UK-EU Joint Consultative Working Group: What It Is And What It Could Be - Queen's Policy Engagement' (*QUB.ac.uk*, 2022) <http://qpol.qub.ac.uk/the-uk-eu-joint-consultative-working-group-what-it-is-and-what-it-could-be/> accessed 29 June 2022.

[179] Georgina Wright and Joe Owen, 'Implementing Brexit: The Role Of The Joint Committee' (*Instituteforgovernment.org.uk*, 2022) <https://www.instituteforgovernment.org.uk/sites/default/files/publications/implementing-brexit-role-joint-committee_0.pdf> accessed 29 June 2022.

[180] Paul Anderson, 'Plurinationalism, Devolution And Intergovernmental Relations In The United Kingdom' in Yonatan Fessha, Karl Kossler, and Francesco Palermo (eds), *Intergovernmental Relations in Divided Societies* (Palgrave Macmillan 2022) Pp. 97 - 100

[181]'The Agreement between The Scottish Government And The United Kingdom Government On The Scottish Government's Fiscal Framework' (*gov.uk*, 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/503481/fiscal_framework_agreement_25_feb_16_2.pdf> accessed 27 September 2022.

[182] 'The Agreement between The Welsh Government And The United Kingdom Government On The Welsh Government's Fiscal Framework' (*Gov.wales*, 2016) <https://gov.wales/sites/default/files/publications/2018-11/agreement-on-welsh-government-fiscal-framework.pdf> accessed 27 September 2022.

[183] 'Hillsborough Castle Agreement' (*gov.UK*, 2010) <https://www.gov.uk/government/publications/hillsborough-castle-agreement> accessed 27 September 2022.

current constitutional status quo, employing the above solution would require a bilateral agreement being drawn up between the UK Government and the NI Executive that would grant the NI Executive shared decision-making powers over the Protocol, which would then allow for a more direct and meaningful role for NI within the JC (alongside the UK Government). It is acknowledged that the greatest challenge to this arrangement is the possibility of having a non-functioning NI Executive. In such an instance, it might be best to expect the UK Government to 'wear two hats' and act in the best interests of the cross-community in NI and GB. As discussed in chapter 5, this is not an uncommon practice for the UK Government, as they regularly 'wear two hats' when making policy decisions for England and the UK.

A bilateral agreement based on the above between the UK Government and the NI Executive would have great potential in rebuilding the relationship of trust and partnership between the EU and the UK over the Protocol. This is because shared decision-making would limit the ability of the UK Government to act unilaterally (based on their political objectives), as the NI Executive would have to approve of this first. In the absence of a functioning Executive, consideration of the cross–community in NI would also limit the potential of the UK Government to act solely based on political objectives and ideology. As aforementioned, the UK Government's combative approach thus far, through unilateral action, has been central to the weakened relations with the EU. This combinative approach will not bring stability to the relationship anytime soon. Remaining on the subject of stability, as the sole representative of the UK in the JC (and as aforementioned, the DUP's actions in protest to the Protocol are aimed at influencing the actions of the UK Government), political and constitutional stability in NI now rests on the UK Government's actions. This is relatively new territory, as previous periods of political instability in NI have resulted from internal stalemate, whereby resolutions are reached through cross–party negotiations. As the decision-making process over the Protocol is beyond the remit of the authorities in NI, cross-party direct negotiations cannot take place, which makes overcoming the deadlock much more challenging, as there is now a reliance on external factors for resolution.[184] Thus, one way of overcoming this deadlock, is through the above mentioned bilateral agreement, as this would internalise the Protocol, and allow for cross-party direct negotiations to take place, further reducing the significance of the external factors. In addition to this, such a bilateral agreement would also tackle, to some extent, the democratic deficit issues in NI that are associated with the operation of the Protocol, such as the lack of direct and meaningful NI representation over the decision-making process with respect to the operation of the Protocol.

Nevertheless, UK intergovernmental bilateral agreements (and other IGR channels) do not guarantee the execution of shared decision-making for the devolved jurisdictions. This is owed to two factors. First, the constitutional supremacy of the UK Government over its devolved counterparts, and second, the UK's IGR channels are governed by non-legally binding conventions.[185] As demonstrated by the shortcomings of the JMC (EU Negotiations), this means then, the UK Government always has the final say. The devolved Governments cannot

[184] Clare Rice and Colin Murray, 'Evidence To The House Of Lords Sub-Committee On The Protocol On Ireland/Northern Ireland On The Protocol's Impact On Northern Ireland' (*Academia.edu*, 2022) <https://www.academia.edu/80453636/Evidence_to_the_House_of_Lords_Sub_Committee_on_the_Protocol_on_Ireland_Northern_Ireland_on_the_Protocols_Impact_on_Northern_Ireland> accessed 29 June 2022.

[185] Nicola McEwen, 'Still Better Together? Purpose And Power In Intergovernmental Councils In The UK' (2017) 27 Regional and Federal studies.

veto or override the wishes of the UK Government.[186] Going back to the proposal for a bilateral agreement between the UK Government and the NI Executive, given the UK Government's willingness to act over the Protocol unilaterally, it would seem reasonable to predict that such a bilateral agreement would most likely be subject to UK Government unilateral action. As detailed in chapter 7, the only way to guarantee shared decision-making for the NI Executive would involve introducing radical constitutional reforms such as reforming the UK's IGR by removing the centre's hegemony and governing the IGR channels through legally binding means.[187] There is currently no appetite within the UK Government for such radical reform. As a result, this demonstrates that under the current constitutional status quo, it is challenging to establish a direct and meaningful role for the NI Executive over the Protocol.

As aforementioned, Stormont would be tasked with the role of providing a 'voice for the cross community' over the Protocol. For a while, the Unionist parties in NI have raised concerns over the lack of cross-community consent to the Protocol. As discussed earlier in the chapter, the consent mechanism under article 18 of the Protocol and schedule 6A of the NI Act 1998 allows Stormont to attain cross-community consent to the Protocol. This is, however, limited to voting on the continuation of the operation of the Protocol after a set period. Moreover, cross-community consent is not the only or main requirement, as a simple majority would suffice. Thus, the Unionists in NI argue that these arrangements go against the principle set out in the GFA 1998 that significant decisions should be taken on a cross-community basis for them to be legitimate. This argument was unsuccessfully litigated in the Allister judicial review hearing, where the NI Court of Appeal held that the cross-community consent provisions entrenched under the NI Act 1998 only apply to matters within devolved competence.[188] This decision has now been appealed to the Supreme Court, and it is expected that the Court will not reverse this decision.[189]

Thus, if the role mentioned above for Stormont is to be realised, then further devolution is required. In particular, this would entail decentralising matters concerning EU relations, which are currently excepted under schedule 2(3) of the NI Act 1998. Doing so would allow the Protocol to fall within the cross-community consent process. The primary rationale for decentralising this power is to overcome one of the challenges the Protocol currently faces - the lack of cross-community support, which has resulted in the stalling of devolution in NI. As mentioned in chapter 1, following the Sunningdale agreement in 1973, approaches to devolution in NI have since been based on consociationalism. An integral feature of consociationalism in NI is the idea that cross-community consent is necessary for certain decisions to be legitimate. Before the introduction of this feature, Unionist domination of NI's political institutions and policy was central to the instability and collapse of devolution in NI at the time.[190] In light of the current political climate in NI, there seems to be a glimpse of the past in that devolution in NI is at paralysis due to the lack of cross-community support for the Protocol. Therefore, in keeping up with consociationalism, especially when there's been a

[186] These shortcoming will be detailed out in chapter 7. See also: Anderson, Ibid n. 142. Pp. 92 – 105.

[187] See; Michael Keating, 'Brexit and The Nations' (2018) 90 The Political Quarterly 167.

[188] Allister and others v The Secretary of State for Northern Ireland [2022] NICA 15

[189] Rice and Murray, Ibid n. 146

[190] Schwartz, Ibid n. 55

resurgence in identity politics in NI, subjecting the Protocol to cross-community voting seems reasonable. In the instance that the Protocol is rejected, the cross-community in NI would still have an influence in shaping the next border regime through shared participation with the UK in the JC, as discussed above.

Nevertheless, it is acknowledged that given the current political polarisation in NI, securing a cross-community vote and approach could prove very difficult, resulting in another impasse. The irreconcilable objectives of the two main political parties in NI, coupled with the ongoing paralysis of NI's devolved institutions, is strong evidence of this potential reality. However, the precedent set by the GFA 1998 demonstrates that polarisation can be overcome when there is real engagement between the leaders from the different communities, who are prepared to negotiate, and at times, look beyond some of their red lines, with the sole objective of reaching to an enduring settlement that serves the interests for all in NI.[191] As mentioned in chapter 1, the two main communities in NI had to accept grave concessions. For instance, the Unionists accepted the mandatory power-sharing with the Nationalists, and the Nationalists explicitly accepted NI's current constitutional status as part of the UK. In addition, the GFA 1998 was founded upon principles of inclusivity, with consociationalism at the centre. The cross-community decision-making process is an integral feature of consociationalism in NI, and as aforementioned, it is designed to legitimise contested issues in NI. Most common examples of such issues include sexuality and the Irish language.[192] As already demonstrated within this chapter, the Protocol (and more broadly, the conundrum) has resulted in the emergence of deep divisions between the different communities in NI. Such divisions are what the cross-community decision-making process was designed to deal with. Therefore, given that the Protocol has thus far not been subjected to this decision-making process, it would be reasonable to suggest at least that this is attempted as a possible way forward.

In all, though, realising this proposal rests on the shoulders of the UK Government, who might be hesitant to introduce such reform. This can be attributed in part to the fact that by allowing such powers to be devolved to NI, the UK Government would face another challenge elsewhere. As noted in the Scotland chapter, eyebrows were raised by the Scottish Government following the Brexit referendum due to the 'unique treatment' NI was receiving on solving the Irish border conundrum.[193] Essentially, making a Brexit-related issue a (special) devolved issue will raise eyebrows in Scotland. And given the recent developments in Scotland regarding plans for a second independence referendum, it is doubtful that the UK Government has any appetite to engage further in its current political and constitutional battle with the Scottish Government. Additionally, critics, including the UK Government, could question whether it is

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[191] Andrew McCormick, 'The Northern Ireland Protocol Bill' (*Iiea.com*, 2022) <https://www.iiea.com/publications/the-northern-ireland-protocol-bill> accessed 27 September 2022.

[192] For a thorough analysis on how the cross community decision making process has dealt with these issues see: Sarah McMonagle and Philip McDermott, 'Transitional Politics And Language Rights In A Multi-Ethnic Northern Ireland: Towards A True Linguistic Pluralism?' (2014) 13 Ethnopolitics 245; Bernadette Hayes and John Nagle, 'Ethnonationalism And Attitudes Towards Gay And Lesbian Rights In Northern Ireland' (2015) 22 Nations and Nationalism 20; Bernadette Hayes and Andrew McKinnon, 'Belonging Without Believing: Religion And Attitudes Towards Gay Marriage And Abortion Rights In Northern Ireland' (2018) 46 Religion, State and Society 351.

[193] See: 'Scotland's Place In Europe' (*Gov.scot*, 2016) <http://www.gov.scot/Resource/0051/00512073.pdf> accessed 16 April 2020. See also: 'Oral Evidence - Brexit: Devolution - Michael Russell MSP' (*parliament.uk*, 2017) <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/european-union-committee/brexit-devolution/oral/46912.html> accessed 16 April 2020

appropriate for NI to wield the level of power (including over other parts of the Union) that this proposal, in effect, gives them. Therefore, it is hard to perceive that under the current status quo, such powers would be afforded to NI.

In concluding this section, it is clear that under the current constitutional status quo, it would be difficult to realise the above-proposed solution to the challenges faced by the Protocol. As mentioned from the onset of this thesis, it is difficult to bring about universally accepted constitutional reforms and solutions to the problems identified. At the same time, however, the status quo is increasingly becoming untenable, opening up space for the need for some reforms. As discussed, maintaining the status quo risks either (or both) the complete destabilisation of NI's devolution settlement and the creation of new border arrangements on the island of Ireland, which can include the hardening of the land border or Irish (re)unification. Given the grave consequences associated with a hard land border, the latter becomes a greater possibility.[194] Thus, the above proposal could be of value, as it can be seen as a suitable compromise to overcoming the current state of paralysis.

Conclusion

In concluding this chapter, it is clear that the UK's decision to withdraw from the EU has disrupted the border regimes that have co-existed on the island of Ireland since the re-establishment of NI's devolution settlement in 1998. These border regimes allowed for a seamless land border in Ireland to operate. By disrupting these border regimes, and in particular, the GFA 1998, Brexit risks threatening the NI peace process and the devolution settlement. From the onset of negotiations, these threats were evident to both the EU, and the UK Government, who pledged a shared commitment to ensure that no hard border emerges on the island of Ireland because of Brexit. However, given the contrasting negotiating objectives of the EU (preserving the internal market) and the UK (defending sovereignty), it was not easy, at times, to agree on a solution that would meet their shared commitment. The impasse was finally broken following the succession of Boris Johnson as PM, whose negotiations with the EU resulted in the establishment of the Ireland / Northern Ireland Protocol.

[194] An increasing number now believe that the only solution to the Irish border conundrum is Irish (re)unification. It is key to note though, that this increase does not entail that Irish unity is any closer, rather it illustrates the willingness to contemplate this option, which was greatly over – looked during the Brexit withdrawal process. Irish (re)unification involves altering the constitutional status of NI, which the GFA and section 1 of the NI Act 1998 allows for. Irish unity would resolve the border conundrum as having NI become part of a United Ireland would guarantee no divergence in regulations between North and South of the Island, ensuring the land border ceases to exist, moving it to the Irish sea instead. For a more detailed analysis on Irish Unity, and how this would resolve the border conundrum see: Rory Montgomery, 'The Good Friday Agreement and a United Ireland' (2021) 32 Irish Studies in International Affairs 111; Colin Harvey and Mark Bassett, 'The EU & Irish Unity: Planning And Preparing For Constitutional Change In Ireland.' (*GUE/NGL*, 2021) <https://www.guengl.eu/issues/publications/the-eu-irish-unity/> accessed 8 July 2021; Nicola McEwen and Mary Murphy, 'Brexit And The Union: Territorial Voice, Exit And Re-Entry Strategies In Scotland And Northern Ireland After EU Exit' (2021) 43 International Political Science Review 374; Darryn Nyatanga, 'Irish Unification Is A Solution To The Border Conundrum' <https://blogs.lse.ac.uk/brexit/2019/05/07/irish-unification-is-a-solution-to-the-irish-border-conundrum/> accessed 30 May 2022; Nikos Skoutaris, 'Territorial Differentiation In EU Law: Can Scotland And Northern Ireland Remain In The EU And/Or The Single Market?' (2017) 19 Cambridge Yearbook of European Legal Studies 287; Michael Dougan, 'So Long, Farewell, Auf Wiedersehen, Goodbye: The UK'S Withdrawal Package' (2020) 57 Common Market Law Review 631.

However, questions were and continue to be raised over the viability of this new border regime as a long-term solution to the Irish border conundrum. This is owed to the combination of first, the lack of cross-community support in NI for the Protocol, as the two main political parties are divided over its operation – which has thus far resulted in the stalling of NI's consociational devolution settlement. Secondly, trust and partnership have weakened over implementing the Protocol following several EU and UK disputes. In these disputes, the UK was resisting perceived encroachments on its sovereignty, and the EU was resisting what it perceived as the UK seeking unfair access to its internal market. Owing to the combination of these two main challenges, the operation of the Protocol in its current form is increasingly becoming untenable - further increasing the likelihood of the emergence of a hard border in Ireland. This also provides evidence for the need for a new approach to this conundrum. One such way forward could include reforming the UK's IGR framework and NI's devolution settlement to provide for a direct and meaningful role and voice for the cross-community in NI over the decision-making process surrounding the future of the Irish border. However, under the current constitutional status quo, devolution in NI cannot be stretched so far to allow for this. However, the 'realpolitik' remains that the continued failure to recognise and provide for a way forward will only further exacerbate the current implications – resulting in the risk of the complete destabilisation of NI's devolution settlement and/ or the UK's territorial integrity.

Chapter 3: Scotland's constitutional future: Brexit and the third wave of reform

Introduction

As shall be detailed in this chapter, the overall historical and evolutionary trajectory of Scottish devolution has been one of increasing autonomy and constitutional recognition in response to the growth in nationalism driven by the electoral success of the SNP. This has been marked by two main waves of constitutional reform. Briefly, the first wave was proactive on the part of the SNP-led Scottish Government and was concluded via the enactment of the Scotland Act 2012. And the second wave was cooperative (mainly to avoid a constitutional crisis) between the Scottish and the UK Governments and was concluded via the enactment of the Scotland Act 2016. Due to the UK's decision to leave the EU, we are potentially entering a third wave of constitutional reform in Scotland.

The Brexit process has highlighted that devolution is changing radically, and in the eyes of the Scottish Government, this change has been primarily negative. As detailed in this chapter, the UK Government and its Scottish counterpart have engaged in numerous political and legal clashes resulting from the UK Government's approach to Brexit, which mostly has involved ignoring and undermining the Scottish Government's Brexit-related interests. In combination with this, the introduction of some necessary Brexit-related constitutional changes, such as the enactment of the UK Internal Market Act 2020, has had the overall effect of exacerbating the current period of constitutional unsettlement in Scotland. More broadly, Brexit has exposed the democratic and constitutional weaknesses of Scotland's constitutional position within the UK's Union.[1]

Maintaining the status quo is increasingly becoming untenable, further edging towards a constitutional crisis in Scotland, not seen since the Scottish independence referendum in 2014. Thus, there is now a growing need for a third wave of constructive constitutional reform in Scotland.[2] Constructive constitutional reform in this instance means constitutional reform that is achieved through consent and cooperation and addresses the specific constitutional issues that arise in Scotland, as a result of Brexit.[3] Going off the precedent of the first two waves, such reform could be achieved in two very different constitutional landscapes.[4] The first of which is Scottish independence. The option for a constitutional exit from the UK's Union has opened up for Scotland (in a way it hasn't been for years) through the potential of a new

[1] Aileen McHarg, 'Devolution In Scotland', *The Changing Constitution* (9th edn, Oxford University Press 2019) Pp. 293

[2] See: Chris McCorkindale, 'Devolution : A New Fundamental Principle Of The UK Constitution' in Michael Gordon and Adam Tucker (eds) *The New Labour Constitution: Twenty years on* (Hart Publishing 2022).

[3] As analysed in chapter 6, the developments of the common frameworks and the UK internal market, do not count as constructive constitutional reform. Given that they were a constitutional development that had to occur in order to fill out the function that was previously performed by the EU's legal framework. And in addition, they are not specific to Scotland.

[4] As discussed in chapter 1, the constitutional choices of either the extension of devolution, or independence were a key feature in both waves – with the former succeeding in both waves. Alternative constitutional proposals such as maintaining the status quo, or federalism weren't given much significance.

independence referendum (indyref 2).[5] In addition, questions of an independent Scotland and its place in Europe are also getting renewed attention.[6] This means then, the Scottish electorate may soon be granted with the choice between two Unions.[7] As put forward by FM Nicola Sturgeon "I consider that a choice between Brexit and a future for Scotland as an independent European nation." [8] As put forward in this chapter, the SNP's calls for indyref 2 are based on the belief that the UK Government's outworking on Brexit has failed to respect the background assumptions behind the promises made in the vow back in 2014 (which included Scotland being treated as an equal partner). However, the continued refusal by the UK Government to grant Holyrood, an Order in council made under section 30 of the Scotland Act 1998, remains the main constitutional barrier to realising the Scottish Government's constitutional plans.[9]

In the event that Scottish independence does not come to pass, debates around independence will remain continuous given that the constitutional issues exposed and exacerbated by the Brexit process will not erode. At the least then, Scotland's position within the Union needs to be revised. Therefore, the other option for the third wave of constructive reform could take shape in a similar constitutional landscape to the first two waves - a reformed Scottish settlement within the UK. Nevertheless, it will be concluded that under the current constitutional arrangements, devolution in Scotland cannot be stretched so far to address the constitutional issues raised by Brexit adequately.

Given the above, the prevailing argument in this chapter is that the UK Government's outworking on Brexit has fuelled political and legal tensions between themselves and their Scottish counterpart. With no signs of the tensions easing, there is now an ever-growing possibility that this could result in the eruption of a constitutional crisis. Therefore, there is now an increasing need in Scotland for a third wave of constructive constitutional reform. Subsidiary to this, the chapter also argues that this third wave could be realised under two different constitutional landscapes; Scottish independence or a new Scottish devolution settlement within the UK. Moreover, both options are parallel and, to some extent competing and in tension. The chapter will conclude by acknowledging that, in the immediate future, the third wave will not be realised just yet. Given the UK Government's approach so far, the most likely situation seems to be the maintenance of the status quo - no referendum and no substantive changes to Scotland's devolution settlement. In the same vein, however, maintaining the status quo will only further exacerbate this current period of constitutional unsettlement, further intensifying the need for a third wave of constructive reform.

In presenting the above argument, the chapter will be structured into four main sections. Section one will provide an overview of the historical trajectory of Scottish devolution, with section 2 focusing particularly on Scottish constitutional developments since 2014. The combination of these two sections will provide the reader with some context behind the

[5] Aileen McHarg and James Mitchell, 'Brexit And Scotland' (2017) 19 The British Journal of Politics and International Relations 512.

[6] Kirsty Hughes, 'An Independent Scotland In The EU: Issues For Accession' (Scottish centre on European relations 2020) <https://www.scer.scot/database/ident-12533> accessed 8 May 2020.

[7] Nicola McEwen, 'Brexit And Scotland: Between Two Unions' (2017) 13 British Politics.

[8] 'Brexit And Scotland's Future: First Minister Statement' (*Gov.scot*, 2019) <https://www.gov.scot/publications/first-minister-statement-brexit-scotlands-future/> accessed 6 October 2020.

[9] Tom Gallagher, 'Britain After Brexit: Resistance from Scotland' (2017) 28 Journal of Democracy 31.

remainder sections which discuss the constitutional effects and challenges that Brexit has exposed and exacerbated in Scotland. In the third section, the chapter will discuss the feasibility of realising Scottish independence. This will be achieved by analysing the constitutional options and barriers to realising independence. In the final section, the chapter will move on to outline and analyse the issues a potential reformed constitutional model for Scottish devolution would need to address if it is to be a good alternative to independence.

1. Overview of devolution in Scotland

1.1. Constitutional history

The first considerations for devolution / home rule for the nations of GB were convened at the House of Commons speakers' conference on devolution in 1919 - 1920. The Irish question was arguably the driving force behind the establishment of the conference and, more generally, the consideration of devolution within GB.[10] The conference concluded by proposing devolution based on national lines for Scotland, Wales, and England. These subordinate national bodies would have both legislative and executive competences. A stalemate was reached, however, over how these new bodies should be constituted. On the one hand, it was proposed that these new institutions take form based on the existing model of Parliamentary Grand Committees. The alternative option was to create separately elected subordinate unicameral legislative bodies. As a result of this, the conference, in its report, concluded that no agreement was reached over this fundamental question.[11]

Following the shortcomings of the speaker's conference on devolution in 1920, home rule for Scotland began to seem unattainable. This remained the view within Westminster until there were signs of growth in Scottish nationalism. This nationalism was spearheaded by the Scottish Nationalist Party (SNP), which was founded in 1934. The party initially aimed to secure home rule for Scotland by establishing a Scottish legislative body within the Union. It also sought to collaborate with other parties rather than electoral competition, so at first, it did not contest elections.[12] Following a change in leadership during World War two, the SNP became an explicitly separatist party, with the constitutional aim of Scottish independence.[13] The party also began to contest elections, and it won its first Westminster seat in 1964, and by 1974 it had gained six seats, two of which were from Labour. The discovery of the North Sea oil off the coast of Scotland in the 1970s was instrumental to the increase in support for the SNP and

[10] David Boyce, 'Federalism And The Irish Question', in Andrea Bosco (ed) *The Federal Idea: the History of Federalism from the Enlightenment to 1945* (Lothian Foundation Press 2020)
[11] Adam Evans, 'Back To The Future? Warnings From History For A Future UK Constitutional Convention' (2015) 86 The Political Quarterly 24.
[12] Vernon Bogdanor, *Devolution In The United Kingdom* (Oxford University Press 2001) Pp. 120
[13] See: Michael Keating, 'European Integration and the Nationalities Question' (2004) 32 (3) Politics and Society 367

Scottish nationalism.[14] The party politicised this discovery' its Scotland's oil' by using it to support its economic argument for independence.[15]

In response to the growth of nationalism in Scotland, the main political parties in Westminster began to put devolution on their policy agenda. For instance, in 1968, at a party conference, the then-leader of the Conservative party, Edward Heath, declared his support for Scottish devolution (the declaration of Perth). A constitutional committee was then set up, chaired by the former Prime Minister, Sir Alec Douglas Home. It made its final report in 1970, proposing Scottish devolution via an elected Assembly.[16] The party's 1970 election manifesto promised to fulfil the recommendations of the constitutional committee. However, no moves were ultimately made to establish an Assembly. Instead, the focus was on local Government reform. By 1974, the party had lost 8 Westminster seats to the SNP, and the following year Margret Thatcher was elected as the new party leader, and she was very hostile to devolution.

The Labour party's response to the rise in Scottish nationalism came slightly later than the Conservatives. Their conversion to devolution first came about in 1969 under the premiership of Harold Wilson, following the establishment of the Kilbrandon Commission in 1969. In its final report in 1973, the Commission proposed Scottish devolution via the creation of a 100-member unicameral Scottish legislative body, elected via proportional representation. The areas of competency that would be devolved to the Scottish Assembly would be some of those already under the supervision of the SoS for Scotland and the Lord Advocate, which included health, legal matters, education, and the environment.[17] The Commission's recommendations were not greeted with much enthusiasm from within the Labour party. This was evidenced by the absence of devolution in the party's February 1974 general election manifesto. [18]However, in the October 1974 general election, the Labour party dramatically switched from no mention of devolution to supporting devolution in their manifesto. The switch was arguably influenced by the significant increase in electoral support for the SNP. Between 1970 and the February 1974 election, the SNP gained six seats, two of which were from Labour. In the October 1974 election, the SNP took over the Conservative party and became the second-largest party in Scotland (in terms of vote share) behind Labour. The party also threatened Labour's hegemony in Scotland as they won 11 seats and were second in 35 of Labour's 41 seats in Scotland. [19]

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[14] James Mitchell (ed), *Devolution in the UK* (Manchester University Press 2009). Pp 29

[15]Aileen McHarg, 'Devolution In Scotland' in Jeffery Jowell and Colm O'Cinneide (eds) *The Changing Constitution* (9th edn, Oxford University Press 2019). Pp. 276 . See also: James Mitchell (ed), *The Scottish question* (Oxford University Press 2014). Pp 157 - 163

[16] Gordon Pentland, 'Edward Heath, The Declaration Of Perth And The Scottish Conservative And Unionist Party, 1966-70' (2015) 26 Twentieth Century British History 249.

[17]Royal Commission on the Constitution (Kilbrandon Report) (1973). See also: James Mitchell (ed), *Devolution in the UK* (Manchester University Press 2009). Pp 113 – 115.

[18] For a thorough analysis of Labour's position on Scottish devolution during this period, see: James Mitchell (ed), *The Scottish question* (Oxford University Press 2014). Pp 164 – 168.

[19] James Mitchell, Lynn G Bennie and Robert Johns, *The Scottish National Party* (Oxford University Press 2012); James Mitchell, 'The Creation of the Scottish Parliament: A Journey without End' (1999) 52 (4) Parliamentary Affairs 649.

Following the shock resignation of Harold Wilson as Prime Minister in 1976, his successor, James Callahan, took inspiration from the report of the Kilbrandon Commission and put into place plans for Scottish devolution. These plans were formally enacted under the Scotland Act 1978. The Act proposed the creation of a Scottish Assembly, with primary legislative powers (in minimal and defined policy areas) and members elected via the 'First past the post' majoritarian system used for Westminster elections. A First Secretary would also head a Scottish executive. A key provision of the Act was the rebel amendment known as the Cunningham amendment. This provision meant that a repeal motion would be laid before the House if less than 40% of the Scottish electorate entitled to vote said Yes. The referendum to bring into effect the provisions of the Scotland Act 1978 was held in March 1979.[20] On a turnout of 63%, the overall result was majority Yes, at 51.6%. However, the Yes vote only accounted for 32.85% of the electorate. As a result, devolution to Scotland was not realised. Moreover, none of the regional council areas met the 40% Yes vote threshold.[21] Prima facie, this result seemed surprising, given the growing momentum in Scottish nationalism at the time.

In the aftermath of the referendum, the SNP, angered with the failure to implement the Scotland Act 1978, put down a motion of no confidence in the Labour Government, which led to the 1979 general election and more than a decade of Thatcherism.[22] The Thatcher years were arguably crucial to the renewed calls for Scottish devolution. As described by Vernon Bogdanor, "no individual did more for the case of devolution than Margaret Thatcher." [23]

Scotland had long rejected Thatcherism. Most notable was when the 'Poll tax' (Community charge) was introduced in Scotland one year before the rest of the UK. This resulted in mass non-payment and the support from the SNP for civil disobedience.[24] Electorally, the support for the Conservative party in Scotland slowly drained away too, and by 1997, the party had no single seat in Scotland. In addition, during this period, the Conservative party would secure large majorities at Westminster, whilst the Scottish electorate returned equally overwhelming majorities of Labour MPs. Owing to this then, it was argued that there was a democratic deficit when it came to the governance of Scotland. This aided in the growth of support for Scottish devolution.[25]

During the same period, the Campaign for a Scottish Assembly (CSA) was established right after the 1979 referendum. The membership of the CSA was cross-party and included members

[20] For a more detailed examination of the key provisions of the Scotland Act 1978, see: James Mitchell (ed), *The Scottish question* (Oxford University Press 2014). Pp 178 – 180.
[21] Results Of Devolution Referendums (1979 & 1997)' (*Parliament.uk*, 1997) <http://researchbriefings.files.Parliament.uk/documents/RP97-113/RP97-113.pdf> accessed 3 March 2020.
[22] James Mitchell, 'The Creation of the Scottish Parliament: A Journey without End' (1999) 52 (4) Parliamentary Affairs 649; Chris McCorkindale, 'Devolution : A New Fundamental Principle Of The UK Constitution' in Michael Gordon and Adam Tucker (eds) *The New Labour Constitution: Twenty years on* (Hart Publishing 2022).

[23]Vernon Bogdanor, *Devolution In The United Kingdom* (Oxford University Press 2001). Pp. 118. See also: James Mitchell (ed), *Devolution in the UK* (Manchester University Press 2009). Pp 30; See also: Michael Keating (ed), *State and Nation in the United Kingdom : The Fractured Union* (Oxford University Press 2021). Chapter 3; James Mitchell, Lynn G Bennie and Robert Johns, *The Scottish National Party* (Oxford University Press 2012);
[24] Marco Goldoni and Christopher McCorkindale, 'Why We (Still) Need A Revolution' (2013) 14 German Law Journal 2197.
[25] Aileen McHarg, 'Devolution In Scotland' in Jeffery Jowell and Colm O'Cinneide (eds) *The Changing Constitution* (9th edn, Oxford University Press 2019).

from the Labour party, Liberal Democrats, the Green party, and the SNP. The CSA then established a Constitutional Steering Committee (CSC) to make a report on persuading Westminster to introduce devolution to Scotland.[26] The CSC published its report titled ‘A claim of right for Scotland’ in 1988. The claim declared an entitlement for Scottish Self-Government, within the UK’s constitutional framework, based upon the notion “that distinctive national identity carried with it a legitimate, indeed inherent, political right of self – determination.”[27] The claim also proposed a Scottish Constitutional Convention (SCC), which was then formed in 1989, to explore how Scottish devolution could be achieved. The Convention superseded the multi-party CSA. Just like its predecessor, the membership of the Convention was cross-party, but the SNP later dramatically withdrew from participating in the Convention, as independence was not an option.[28] In 1995, the Convention published its findings, calling for a Scottish Parliament, with 129 members elected under the PR Additional Member System (AMS).[29]

The Labour and the Liberal Democrats parties adopted the Convention proposals without question, and these proposals were central to both their 1997 general election manifestos.[30]Following the landslide general election victory in 1997, Labour quickly mobilised its devolution plans. These plans for the creation of a Scottish Parliament with primary legislative and tax – varying powers were first detailed out in the Government’s 1997 White Paper tilted ‘Scotland's Parliament.’[31] Like in 1979, to bring about devolution to Scotland, a referendum had to be held. This time round, however, the referendum was pre-legislative, and a simple majority was required. On a turnout of 60.2 % (lower than in 1979), a majority of 74.3% voted in favour of establishing a Scottish Parliament, an increase from 1979. [32]The Yes vote accounted for 44.7% of the electorate. In the same referendum, a majority of 63% (accounting for 38.1% of the electorate) also voted in favour of tax varying powers for

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[26] See: James Mitchell (ed), *The Scottish question* (Oxford University Press 2014). Pp 2345 – 240; Michael Keating, ‘Reforging the Union: Devolution and Constitutional Change in the United Kingdom’ (1998) 28 Publius 217

[27] Stephen Tierney, 'Federalism In A Unitary State: A Paradox Too Far?' (2009) 19 Regional & Federal Studies 237.

[28] 'The Devolution Debate This Century' (*Bbc.co.uk*, 1997) <http://www.bbc.co.uk/news/special/politics97/devolution/scotland/briefing/c20scot.shtml> accessed 8 October 2020.

[29] 'Scottish Constitutional Convention - Scotland’s Parliament: Scotland’s Right' (*wordpress.com*, 1995) <https://paulcairney.files.wordpress.com/2015/09/scc-1995.pdf> accessed 8 October 2020.

[30] James Mitchell (ed), *The Scottish question* (Oxford University Press 2014). Pp 241 -245; James Mitchell, ‘The Creation of the Scottish Parliament: A Journey without End’ (1999) 52 (4) Parliamentary Affairs 649.

[31] Michael Keating, ‘Reforging the Union: Devolution and Constitutional Change in the United Kingdom’ (1998) 28 Publius 217; Isobel White and Jessica Yonwin, 'Devolution In Scotland' (*Researchbriefings.files.Parliament.uk*, 2004) <https://researchbriefings.files.Parliament.uk/documents/SN03000/SN03000.pdf> accessed 8 October 2020.

[32] For an in-depth analysis on the referendum, see: James Mitchell, and others 'The 1997 devolution referendum in Scotland' (1998) 51 (2) Parliamentary Affairs 166.

the Scottish Parliament. Thus, if the 40% threshold existed in 1997, the Scottish Parliament would have been approved, but without tax varying powers.[33]

1.2. Constitutional form

Soon after the referendum, devolution in Scotland was realised following the enactment of the Scotland Act 1998. The Act established a unicameral Scottish Parliament (Holyrood) with primary legislative powers (Acts of the Scottish Parliament). The legislative body comprised of 129 Members, referred to as Members of the Scottish Parliament (MSPs), who are elected via the Additional Member System (AMS). The Act also established a Scottish Government formed from the traditional Westminster model, which requires commanding a majority in Parliament.[34] In addition, the Act provided these Scottish institutions with competences based on the reserved power model, meaning that "all areas of law not explicitly reserved to Westminster are within the competence of the Scottish Government."[35] The reserved matters are specified in schedule 5 of the Act, and include immigration, the constitution, defence and foreign affairs among others.

The first election for the Scottish Parliament occurred in May 1999, which resulted in forming of a coalition between Labour and the Liberal Democrats.[36] Holyrood elections occur on a fixed-term basis, with the next election set to be held in May 2026. Following the May 2021 Holyrood elections, the SNP currently holds the most seats in the Scottish Parliament and forms the Scottish Government. Electorally, they have been the most successful party in Holyrood and have been in Government since 2007.

Post 1998, Scotland's devolution settlement has continued to evolve through the extension of competences.[37] The dynamics of Scottish devolution can be marked by two significant waves of constitutional reform, both of which were arguably a response to the resurgence of the SNP.[38] The first of these waves came in 2007, following the Holyrood election, which saw the SNP become the largest party in the Scottish Parliament for the first time. During the campaign, the SNP, in its manifesto, had put forward plans for Scottish independence.[39] Following their

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[33] Results Of Devolution Referendums (1979 & 1997)' (*Parliament.uk*, 1997) <http://researchbriefings.files.Parliament.uk/documents/RP97-113/RP97-113.pdf> accessed 3 March 2020.

[33] 'Labour Party Manifesto - 1997' (*Labour-party.org.uk*, 1997) <http://www.labour-party.org.uk/manifestos/1997/1997-labour-manifesto.shtml> accessed 12 May 2020.

[34] Isobel White and Jessica Yonwin, 'Devolution In Scotland' (*Researchbriefings.files.Parliament.uk*, 2004) <https://researchbriefings.files.Parliament.uk/documents/SN03000/SN03000.pdf> accessed 8 October 2020.

[35] Akash Paun, 'Is the UK-Scotland Supreme Court Case The Start Of A New Phase Of Constitutional Conflict?' <https://constitution-unit.com/2018/08/07/is-the-uk-scotland-supreme-court-case-the-start-of-a-new-phase-of-constitutional-conflict/> accessed 16 September 2020.

[36] James Mitchell (ed), *Devolution in the UK* (Manchester University Press 2009). Pp 132-133

[37] Stephen Tierney, 'Brexit And The English Question' in Federico Fabbrini (ed), *The Law & Politics of Brexit* (Oxford University Press 2017).

[38] Aileen McHarg, 'Devolution In Scotland' in Jeffery Jowell and Colm O'Cinneide (eds) *The Changing Constitution* (9th edn, Oxford University Press 2019). Pp.280. See also: Michael Keating (ed), *State and Nation in the United Kingdom : The Fractured Union* (Oxford University Press 2021). Chapter 3.

[39] 'SNP Manifesto 2007' (*guardian.co.uk*, 2007) <https://image.guardian.co.uk/sys-files/Politics/documents/2007/04/12/SNPManifestoprogramme.pdf> accessed 12 October 2020. See also: James Mitchell (ed), *The Scottish question* (Oxford University Press 2014). Pp 269 – 273.

electoral victory, the new minority Government failed to realise their constitutional ambitions for Scotland due to the lack of support within Holyrood. Owing to this, the Scottish Government then published a White Paper titled 'Choosing Scotland's Future. A National Conversation. Independence and Responsibility in the Modern World.'[40] The White Paper detailed Scotland's constitutional future options, including independence and further devolution. In response to this, Holyrood, via the strong backing of the UK Government and the Unionist parties in Scotland (Conservatives, Labour and Liberal Democrats), voted to establish a Commission on Scottish devolution.[41] In March 2008, the Commission was launched, chaired by Sir Kenneth Calman (the Calman Commission). The Commission published two reports, the first of which was in December 2008, where it concluded that devolution in Scotland was a very significant constitutional development and that it had been largely a great success. [42] In its final report published in June 2009, the Commission made 63 recommendations, which ultimately saw little scope for the further decentralisation of substantive policy-making powers, apart from the financing of devolution (for instance, borrowing and setting income tax powers).[43] In response to the Commission's conclusions, the SNP led Scottish Government argued that:

> "The success of the Parliament has inevitably led to a hunger for further reform of the devolution settlement. The establishment of the Calman Commission recognised that hunger - but it provided very limited nourishment. The remit of the Commission was too narrow…therefore it was clear that the Commission would not be able to consider the proposition that Scotland should be an independent country. Federalism was also outwith the Commission's remit."[44]

These arguments were formalised in the Scottish Government's 2009 published White Paper titled 'Your Scotland, Your Voice.' [45] The paper detailed four future potential constitutional arrangements for Scotland, which included maintaining the status quo, adopting the constitutional recommendations of the Calman Commission, full devolution of constitutional affairs, and independence. The Scottish Government favoured the fourth arrangement, which resulted in them publishing a consultation paper titled 'Scotland's Future: Draft Referendum (Scotland) Bill Consultation Paper.'[46] The intentions of the paper was to detail the process and regulation of an independence referendum through the proposed Referendum (Scotland Bill)

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[40] 'Choosing Scotland's Future: A National Conversation: Independence And Responsibility In The Modern World' (*Webarchive.org.uk*, 2007) <https://www.webarchive.org.uk/wayback/archive/20180516024923mp_/http://www.gov.scot/Resource/Doc/194791/0052321.pdf> accessed 12 October 2020.

[41] Aileen McHarg, 'Devolution In Scotland' in Jeffery Jowell and Colm O'Cinneide (eds) *The Changing Constitution* (9th edn, Oxford University Press 2019). Pp.280

[42] Commission on Scottish devolution, The future of Scottish devolution within the Union (Calman Commission first report) (2008)

[43] Commission on Scottish devolution, Serving Scotland better: Scotland and the United Kingdom in the 21st century (Calman Commission Final report) (2009)

[44] 'The Scottish Government Response To The Recommendations Of The Commission On Scottish Devolution' (*Webarchive.org.uk*, 2009) <https://www.webarchive.org.uk/wayback/archive/20160110201436mp_/http:/www.gov.scot/Resource/Doc/291162/0089439.pdf> accessed 12 October 2020.

[45] 'Your Scotland, Your Voice' (*Webarchive.org.uk*, 2009) <https://www.webarchive.org.uk/wayback/archive/20170215035756mp_/http:/www.gov.scot/Resource/Doc/293639/0090721.pdf> accessed 12 October 2020.

[46] 'Scotland's Future: Draft Referendum (Scotland) Bill Consultation Paper' (*gov.scot*, 2010) <https://www2.gov.scot/resource/doc/303348/0095138.pdf> accessed 12 October 2020.

2010. However, after failing to get the support of the opposition parties in Holyrood, the Bill was later withdrawn by the Scottish Government. [47]

Despite this defeat, the SNP-led Scottish Government continued to apply consistent pressure on the UK Government for constitutional reform in Scotland. This resulted in the newly elected Coalition Government committing in 2010 to fulfil the recommendations of the Calman Commission. The commitment was realised following the passing of the Scotland Act 2012, which devolved extra fiscal powers to Scotland, including powers over stamp duty land tax and landfill tax, new borrowing powers, setting income tax and creating a tax authority for Scottish devolved taxes. This was the most significant transfer of fiscal powers from Westminster since the establishment of devolution.

The second wave of Scottish devolution reform has its genesis in the 2011 Holyrood election. During the election, the SNP's central manifesto commitment was to hold an independence referendum for Scotland within the following session of the Scottish Parliament.[48] Following the party's great electoral success in an election that delivered the first majority Government in Scotland since the introduction of devolution, the UK Government decided to honour the Scottish Government's mandate. The Coalition Government formally expressed this view in its 2012 published consultation paper titled 'Scotland's constitutional future':

> "The Scottish National Party entered the May 2011 election with a manifesto pledge for a referendum on independence. They have campaigned consistently for independence, and while the UK Government does not believe this is in the interests of Scotland, or the rest of the United Kingdom, we will not stand in the way of a referendum on independence: the future of Scotland's place within the United Kingdom is for people in Scotland to vote on."[49]

Soon after, the UK Government and the SNP-led Scottish Government engaged in constructive discussions, which resulted in the Edinburgh agreement of October 2012. Central to the agreement was the acceptance by the UK Government to:

> "promote an Order in Council under Section 30 of the Scotland Act 1998 in the United Kingdom and Scottish Parliaments to allow a single question referendum on Scottish independence to be held before the end of 2014." [50]

This refers to an Order in council made under section 30 of the Scotland Act 1998. Section 30 orders can alter the legislative competences of the Scottish Parliament by changing the list of subject matters reserved to Westminster under schedule 5 of the Scotland Act 1998. Now that Holyrood had been granted the competences to legislate for the referendum, the Scottish

[47] 'Independence 'An Election Issue' (*BBC.co.uk*, 2010) <https://www.bbc.co.uk/news/uk-scotland-11196967> accessed 12 October 2020.

[48] 'Scottish National Party Election Manifesto 2011' (*Andywightman.com*, 2014) <http://www.andywightman.com/docs/SNP_Manifesto_2011.pdf> accessed 8 May 2020.

[49] 'Scotland's Constitutional Future' (*Gov.UK*, 2012) <https://www.gov.uk/Government/consultations/scotlands-constitutional-future> accessed 8 May 2020.

[50] 'Agreement between the United Kingdom Government And the Scottish Government on a referendum on independence for Scotland' (*Gov.uk*, 2012) <https://webarchive.nationalarchives.gov.uk/20130102230945/http:/www.number10.gov.uk/wp-content/uploads/2012/10/Agreement-final-for-signing.pdf> accessed 8 May 2020.

Parliament passed the Scottish Independence Referendum Act 2013 and the Scottish Independence Referendum (Franchise) Act 2013. The two Acts granted the Scottish Parliament control over key aspects, including the franchise (16 years and over), the referendum question ('Should Scotland be an independent country?') and the date (18 September 2014).

Given that the central issue during the independence referendum campaign concerned Scottish decisions being made in Scotland, two days before the referendum, the leaders of Westminster's three main political parties (Conservative, Labour and Liberal Democrat) made a vow to the Scottish electorate. The vow was essentially a pledge to devolve more powers to Scotland if the majority outcome in the referendum was against independence.[51] At a turnout of 84.6% (the highest turnout in any referendum in Scotland), the result of indyref was 55.3% voting against independence.[52] In fulfilling its vow, in the aftermath of the referendum, the UK Government set up the Smith Commission.

The Commission's final report was published in November 2014 and was divided into three pillars: pillar one discussed the recommendations for Scotland's constitutional settlement. Pillar two dealt with the recommendations for Scotland's economy and social justice. And the last pillar discussed the recommendations for Scotland's fiscal framework. Focusing on pillar one, the Commission recommended, amongst other things, for the recognition in statute, the permanence of the Scottish Parliament and Government as institutions in the UK's constitutional order. Also significant in pillar one was the recommendation to place the Sewel Convention under statutory footing. [53] These key recommendations and many others within the report were translated into law via the enactment of the Scotland Act 2016, which amended the 1998 statute. For instance, the Act recognised the permanence of the Scottish devolved institutions and included a referendum lock for their abolishment. It also placed the Sewel Convention on a statutory footing. Moreover, the Act granted greater competences to Scotland's devolved institutions. For instance, there was an enhancement of the Scottish Government's competences over tax powers (such as control over the majority of VAT raised in Scotland) and social security benefits. A detailed analysis of the Scotland Act 2016 will be discussed further in the chapter. For the UK Government, not only did these new reforms address the issues surrounding independence, but they also made Holyrood "one of the most powerful devolved Parliaments in the world." [54]

Overall, as highlighted in this section, the evolutive trajectory of Scottish devolution has been one of increasing autonomy and constitutional recognition in response to the growth in nationalism. As shall be evidenced further in this chapter, Brexit has continued this trajectory to some extent. There is now an increasing need in Scotland for a third wave of constitutional reform, which is in response to the growth of the SNP (and Brexit). There is a current constitutional gridlock however, between the UK Government and its Scottish counterpart over Scotland's constitutional future. This has resulted in a clash between the UK's constitutional

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[51] David Clegg, 'The Vow' (*dailyrecord*, 2014) <https://www.dailyrecord.co.uk/news/politics/david-cameron-ed-miliband-nick-4265992> accessed 16 April 2020.

[52] 'Scottish Independence Referendum' (*Electoralcommission.org.uk*, 2014) <http://www.electoralcommission.org.uk/__data/assets/pdf_file/0010/179812/Scottish-independence-referendum-report.pdf> accessed 16 April 2020.

[53] Commission for further devolution of powers to the Scottish Parliament (Smith Commission) (2014)

[54] 'Mundell Calls For End To 'Blame Games' (*BBC.co.uk*, 2016) <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-36300885> accessed 12 October 2020.

law and the Scottish Government's democratic mandate to hold indyref 2.[55] As the constitutional situation is only as tenable as the political cause, the continuation of this clash will increase the likelihood of the eruption of a constitutional crisis. [56]

2. Brexit, and Indyref.

In the immediate aftermath of the Brexit referendum result, FM Nicola Sturgeon confirmed that the possibility of indyref 2 was "on the table" due to "a significant and material change in the circumstances that prevailed in 2014".[57] Her statement alluded to the perspective that withdrawal from the EU alone was not the sole reason behind the Scottish Government's calls for indyref 2. Instead, it is a culmination of constitutional developments that have occurred since 2014. This section will argue that the contentious constitutional issues uncovered by Brexit that result in the need for a new wave of constructive constitutional reform in Scotland have their genesis from indyref in 2014. In presenting this argument, the section will provide a thorough analytical overview of how the background assumptions of the pledges made during indyref in 2014, have had a lasting impact that Brexit has now exacerbated. The section will begin by providing some context behind these assumptions then discuss how Brexit has exposed that these assumptions were never realised – resulting in the current period of constitutional unsettlement in Scotland.

As detailed above, the second wave of reform for Scottish devolution was cooperative (mainly to avoid a constitutional crisis) between the Scottish and the UK Governments and was concluded via the enactment of the Scotland Act 2016. One of the key episodes of the second wave came a few days before indyref took place – the vow made by Westminster's three main political parties to the Scottish electorate.[58]The referendum result produced a majority vote against independence (53.3%), indicating the vow's (and constitutional landscape) influence.[59]

After the result, the UK Government published a policy paper titled 'Scotland in the United Kingdom: An enduring settlement.' The paper reiterated the promises made in the vow and provided that the ultimate intention and purpose of the vow was to enhance Scotland's role

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[55]Michael Gordon, 'UK supreme court rules Scotland cannot call a second independence referendum – the decision explained' (*The Conversation, 2022*) <https://theconversation.com/uk-supreme-court-rules-scotland-cannot-call-a-second-independence-referendum-the-decision-explained-194877> accessed 10 December 2022.

[56] Anthony Salamone, 'The Legal Focus Of The Scottish Independence Debate Misses The Point.' (*Blogs.lse.ac.uk*, 2021) <https://blogs.lse.ac.uk/politicsandpolicy/legal-focus-indyref2/> accessed 1 December 2021.

[57] 'Nicola Sturgeon Statement In Full' (*BBC News*, 2018) <https://www.bbc.co.uk/news/uk-scotland-36620375> accessed 16 April 2020.

[58] Michael Keating (ed), *Debating Scotland : issues of independence and union in the 2014 referendum* (Oxford University Press 2017). Pp. 198.

[59] 'Scottish Independence Referendum' (*Electoralcommission.org.uk*, 2014) <http://www.electoralcommission.org.uk/__data/assets/pdf_file/0010/179812/Scottish-independence-referendum-report.pdf> accessed 16 April 2020. For a detailed discussion on the influence of EU membership during indyref see: Michael Keating (ed), *Debating Scotland : issues of independence and union in the 2014 referendum* (Oxford University Press 2017). Chapter 6

within the Union rather than maintaining the status quo.[60] As aforementioned, as part of the process of fulfilling the vow, the UK Government set up the Smith Commission, who's recommendations were translated into law via the enactment of the Scotland Act 2016, which amended the 1998 statute. For instance, Section 1(1) of the Scotland Act 2016, amends part 2A of the Scotland Act 1998 to now read:

> "(1) The Scottish Parliament and the Scottish Government are a permanent part of the United Kingdom's constitutional arrangements. (3)...the Scottish Parliament and the Scottish Government are not to be abolished except on the basis of a decision of the people of Scotland voting in a referendum."[61]

Ensuring the permanency of the Scottish Government and Parliament under statutory footing was significant in appeasing nationalism within Scotland, as these are the only institutions entrusted with making sure that Scottish decisions are made in Scotland. An important aspect to highlight here is the differences in comparison of the referendum lock under the above provision with the one under Section 1 of the Northern Ireland Act 1998. The above provision within the Scotland Act sets a referendum lock relating to the abolishment of devolution in Scotland, and in comparison, the referendum lock under Section 1 of the Northern Ireland Act 1998 relates to the cessation of NI from the UK's Union. Given the constitutional and political backdrop of the enactment of the Scotland Act 2016, it is interesting and surprising that the Act makes no provisions for a referendum lock related to independence, similar to that under the Northern Ireland Act 1998. The only plausible explanation could be that, unlike the political sensitives present in NI, the Scottish independence question was 'resolved' in 2014, following the often coined 'once in a generation' referendum. In addition, the need for a referendum lock on independence could be insignificant, given that the Edinburgh agreement already acts as a legal precedent for the framework for an independence referendum.

Moving on, section 1(2)(8) of the Scotland Act 2016 places the Sewel Convention on a statutory footing by amending section 28 of the Scotland Act 1998 to now read:

"But 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."[62]

The Sewel Convention was deliberately created after the establishment of devolution in 1998, and the rationale behind the convention is that:

> "the UK Parliament, as a sovereign body, retains full legal power to legislate on devolved matters, yet the spirit of devolution implies that political power rests with the Scottish Parliament. In order to avoid conflict, the Government undertook not to seek nor support relevant legislation in the UK Parliament without the prior consent of the Scottish Parliament. This consent is embodied in a "Sewel motion," or, formally, a legislative consent motion." In addition, the convention applies either when the legislation "changes

[60] 'Scotland In The United Kingdom: An Enduring Settlement' (*gov.uk*, 2015) <https://assets.publishing.service.gov.uk/Government/uploads/system/uploads/attachment_data/file/397560/Scotland_Settlement_print_ready.pdf> accessed 16 April 2020.

[61] Section 1(1), Scotland Act 2016

[62] Section 1(2)(8), Scotland Act 2016

> the law in a devolved area of competence, or alters the legislative competence of a devolved legislature, or alters the executive competence of devolved ministers."[63]

Since conventions are non-legally binding and, as a result, are usually only regarded based on political convenience, placing the Sewel Convention under statutory footing was seen as significant at the time. This provision alluded to the thought that Westminster now had a greater obligation to respect the Sewel Convention. Nonetheless, as detailed further below, the significance of this provision was dismissed by the Supreme Court following the *R (Miller)* litigation.[64]

In all, the changes brought in by the Scotland Act 2016, and in particular, ensuring the permanence of the Scottish Government and Parliament, and placing the Sewel Convention under statutory recognition, were assumed by the UK Government as having the overall effect of enhancing Scotland's place within the UK's Union. However, as discussed below, Brexit has exposed that this assumption was void - resulting in the current period of constitutional unsettlement in Scotland.

2.1. Brexit and the broken Vow

Brexit resulted in a significant transformation of the UK's constitutional landscape. Alongside this, and as argued by the Scottish Government, the UK Government's outworking on Brexit has revealed that the promises made in the vow were no more than just imaginary in practical terms.[65] This is because, despite the devolution of more powers over time, the promises were delivered under the assumption that Scotland's position within the UK's Union would be enhanced. The nation would be treated as an equal partner.[66] Nonetheless, the UK Government's approach in dealing with the internal territorial dynamics that have arisen as a result of Brexit has voided such assumptions, and resulted instead, in the worsening of Scotland's position. For instance, the result of the 2016 Brexit referendum emphasised that Scotland was democratically opposed to Brexit. Despite this, the UK Government negotiated a Withdrawal Agreement with the EU, without consulting nor considering the Scottish Government's interests.[67] In further evidencing this argument, the section will analyse several legal and political clashes the UK Government and its Scottish counterpart have engaged in over Brexit.

2.2.1 Legal clashes

Since Brexit, the Supreme Court has dealt with several disputes involving the UK Government and its devolved counterparts – most notably, the Scottish Government. In this section, the focus will be on three significant Supreme Court cases involving clashes between the UK and

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[63]Paul Bowers, 'The Sewel Convention' (*Parliament.uk*, 2005) <http://researchbriefings.files.Parliament.uk/documents/SN02084/SN02084.pdf> accessed 16 April 2020.

[64] R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5, para 146

[65] Ibid n. 8

[66] Ibid n. 17

[67] Klaus Stolz, 'Scotland, Brexit, And The Broken Promise Of Democracy' in Guderjan Marius, Mackay Hugh and Stedman Gesa (eds) *Contested Britain: Brexit, Austerity and Agency* (Policy Press 2020)

Scottish Governments; the *R(miller)* case,[68] the *Scottish Continuity Bill* case,[69] and the *Scottish Referendum Bill* case.[70] What will be noted from all three cases is that the Supreme Court consistently reaffirm the orthodox approach of Parliamentary Sovereignty in regard to devolution. Moreover, the arguments put forward by the UK Government in each of these cases clarifies their subscription to this orthodox approach – which goes against the view of treating Scotland as an equal partner.

The *R (Miller)* case

The central legal issue the Supreme Court faced in the *R(Miller)* litigation was over who had the constitutional responsibility of triggering Article 50 of the Treaty for the European Union (TEU). In reaching its conclusions, the Court found that Parliament intended to abrogate the royal prerogative by enacting the European Communities Act 1972. This enabled them to conclude that the UK Government may not trigger Article 50 TEU without an Act of Parliament permitting the Government to do so.[71] As a result of this conclusion, the Court was now faced with another issue - the applicability of the Sewel Convention for the Act of Parliament that would initiate the triggering of Article 50. In more formal terms, the legal question the Court faced was over the legal enforceability of a constitutional convention. The legal recognition of the Sewel Convention under section 1 of the Scotland Act 2016 and section 1 of the Wales Act 2017 added complexity to the legal issue.

The Scottish Government were in support of the argument that devolved legislative consent was needed for such an Act on the basis that the EU withdrawal legislation would have implications on devolved policy areas and competences.[72] In contrast, the UK Government argued that devolved legislative consent motion would not be required for such an Act on the basis that matters concerning the EU are reserved. In its judgment, the Court recognised that the Sewel Convention "has an important role in facilitating harmonious relations between the UK Parliament and the devolved legislatures."[73] Despite this, the Court held that "judges therefore are neither the parents nor the guardians of political conventions; they are merely observers…and they cannot give legal rulings on their operation or scope, because those matters are determined within the political world."[74] In relation to the reference of the convention under legislation, the Court held that "the convention for what it is, namely a political convention … the purpose of the legislative recognition of the convention was to entrench it as a convention."[75] Thus, in directly answering the question, the Court held that the

[68] Ibid n. 21

[69] The UK Withdrawal From The European Union (Legal Continuity) (Scotland) Bill – A reference by the Attorney General and the Advocate General for Scotland [2018] UKSC 64

[70] Reference by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998 [2022] UKSC 31

[71] Hattie Middleditch , 'The Miller Decision: Continuing Uncertainty over Brexit.' (2017) 49(3) NYU Journal of International Law & Politics 971.

[72] Gordon Anthony, 'Devolution, Brexit, And The Sewel Convention' (The Constitution Society 2018) <https://consoc.org.uk/wp-content/uploads/2018/04/Gordon-Anthony-Devolution-Brexit-and-the-Sewel-Convention-1.pdf> accessed 8 May 2020

[73] Ibid n. 21, paras 146 and 151.

[74]Ibid, para 146

[75] Ibid, paras 148 – 149

consent of the devolved legislative bodies would not be a legal requirement before the enactment of the relevant Act. [76]

As aforementioned in chapter 1, this decision reaffirmed the orthodox approach of Parliamentary Sovereignty in regard to devolution.[77] More significantly, the UK Government could now rely on the *R(Miller)* decision to justify its apparent approach to concede to any special treatment for Scotland over Brexit unwillingly.[78] Essentially, the case contributed to the weakening of political obligation and risks, associated with ignoring the Sewel Convention.[79]

In response to the Supreme Court's judgment, Scotland's FM, Nicola Sturgeon stated that:

> "The claims about Scotland being an equal partner are being exposed as nothing more than empty rhetoric and the very foundations of the devolution settlement that are supposed to protect our interests - such as the statutory embedding of the Sewel Convention - are being shown to be worthless. This raises fundamental issues above and beyond that of EU membership." [80]

Her statements aimed to reinforce the Scottish Government's argument that the promises Scotland received in the vow have not been upheld nor respected. However, in this instance, it is key to note that the Supreme Court did not contribute to the vow. They just interpreted the law to their own understanding. In addition, they are operationally separate from the UK Government and Westminster. Therefore, the Supreme Court's judgment alone cannot constitute the vow being broken. However, based on constitutional analysis, what the *R (Miller)* decision could suggest is that the implementation in legislation of the vow was done in such a clever and incredibly qualified way, which might have limited its actual effect. Moreover, those who thought it would be the saviour of devolution were mis-sold or misunderstood what was going on. Essentially, the reference of the convention under statutory footing was done for political entrenchment (appeasing nationalism in Scotland) rather than giving the convention legal effect.[81]

The *Scottish Continuity Bill* case

As detailed in ter hap, a key issue over what happens to the EU repatriated powers emerged following the Brexit referendum. The UK Government's EU Withdrawal Bill and the Scottish Government's Continuity Bill proposed solutions to this issue. However, the two Bills had contrasting approaches. For instance, Clause 11 of the UK Bill stated that the powers currently exercised by the EU would initially be repatriated back to Westminster, who will then devolve some of these powers at Ministerial discretion through secondary legislation, the purposes being for the establishment of UK – wide common frameworks. In contrast, the Scottish Continuity Bill stated that these same powers should be repatriated back to the devolved level

[76] Ibid, para 150
[77] Stuart White, 'Brexit And The Future Of The UK Constitution' (2021 42 International Political Science Review 359.

[78]McHarg and Mitchell, Ibid n. 5
[79] See: Aileen McHarg, 'The Miller Case And The Sewel Convention' in Mark Elliott, Jack Williams and Alison Young (eds) *The UK Constitution after Miller* (Hart publishing 2018)
[80] Sean Swan, 'A Democratic Outrage: Scotland's Constitutional Position And Brexit' <http://blogs.lse.ac.uk/politicsandpolicy/scotlands-constitutional-position-and-brexit/> accessed 16 April 2020.
[81] McHarg and Mitchell, Ibid n. 5

and that Scottish Ministers will have the power to amend this new body of retained EU legislation. [82] Owing to the contrast in approaches in the two Bills, the UK Government lodged a legal challenge against the passing of Scotland's Continuity Bill. This was unprecedented as it marked the first time that the UK Government had referred Holyrood legislation to the Supreme Court (in comparison, there have been multiple references from Wales). The Court, in this case, was essentially tasked with defining the limits of Scotland's devolved competences.[83]

The Advocate General (AG), on behalf of the UK Government, attacked the legality of the Scottish Bill on three main grounds; (1) the entirety of the Bill goes beyond devolved legislative competences, (2) the Bill challenges the will and Sovereign powers of Westminster, and (3) the Bill is inconsistent with the EU Withdrawal Act 2018.[84] The Lord Advocate (LA), on behalf of the Scottish Government, rejected these arguments:

> "the Bill has no impact on Parliamentary Sovereignty as Westminster has the power to amend or indeed repeal the Scottish Bill but has not moved to do so…. the Bill simply regulates the exercise of executive powers in devolved areas, which is within the powers of the Scottish Parliament….[Moreover] the Bill does not actually modify the provisions of the Withdrawal Act, but simply creates a parallel framework which can work alongside that created by Westminster" [85]

As a preliminarily matter the Court had to decide on which date to judge the competence of the Bill, either the date the Bill was passed or the time of the decision.[86] Relying on the wording of section 33 of the Scotland Act 1998, the Court indicated in favour of the latter. This decision was significant because the EU withdrawal Act 2018 was enacted whilst still awaiting a decision on this proceeding. The Act significantly changed the legal landscape as now, along with its amendments to schedule 4 of the Scotland Act 1998, it had to be taken into account in the Court's assessment of the case.[87] In reaching its conclusions, the Supreme Court held that the Bill was within competence when it was passed by MSPs, with exception to section 17. However, due to the legal changes made by the enactment of the EU withdrawal Act 2018, the

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[82] Christopher McCorkindale and Aileen McHarg , 'Continuity And Confusion: Legislating For Brexit In Scotland And Wales (Part I)' <https://ukconstitutionallaw.org/2018/03/06/christopher-mccorkindale-and-aileen-mcharg-continuity-and-confusion-legislating-for-brexit-in-scotland-and-wales-part-i/> accessed 24 February 2019.

[83] Akash Paun, 'Westminster Is Taking Edinburgh And Cardiff To Court – But It Faces Difficulties Even If It Wins' <https://www.instituteforGovernment.org.uk/blog/westminster-taking-edinburgh-and-cardiff-court-eu-continuity-bills> accessed 8 May 2020.

[84] 'Court Submissions of Advocate General for Scotland Lord Keen and the Attorney General Geoffrey Cox' (*Gov.uk*, 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/728147/Applicants__Written_Case.pdf> accessed 8 February 2019. See also: Akash Paun, 'S The UK-Scotland Supreme Court Case The Start Of A New Phase Of Constitutional Conflict?' <https://constitution-unit.com/2018/08/07/is-the-uk-scotland-supreme-court-case-the-start-of-a-new-phase-of-constitutional-conflict/> accessed 8 February 2019

[85] 'Court Submissions Of Lord Advocate James Wolffe' (*Parliament.scot*, 2018) <http://www.parliament.scot/S5_Finance/General%20Documents/Letter_from_Lord_Advocate_James_Wolffe_QC_to_Convener_16_July_2018.pdf> accessed 8 February 2019

[86] Andrew Tickell, 'How The UK Shifted Goalposts On Scotland's Brexit Bill' (*The National*, 2018) <https://www.thenational.scot/news/17297406.how-the-uk-shifted-goalposts-on-scotlands-brexit-bill/> accessed 8 May 2020

[87] Sionaidh Douglas-Scott, 'Brexit Legislation In The Supreme Court: A Tale Of Two Withdrawal Acts?' <http://www.centreonconstitutionalchange.ac.uk/blog/brexit-legislation-supreme-court-tale-two-withdrawal-acts> accessed 8 May 2020

Court concluded that the Bill was still within the legislative competence of the Scottish Parliament but with key exception to a number of important provisions which fell outside Holyrood's sphere of remit. Thus, as provided by section 29(1) of the Scotland Act 1998, these provisions are "not law". [88]

Due to Court's assessment that the Bill fell outside reserved matters, it did not strike it down in its entirety. Instead, it analysed the individual provisions of the Bill to assess whether any of them were void in light of the legal changes brought by the EU withdrawal Act 2018. The Act makes amendments to Schedule 4 of the Scotland Act 1998 by placing the Act as a protected provision, with the effect of denying "the Scottish Parliament legal authority to modify the UK withdrawal Act."[89] Thus, the Court was tasked with identifying the provisions within the Bill that amended or modified provisions within the EU withdrawal Act 2018 and voiding the inconsistent provisions. Some of the key inconsistencies the Court found within the Scottish Bill and thus deemed to amount to a modification of the EU Withdrawal Act 2018 were the retention of the EU Charter as law (Section 5), the preservation of the Francovich principle (section 8(2)) and the need for Scottish Ministerial consent on UK Ministerial secondary legislation that applies to Scotland (Section 17). Consequently, these provisions could not survive.[90]

Alongside its legal importance, the decision presents political and constitutional implications. In particular, the post-reference enactment of the EU withdrawal Act 2018.[91] The Scottish Bill was passed by MSPs under emergency procedures as it was imperative for it to be enacted before the EU withdrawal Act 2018.[92] This race to the statute book was influenced by the knowledge that the EU withdrawal Act 2018 would be passed as a protected provision under Schedule 4 of the Scotland Act 1998.[93] The section 33 reference created an 'unfair advantage' in this enactment race, as it resulted in halting the Scottish Bills progress to royal assent, a move Scottish Brexit Secretary Mike Russell described as an "act of constitutional vandalism."[94] In addition to this, the Court's initial assertion that the Bill was within competence at the time of passing (with exception to section 17) added with the UK Government's delaying tactics (which resulted in large parts of the Bill becoming ultra-virus) served as ammunition for the Scottish Government to reaffirm their narrative that the EU Withdrawal Act 2018 amounts to a 'power grab' that undermines the devolved competences

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[88] Mark Elliott, 'The Supreme Court's Judgment In The Scottish Continuity Bill Case' <https://publiclawforeveryone.com/2018/12/14/the-supreme-courts-judgment-in-the-scottish-continuity-bill-case/> accessed 8 May 2020
[89] Ibid.
[90] Chris McCorkindale and Aileen McHarg , 'Towards Clarity? – The Supreme Court And The Scottish Continuity Bill' <https://ukconstitutionallaw.org/2018/12/20/chris-mccorkindale-and-aileen-mcharg-continuity-and-confusion-towards-clarity-the-supreme-court-and-the-scottish-continuity-bill/> accessed 24 February 2019.
[91] Aileen McHarg, 'The Scottish Continuity Bill Reference' <http://www.centreonconstitutionalchange.ac.uk/blog/scottish-continuity-bill-reference> accessed 8 May 2020
[92] Severin Carrell, 'Nicola Sturgeon To Decide Whether To Save Unlawful Brexit Bill' (*the Guardian*, 2018) <https://www.theguardian.com/uk-news/2018/dec/13/key-holyrood-brexit-legislation-breaches-law-rules-uk-supreme-court> accessed 8 May 2020
[93] McHarg, Ibid n. 48
[94] Jennie Davidson, 'EU Continuity Bill Was Within Competence Of Scottish Parliament When It Was Passed' (*Holyrood Magazine*, 2018) <https://www.holyrood.com/articles/news/eu-continuity-bill-was-within-competence-scottish-Parliament-when-it-was-passed> accessed 8 May 2020

of Scotland, and more broadly, the UK Government continue to act in a way that betrays the promises made in the vow. [95]

The *Scottish Referendum Bill* case

As detailed in the next section, the row between the Scottish Government and the UK Government over indyref 2 began as a political clash that later evolved into a legal battle. As part of their three-pronged plan to indyref 2, the Scottish Government asked the LA to refer a draft independence referendum Bill to the Supreme Court under paragraph 34, schedule 6 of the Scotland Act 1998 (SA). The reference was based on whether the draft Bill would fall under reserved matters as outlined in Schedule 5 of the SA (para 1(b) and 1(c) in particular). The Bill was a revised version of an earlier Bill published in March 2021. The original Bill consolidated the Referendums (Scotland) Act 2020 and the Scottish Elections (Franchise and Representation) Act 2020 by reaffirming the details on the date, question, and franchise of indyref 2.[96] On the 28th of June 2022, the Scottish Government then published a revised version of this Bill, with the most significant change being section 1. The section stresses that the purpose and effect of indyref 2 are advisory only. Therefore it won't have any impact on the future of the Union.[97]

In the case, the Court faced two main legal questions: (1) the jurisdictional question over the reference by the LA under paragraph 34 of schedule 6 SA, and (2) whether Holyrood has the power to legislate for indyref 2, without an Order in Council made under section 30 of the SA. Regarding the first question, under paragraph 34, schedule 6 SA, the LA can refer to the Supreme Court "any devolution issue which is not the subject of proceedings." Paragraph 1 of the same provision defines the term 'devolution issue' to include "(f) any question arising by virtue of this Act about reserved matters." On this matter, the Court held that the reference was competent, as it fell within the scope of the definition mentioned above. Furthermore, the Court rejected the AG's argument that that the reasoning adopted in the Court of Session in the *Keatings v Advocate General* case[98] on prematurity applied in this case too. The Court's stated rationale on its rejection was that their judgment would "determine whether the proposed Bill is introduced into the Scottish Parliament…. [therefore, the reference is not] hypothetical, academic or premature."[99]

Regarding the second matter the Court had to investigate, the LA, in her submissions, presented a 'balanced' argument to the question. For instance, the LA accepted that an independence referendum would have a significant connection to the reserved matter of the UK's Union as prescribed by paragraph 1(b) of schedule 5 SA. [100] On the other hand, the LA also argued that

[95] McHarg, Ibid n. 48

[96] 'Scottish Independence Referendum Bill' (*Gov.scot*, 2021) <https://www.gov.scot/binaries/content/documents/govscot/publications/strategy-plan/2021/03/draft-independence-referendum-bill/documents/scottish-independence-referendum-bill-draft-publication/scottish-independence-referendum-bill-draft-publication/govscot%3Adocument/scottish-independence-referendum-bill-draft-publication.pdf> accessed 18 July 2022.

[97] 'Scottish Independence Referendum Bill' (*Gov.scot*, 2022) <https://www.gov.scot/publications/scottish-independence-referendum-bill/> accessed 18 July 2022.

[98] Keatings v Advocate General [2021] CSIH 25

[99] Ibid n. 27, para 53 - 54

[100] Ibid, para 58 - 63.

as set out by section 1 of the Bill, the Bill and the subsequent referendum have no direct legal effect on the reserved matter of the Union or the UK Parliament as prescribed by paragraphs 1(b), and 1(c) of schedule 5 SA. This is because the referendum would be advisory in nature, as it is intended to seek “the views of the people of Scotland” and not immediately result in the act of secession.[101] The Court allowed the SNP’s intervention in the case, and in their written submission, the SNP supplemented the LA’s latter argument and stated that the Court should interpret schedule 5 of the SA in a very narrow and restrictive way. On the basis of first, the referendum itself would result in a negotiation process that would require further legislation to give effect to the referendum outcome if in favour of independence. Secondly, a narrow interpretation should be applied “so as not to infringe upon nor render otiose the right of the Scottish people to exercise their right to self-determination.”[102] In contrast, the AG, on behalf of the UK Government, argued that the terms of paragraphs 1(b) and 1(c) of schedule 5 SA, make it unambiguous that the Bill is outwith competence.[103] This is because the subject matter of the Bill falls under reserved matters. In addition, the purpose and effect of section 1 of the Bill also fall under the same. In expanding on this, the AG accepts that the referendum itself would not be self-executing. However, a referendum outcome in favour of independence would have the consequential effect of building momentum “for the end of the Union and the secession of Scotland. It is in precisely that hope [for the SNP] that the draft Bill is being proposed.”[104] Essentially, such an outcome would affect the UK’s Union, and Westminster’s Sovereignty over Scotland – which are reserved matters.[105]

In reaching its decision on this matter, the Court adopted a similar interpretive approach to its earlier rulings in the *Scottish continuity Bill reference* case,[106] and the *United Nations Convention of the Rights of the Child (UNCRC) (Incorporation) (Scotland) Bill reference* case.[107] In both cases, the Court adopted a broad ‘ordinary meaning’ approach to interpreting section 28(7) of the SA, which provides that the legislative authority of Holyrood “does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.” In doing

[101] Ibid, Para 67 – 69

[102] 'SNP application for permission to intervene in the Lord Advocate's reference on an independence referendum' (*SNP.org,* 2022) <https://s3-eu-west 2.amazonaws.com/www.snp.org/uploads/2022/08/Scottish-National-Party-2022-0098-Paper-Apart-Application-for-permission-to-intervene-1.pdf> accessed 8 December 2022. Para 41 and 57.

[103] Ibid, para 57 -59.

[104]'Written Case on Behalf of Her Majesty's Advocate General for Scotland' (*Gov.Uk,* 2022) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1097237/UKSC_2022_0098_-_Reference_by_Lord_Advocate_-_Written_Case_for_the_Advocate_General_for_Scotland.pdf> accessed 8 December 2022 Para. 78

[105] See: Alan McDonald A, 'Case Preview: Reference by the Lord Advocate in relation to the Scottish Independence Referendum Bill' (*UKSC blog, 2022*) <http://ukscblog.com/case-preview-reference-by-the-lord-advocate-in-relation-to-the-scottish-independence-referendum-bill/#easy-footnote-bottom-7-22899> accessed 10 December 2022.See also: David Torrance, 'Scottish Independence Referendum: Legal Issues' (*Researchbriefings.files.Parliament.uk*, 2022) <https://researchbriefings.files.Parliament.uk/documents/CBP-9104/CBP-9104.pdf> accessed 8 December 2022.

[106] Ibid n.26, para 41

[107] Reference by the Attorney General and the Advocate General for Scotland – United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill [2021] UKSC 42 Para. 50

so, the Court in both cases was able to reaffirm Parliament's Sovereignty over Scotland. Reverting to the *referendum Bill* case, the Court held that:

> "1) The provision of the proposed Scottish Independence Referendum Bill that provides that the question to be asked in a referendum would be "Should Scotland be an independent country?" does relate to reserved matters. (2) In particular, it relates to (i) the Union of the Kingdoms of Scotland and England and (ii) the Parliament of the United Kingdom." [108]

In reaching this conclusion, it was clear that the Court had continued with its interpretive approach to the SA, specifically in this instance, over paragraphs 1(b) and 1(c) of schedule 5 of the Act. This is because the Court's analysis went beyond considering the Bill's legal effect to include its political consequences. As a result of the potential political consequences, the Court asserted that the Bill had "more than a loose or consequential connection" to reserved matters - the Bill was therefore outwith Holyrood's competences.[109]

In the aftermath of the Court's decision, FM Nicola Sturgeon accepted that the Court's role is only to interpret legislation and that she would respect the decision. She then added that the ruling exposes that the legislation in question (the SA), is inconsistent with any reasonable notion of Scottish democracy, as Scotland can't choose its own future without Westminster's consent. She further adds that "in the short term at least, is that the UK Government will maintain its position of democracy denial."[110] As discussed further below, to combat this, the FM confirmed that the SNP will run the next UK general election as a 'de facto referendum.' Ultimately for the FM, the ruling makes a further case for independence. For the UK Government, this decision was welcomed, as it "supports the UK Government's long-standing position on this matter." [111]

From the analysis of the above three cases, it is clear that when it comes to interpreting devolution-related pieces of legislation, the Supreme Court applies a literal and ordinary sense interpretation. However, given the broader principles behind most of these cases, a question arises: should the Court adopt a much broader and purposive interpretation? For instance, if the Court had adopted this interpretative approach in the *R(Miller)* case, the judgment would have arguably concluded in favour of the Scottish Government. This is because the broader principle and assumption underpinning the Scotland Act 2016 was to make Scotland an equal partner within the Union. Therefore, making the Sewel Convention legally enforceable would ensure this to some extent, as Scotland would now have a legal safeguard against any amendments being made to its constitutional framework without its consent.

Nonetheless, this interpretation approach raises a significant challenge - why do the (unelected) judges have the legitimacy to determine and enforce the principles underpinning a democratic devolution settlement? Furthermore, such an interpretation could potentially disregard a long-standing constitutional principle, Parliamentary Sovereignty. Thus, given these challenges, and

[108] Ibid n. 27, Para 92.
[109] Ibid, Para 81 – 83.

[110] 'Nicola Sturgeon's Address about Scotland's Future' (*SNP.org,* 2022) <https://www.snp.org/nicola-sturgeons-address-about-scotlands-future/> accessed 8 December 2022

[111] 'House of Commons Debate 23 November 2022 Volume 723' (*Parliament.UK*) <https://hansard.parliament.uk/commons/2022-> accessed December 8, 2022 Column 293.

the highly charged political backdrop behind the above three cases, the Supreme Court was arguably bound to apply quite limited statutory rules.[112]

1.2.2. Political clashes

Since Brexit, the UK and Scottish Governments have engaged in numerous political clashes. Most of these clashes have occurred during the enactment of key Brexit-related pieces of legislation that introduce necessary changes to the UK's constitutional order. In these clashes, the Scottish Government have utilised the Sewel Convention to voice its opposition to the UK Government's approach to Brexit and dealing with internal territorial dynamics. In response, the UK Government have sidestepped the Sewel Convention and pursued its Brexit-related legislative agenda without the consent of the Scottish Government and Holyrood. Similar to the legal clashes, the political clashes have further evidenced that the UK Government subscribe to the orthodox understanding of Parliamentary Sovereignty, which does not align with treating Scotland as an equal partner within the UK's Union. To contextualise this argument, this section will examine the enactment process of the EU Withdrawal Act 2018 and the EU (Withdrawal Agreement) Act 2020.

The EU Withdrawal Act 2018 is a significant piece of legislation that repeals the European Communities Act 1972 and provides for the legal continuity of EU law within the UK statute book (EU retained law). This legislation was first introduced to Westminster in July 2017 but only received royal assent in June 2018, a year after it was first formally announced in the Queen's Speech in June 2017.[113] The lengthy process was due to the numerous recommendations and amendments that had to be made before its enactment, most of which derived from the devolved admirations.[114] The devolved administrations had a great interest in the Act, particularly over the devolved provisions (Sections 10 – 12) due to their implications on devolved competences. Before its enactment, both the Welsh and Scottish Governments described the Bill as a "naked power grab."[115] The UK Government made sufficient concessions to secure the legislative consent of the Senedd, but these concessions were not enough to secure Holyrood's legislative consent.[116] By passing the EU Withdrawal Act 2018 without Holyrood's legislative consent, Westminster had sidestepped the Sewel Convention for the first time ever, since the creation of devolution and the convention in 1998. Prior to this, Holyrood had only once refused to grant legislative consent to a Westminster Bill (the Welfare reform Bill 2011). However, rather than sidestepping the Sewel Convention, sufficient concessions to the Bill were made. Eventually, the Scottish Parliament granted legislative

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[112] See for example: McHarg, Ibid n.36

[113] Maddy Jack, 'EU Withdrawal Act 2018 explainer' (*The Institute for Government*, 2018) <https://www.instituteforGovernment.org.uk/explainers/eu-withdrawal-act> accessed 8 May 2020.

[114] Gordon Anthony , 'Devolution, Brexit, And The Sewel Convention' (The Constitution Society 2018) <https://consoc.org.uk/wp-content/uploads/2018/04/Gordon-Anthony-Devolution-Brexit-and-the-Sewel-Convention-1.pdf> accessed 16 April 2020.

[115] 'Brexit Bill 'A Naked Power Grab' (*BBC News*, 2017) <https://www.bbc.co.uk/news/uk-wales-politics-40582756> accessed 8 May 2020.

[116] Graeme Cowie, 'Legislative Consent and the European Union (Withdrawal) Bill (2017-19)' (*Researchbriefings.Parliament.uk*, 2018) <https://researchbriefings.Parliament.uk/ResearchBriefing/Summary/CBP-8275> accessed 16 April 2020.

consent.[117] Imposing this piece of legislation without Holyrood's consent, only confirmed the Scottish Government's argument that the UK Government (and its ability to force through legislation in Parliament) continues to act in a way that diminutive's Scotland's interests. Despite offering consent, the Welsh Government were in support of their Scottish counterpart, arguing that the UK Government had acted in an illegitimate fashion by deliberately sidestepping the Sewel Convention.[118]

The EU (Withdrawal Agreement) Act 2020 enshrines the revised Brexit Withdrawal Agreement negotiated by the UK Government and the EU into UK domestic law. The Act also makes amendments to the EU Withdrawal Act 2018. For instance, section 27 of the EU (Withdrawal Agreement) Act 2020 amends section 8 of the EU Withdrawal Act 2018 in relation to enlarging the scope of the Minister's powers to adopt secondary legislation to address deficiencies in EU law as a result of Brexit, to now include measures adopted during the transition period.[119] The Act also touches upon devolved matters. For instance, section 22 of the Act creates powers for devolved ministers to make laws by regulation to enact the Ireland / Northern Ireland protocol. Additionally, schedule 6 of the Act makes several technical amendments to the Northern Ireland Act 1998, The Government of Wales Act 2006 and the Scotland Act 1998. Furthermore, schedule 1 of the Act sets out devolved competences over sections 12, 13 and 14 of the Act.[120] As a result of these provisions, the UK Government sought the legislative consent of Stormont, Holyrood and the Senedd. In another constitutional first, all three devolved legislative bodies refused to grant any legislative consent for the Act before its passing. The Scottish Government, in particular, argued that the reasoning behind withholding consent was because there was no democratic mandate within Scotland for the withdrawal from the EU.[121] Nonetheless, this did not stop Westminster from exercising its authority by passing the Act soon after. The UK Government's defence on this matter was that the circumstances surrounding the withdrawal from the EU were "not normal – they are unique." [122] This argument derives from the wording of Section 1(2)(8) of the Scotland Act 2016, which, as mentioned above, places the Sewel Convention on a statutory footing by amending section 28 of the Scotland Act 1998 to now read: "But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters

[117] Akash Paun, 'The Scottish Parliament Has Rejected The Brexit Bill – Are We Heading For A Second Independence Referendum?' <https://www.instituteforGovernment.org.uk/blog/scottish-Parliament-has-rejected-brexit-bill-are-we-heading-second-indep-referendum> accessed 16 April 2020.
[118] Akash Paun and Kelly Shuttleworth, 'Legislating By Consent - How To Revive The Sewel Convention' (Institute for Government 2020) <https://www.instituteforGovernment.org.uk/sites/default/files/publications/legislating-by-consent-sewel-convention.pdf> accessed 30 September 2020.
[119] Steve Peers, 'The Withdrawal Agreement Act: Implementing The Brexit Withdrawal Agreement In The UK' (*Eu law analysis blogspot*, 2020) <http://eulawanalysis.blogspot.com/2020/02/the-withdrawal-agreement-act.html> accessed 8 May 2020.

[120] David Torrance, 'Withdrawal Agreement Bill: Implications For Devolved Institutions' (*House of Commons Library*, 2019) <https://commonslibrary.Parliament.uk/Parliament-and-elections/devolution/withdrawal-agreement-bill-implications-for-devolved-institutions/> accessed 8 May 2020.

[121] 'Brexit' (*Gov.scot*, 2020) <https://www.gov.scot/brexit/> accessed 8 May 2020.

[122] 'Michael Gove MP, Chancellor Of The Duchy Of Lancaster, Update On The EU (Withdrawal Agreement) Bill Statement' (*Parliament.uk*, 2020) <https://questions-statements.Parliament.uk/written-statements/detail/2020-01-23/HCWS60> accessed 30 September 2020.

without the consent of the Scottish Parliament."[123] On behalf of the UK Government, the AG for Scotland, Lord Keen, explained this provision as follows:

> "the words 'it is recognised' that appear in clause 2 also reflect the continued Sovereignty of the United Kingdom Parliament and that it is for Parliament to determine when a circumstance may be considered not normal"[124]

Essentially then, the Sewel Convention can be derogated from in non-normal circumstances, which the sovereign UK Parliament determines. While this provided the UK Government with a justification for its actions, clarity on this matter was only provided at the end of the process when it became clear that the devolved jurisdictions would not grant consent. This raised the question as to why then, the UK Government sought consent in the first place when it should have stated from the onset that these were exceptional circumstances, thus the Government intends to legislate without consent.[125] Regardless of an explanation, the damage had already been done. For instance, following this episode, the Scottish Government and Holyrood went on a 'Sewel strike,' refusing to grant consent to any Brexit-related piece of legislation. With the forthcoming Brexit-related legislation set out in the 2019 Queens Speech (which included the Agriculture Bill, Fisheries Bill, Trade Bill, and Environment Bill), it was predicted that there would be an impasse.[126] However, in a surprise turn of events, the Scottish Government and Parliament broke the strike and granted consent to most of these Bills, including the Agriculture Act 2020, Fisheries Act 2020, Trade Act 2021, and Environment Act 2021. This marked a constitutional positive in that the operation of the Sewel Convention was back to 'normal.' As detailed in chapter 6, this was short lived following the passing of the UK Internal Market Act 2020. When first introduced, the accompanying explanatory notes of the legislation stated that every provision within the Bill falls within the scope of the Sewel Convention.[127] However, both Holyrood and the Senedd withheld legislative consent. The rationale behind withholding consent was over the legislation's negative implications on the exercise of devolved regulatory competences.[128]

Aside from the sidestepping of the Sewel Convention, it is also important to note that several of Westminster's Brexit-related pieces of legislation have curtailed the Scottish Government's competences and policy objectives. For instance, to ensure conformity with the EU's acquis communautaire post – Brexit, Holyrood passed the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021, which revives the 'keeping pace' power first introduced under section 13 of the Scottish Continuity Bill. However, there are several Westminster Brexit-related pieces of legislation that grant UK Ministers secondary powers to potentially divert from EU law (including areas covered by devolved competences). These include the EU

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[123] Section 1(2)(8), Scotland Act 2016
[124]'House Of Lords, Hansard, "Scotland Bill"' (*Hansard.Parliament.uk*, 2016) <https://hansard.Parliament.uk/Lords/2016-03-21/debates/F5398D1D-9900-47EE-A911-54F0A67CB5F5/ScotlandBill> accessed 30 September 2020.
[125]Paun, Ibid n. 74
[126] Nicola McEwen, 'Brexit: What Next?' (The UK in a changing Europe 2020) <https://ukandeu.ac.uk/wp-content/uploads/2020/02/Brexit-what-next-report.pdf> accessed 8 May 2020.

[127] 'United Kingdom Internal Market Bill: Explanatory Notes' (*Parliament.uk*, 2020) <https://publications.Parliament.uk/pa/bills/cbill/58-01/0177/en/20177en.pdf> accessed 30 September 2020.
[128] Kenneth Armstrong, 'Governing With Or Without Consent – The United Kingdom Internal Market Act 2020' (*UK Constitutional Law Association*, 2020) <https://ukconstitutionallaw.org/2020/12/18/kenneth-armstrong-governing-with-or-without-consent-the-united-kingdom-internal-market-act-2020/> accessed 2 February 2021.

Withdrawal Act 2018 (section 8, and Schedule 7), the Agriculture Act 2020 (section 40), the Fisheries Act 2020 (section 36 and 38), and the Environment Act 2021 (section 47- 50, 81 and 125). In a broad sense, the effect of these pieces of legislation further demonstrates the UK Government's ability to act in a unilateral way to curtail the Scottish Government's interests – which feeds back to the Scottish Government's argument that Scotland is not an equal partner within the Union.

In concluding this section, the above analysis has demonstrated that Scotland's position within the UK's Union is not that of an equal partner within the constitutional and political realms, as alluded to by the background assumptions of the vow. Moreover, the UK Government uses its hegemonic power often to the disadvantage of Scotland's devolution settlement. As examined in the succeeding chapter, the Scottish Government have a democratic mandate for a second independence referendum. However, the Scottish Government are now faced with a significant constitutional block from the UK Government. Despite legal clarity from the Supreme Court on the matter, politically, it is far from resolved. The Scottish Government have already tabled their alternative political means to achieving their constitutional objective – resulting in a clash between the UK's constitutional law and the Scottish Government's democratic mandate to hold indyref 2.[129]

3. Realising the third wave: Scottish Independence

As highlighted by the above clashes, Brexit has exposed the democratic and constitutional weaknesses of Scotland's constitutional position within the UK's Union. As a result, Brexit has had the overall effect of exacerbating the current period of constitutional unsettlement in Scotland. With further clashes expected, there is now an ever-growing need for a third wave of constructive constitutional reform in Scotland. Such reform can be realised in two very different constitutional landscapes. The first is Scottish independence, which the Scottish Government retains in favour of (desirably with EU membership too). As examined in this section, despite their democratic mandate, the Scottish Government have minimal constitutional options for achieving Scottish independence.

In December 2016, the Scottish Government formally confirmed its constitutional preference for Scotland in its policy paper titled 'Scotland's place in Europe.'[130] In protecting Scotland's national interests after Brexit, the paper set out several proposals to place Scotland's position within the EU single market. At the forefront of these proposals was an independent Scotland with EU membership. If this option was not plausible, the paper then discussed two more options described as compromises. The first was to negotiate a Withdrawal Agreement with the EU that would see the UK remain within the single market and customs union. Failing that, the other option was for a 'differentiated solution' for Scotland which would allow the nation

[129]Michael Gordon, 'UK supreme court rules Scotland cannot call a second independence referendum – the decision explained' (*The Conversation, 2022*) <https://theconversation.com/uk-supreme-court-rules-scotland-cannot-call-a-second-independence-referendum-the-decision-explained-194877> accessed 10 December 2022.

[130] 'Scotland's Place In Europe' (*Gov.scot*, 2016) <http://www.gov.scot/Resource/0051/00512073.pdf> accessed 16 April 2020.

to remain a member of the EU single market and retain some key benefits of EU membership in the instance that the rest of the UK decides to diverge.[131]

The Scottish Government's earlier calls for indyref 2 failed to gain much traction, owing to the combination of first, the UK Government's swift and firm approach on the matter, and second, the SNP's 'woeful' 2017 UK general election result. Regarding the former, the UK Government swiftly rejected to grant Holyrood a section 30 Order, with former PM Theresa May stating that "now is not the time for a second referendum."[132] Following on from then, the UK Government, at every ask, have remained firm with their rejection. To add to the obstacle of the UK Government, in the 2017 UK general election, the SNP lost a third of its Westminster seats amid a surge by the Conservative party in Scotland. The disappointing election result, added to the Tory surge, made clear that proposals for indyref 2 played an important part, as confirmed by Deputy FM John Swinney, who admitted that "the issue of a second referendum on Scottish independence had played a significant role in the result."[133] The aftermath of the election resulted in a change of policy direction by the SNP in regard to indyref 2.[134] The FM stated that the Government's new approach was "not to introduce the legislation for an independence referendum immediately, but rather to seek to influence the Brexit talks in a way that protects Scotland's interests."[135]

By changing its policy direction from independence, the Scottish Government began focusing on securing a differential solution for Scotland, as proposed in the earlier mentioned policy paper. The envisioned differential solution would see Scotland enjoy access to the EU's single market and customs union, even if the rest of the UK opts out. In justifying the need for a differential solution for Scotland, the Scottish Cabinet Secretary for Government Business and Constitutional Relations Michael Russell, outlined these reasons:

> "(1) The strengthened democratic mandate given to the Scottish Government, both by the referendum and by the fact that the Scottish Parliament had twice voted strongly in favour of remaining in the Single Market and (2) The profound economic challenges that Brexit will present to Scotland if they don't remain a member of the EU single market and customs Union."[136]

However, unlike the prominence that was given to ensuring Northern Ireland's special arrangements, the Scottish Government's preferences weren't reflected in the final Withdrawal Agreement negotiated by the UK Government and the EU.[137] Thus, the enactment of the EU

[131] Ibid.

[132] 'Now Is Not The Time': May Rules Out Sturgeon's Call For Indyref2' (*ITV News*, 2017) <http://www.itv.com/news/2017-03-16/may-rules-out-sturgeons-call-for-second-scottish-referendum-saying-now-is-not-the-time/> accessed 16 April 2020.

[133] 'SNP Lose 21 Seats Amid Tory Surge' (*BBC News*, 2017) <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-40192707> accessed 16 April 2020.

[134] Kirsty Hughes and Katy Hayward, 'Brexit, Scotland And Northern Ireland' (2018) <https://www.qub.ac.uk/brexit/Brexitfilestore/Filetoupload,816731,en.pdf> accessed 16 April 2020.

[135] 'Sturgeon Puts Referendum Plans On Hold' (*BBC News*, 2017) <https://www.bbc.co.uk/news/uk-scotland-40415457> accessed 16 April 2020.

[136] 'Oral Evidence - Brexit: Devolution - Michael Russell MSP' (*Parliament.uk*, 2017) <http://data.Parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/european-Union-committee/brexit-devolution/oral/46912.html> accessed 16 April 2020.

[137] 'Agreement On The Withdrawal Of The United Kingdom Of Great Britain And Northern Ireland From The European Union And The European Atomic Energy Community' (*Europa.EU*, 2019)

(Withdrawal Agreement) Act 2020 confirmed the burial of the realisation of the Scottish Government's plans for a differential solution.

With the failure to realise a differential solution for Scotland, the Scottish Government shifted policy focus back onto independence at a time when calls for indyref 2 became re-energised. Influential to this was the electoral redemption of the SNP in the 2019 UK general election, where the party received 45 percent of the vote share and 80 percent of the seat share in Scotland.[138] As a result of this electoral success, Nicola Sturgeon claimed there was a "renewed, refreshed and strengthened mandate" for indyref 2.[139] Soon after the election, the Scottish Government published a report titled 'Scotland's right to choose: Putting Scotland's future in Scotland's hands.'[140] The document outlined the Scottish Government's case for indyref 2. Which is based on three main reasons, with the first being that the Scottish Government have a democratic mandate arising from the 2016 Holyrood election and the 2019 UK General election. Secondly, (as discussed in the previous section) there has been a significant and material change in circumstances since the 2014 referendum, including Scotland formally leaving the EU against its democratic will. The final reason given is that Scotland, as a member of a voluntary union of nations, has the sovereign right to choose whether they want independence. By referring to the precedent of the Edinburgh Agreement 2012, the document makes a case for indyref 2 to be held on a consensual and cooperative basis with the UK Government to ensure no legal ambiguities. In addition, the document sets out draft amendments to be made to the Scotland Act 1998, by either a section 30 order or by primary legislation, to secure the required competences to hold indyref 2. The two main amendments include recognition in statute, Scotland's right to self–determination, and a permanent provision that grants Holyrood the competences to hold an indyref. These amendments go beyond what was set out in the Edinburgh agreement in 2012.[141]

Initially, the Scottish Government had planned to hold indyref 2 before the end of the Scottish Parliament term in 2021.[142] The rationale behind the time period was on the assumption that by then, there would be a clearer picture of the UK after Brexit, thus giving the Scottish electorate a much-informed choice.[143] In preparation to holding indyref 2, Holyrood enacted

<https://commission.europa.eu/strategy-and-policy/relations-non-eu-countries/relations-united-kingdom/eu-uk-withdrawal-agreement_en > accessed 12 April 2022.

[138] McEwen, Ibid n.83

[139] Akash Paun and Jess Sargeant, 'A Second Referendum On Scottish Independence' (*The Institute for Government*, 2020) <https://www.instituteforGovernment.org.uk/explainers/second-referendum-scottish-independence> accessed 18 September 2020.

[140] 'Scotland's Right To Choose: Putting Scotland's Future In Scotland's Hands - Gov.Scot' (*Gov.scot*, 2019) <https://www.gov.scot/publications/scotlands-right-choose-putting-scotlands-future-scotlands-hands/> accessed 4 February 2021.

[141] Chirs McCorkindale and Aileen McHarg, 'Constitutional Pathways to a second Independence Referendum', in Eve Hepburn, Michael Keating and Nicola McEwen (eds), *Scotland's new choice Independence after Brexit*(Centre on Constitutional Change 2021).

[142] 'Official Report - Parliamentary Business : 24 April 2019' (*Parliament.scot*, 2019) <http://www.Parliament.scot/Parliamentarybusiness/report.aspx?r=12053&i=109040> accessed 8 May 2020.

[143] 'Indyref2 'Framework' Bill Published At Holyrood' (*BBC News*, 2019) <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-48435198> accessed 8 May 2020.

the Scottish Elections (Franchise and Representation) Act 2020, and the Referendums (Scotland) Act 2020. The former Act extends the voting franchise for Scottish elections and referendums. Previously (as it was for indyref 1), the voting franchise in Scotland was limited to Scottish residents over the age of 16 with certain citizenships, including Commonwealth and EU. Now, all legal residents over the age of 16 within Scotland are eligible to vote, regardless of citizenship, and prisoners serving sentences of less than a year can vote too. In regard to the latter Act, it sets out the legal framework of any future indyref and draws upon the Scottish Independence Referendum Act 2013. It also extensively replicates the Political Parties, Elections and Referendums Act 2000, which sets out how referendums in the UK are to be regulated. For instance, both Acts require the Electoral Commission to test the 'intelligibility' of a proposed referendum question and require primary legislation for any referendum.[144] As mentioned in the previous section, to consolidate the two Holyrood Acts, the Scottish Government, in March 2021, published a draft independence referendum Bill, reaffirming the details of the date, question, and franchise of indyref 2.[145] To avoid the inevitable legal challenge to its competences, the Scottish Government stalled the Bill in hope of securing a section 30 order first. Such an order never came, as the UK Government repeatedly opposed indyref 2.[146] As a result, the Scottish Government failed to secure indyref 2 in their proposed period.

In an attempt to overcome the impasse, the Scottish Government, following the May 2021 Holyrood election (where the SNP narrowly missed out on an overall majority by one seat), altered their approach to achieving indyref 2. In a statement to the Scottish Parliament on the 28th of June 2022, the FM set out a three-pronged plan to indyref 2. Plan A remains to follow the precedent set in the Edinburgh Agreement by holding a consensual referendum. Thus far, the UK Government have continued to reject any section 30 order requests from the Scottish Government.[147] With the continued impasse on plan A, focus shifted to plan B, which involved the LA referring the draft referendum Bill to the Supreme Court under paragraph 34 of schedule 6 SA. As aforementioned in the previous section, the Supreme Court held that the draft Bill was outwith Holyrood's competences. In reaction to the case, the FM confirmed that the Scottish Government would be going ahead with its third and final plan.[148] Plan C involves the SNP contesting the next UK general election on a single question: 'Should Scotland be an independent country?' This election would be a 'de facto referendum' for the FM. As legal clarity exists over Plans A, and B, an analysis of the legality of Plan C will be conducted below.

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[144] Alistar Clark, 'More Than Indyref2? The Referendums (Scotland) Act 2020' (2020) 91 The Political Quarterly 467.

[145] Ibid n. 53.

[146] 'Letter From PM Boris Johnson To Scottish First Minister Nicola Sturgeon: 14 January 2020' (*Gov.UK*, 2020) <https://www.gov.uk/Government/publications/letter-from-pm-boris-johnson-to-scottish-first-minister-nicola-sturgeon-14-january-2020> accessed 12 March 2021.

[147] See: 'Letter From The First Minister To The Prime Minister On Independence Referendum' (*Gov.scot*, 2022) <https://www.gov.scot/publications/letter-from-the-first-minister-to-the-prime-minister-on-independence-referendum/> accessed 18 July 2022.

[148] Ibid n. 67

3.1.The legality of a 'de facto' referendum

As rightly put forward by McCorkindale and McHarg:

> "A state may become independent in one of two ways: either with the consent or at least acquiescence of the parent state, in accordance with its domestic constitutional requirements, or via a unilateral declaration of independence (UDI)…[the latter] is a less certain and less satisfactory route to independence. This is because achieving *effective* independence is a matter of securing recognition by other sovereign states, including the parent state, and this, as the ICJ pointed out, is essentially a political rather than a legal matter. In effect, international recognition is much more likely to be forthcoming if the independence process is perceived to have been legitimate." [149]

The Scottish Government have long agreed that independence needs to be done in a legitimate manner, and the UK, the EU, and the rest of the international community must accept the decision.[150] Therefore, the option of UDI is taken off the table, as the Scottish Government's primary objective, alongside independence, is for EU membership. Thus, if Scotland is to achieve effective and legitimate independence, the Scottish Government must do this under UK constitutional law requirements. As provided by the ruling in *the referendum Bill case*, the only indisputable option will entail gaining the agreement of the UK Government and Parliament. The agreement will most likely include the need for a referendum to be held first before independence can be agreed to. This is not a requirement as a matter of law, but by convention, as evidenced by the precedent of indyref in 2014, the 'border poll' requirement under Section 1 of the Northern Ireland Act 1998, and the referendum locks under Section 1 of the Scotland Act 2016, and Section 1 of the Wales Act 2017.[151]

There are many ambiguities regarding the Scottish Government's plan C. For instance, it does not stipulate what constitutes a victory. Does a victory entail winning a majority of the Scottish Westminster seats? Before the introduction of devolution in Scotland, the SNP saw the election of a majority of SNP MPs in Scottish seats as a mandate to negotiate independence.[152]However, given that this is meant to be a 'de facto referendum,' victory could therefore mean securing more than 50% of the vote share, as would be required under a 'de jure referendum.' The closest the SNP came to achieving a majority of the vote share was in the historic 2015 UK general election, where they secured 50% of the vote share.[153] Nonetheless, even when clarity is finally provided on what constitutes a victory, ambiguity remains on how a victory within

[149] Chris McCorkindale and Aileen McHarg, 'Constitutional Pathways To A Second Scottish Independence Referendum' (*UK Constitutional Law Association*, 2020) <https://ukconstitutionallaw.org/2020/01/13/chris-mccorkindale-and-aileen-mcharg-constitutional-pathways-to-a-second-scottish-independence-referendum/> accessed 4 February 2021.

[150] Ibid n. 97

[151]McCorkindale and McHarg, Ibid n.98

[152] Aileen McHarg, 'Securing Scotland's Independence: Moving Beyond Process?' (*Centre on Constitutional Change*, 2022) <https://www.centreonconstitutionalchange.ac.uk/news-and-opinion/securing-scotlands-independence-moving-beyond-process> accessed 18 July 2022.

[153] '2015 General Election Results (Scotland)' (*parliament.uk*, 2015) <https://electionresults.parliament.uk/election/2015-05-07/results/Location/Country/Scotland> accessed 18 July 2022.

the election would deliver independence or a subsequent indyref. Moreover, there is a great risk that if victory is declared, opponents of the referendum, and more importantly, the international community, including the EU, would not recognise this is a legitimate referendum – resulting in the continuation of the current constitutional gridlock on this matter.[154] Consequently, the only viable point of plan C would be to return to plan A with a stronger mandate for independence. Ultimately, sovereignty still rests with the UK Government and Westminster. In the same vein, however, the constitutional situation is only as tenable as the political cause.[155]

4. Realising the third wave: A reformed constitutional model for Scotland in the UK

As argued throughout this thesis, Brexit has resulted in the unfolding of a domestic constitutional drama, which on its current trajectory could lead to the destabilisation of the Union.[156] So far in this chapter, the analysis has focused on the constitutional debates and complications surrounding the potential of indyref 2. However, as has already been alluded to, the realisation of this is not guaranteed, given the current constitutional deadlock. Though, the existing constitutional issues exposed and exacerbated by Brexit will not erode. Given this, the UK Government might at some point be (reluctantly) forced to offer Scotland a reformed constitutional settlement, alternative to independence. Essentially, a 'vow 2.0' might soon be required in attempts to mitigate nationalism and preserve the UK's Union. To achieve this aim, a newly reformed Scottish devolution settlement would arguably need to address the constitutional issues surrounding the need for independence.

As noted earlier in the chapter, the Brexit-influenced clashes between the UK and Scottish Governments have contributed to the Scottish Government's calls for indyref 2. The clashes have exposed the UK Government's willingness to utilise its hegemony to the detriment of Scotland's devolution settlement. Thus, any new Scottish devolved settlement would need to deal with this issue. As a starting point, changes to the operation of the Sewel Convention would need to be considered. As demonstrated earlier in the chapter, the limits of the Convention have been tested since Brexit. For the Scottish Government, the continuous sidestepping of the Convention by the UK Government exposes that Scotland is not an equal partner in the Union and that the UK Government continue to treat Scottish interests in a diminutive way. As a result, the Scottish Government are in favour of reforming the Convention in the following ways:

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[154] For a further analysis on the SNP's plan C, see: Chris McCorkindale, 'Constitutional pathways to a second independence referendum – who ordered the duck? < https://ukandeu.ac.uk/constitutional-pathways-to-a-second-independence-referendum/> accessed 24 December 2022.

[155] Anthony Salamone, 'The Legal Focus Of The Scottish Independence Debate Misses The Point.' (*Blogs.lse.ac.uk*, 2021) <https://blogs.lse.ac.uk/politicsandpolicy/legal-focus-indyref2/> accessed 1 December 2021.

[156] Rebecca Zahn and Maria Fletcher, 'Brexit, The UK And Scotland : The Story So Far: A Constitutional Drama In Four Acts' in Gerry Hassan G and Russell Gunson (eds) Scotland*, the UK and Brexit: A guide to the future* (Luath Press Ltd 2017).

> “(1) Strengthening processes for determining the applicability of the Sewel Convention to Westminster legislation. (2) Commitment by the UK Government to respect the views of the Scottish Parliament when consent is required; in particular that it undermines the convention if the UK Government can decide circumstances are “not normal” having initially sought consent. (3) Robust procedures to protect the interest of the Scottish Parliament and enforce the convention; including strengthening the statutory protection in the Scotland Act 2016, and procedures for resolving disputes on the scope of reservations and the applicability of the convention.” [157]

In a similar vein, the Welsh Government also argue for the reformation of the Sewel Convention:

> “The ‘not normally’ requirement should be entrenched and codified by proper definition and criteria governing its application, giving it real rather than symbolic acknowledgement in our constitutional arrangements. Alternatively, a new constitutional settlement could simply provide that the UK Parliament will not legislate on matters within devolved competence or seek to modify legislative competence or the functions of the devolved Governments, without the consent of the relevant devolved legislature.”[158]

These proposals amount to a request to provide the legal codification of the Sewel Convention, which entails modifying the convention into a legally enforceable rule. As noted in the *R(Miller)* decision, the convention was politically codified under the Scotland Act 2016 and the Wales Act 2017, meaning then, its nature as a non-legal rule was not altered. This request is not uncommon, as examples do exist whereby conventions have been transformed into legal obligations - the Ponsonby rule was codified under section 20 of the Constitutional Reform and Governance Act 2010.[159]

It could be argued that it is possible to conceive an entrenched Sewel Convention via ‘manner and form’ changes to Parliamentary Sovereignty. Whereby, a new statute could provide for what is set out above, but at the same time, it would still be possible for Westminster to legislate to modify devolved powers with the consent of the devolved institutions. Parliament would still have unlimited legislative competence – but its exercise would be subject to new procedural conditions.[160] Nonetheless, Brexit has exposed that when it comes to devolution, the UK Government and Parliament often subscribe to the orthodox approach of Parliamentary Sovereignty, as set out in chapter 1. Given this, the above recommendations differ from the ‘Diceyan’ understanding of the Sewel Convention re Parliamentary Sovereignty.[161] In essence, these proposals challenge the orthodox approach to Parliamentary Sovereignty. In that, by entrenching the Sewel Convention, Westminster’s unlimited legislative authority concerning devolved matters would be limited, especially when consent is not granted. Therefore, it is very

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[157] 'Strengthening The Sewel Convention: Letter From Michael Russell To David Lidington' (*Gov.scot*, 2020) <https://www.gov.scot/publications/strengthening-the-sewel-convention-letter-from-michael-russell-to-david-lidington/> accessed 30 September 2020.

[158] 'Reforming Our Union: Shared Governance In The UK' (*Gov.wales*, 2019) <https://gov.wales/sites/default/files/publications/2019-10/reforming-our-Union-shared-governance-in-the-uk.pdf> accessed 30 September 2020.

[159] Alison Young, 'The Constitutional Implications Of Brexit' (2017) 23 European Public Law 757.

[160] Michael Gordon, 'Parliamentary Sovereignty And The Political Constitution(S): From Griffith To Brexit' (2019) 30 King's Law Journal 125.

[161] Gordon Anthony, 'Devolution, Brexit, And The Sewel Convention' (The Constitution Society 2018) <https://consoc.org.uk/wp-content/uploads/2018/04/Gordon-Anthony-Devolution-Brexit-and-the-Sewel-Convention-1.pdf> accessed 16 September 2018.

doubtful that there is any appetite for this sort of constitutional reform within the UK Government at present.

As discussed earlier in the chapter, several Brexit-related pieces of legislation, such as the EU Withdrawal Act 2018 and the UK Internal Market Act 2020, provide UK Ministers with wide-ranging powers to encroach on devolved competences. This limits the devolved Governments' ability to attain their policy objectives. Focusing on the UK Internal Market Act 2020, the Scottish Government have characterised this piece of legislation as a 'power grab' and has utilised this to strengthen their calls for indyref 2 further. Arguably then, reforming this and the other related pieces of legislation would be an important issue that would need addressing in any new Scottish devolved settlement. As analysed in chapter 6, the UK Internal Market Act, 2020 could be reformed to undo some of its effects on devolved regulatory autonomy. For instance, the Act imposes much tighter constraints than those under the EU's internal market. In practice, this limits the scope to govern for the devolved jurisdictions.[162] Furthermore, the common frameworks process should be prioritised as the main mechanism for drawing out the UK internal market. In light of England's dominance, this proposal would help identify and sustain the space for the devolved Governments. Nonetheless, given the current political climate, it is very difficult to envisage that the UK Government would be forthcoming with realising such reform anytime soon. The current trajectory seems to indicate that the UK Government will continue to unilaterally encroach on devolved competences, as exemplified by the Retained EU Law (Revocation and Reform) Bill, which risks UK Ministers being able to impose statutory instruments on devolved matters, without consent or consultation.[163] A more thorough analysis of this Bill is carried out in chapter 6.

The question of competences would arguably be another critical issue that would need addressing when considering the reforms for a new Scottish devolution settlement. In particular, competences over foreign affairs and the UK's Union. On several occasions, the Scottish Government has requested to exercise these two areas of competence. For instance, regarding foreign affairs, the Scottish Government has made it clear that they want a close relationship with the EU since Brexit. Falling short of independence with EU membership, the Scottish Government voiced that they would be content with a 'differentiated solution' for Scotland which would allow the nation to be a member of the EU single market and retain some key benefits of EU membership.[164] By devolving matters to do with foreign affairs, the Scottish Government would be able to realise their differential solution, as they'd be able to sign international agreements with the EU. However, it is doubtful that the current UK Government would be willing to devolve such powers to Scotland. Based on first, the UK Government has been adamant since the genesis of Brexit that all parts of the UK would be outside the EU's single market and customs union, with no special considerations given to the GB nations. Secondly, given the complications that arise from the special status given to NI, the UK Government would not be keen to extend these issues to Scotland too. Moving on, the row over indyref 2 between the UK and Scottish Governments has resulted in the Scottish

[162] Daniel Wincott, 'UK Internal Market Bill: Risks And Challenges' (*UK in a changing Europe*, 2020) <https://ukandeu.ac.uk/uk-internal-market-bill-risks-and-challenges/> accessed 5 October 2020.
[163] Ruth Fox, 'Five problems with the Retained EU Law (Revocation and Reform) Bill' (*Hansard Society*, 2022) <https://www.hansardsociety.org.uk/publications/briefings/five-problems-with-the-retained-eu-law-revocation-and-reform-bill#problem-5-there-are-potentially-serious-implications-for> accessed 2 December 2022.
[164] Ibid n. 87

Government arguing for secession powers to be devolved to Scotland.[165] Given the current clash between the UK's constitutional law and the Scottish Government's democratic mandate, devolving secession powers would be a crucial issue for consideration when proposing a reformed Scottish devolution settlement. Nevertheless, the ongoing deadlock over granting Holyrood a section 30 Order indicates that the UK Government would not be willing to transfer powers over this matter to Scotland any time soon.

Overall, it is evident to see that the realisation of the third wave of constructive constitutional reform in Scotland via a new devolved settlement is unlikely in the immediate future. This then alludes to the view that Scottish devolution is difficult to extend that much further before having to alter the constitution's status quo.[166] Essentially, the issues discussed above seem to be best addressed either through independence, or radical constitutional reform.

Conclusion

The chapter has highlighted the extent to which Brexit has exacerbated Scotland's constitutional unrest as evidenced by the numerous political and legal clashes the UK Government has had with its Scottish counterpart. With no signs of tensions easing, a constitutional crisis erupting is now an increasing possibility. Therefore, the need for a third wave of constructive constitutional reform in Scotland is growing. Such reform can be achieved in two distinct constitutional landscapes - Scottish independence or a new Scottish settlement within the UK. The Scottish Government favours the former, stemming from the constitutional developments that have occurred since 2014, which have cumulated to the proposition that Scotland is being governed against its own will. However, a major constitutional roadblock stands in the way of the Scottish Government's constitutional objective – the UK Government's refusal to grant Holyrood a section 30 Order to hold indyref 2. As a result of this impasse, the UK's constitutional law is now clashing with the Scottish Government's democratic mandate to hold indyref 2. This clash also exposes the contrasting visions of devolution the two Governments have. As outlined in chapter 1, for the UK Government, devolution is understood from a traditional perspective through constitutional theory, whereas for the Scottish Government, devolution is understood from a contemporary perspective through practice and political reality. [167]

In the instance that Scottish independence does not materialise, the existing constitutional issues will not erode. Meaning in the least, Scotland's position within the Union needs to be revised. However, under the current constitutional status quo, Scotland's devolution settlement cannot be stretched so far to halt the demands for indyref 2. Doing so would require the need for the introduction of radical constitutional reform. Something which the current UK Government have no appetite for. As noted by Rodney Brazier:

[165] Ibid n. 97
[166] Michael Keating, 'Indy Ref 2: Legal Or Constitutional?' (*Scottish Centre on European Relations*, 2021) <https://www.scer.scot/database/ident-13074> accessed 12 March 2021.
[167] McHarg and Mitchell, Ibid n. 5

> "Politicians are the midwives of constitutional change. Reform cannot come about unless a political party delivers it while in Government. All the reforming energies of those outside of Government are of limited practical significance until that happens." [168]

Given the UK Government's approach so far, the most likely situation in the immediacy seems to be the maintenance of the status quo - no referendum and no constitutional reform. In the long-term however, this approach can potentially erupt a constitutional crisis, as this period of constitutional unsettlement is increasingly becoming untenable. This will only further intensify the need for a third wave of constructive constitutional reform.

[168] Rodney Brazier, 'How Near Is A Written Constitution' (2001) 52 Northern Ireland Legal Quarterly 52.

Chapter 4: ‘Awakening the sleeping dragon’: Brexit and the Welsh Government’s constitutional interests

Introduction

Brexit has arguably had the least constitutional and political implications in Wales compared to the other devolved territories. This can be attributed to the following reasons: first, despite a pro-remain political establishment, Wales was the only devolved territory in the UK to have voted to leave the EU (52.5 percent).[1] Second, the situation in Wales does not give rise to complex political and constitutional questions than those seen in the other devolved jurisdictions. Third, within Wales, there has been a long-term public consensus in support of the Union and devolution. Though this has significantly been damaged recently through Brexit - 2021 saw the highest levels of support ever recorded for Welsh independence. Nevertheless, this increase in support is yet to become a leading election issue as it has been in Scotland. And much of the electorate still supports the Union and devolution.[2]

Despite the above, Brexit has and will continue to influence and alter the devolution settlement in Wales profoundly. As shall be discussed further in this chapter, developments in Scotland’s constitutional future are important for Wales. At times, pressures that induce change in Scotland can lead to the same changes in Wales (even when the pressure concerned does not apply in Wales). Furthermore, as analysed in chapter 3, Brexit has the potential to greatly alter Scotland’s devolution settlement. More significantly, it has put into question the nation’s future within the UK’s Union. Thus, as a result of this overall trajectory of Welsh devolution, the common narrative perceives that Scottish influence will play a significant role in regard to shaping Welsh devolution in a post – Brexit reformed constitution.

However, the Brexit process has evidenced that this narrative is increasingly eroding. As highlighted throughout this thesis, because of Brexit, the UK’s constitution is undergoing some necessary changes, including reforming its intergovernmental framework and the (re)establishment of its internal market. These developments have impacted Welsh devolution, as exemplified by the latter development, which has had the overall effect of rolling back Welsh devolved regulatory competences. Moreover, these reforms have not come about due to developments in Scotland. More significantly, these developments have resulted in ‘awakening the Welsh sleeping dragon,’ as the Welsh Government (through its policy papers and decision-making) have become very vociferous, more than at any other time since the establishment of devolution, over their constitutional aspirations for Wales and the UK. [3]These constitutional

[1] 'Brexit Results, By Nation 2016 | Statista' (*Statista*, 2016) <https://www.statista.com/statistics/568701/brexit-results-by-nation/> accessed 2 April 2020.

[2] Greg Davies, 'The Constitutional Prospects Of The Sixth Senedd' (*Centre on Constitutional Change*, 2021) <https://www.centreonconstitutionalchange.ac.uk/news-and-opinion/constitutional-prospects-sixth-senedd> accessed 17 November 2021.

[3] Richard Rawlings 'The Welsh way' in Jeffery Jowell and Colm O’Cinneide (eds) *The Changing Constitution* (9th edn, Oxford University Press 2019).

aspirations have the overall effect of strengthening devolution (via the defence of existing competences and the extension of powers) and safeguarding the UK's Union. This position is distinct in comparison to the approaches of the rest of the UK's Governments, including, the UK Government. [4] Given the current political climate, it is doubtful that the 'midwives' of constitutional reform – the UK Government, have any appetite for realising the Welsh Government's constitutional demands. Nevertheless, the UK Government's current approach to dealing with the internal constitutional tensions arising from Brexit is increasingly becoming untenable, intensifying the Welsh Government's calls for radical constitutional reform.

Based on the above, the main argument in the chapter is that Brexit has 'awakened the sleeping dragon in Wales.' This is because the UK Government's approach to Brexit has undermined Welsh devolution overall. In response, the Welsh Government is calling for radical constitutional reforms to strengthen devolution and protect the UK's territorial integrity. It will be challenging, however, for the Welsh Government to secure their radical constitutional proposals due to the hegemony of the UK Government and Parliament on constitutional reform. Subsidiary to this, the chapter will also argue that the only way to achieve these proposals in their current form would arguably be through an improbable solution - independence, which the Welsh Government has always been against. However, by revising their proposals, the Welsh Government would place themselves in a better position to realise them by appealing to the UK Government and/ or via Scottish influence and involvement.

In setting out the above argument, the chapter will be structured into five main sections. In section one, the historical trajectory of Welsh devolution will be examined. This examination will provide the reader with some context behind the implications of Brexit on the future of Welsh devolution. In section two, the Brexit referendum in Wales will be examined. The section will highlight the disparity that exists between the Welsh Government and the electorate over Brexit. In section three, the Welsh Government's constitutional objectivities will be evaluated, before comparing them with the approaches taken up by the rest of the UK's Governments in section four. In the final section, the chapter will analyse the ways in which the Welsh Government can realise their constitutional objectives, under the current constitutional status quo.

1. Overview of devolution in Wales

1.1.Constitutional history

As discussed in chapter 3, following the shortcomings of the speakers' conference in 1920, plans for devolution were next brought forward by the Kilbrandon Commission in 1973. In its final report, the Commission suggested (like in Scotland) for the creation of a 100-member unicameral Welsh legislative body, elected via proportional representation. The areas of competency that would be devolved to the Welsh Assembly would be some of those already

[4] Gregory Davies, and Daniel Wincott, 'Ripening Time? The Welsh Labour Government Between Brexit And Parliamentary Sovereignty' (2022) 0 The British Journal of Politics and International Relations 1; Vernon Bogdanor, *Beyond Brexit: Towards A British Constitution* (IB Tauris 2019). Pp. 217; Jonathan Bradbury, 'Welsh Devolution And The Union: Reform Debates After Brexit' (2021) 92 The Political Quarterly 125.

under the supervision of the SoS for Wales. Which included health, education, and the environment.[5]

Following victory in the October 1974 general election, the New Labour Government took inspiration from the Kilbrandon Commission report and put plans for Welsh devolution into place. These plans were enacted via the Wales Act 1978, which outlined the legal framework of the proposed devolution settlement in Wales. The Act proposed the creation of a Welsh Assembly, with 72 members elected via the 'First past the post' majoritarian system used for Westminster elections. The chair of the executive committee would lead the Assembly. The Assembly would have executive and not legislative power on policy issues such as housing, health, and education. [6] To bring into effect the provisions of the Wales Act 1978, a referendum was held in Wales to ensure that there was support for establishing devolution to the nation. The Act required that at least 40% of the Welsh electorate vote Yes in the referendum for its provisions to come into effect. On a turnout of 58.8%, 79.7% of those voted No in the referendum. The Yes vote only accounted for 11.8% of the electorate, which was way below the 40% threshold. The vote was essentially 4 to 1 against devolution, with no single council area voting majority Yes.[7]

This resounding rejection by the Welsh electorate to devolution confirmed the traditional attitudes of Welsh nationalism. Traditionally, nationalism in Wales has been embedded in culture rather than institutionalism, as noted in Scotland and NI. Essentially, Welsh nationalism has tended to focus on language and culture rather than the creation of separate Welsh political institutions. This can be attributed partly to the fact that since the 1922 general election, Wales has been dominated by the Labour party. Under the modern electoral franchise, there has never been a Conservative majority in Wales returned to Westminster (or the Senedd). Thus, as noted above, nationalism has not been politicised in the way that Scottish electoral divergence has over the last five decades. [8]

Following on from the resounding rejection in 1979, the agenda for Welsh devolution was resurrected by the Labour party as part of a manifesto commitment in 1997:

> "As soon as possible after the election we will enact legislation to allow the people of Wales to vote in a referendum on our proposals, which will be set out in a White Paper . This referendum will take place not later than the autumn of 1997. A simple majority of those voting in Wales will be the requirement." [9]

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[5] Royal Commission on the Constitution (Kilbrandon Report) (1973). Para 1140 - 1144

[6]See: Richard Rawlings, *Delineating Wales: Constitutional, Legal, and Administrative aspects of national devolution* (University of Wales Press 2003); 'Research Paper: Wales And Devolution' (*Parliament.UK*, 1997) <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=2ahUKEwiT97PQiKzpAhXYPsAKHU2GDNEQFjABegQIAhAB&url=http%3A%2F%2Fresearchbriefings.files.Parliament.uk%2Fdocuments%2FRP97-60%2FRP97-60.pdf&usg=AOvVaw2Gv4qOpLfi3wD1nJ4HNLpN> accessed 12 May 2020.

[7] Results Of Devolution Referendums (1979 & 1997)' (*Parliament.uk*, 1997) <http://researchbriefings.files.Parliament.uk/documents/RP97-113/RP97-113.pdf> accessed 3 March 2020.

[8] See for example: Peter Dorey, *The Labour Governments, 1964-1970* (Routledge 2008)

[9] 'Labour Party Manifesto - 1997' (*Labour-party.org.uk*, 1997) <http://www.labour-party.org.uk/manifestos/1997/1997-labour-manifesto.shtml> accessed 12 May 2020.

Like in 1979, in 1997, a referendum had to be held in Wales before devolution could be realised. The 1997 referendum once again highlighted the relative lack of popularity from the Welsh electorate for devolution. On a turnout of 50.22% (below 1979), the narrow majority Yes result of 50.3% only accounted for 25% of the Welsh electorate voting in favour of devolution. Under the criteria set in 1979, Wales would have failed to gain devolution in 1997, as the Yes vote would have fallen well below the 40% threshold. The referendum also split the nation in half. Of the 22 council areas in Wales, 11 (mainly in the east) voted majority No - Cardiff included.[10]

1.2. Constitutional form

The referendum result was realised via the enactment of the Government of Wales Act 1998.[11] The Act established a single chamber Welsh Assembly (Senedd), with 60 members elected via the Additional Member System. The Assembly had a local Government structure, thus there was a lack of separation between the executive and the legislature, so no real distinct Welsh Government. The Assembly leader would be the executive committee chair, whose membership comprised the heads of the other committees. Regarding competences, the Assembly had far fewer powers than the Scottish Parliament. The powers were similar to those first proposed by the Wales Act 1978. For example, both Acts provided subordinate legislative power in policy areas such as housing, education and health. This meant that the Assembly could only make regulations, which interpret and implement Westminster legislation.[12] Overall, as put forward by Rawlings, "[the 1998 Act] delivered a weak and spotty form of executive devolution."[13]

The Assembly's first election took place in 1999, in which the Labour party won the most seats (28), with the nationalist party Plaid Cymru coming in second with 17 seats. Labour's Alun Michael became the first leader of the Welsh Assembly and ran a minority administration.[14] Senedd elections occur on a fixed term basis, with the next election scheduled for May 2026. Labour currently holds the most seats in the Senedd and forms the Welsh Government, led by First Minister Mark Drakeford. Electorally, Labour has been the most successful party in the Senedd and has formed part of the Welsh Government in every election.[15]

Over time, Welsh devolution has evolved and expanded from its minimalistic genesis. This has been done through structural changes and the acquisition of greater competences over a wider

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[10] Results Of Devolution Referendums (1979 & 1997)' (*Parliament.uk*, 1997) <http://researchbriefings.files.Parliament.uk/documents/RP97-113/RP97-113.pdf> accessed 3 March 2020.

[11] For a more thorough analysis on the Welsh devolution scheme established by the Government of Wales Act 1998 see: Richard Rawlings, 'The New Model Wales' (1998) 25 Journal of Law and Society 461.

[12] Daniel Wincott, 'The Possible Break-Up Of The United Kingdom' (*UK in a changing Europe*, 2020) <https://ukandeu.ac.uk/long-read/the-possible-break-up-of-the-united-kingdom/> accessed 8 October 2020.

[13] Richard Rawlings 'The Welsh way' in Jeffery Jowell and Colm O'Cinneide (eds) *The Changing Constitution* (9th edn, Oxford University Press 2019). Pp. 297

[14] 'Welsh Assembly Election, 1999' (*Democratic Dashboard*, 2020) <https://democraticdashboard.com/elections/welsh-assembly-election-1999> accessed 8 October 2020.

[15] Richard Rawlings 'The Welsh way' in Jeffery Jowell and Colm O'Cinneide (eds) *The Changing Constitution* (9th edn, Oxford University Press 2019). Pp. 298

range of policy fields.[16] For instance, in 2002, the Welsh Labour – Liberal Democrat coalition administration set up the Richard Commission, whose terms of reference were to examine the powers and electoral arrangements of the Welsh Assembly. The Commission published its report in 2004, and amongst many things, recommended that the Assembly should have primary legislative powers and there should also be a legal separation between the executive and legislature.[17] These recommendations were realised via the enactment of the Government of Wales Act 2006. The Act superseded the Government of Wales Act 1998 and granted the Welsh Assembly competences via Orders in Council (Legislative Competence Orders) to pass primary legislative statute's (Assembly Measures). It also established a separation between the Assembly and Government by creating the Welsh Assembly Government (WAG). In addition, part 4 of the Act provided for the potential for further legislative competences for the Senedd to pass Assembly Acts, but this would be subject to a referendum.[18]

This referendum was held in 2011. Voters in the referendum were asked whether the Welsh Assembly should have full legislative competences over its devolved matters. On a turnout of 35.6%, 63.5% voted Yes and 36.5% voted No. Of the 22 unitary authorities, Monmouthshire was the only area to return a majority No vote.[19] The referendum marked the beginning of a new narrative in relation to Welsh nationalism. Unlike in 1979 and 1997, the Welsh electorate unequivocally supported devolution for the first time. By lifting the 'shadows' of 1979 and 1997, this emphatic vote in 2011 ensured that devolution had now become a settled will for the Welsh nation.[20]

Following on from the referendum, in October 2011, the Silk Commission was set up by the UK Government, with the terms of reference of reviewing devolving fiscal powers and more generally, the powers of the Welsh Assembly. The Silk Commission published its report in two parts. The first part was published in 2012 and dealt with the fiscal powers question. The report recommended for the devolution of some fiscal powers to the Senedd including on stamp duty land tax and landfill tax.[21] These recommendations were implemented via the Wales Act 2014, which "bestowed a number of new financial powers on Wales." [22] The Act also formally changed WAG's name to the Welsh Government. The second part of the Silk Commission's report was published in March 2014. Amongst many things, the Commission recommend for

[16] Stephen Tierney, 'Brexit And The English Question' in Federico Fabbrini (ed), *The Law & Politics of Brexit* (Oxford University Press 2017).

[17] Commission on the powers and electoral arrangements of the National Assembly for Wales (Richard Commission) (2004)

[18] The Government of Wales Act 2006. See also: Richard Rawlings ' Law making in a virtual Parliament: The Welsh Experience ' in Robert Hazell and Richard Rawlings (eds*) Devolution, Law making and the Constitution* (Andrews UK Limitted 2015)

[19] 'Results Of The National Assembly For Wales Referendum 2011' (*Senedd.wales*, 2011) <https://senedd.wales/Research%20Documents/Results%20of%20the%20National%20Assembly%20for%20Wales%20Referendum%202011%20-%20Research%20paper-04032011-211809/11-017-English.pdf> accessed 12 May 2020.

[20] Ibid

[21] Commission on devolution in Wales (Silk Commission Part I) (2012)

[22]'The Silk Commission And Wales Act 2014' (*National Assembly for Wales*, 2014) <https://www.assembly.wales/en/bus-home/research/Pages/research-silk-Commission.aspx> accessed 3 December 2018.

more competences to be devolved to Wales in areas such as policing and youth justice, and also the Commission recommended for the adoption for Wales, of the reserved powers model as in Scotland.[23] The majority of these recommendations formed part of the St David's day agreement, including the recommendation in the first report for the devolution of tax varying powers.[24] The agreement resulted in the enactment of the Wales Act 2017, which granted the Welsh Assembly tax varying powers, and placed Welsh devolution under the reserved power model.[25]The Act also granted the Assembly the power to change its name. As result, in May 2020 the Welsh Assembly passed the Senedd and Elections (Wales) Act 2020, which changed its name to the Welsh Parliament / Senedd Cymru. The Wales Act 2017 also recognised the Senedd and Welsh Government as permanent institutions among the UK's constitutional arrangements, with a referendum required before either can be abolished.[26]

The single shared jurisdiction between England and Wales makes it difficult for the Welsh devolved administration to exercise some of its responsibilities fully. For instance, Wales has some devolved responsibility in relation to the criminal justice system, which includes the education of prisoners and police funding, but yet no real powers over policing and prisons for instance.[27] The criminal justice system and prisons are reserved from Wales on the basis of the shared territorial legal jurisdiction. In contrast, the other devolved territories have these competences devolved to them, as well as separate and distinct legal systems. [28] As a consequence of this, in 2017 the Welsh Government set up the Thomas Commission, whose terms of reference were to review the operation of the justice system in Wales. The Commission published its report in 2019 and recommended devolving the criminal justice system and prisons to Wales, in line with the other devolved jurisdictions. The Commission also recommended separating the shared territorial legal jurisdiction between Wales and England by formally recognising Welsh law as distinct to English law. The Commission's report adds that such reform needs to take place immediately. [29] The Commission's report was not received well by the UK Government, as evidenced by the statements of Chris Philip, the then Parliamentary Under-Secretary of State for Justice, during a House of Commons debate on the report:

> "The member who moved today's motion made a case for what essentially amounts to the full devolution of justice functions to Wales in line with the recommendations of the report that Lord Thomas recently published. I respectfully disagree with her conclusion that the wholesale devolution of justice to Wales would be in the interests of Wales. Devolving justice in the context of a body of law where the majority of it applies to England and Wales would actually exacerbate or worsen the jagged edge problem [referred to in the Thomas report]…because it would then apply to these reserved matters, which are far

[23] Commission on devolution in Wales (Silk Commission Part II) (2014)
[24] 'Powers For A Purpose: Towards A Lasting Devolution Settlement For Wales' (*Gov.UK*, 2015) <https://www.gov.uk/Government/publications/powers-for-a-purpose-towards-a-lasting-devolution-settlement-for-wales> accessed 12 May 2020.

[25] This model includes far more reservations than the Scottish reserved model.
[26] Wales Act 2017, section 1.
[27] Commission On Justice in Wales (Thomas Commission) Report (2019)
[28] Daniel Wincott, 'The Commission On Justice In Wales (Thomas Commission)' (*UK Constitutional Law Association*, 2018) <https://ukconstitutionallaw.org/2018/10/05/daniel-wincott-the-Commission-on-justice-in-wales-thomas-Commission/> accessed 13 May 2020.

[29] Commission On Justice in Wales (Thomas Commission) Report (2019)

> larger in number than the matters that have been legislated for separately at the Welsh level."[30]

It is unlikely then, that the recommendations of the Thomas Commission will be fully realised in the immediacy.[31]

Overall, the trajectory of the devolution settlement in Wales has been that of more powers and structural changes. This has allowed for Welsh devolution to be further strengthened into a model resembling Scotland. As characterised by Rawlings the theme behind the evolution of devolution in Wales has been that of "winning some autonomy with a view to winning more... [Since 1998] there always has been another (Government of) Wales Act to imagine"[32] In the remainder of this chapter, it will be demonstrated how Brexit has had the implication of presenting both opportunities and challenges for the further enhancement of Welsh devolution.

2. The Brexit referendum result in Wales: Disparity between the electorate and political establishment

Of the devolved territories, Wales had the highest turnout (71.7 percent) during the 2016 Brexit referendum. Wales was also the only devolved territory to vote majority leave (52.5 percent) in the referendum. On a closer inspection of the result in Wales, only 5 of the 22 Welsh unitary authorities voted majority remain (Cardiff, Ceredigion, Monmouthshire, the Vale of Glamorgan and Gwynedd).[33] Furthermore, a study conducted by the British Election Survey looking at the leave vote in Wales by national identity, highlighted that the less Welsh you felt, the more likely you were to vote leave within the referendum. For instance, those that voted heavily to leave identified more either as English only, English British, British only (not Welsh) or Welsh British - combined they accounted for 62.75 percent of the leave vote and 12.5 percent of the Welsh electorate. On the other end of the spectrum, those that identified strongly as Welsh only, voted heavily remain - they accounted for 29 percent of the leave vote and 24 percent of the Welsh electorate.[34]

In contrast to the electorate, the majority of the main political parties within Wales (Labour, Plaid Cymru, and the Liberal Democrat party) all campaigned to remain within the EU during the Brexit referendum in 2016. Of the 60 Senedd members, only a small minority of MSs were Eurosceptic - representatives mostly of UKIP and some Conservative party members.[35] The Labour-led Welsh Government ran a campaign that expressed the economic and political risks associated with leaving the EU during the referendum. Given the campaign position taken by

[30] 'Westminster Hall Debates: Commission On Justice In Wales - 22 Jan 2020' (*TheyWorkForYou*, 2020) <https://www.theyworkforyou.com/whall/?id=2020-01-22b.138.0> accessed 13 May 2020.

[31] Jonathan Bradbury, 'Welsh Devolution and The Union: Reform Debates After Brexit' (2021) 92 The Political Quarterly 125.
[32] Richard Rawlings 'The Welsh way' in Jeffery Jowell and Colm O'Cinneide (eds) *The Changing Constitution* (9th edn, Oxford University Press 2019). Pp. 320
[33] Ibid n. 1
[34] Roger Awan-Scully, 'Brexit and Wales' <http://blogs.cardiff.ac.uk/brexit/2018/03/29/brexit-and-wales/> accessed 2 April 2020.
[35] Jo Hunt, Rachel Minto and Jayne Woolford, 'Winners And Losers: The EU Referendum Vote And Its Consequences For Wales' (2016) 12 Journal of Contemporary European Research 824.

the Welsh political establishment and the characterisation of Wales as a left-leaning, Europhile, and politically progressive nation, the majority leave result caused a bit of a shock. In explaining this disparity, an often-cited reason is that the Welsh political establishment failed to communicate well, their Europhile position to the electorate.[36] For instance, the Welsh Government argued that Brexit would result in the loss of EU funding (which made up for the failings of the Barnett formula), and as a consequence, the nation's economy would be weakened. For context, during the last EU funding period (2014 – 2020) Wales had received up to £3 billion, mainly through the structural and investment fund and the common agriculture policy.[37] The Welsh Government were also sceptical to the extent to which the UK Government could replace such funding for Wales in the case of Brexit. Given the strained intergovernmental relations, they were also weary that the replacement of such funding would have no devolved input.[38] The politicians in NI that campaigned to remain within the EU put forward similar economic arguments as NI, just like Wales, were great beneficiaries of EU funding. Their arguments had an impact as the jurisdiction voted majority to remain (as discussed in chapter 2, it is key to note though, that given the political sensitivities in that jurisdiction, other factors heavily contributed to the referendum outcome). Returning to the Welsh context, these economic arguments failed to resonate well with the electorate, who decided to vote majority leave against the backdrop of the economic benefits associated with EU membership. This decision was likened to "Turkey's voting for Christmas."[39]

Welsh electoral politics in the democratic era has long been defined by one-partyism due to Labour's hegemony. The Welsh leave result in the 2016 Brexit referendum resulted in the emergence of disparity for the first time since 1979 (when the electorate rejected Labour's plans for devolution) between the political establishment and the electorate.[40] In the aftermath of the referendum, the leave vote placed the Welsh Government in a detrimental position, as they now had a fragile public mandate to pursue their Europhile approach. Moreover, the leave result also meant that when it came to bargaining with the UK Government over Brexit interests, the Welsh Government had far less leverage than their devolved counterparts.[41] Though, following the May 2021 Senedd elections, that leverage could be perceived to have increased. Given that the Welsh Labour party won the election on a manifesto that included several Brexit-related constitutional objectives (which will be detailed further below). Therefore, this could be considered a more legitimate and convincing mandate than the Brexit referendum. However, as analysed further below, the UK Government have thus far shown no interest in engaging with or realising the Welsh Government's constitutional demands. Conversely, the continuation of the status quo will arguably result in further destabilising effects.[42]

[36] See for example: Moya Jones, 'Wales and the Brexit Vote' (2017) 22 French Journal of British Studies
[37] Jo Hunt, 'A Welsh Brexit' <https://blogs.cardiff.ac.uk/brexit/2017/03/28/a-welsh-brexit-2/> accessed 2 April 2020.

[38] Derek Birrell and Ann Marie Gray, 'Devolution: The Social, Political And Policy Implications Of Brexit For Scotland, Wales And Northern Ireland' (2017) 46 Journal of Social Policy 765.

[39] Hunt, Minto and Woolford, Ibid n. 6

[40] Ibid n. 1
[41] Nicola McEwen, ' Negotiating Brexit: Power Dynamics in British Intergovernmental Relations' (2021) 55 Regional Studies 1538.
[42] Ibid n. 2

3. Departing from tradition: Brexit and the Welsh Government's constitutional objectives

As outlined in chapter 1, the Labour party have been in Government in Wales since the inception of devolution in 1998. Traditionally, they have often been characterised as a 'good unionist,' as they have tended not to challenge fundamental UK constitutional principles. Additionally, their approach to constitutional reform, such as enhancing devolution in Wales, has often been "cooperative, as opposed to combative or disruptive towards the UK Government." [43] The Brexit referendum campaign exemplifies that the Welsh Government's 'good unionist' approach has also coincided with their 'good European' approach.'[44] In the immediate aftermath of the Brexit referendum, the then First Minister Carwyn Jones outlined six priorities for Wales arising from the change in circumstances, which were:

> "1) Protect jobs and economic confidence, 2) Play a full part in discussions on EU withdrawal, 3) Retain access to the European single market, 4) Negotiate continued involvement in major EU funding programmes, such as for farming and poorer areas, 5) Revise the Treasury's funding formula for the Welsh Government budget, 6) Put the relationship between devolved administrations and the UK Government on an entirely different footing."[45]

These priorities advocated for two main things. First, the softest Brexit possible in which the future relationship between the UK and EU would be close. Second, for constitutional reform, especially on the intergovernmental relationship between the UK Government and its devolved counterparts. These priorities exemplified the character of Wales as the 'good European' and, to some extent, a 'good unionist.' In their two White Paper s on Brexit, the Welsh Government formalised these six priorities in 2017. The first paper, titled 'Securing Wales's future,' was drafted in partnership with Plaid Cymru and took a very similar economic approach to the Scottish Governments policy paper titled 'Scotland's place in Europe.'[46] Both papers advocated for the UK Government to secure full and unfettered access to the EU's single market after Brexit. There were also similarities between the two papers over governance - to safeguard their national interests, both papers called for devolved input over the Brexit negotiation process. Both papers also accepted that Brexit was a fundamental development that required constitutional reform. This is where the similarities ended, however, as for constitutional reform, the Scottish paper advocated for independence, whereas the Welsh paper advocated for strengthening the devolution settlements by reforming intergovernmental relations and extending competences.[47]

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[43] Jo Hunt and Rachel Minto, 'Between Intergovernmental Relations and Paradiplomacy: Wales and the Brexit of the Regions' (2017) 19 The British Journal of Politics and International Relations 647.
[44] Ibid.
[45] 'Jones Fears for Jobs after Brexit Vote' (*BBC*, 2016) <https://www.bbc.co.uk/news/uk-politics-eu-referendum-36618878> accessed 2 April 2020.
[46] 'Scotland's Place In Europe' (*Gov.scot*, 2016) <http://www.gov.scot/Resource/0051/00512073.pdf> accessed 16 April 2020.
[47] Daniel Wincott, Gregory Davies and Alan Wager, 'Crisis, What Crisis? Conceptualizing Crisis, UK Pluri-Constitutionalism And Brexit Politics' (2020) 55 Regional Studies 1528.

The second White Paper , which was released a week after the 2017 UK general election titled 'Brexit and Devolution: Securing Wales' future,'[48] discussed the potential constitutional implications Brexit would have on Wales. It also provided a detailed follow-up on the recommendations for the future constitutional landscape of the UK after Brexit. For instance, owing to the shortcomings of the Joint Ministerial Committee (JMC) over the Brexit process (as detailed in chapter 7), the paper proposed the replacement of the JMC, with a UK Council of Ministers, with the aim of eradicating the UK Government's current hegemony in intergovernmental relations. The principles of subsidiarity, parity of esteem and mutual respect would govern this new intergovernmental channel. Furthermore, affirmative decisions would need to be achieved through plurality, which would involve a combination of the UK Government (representing the UK and England) and one devolved Government. The paper also advocated for the enhancement of devolved powers, especially over helping set out the new UK internal market once the powers from the EU had been repatriated.[49] Overall, these two policy papers essentially reinforced the Welsh Government's pro – European approach and began to question its 'good unionist' character.

As the Brexit process evolved, the Welsh Government shifted from advocating for a future close relationship with the EU and constitutional reform within the UK to focusing all energies on the latter. This was first evidenced by the Welsh Government's October 2019 White Paper on Brexit titled 'Reforming our Union: Shared governance in the UK.'[50] In a comprehensive manner, the paper brought together the various ideas for UK constitutional reform the Welsh Government have proposed over the past few years. The overreaching constitutional vision the paper advocates for is shared sovereignty between the UK's territories, with more entrenched devolved autonomy. Regarding the former, the paper argues that the UK constitution needs to adopt a new understanding of Parliamentary Sovereignty, as "the traditional doctrine of Parliamentary Sovereignty no longer provides a firm foundation for the constitution of the UK."[51] For the Welsh Government, the 'Diceyan' approach to Parliamentary Sovereignty does not ensure the absolute constitutional permanence of the devolution settlements as embedded under section 1 of the Wales Act 2017 and section 1 of the Scotland Act 2016, as Westminster could easily repeal these Acts (subject to heavy political backlash). In addition to this, the paper argues that the statutory recognition of the Sewel Convention, which the Supreme court in *R(miller)* held was non-justiciable,[52] does not provide any safeguards for the protection of devolved competences. For the Welsh Government, this is because Westminster's noncompliance with the Sewel Convention could erode devolved competences and responsibilities. As detailed in chapter 6, this has already been evidenced to an extent following the enactment of the UK Internal Market Act 2020, which has allowed for the overall rollback of devolved competences. Essentially, the Welsh Government's main argument is that owing to the 'Diceyan' approach to Parliamentary Sovereignty, devolution in the UK is vulnerable to

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[48] 'Brexit And Devolution' (Government of Wales 2017) <https://beta.gov.wales/sites/default/files/2017-06/170615-brexit%20and%20devolution%20%28en%29.pdf> accessed 16 March 2020.
[49] Ibid
[50] 'Reforming Our Union: Shared Governance In The UK' (*Gov.wales*, 2019) <https://gov.wales/sites/default/files/publications/2019-10/reforming-our-Union-shared-governance-in-the-uk.pdf> accessed 2 April 2020.

[51] Ibid.

[52] R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5, para 146

reversibility, and this has been evidenced to some extent, following Brexit. To address this, the White Paper proposes the reformation of the Sewel Convention:

> "The 'not normally' requirement should be entrenched and codified by proper definition and criteria governing its application, giving it real rather than symbolic acknowledgement in our constitutional arrangements. Alternatively, a new constitutional settlement could simply provide that the UK Parliament will not legislate on matters within devolved competence or seek to modify legislative competence or the functions of the devolved Governments, without the consent of the relevant devolved legislature." [53]

The Welsh Government seems flexible on this reform issue as they set out different options but do not insist on any of them. At first, the Welsh Government seem to be advocating for significant 'manner and form' changes to Parliamentary Sovereignty. Additionally, the Welsh Government also seem to be advocating for a contemporary / political understanding of Parliamentary Sovereignty based on the respect of the autonomy of the individual devolved territories (as discussed in chapter 1).[54] More striking though, the Welsh Government also seem to be supportive of eradicating the doctrine entirely. Clarity on the Welsh Government's position was provided in it's May 2021 Senedd election manifesto, which proposed shared sovereignty amongst the four territories based on principles of federalism. In essence, they are in support of eradicating Parliamentary Sovereignty.[55] Other key constitutional proposals made in the White Paper included: a 'watered down' version of the proposal for the replacement of the JMC with a UK Council of Ministers; reforming the composition and functions of the House of Lords; paradiplomacy in instances whereby international agreements have an effect on devolved matters; and that constitutional reform should be conducted via the establishment of a constitutional convention, whereby the devolved administrations have a say in terms of their constitutional aspirations. Following the sixth Senedd elections in May 2021, where the governing Labour party increased its seat share, the Welsh Government in June 2021 published a second edition of their 2019 White Paper .[56]

The White Paper , just like the first edition, puts forward 20 proposals for constitutional reform in the UK, which aim to strengthen devolution further and safeguard the UK's internal functioning after Brexit as a voluntary Union of four territories. The proposals listed are very similar to the first paper. However, in this instance, the proposals put into context the constitutional and political developments that have taken place since the publication of the first paper - which reinforce the arguments for constitutional reform. These developments include the establishment of the UK's internal market and the handling of the coronavirus pandemic. These developments exemplified the strengths of intergovernmental working when there is close collaboration. For instance, the common frameworks process has been a success, as has

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[53] Ibid n. 21

[54] Mark Elliott, 'The British Constitution, Devolution And "Doublethink"' <https://publiclawforeveryone.com/2012/09/13/the-british-constitution-devolution-and-doublethink/> accessed 2 April 2020.

[55] 'Moving Wales Forward: Welsh Labour Manifesto 202' (*Movingforward.wales*, 2021) <https://movingforward.wales/documents/WEB-14542_21-Welsh-Labour-Manifesto_A5.pdf> accessed 17 December 2021.

[56] 'Reforming Our Union: Shared Governance In The UK - June 2021' (*Gov.wales*, 2021) <http://gov.wales> accessed 24 November 2021.

the vaccination programme. Nevertheless, at the same time, due to the ad-hoc nature of the intergovernmental relationship, weaknesses have also been exposed, as detailed in chapter 7. Furthermore, the Welsh Government see the enactment of the UK Internal Market Act 2020 as another development that further exposes the ‘aggressive unilateralism’[57] of the centre, and the need for constitutional reform. Aside from undermining devolved regulatory autonomy, the Act grants UK Ministers unilateral spending powers in non–reserved policy areas such as infrastructure and housing. This development undermines devolved financial competences, as unlike the EU’s Structural Fund, the Shared Prosperity Fund only allows for marginal devolved input. Moreover, the fund is allocated through a competitive scheme orchestrated by the centre.

In its conclusions, the White Paper provides for a commitment to set up an independent Commission to consider the future constitutional future of Wales. This commitment was fulfilled in October 2021 when the Welsh Government announced the establishment of this Commission, which Professor Laura McAllister and Dr Rowan Williams co-chair. The Commission’s terms of reference are:

> “(1) To consider and develop options for fundamental reform of the constitutional structures of the United Kingdom, in which Wales remains an integral part.(2)To consider and develop all progressive principal options to strengthen Welsh democracy and deliver improvements for the people of Wales.” [58]

These two objectives are particularly interesting in terms of how broad and far-reaching they are. The first objective reinforces the Welsh Government’s approach to constitutional reform, which can be summarised as that they want radical constitutional reform, but at the same time, want to ensure the safeguarding of the territorial integrity of the Union. The second objective is interesting too, in that the chairs of the Commission have interpreted it as a direction to consider Welsh independence.[59]

It is key to note from the above policy papers that the Welsh Government seem to have departed away from their ‘good unionist’ character, as their proposed constitutional reforms challenge fundamental UK constitutional principles - which they had long subscribed to. In addition, confirmation of this departure is evidenced by the Welsh Government’s post-Brexit combative approach towards the UK Government, which has included multiple refusals to consent to UK Brexit-related pieces of legislation and instituting judicial review proceedings against the UK Internal Market Act 2020.[60] Concerning the latter, the Welsh Government in their opposition to the Act, lodged a legal challenge against it.[61] This also marked the first time that a devolved Government had initiated legal proceedings against the UK Government, to challenge a piece

[57] Ibid.
[58] 'Written Statement: Independent Commission On The Constitutional Future Of Wales – Broad Objectives' (*gov.wales*, 2021) <https://gov.wales/written-statement-independent-Commission-constitutional-future-wales-broad-objectives> accessed 24 November 2021.
[59] Laura McAllister, 'The Independent Commission On The Constitutional Future Of Wales: Putting Wales On The Front Foot' (*The Constitution Unit Blog*, 2022) <https://constitution-unit.com/2022/01/20/the-independent-Commission-on-the-constitutional-future-of-wales-putting-wales-on-the-front-foot/> accessed 20 January 2022.

[60] Davies and Wincott, Ibid n. 3
[61] The Counsel General for Wales, R (On the Application Of) v The Secretary of State for Business Energy and Industrial Strategy [2021] EWHC 950 (Admin)

of Westminster legislation.[62] In the case, the Welsh Government argued that the Act would restrict devolved regulatory autonomy and that the combination of section 2 (the mutual recognition principle), and section 54(2) (amends schedule 7(b) of the Government of Wales Act 2006) of the Act essentially amount to a power grab as they allow for the extension of the reserved matters list. For the Welsh Government, this equates to an implied repeal of the Government of Wales Act 2006, and since it is a constitutional Act, this cannot be achieved.[63] Nonetheless, the Welsh Government's legal challenge failed on the grounds of prematurity. The Court's reasoning was that:

> "A claim concerning the meaning or effect of provisions of Senedd legislation, or whether the legislation is properly within the Senedd's legislative competence, is better addressed in the context of specific legislative proposals. It is inappropriate to seek to address such issues in the absence of specific circumstances giving rise to the arguments raised by the claimant and a specific legislative context in which to test and assess those arguments. Similarly, it is inappropriate to seek to give general, abstract rulings on the circumstances in which the power to make regulations amending the Act may be exercised." [64]

The Court of Appeal granted leave to appeal the Divisional Court's judgment on the basis that "the case raises important issues of principle going to the constitutional relationship between the Senedd and the Parliament of the UK."[65] However, the Supreme Court rejected the Welsh Government's application for permission to appeal on the grounds stated in the Divisional Court's judgment.

In all, by departing from its traditional 'good unionist' approach, Brexit has resulted in 'awakening the sleeping dragon' in Wales. Below, it shall be demonstrated that the Welsh Government's approach is very distinct compared to the rest of the UK's governments.

4. The Welsh Government's proposals in comparison to the rest of the UK's Governments

As discussed in the first chapter, longstanding territorial differences are in existence across the UK's four territories including over legal structure and constitutional interpretation.[66] In addition to this, since the 2010 UK general election, each of the four Governments in the UK is run by a different party or parties, with varying political ideologies, and attitudes to and prior involvement with the EU. Given this, it is unsurprising that each of these Governments presents contrasting visions of Brexit. This includes their approaches to EU/UK future relationships and

[62] Davies and Wincott, Ibid n. 3

[63] Nicholas Kilford, 'The UK Internal Market Act's Interaction With Senedd Competences: The Welsh Government'S Challenge' (*UK Constitutional Law Association*, 2021) <https://ukconstitutionallaw.org/2021/02/23/nicholas-kilford-the-uk-internal-market-acts-interaction-with-senedd-competences-the-welsh-Governments-challenge/> accessed 14 October 2021.

[64] Ibid n. 32

[65] See: Mick Antoniw, 'Written Statement: Legal Challenge To The UK Internal Market Act 2020' (*Gov.Wales*, 2021) <https://gov.wales/written-statement-legal-challenge-uk-internal-market-act-2020-update> accessed 14 October 2021.

[66] Evidence of these territorial differences has often gone unexplored as a few constitutional analysts routinely engage with perspectives from all four territories. See: Wincott, Davies and Wager, Ibid n. 18

how to address internal constitutional tensions.[67] As highlighted in this section, the Welsh Government's vision to Brexit can be seen as the middle ground, as they are not advocating for independence nor the maintenance of the status quo. They are the only Government making proposals to preserve the Union and strengthen devolution as a result of Brexit.[68]

As noted in chapter 2, since Brexit, the power-sharing NI Executive has gone for long periods without functioning. Moreover, given the split communities, contested constitutional settlement of NI, and the contrasting approaches during the Brexit referendum, it is difficult for the main political parties in NI (Sinn Féin and the DUP) to agree on a clear and comprehensive post-Brexit constitutional vision. However, the main political parties in NI did share a common governance interest with the Welsh Government - devolved input over the Brexit negotiation process. Moreover, the Welsh Government shared similar interest with Sinn Féin over the continuation of regulatory alignment with the EU. Furthermore, the Welsh Government and the DUP have taken up combative approaches towards the UK Government (for very different reasons).

Brexit has evidenced that the Welsh Government and their Scottish counterpart align on many interests.[69] For example, the shared interests discussed in the two Brexit-related policy papers above. Moreover, their approaches to Parliamentary Sovereignty, the Sewel Convention, and intergovernmental relations. In addition, the two Governments have adopted a combative approach towards the UK Government, often resulting in joint coordination on several matters, including the refusal to consent to the EU (Withdrawal Agreement) Act 2020 and the UK Internal Market Act 2020. Despite these commonalities, overall, the Welsh Government paints a contrasting picture of Brexit than the Scottish Government. The stark differences lie primarily in the post – Brexit constitutional preferences. The pro–unionist Welsh Government prefers to preserve the UK's Union via quasi-federal constitutional reform. As examined in chapter 3, the constitutional preference for the nationalist Scottish Government is for an independent Scotland in the EU (it could settle for more strengthened devolution in the medium term, however).

From the onset of Brexit, the UK Government has adopted a 'One United Kingdom' policy approach - given that the referendum was conducted on a UK wide basis.[70] As a result of this approach, the UK Government has consistently rejected the Welsh (and Scottish) Government's Brexit vision. For instance, during the early stages of the Brexit process, the UK Government sought to distance itself from any EU rules and regulations as much as possible, including ending the UK's access to the single market and customs union. This starkly contrasted the Welsh Government's envisioned future close relationship with the EU. Thus, it was no surprise when the Senedd formally opposed the UK Government's Brexit strategy by refusing to grant legislative consent for the EU (Withdrawal Agreement) Act 2020 (the first

[67] Birrell and Gray,Ibid n. 9

[68] Davies and Wincott, Ibid n. 3; Vernon Bogdanor, *Beyond Brexit: Towards A British Constitution* (IB Tauris 2019). Pp. 217; Jonathan Bradbury, 'Welsh Devolution And The Union: Reform Debates After Brexit' (2021) 92 The Political Quarterly 125.

[69] McEwen, Ibid n. 12

[70] 'Britain After Brexit. A Vision Of A Global Britain. May's Conference Speech: Full Text' (*Conservative Home*, 2016) <https://www.conservativehome.com/Parliament/2016/10/britain-after-brexit-a-vision-of-a-global-britain-theresa-mays-conservative-conference-speech-full-text.html> accessed 30 November 2021.

Act of Parliament to have been refused legislative consent by all three devolved territories).[71] In the aftermath of this Senedd vote, the Welsh First Minister stated that the grounds for refusing legislative consent was not to derail Brexit but rather protect devolution and Welsh interests specifically.[72] Another significant area the two Governments differ is on the constitutional governance of the UK. As discussed in chapter 1, the UK Government view the UK's Union through the traditional lens of Parliamentary Sovereignty – the UK is a unitary state, and devolution is subordinate to the sovereignty of the centre. In contrast, the Welsh Government view the UK's Union through the contemporary reading of Parliamentary Sovereignty – the UK is a voluntary union state. Moreover, devolution is governed by the principle of respecting the autonomy of the individual devolved jurisdictions.[73] As detailed in chapter 6, the development of the UK's internal market has exacerbated the tension between these two contrasting views.

In all, the above analysis exposes and affirms the notion that the UK is a 'Union without uniformity.'[74]

5. Securing Welsh constitutional interests under the current constitutional status quo

As discussed earlier in the chapter, the Welsh Government's constitutional proposals are aimed at dealing with some of the effects Brexit has exposed and exacerbated. Moreover, following the May 2021 Senedd elections, the Welsh Government now has a public mandate for their post – Brexit constitutional vision. However, in their present form, the Labour Welsh Government's proposals seem too radical and over-ambitious for the incumbent UK Conservative Government. As analysed above, it is doubtful that there is any appetite for this sort of constitutional reform within the UK Government right now. Despite having different electoral mandates, there still is an incentive for the Welsh Government to tailor their proposals to the tastes of the UK Government. This is based on two main factors. The first is that several of the Welsh Government's proposals touch upon matters beyond their competences - schedule 7A of the Government of Wales Act 2006 stipulates that constitutional matters to do with the UK's Union are reserved. As analysed in chapter 3, the row over the Scottish Government's calls for indyref 2 demonstrates that the UK Government are willing to ignore devolved electoral mandates that touch upon reserved matters. The second and very significant factor is that the UK Government are:

[71] Akash Paun and Jess Sargeant, 'Sewel Convention' (*The Institute for Government*, 2020) <https://www.instituteforGovernment.org.uk/explainers/sewel-convention> accessed 16 April 2020.

[72] Dan Wincott and Jac Larner, 'Brexit: What Next? Wales' (*Ukandeu.ac.uk*, 2020) <https://ukandeu.ac.uk/wp-content/uploads/2020/02/Brexit-what-next-report.pdf> accessed 16 April 2020.

[73] Davies and Wincott, Ibid n. 3

[74] Richard Rose, *Understanding The United Kingdom* (Longman 1982). Pp. 35.

> "the midwives of constitutional change…reform cannot come about unless a political party delivers it while in Government. All the reforming energies of those outside of Government are of limited practical significance until that happens." [75]

Owing to the above then, the only way the Welsh Government could achieve their interests in their current form would arguably be through an improbable solution - independence, something which the Welsh Government has always been against.[76] Therefore, if the Welsh Government hopes to secure its interests under the current constitutional status quo, it (arguably) must first revise them. By revising their proposals, the Welsh Government places itself in a much better position to realise them either through appealing to the UK Government and/or through Scottish influence and involvement, as explored further below.

Regarding appealing to the UK Government, some of the Welsh Government's listed proposals for constitutional reform raise some crucial questions. Especially given that its objective of strengthening devolution can still be achieved without such extensive reform. For example, is it necessary to propose for, essentially, the eradication of a long-standing constitutional principle, Parliamentary Sovereignty, to achieve the substantive aim of strengthening and improving the devolution settlements? The evolutionary nature of devolution via the transfer of more powers thus far has ensured this aim to an extent (see chapter 1). Additionally, when addressing the inadequacy of the Sewel Convention as a protection for devolved competences, this could be addressed via the piecemeal solution detailed in chapter 3, without the need to erode Parliamentary Sovereignty.

The Welsh Government's proposals could also, in combination or alternatively, be achieved via Scottish influence and/or involvement.[77] As noted in chapter 3, history tells us that incremental reform in Scotland will be expected in the medium term instead of indyref 2. Even if the UK Government is not interested, the Brexit process has exposed the need for imminent constitutional reform for Scotland. At present, it is not certain how Scottish devolution will be reformed due to Brexit. However, the promises made in the vow will be a starting point. The Scottish Government feels that the Brexit process has exposed how these promises were never fully realised. It can be expected then that any reform would include fully realising these promises. As outlined in chapter 1, the asymmetry between the devolution settlements of Scotland and Wales has softened over time. The overall trajectory of Welsh devolution in the last decade has been marked by multiple extensions of competences and the establishment of a model which better resembles Scotland. Given this trajectory, any reform made to Scotland's devolution settlement would be likely in the future for Wales. Especially when it comes to changes being made to the relationship between the centre and devolved levels for Scotland. For instance, any changes to the Sewel Convention are likely to be replicated in Wales, given the precedent of the Scotland Act 2016 and the Wales Act 2017.[78] It would be advisable for the Welsh Government to cooperate with the Scottish Government to protect their shared interests.

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[75] Rodney Brazier, 'How Near Is A Written Constitution' (2001) 52 Northern Ireland Legal Quarterly 52.

[76] See: Darryn Nyatanga, 'Welsh Independence: Can Brexit Awaken The Sleeping Dragon?' (*LSE Brexit*, 2020) <https://blogs.lse.ac.uk/brexit/2020/06/04/welsh-independence-can-brexit-awaken-the-sleeping-dragon/> accessed 13 June 2020.

[77] See: Richard Rawlings 'The Welsh way' in Jeffery Jowell and Colm O'Cinneide (eds) *The Changing Constitution* (9th edn, Oxford University Press 2019). Pp. 309

[78] Chris McCorkindale, 'Devolution : A New Fundamental Principle Of The UK Constitution' in Michael Gordon and Adam Tucker (eds) *The New Labour Constitution: Twenty years on* (Hart Publishing 2022).

As mentioned above, a Unionist Welsh Government cooperated heavily with a nationalist Scottish Government to oppose Brexit. For instance, the two Governments cooperated over the initial opposition to the EU Withdrawal Bill, which they termed as a power grab in a joint statement.[79] As detailed in chapter 6, the shared leverage between these two devolved Governments was central to the UK Government conceding concessions to the Bill, to which the Welsh administration accepted. Essentially, the Welsh Government realised their interests in the Bill via Scottish involvement. [80]

It should be acknowledged that the above approaches would leave the Welsh Government caught between a rock and a hard place. In that, it would need to find a sweet spot between being sufficiently moderate to appeal to the UK Government but without being so timid as to alienate and have no common cause with the nationalist Scottish Government. This is possible, nonetheless, as the Welsh Government achieved this sweet spot on their proposals for IGR reform. As aforementioned, the Welsh Government's second White Paper on IGR reform was a 'watered down' version of the proposals in the first White Paper . Given that the new proposals were far less radical and more moderate, this arguably increased appeal from the UK Government. In addition, the Welsh Government, and the remainder of the UK's other Governments, including the Scottish Government, launched a review into IGR in the UK. As detailed in chapter 7, the outworking of the review closely matched the Welsh Government's proposals as the structures within the new IGR are designed based on collaborative working and reducing the UK Government's hegemony.

Conclusion

As evidenced in this chapter, Brexit has resulted in 'awakening the sleeping dragon' in Wales. For the first time since the inception of devolution, the Welsh Government have departed from its traditional 'good unionist' approach to adopt an approach that challenges fundamental UK constitutional principles. The change in approach is because of the UK Government's approach to the Brexit process, which has had the overall effect of undermining Welsh devolution. As a result, the Welsh Government are thus far the principal forerunner in putting forward proposals for strengthening devolution and safeguarding the UK's Union against the effects of Brexit. However, given the disparities in interests with the 'midwives' of constitutional change, the UK Government, the Welsh Government's constitutional proposals seem hard to achieve. This is made more difficult, given how radical their proposals are. Subsidiary to this, it was argued that the only way to achieve these proposals in their current form would arguably be through an improbable solution - independence, which the Welsh Government has always been against. However, by revising their proposals, the Welsh Government would be better able to realise them by appealing to the UK Government and/ or via Scottish influence and involvement. For now, however, it must be acknowledged that maintaining the status quo seems to be the most likely outcome given the current political climate. Equally, the continuation of the status quo will arguably further exacerbate the current period of constitutional unsettlement.

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[79] 'Joint statement from the First Ministers of Wales and Scotland n reaction to the EU (Withdrawal) Bill ' (*Gov.Wales*, 2017) <https://www.gov.wales/joint-statement-first-ministers-wales-and-scotland-reaction-eu-withdrawal-bill > accessed 8 March 2020

[80] Jonathan Bradbury, 'Welsh Devolution And The Union: Reform Debates After Brexit' (2021) 92 The Political Quarterly 125.

Chapter 5: Addressing the elephant in the room: Brexit and the English Question

Introduction

Writing in 2000, John Mason argued that "the present arrangements in England are inherently unstable and will lead to pressures for further change."[1] His arguments at the time, and for some period, received no significant traction. Mainly because, England's position within the UK's constitution is often characterised as "the elephant in the room that we constantly ignore."[2] This also helps provide an explanation as to why England, for over two decades now, has remained the gaping hole in devolution.

In recent times, there has been a shift in narrative, however. For instance, the House of Lords select committee on the Constitution ran an inquiry in 2015/16 on the Union and devolution, and in their published report they noted that "the governance of England is becoming a key concern for those considering the territorial constitution." [3] More recently, the House of Commons select committee on Public Administration and Constitutional Affairs (PACAC) ran an inquiry on English devolution. In their October 2022 published report, they concluded that the current "piecemeal and uncoordinated" governance arrangements for England were not effective, and there is now "an urgent and pressing need for significant reform…ultimately, it is clear to the Committee that the question of England cannot continue to be ignored."[4] In addition to this, the UK Government published its long – awaited White Paper titled 'levelling up the United Kingdom' in February 2022, which extensively discussed English devolution – effectively placing it on the political agenda.[5]

Arguably, Brexit has been a key contributor to this change in narrative. This can be owed to two main factors: the English vote in the Brexit referendum and the need to accommodate England in a reshaped post-Brexit constitution. Regarding the first factor, the Brexit referendum marked the only time since 1975 in which the English electorate has managed to vote on a matter of such constitutional significance. Moreover, the majority leave vote in England (53.4%), ultimately decided the overall UK-wide EU referendum result.[6] Given this

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[1] John Mawson, 'Devolution And The English Regions' in Gill Bentley and John Gibney (eds), *Regional Development Agencies and Business Change* (Routledge 2000). Pp. 26.

[2] 'Devolution And Exiting The EU: Reconciling Differences And Building Strong Relationships' (*Publications.Parliament.uk*, 2018) <https://publications.Parliament.uk/pa/cm201719/cmselect/cmpubadm/1485/1485.pdf> accessed 20 January 2020.

[3] 'House of Lords Select Committee on the Constitution: The Union and Devolution' (*Parliament.uk*, 2016) <https://publications.parliament.uk/pa/ld201516/ldselect/ldconst/149/149.pdf> accessed 20 January 2020. Para 353

[4] 'Governing England Report' (*Parliament.uk*, 2022) <https://publications.parliament.uk/pa/cm5803/cmselect/cmpubadm/463/report.html> accessed 7 November 2022.

[5] 'Levelling up the United Kingdom' (*Gov.uk,* 2022) <https://www.gov.uk/government/publications/levelling-up-the-united-kingdom> accessed 7 November, 2022

[6] 'Electoral Commission | EU Referendum Results' (*Electoralcommission.org.uk*, 2018) <https://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information> accessed 3 December 2018

then, the Brexit referendum has often been characterised as an English constitutional moment. As exemplified by the eight referendums held exclusively in the devolved jurisdictions, constitutional moments of such gravity within the UK tend to result in constitutional reforms being introduced.[7] Thus, in line with constitutional practice, the Brexit referendum was assumed to offer similar opportunities to alter England's governance and constitutional position within the UK.

The second and more significant factor is that Brexit has resulted in the need to accommodate England in a reshaped post-Brexit constitution. As analysed in the previous chapters, the UK's constitution is undergoing some necessary changes, including reforming its intergovernmental framework and the (re)establishment of its internal market. However, these constitutional reforms have thus far had a negative impact on the UK's devolution settlements. This is owed to the fact that these post-Brexit reforms fail to accommodate England. For instance, as analysed in chapter 6, due to England's size and constitutional dominance, the trade law principles set out by the UK Internal Market Act favour England to the detriment of devolved regulatory autonomy. Furthermore, as noted in chapters 3 and 4, the Scottish and Welsh Governments have utilised this effect to different ends. For instance, the Scottish Government have used it to further their calls for independence, whilst the Welsh Government have used it to enhance their calls for radical constitutional reform. In addition to this, further constitutional changes are to be expected. Thus, it would be reasonable to assume that they will only serve to exacerbate the current effects. Therefore, in order to mitigate this, the current and prospective constitutional reforms need to accommodate England. In this chapter, it will be put forward that to accommodate England, the often-ignored English question would need to be addressed. The English question refers to two major constitutional facets: England's governance and its position within the UK's constitutional order. This chapter will focus on addressing the former facet, as the lack of English governance has been the central cause behind the above-mentioned Brexit implications. Therefore, the solution to this facet will be synonymous with the solution of accommodating England in a post-Brexit reformed constitution.

In light of the above, the main argument of this chapter is that the implications of Brexit have resulted in the need to accommodate England in a post-Brexit constitution.[8] The need for this arises from the fact that the current reforms have adversely affected the devolved territories, and a significant reason for this has been the failure to accommodate England within these changes. The need increases as further changes are anticipated. These post-Brexit developments have brought the English question back on the political agenda – but with a different rationale for addressing it. Subsidiary to this, the chapter will also argue that one possible way to accommodate England in a post-Brexit constitution would be to expand the current devolution deals system into regionalism. Despite some limited traction, the UK Government does not seem inclined to implement such reforms right now - it seems to favour maintaining the status quo. Thus, the English question once again becomes "the elephant in the

[7] For a full list and brief analysis of each of these referendums, see: Michael Gordon, 'Referendums In The UK Constitution: Authority, Sovereignty And Democracy After Brexit' [2020] European Constitutional Law Review 213.

[8] See: Arianna Giovannini, ' The 'Evolution' of Devolution: Assessing Labour's legacy in England' in Michael Gordon , and Adam Tucker (eds) *The New Labour Constitution: Twenty years on* (Hart Publishing 2022). Pp. 151.

room that we constantly ignore."[9] In the same vein, however, the continuation of the status quo will not be feasible in the long term, as the continued failure to accommodate England has thus far further exacerbated the current period of constitutional unsettlement.

In setting out the above argument, the chapter will be structured into four main sections. Section one will define the English question's key concepts, including an analysis of its historical context and evolution. In section two, the chapter evaluates some of the solutions that have been implemented and proposed to address this constitutional question pre – Brexit. In section three, the discussion will examine how Brexit has re-awakened the English question and the need to accommodate England in a post – Brexit constitution. Section four will analyse several often-cited constitutional proposals that have been put forward as solutions to addressing the English question post-Brexit. In concluding the chapter, it will be put forward that expanding the current devolution deals system into regionalism would arguably be the better option. However, it will be acknowledged that such reform would not be realistically expected any time soon. However, at the same time, the continuation of the status quo is increasingly becoming untenable.

1. Devolution and the English question

As discussed in chapter 1, in contrast to the devolved territories, England lacks constitutional recognition within the UK's territorial constitution, and any coherent system of political devolution at regional/local level. An implication of this constitutional patchwork is that England remains governed by the central UK institutions.[10] This allows for English constitutional dominance through Parliamentary Sovereignty. As a result of this constitutional nature, questions often arise in relation to:

> "Where does England fit into the UK's constitutional arrangements? How should England be governed now that there has been significant devolution of power to Scotland, Wales and Northern Ireland?" [11]

The issues associated with this constitutional patchwork and the questions that derive from it have become known as the English question. As the House of Lords committee identified in their 2016 published report tilted 'the Union and devolution,' the English question can be divided into two main constitutional facets: "the representation of England as a whole, and devolution or decentralisation to regional or local levels within England."[12] The former facet relates to the constitutional recognition of England's position within the UK's constitutional order, whilst the latter relates to the governance of England. Below, the two facets will be explored further, and in doing so, it shall be demonstrated that devolution has been a decisive factor behind the establishment and evolution of the English question.

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[9] Ibid n. 2
[10] Mark Elliottt, 'Scotland Has Voted "No". What Next For The UK Constitution?' (*UK Constitutional Law Association*, 2014) <https://ukconstitutionallaw.org/2014/09/19/mark-Elliottt-scotland-has-voted-no-what-next-for-the-uk-constitution/> accessed 26 May 2021.
[11] Ibid n. 2
[12] Ibid n. 3, Para 359

The West – Lothian question is often perceived as the historical genesis of the English question. Ironically, however, the West – Lothian question predates the enactments of the devolution statutes of 1998 – though it was asked with devolution in mind. Tam Dalyell, then Labour MP for the Scottish constituency of West Lothian, during a Parliamentary debate in 1977, questioned the Labour Government's plans to implement devolution in Scotland and in Wales (albeit unsuccessfully):

> "For how long will English constituencies and English honourable Members tolerate not just 71 Scots, 36 Welsh and a number of Ulstermen but at least 119 honourable Members from Scotland, Wales and Northern Ireland exercising an important, and probably often decisive, effect on English politics while they themselves have no say in the same matters in Scotland, Wales and Ireland?"[13]

Essentially, Tam Dalyell's complaint was that, after the realisation of devolution, a constitutional anomaly would emerge whereby MPs from the devolved jurisdictions would be able to vote on matters that only affect England, whilst English MPs would be denied the opportunity to vote on equivalent matters that have been decentralised to the devolved legislatures.[14]

In response to Mr Dalyell's argument, the former Lord Chancellor Derry Irvine once remarked (in) famously that the best way of dealing with the West –Lothian question was to not ask it.[15] This narrative was further boosted following the rejection via referendums in March 1979 for devolution in both Wales and Scotland. [16] The incoming Conservative Government declared devolution "dead for a generation." [17] This allowed the challenge(s) posed by the West Lothian question to become politically salient until the election of New Labour in 1997.

As discussed in chapter 1, as part of New Labour's era of constitutional reform, devolution was formally implemented in Scotland and Wales via the enactments of the Scotland Act 1998, and the Government of Wales Act 1998 respectively. In NI, it was reintroduced following the enactment of the Northern Ireland Act 1998. However, owing to its size, parallel devolution was not introduced in England. Instead, a piecemeal form of regional decentralisation was realised in London, following the enactment of the Greater London Authority Act 1999. The Act established the Greater London Authority (GLA) which consists of an elected Mayor and an Assembly. These constitutional developments resulted in the re-emergence of the West – Lothian question in the political foreground. This is because when the question was first put forward, devolution was hypothetical. Now the challenge(s) posed by the question had become pertinent. As a result, questions surrounding the governance of England and its place within the Union began to attract debate within the British political system. This resulted in

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[13] House of Commons Debate 14 November 1977 vol 939 c123.
[14] See: Tam Dalyell, *Devolution: The End Of Britain?* (Jonathan Cape 1977) pp. 245 – 247. See also: Oonagh Gay, Paul Bowers and Helen Holden, 'The West Lothian Question' (*Webarchive.Parliament.uk*, 2011) <http://webarchive.Parliament.uk/20120304115551/http://www.Parliament.uk/documents/commons/lib/research/briefings/snpc-02586.pdf> accessed 20 January 2020.
[15]Mark Elliottt, 'The Mckay Commission And The "West Lothian Question"' <https://publiclawforeveryone.com/2013/03/25/the-mckay-Commission-and-the-west-lothian-question/> accessed 20 January 2020.
[16] As discussed in chapter 1, the referendum result in Wales was a resounding 79.7% rejection of devolution. Whilst in Scotland, the narrow yes vote of 51.6 % did not meet the statutory threshold of the Scotland Act 1978 which required at least 40 percent of the electorate to vote yes and in this instance it was only 32.5 percent.
[17] Ros Taylor, 'Timeline: Devolution From 1536 To 1999' *The Gaurdian* (1999) <https://www.theguardian.com/politics/1999/apr/09/devolution.uk3> accessed 20 January 2020.

introducing the English question as we know it today. Thus, the West – Lothian question is now often conflated with the much wider English question, which as aforementioned, encompasses questions over England's governance, and the constitutional recognition of its place within the UK's territorial constitution.[18]

As noted by PACAC's report on English devolution:

> "The more the institutions in devolved nations have become an established part of the UK's constitutional architecture, the more awkward and potentially problematic the position of England becomes."[19]

Essentially, the evolution of the asymmetrical devolved settlements has often served as a catalyst in regard to fuelling debates around the need to address the English question. In particular, the dynamics of Scottish devolution have often intensified discussions surrounding the need to tackle the English question. For instance, following the 2014 Scottish independence referendum, there was a dramatic change in political attitudes regarding tackling the English question. The referendum was significant in that the often-ignored Scottish question re independence was finally being addressed. The referendum also brought back onto the political agenda the often ignored 'elephant in the room,' the English question. This was evidenced by the PM at the time, David Cameron, who in the immediate aftermath of the referendum result, stated that:

> "I have long believed that a crucial part missing from this national discussion is England….We have heard the voice of Scotland - and now the millions of voices of England must also be heard."[20]

As detailed further in the chapter, the introduction of several key policies, such as the reformation of the House of Commons procedures and, more recently, Brexit, have reignited the English question. Again, however, the existence of devolution has been a critical factor behind this. For example, the introduction of the former policy was arguably due to the fact that MP's from the devolved jurisdictions increasingly had a determining say on important issues surrounding England only matters.[21]

In all, the genesis, and evolution of the English question has been heavily influenced by the circumstances highlighted above – which all link back to the existence of devolution. This has allowed for an increase in pressure from within the British political system to try and address the English question. Below, the chapter moves on to examine some of the key pre-Brexit initiatives that have been attempted in response to the English question.

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[18] See: Daniel Kenealy and others, *Publics, Elites And Constitutional Change In The UK* (Palgrave Macmillan 2017).

[19] Ibid n. 4

[20] 'In Full: David Cameron Statement On The UK's Future' (2014) <https://www.bbc.co.uk/news/uk-politics-29271765> accessed 20 January 2020.

[21] Examples are provided further in the chapter. See also: Stephen Tierney, 'Brexit And The English Question' in Federico Fabbrini (ed), *The Law & Politics of Brexit* (Oxford University Press 2017).

2. Addressing the English question pre- Brexit

Over time, the different Labour and Conservative/ Coalition Governments have adopted different approaches to resolving the English question. For example, between 1998 – 2010, the Labour Government established the GLA, Regional Development Agencies (RDAs) and attempted to introduce Regional Assemblies in England. Their successor, the Coalition Government, scrapped the RDAs, replacing them with Local Enterprise Partnerships (LEPs). These LEPs have now been supplemented by the introduction of Combined Authorities. Under a majority Conservative Government, the House of Commons procedures were reformed following the introduction of 'English votes on English Laws' (EVEL).[22] As put forward by Michael Kenny, the divergence in approaches results from the contrast in views, between the above-mentioned political parties, in relation to the geographical scale, and rationale for English devolution:

> "Labour figures have, for the most part, stuck to an ingrained commitment to the idea of devolution to large regions, although such units appear to elicit very little popular support. And the Conservatives have tended to favour governance at the level of cities and counties but have also been more alive to the growing perception that the interests and identity of England as a whole are not adequately represented by the system of territorial governance that has developed in the UK."[23]

When conducting an analysis of the above initiatives, a narrow-focused approach will be adopted in this section, focusing on: Regional Assemblies, Devolution deals, and EVEL. This is because compared to the other initiatives, these three have arguably come closest to providing a solution to the English question.

2.1 Regional Assemblies

Creating a new tier of regional governance in England through the establishment of Regional Assemblies is seen as a solution to one of the constitutional facets of the English question – England's governance.[24] Moreover, the creation of Regional Assemblies is often cited as a better alternative to affording devolution to England as a whole, as it ensures that no new territorial imbalance is created within the Union. The proposal to establish English Regional Assemblies was piloted by the New Labour party, who were attempting to deepen English regional governance through these Assemblies.[25] Alongside promises to introduce devolution to Scotland, Wales, and NI, New Labour in their 1997 election manifesto, also promised to:

[22] Giovannini, Ibid n. 8

[23] Michael Kenny and Tom Kelsey, 'Devolution Or Delegation? What The Revolt Of The Metro Mayors Over Lockdown Tells Us About English Devolution' (*Centre on Constitutional Change*, 2020) <https://www.centreonconstitutionalchange.ac.uk/news-and-opinion/devolution-or-delegation-what-revolt-metro-mayors-over-lockdown-tells-us-about> accessed 16 November 2021.

[24] Robert Hazell and Roger Masterman, 'Devolution And Westminster', in Alan Trench (ed) *The state of the nations 2001: The second year of devolution in the United Kingdom* (Imprint Academics 2001).

[25] Joanie Willett, 'The 'English Question', What We Can Learn From The Cornish Assembly Campaign, And Why An English Tier Is Not Enough' <http://www.democraticaudit.com/2013/09/20/the-english-question-what-

> "Introduce legislation to allow the people, region by region, to decide in a referendum whether they want directly elected regional Government. Only where clear popular consent is established will arrangements be made for elected Regional Assemblies."[26]

The promises to introduce devolution to Scotland, Wales, and NI were realised early during New Labour's first term in Government. In contrast, however, no attempts were made to introduce Regional Assemblies in England during the same period. Instead, this was attempted during New Labour's second term in Government. In 2002, the Government published a White Paper titled 'Your region. Your choice,' detailing its plans for introducing Regional Assemblies in England.[27] The outworking of this paper was the Draft Regional Assemblies Bill 2004. The key provisions of the Bill set out the following: the establishment of directly elected Regional Assemblies in 8 areas - East of England, East Midlands, North East, North West, South East, South West, West Midlands, and Yorkshire and the Humber). In terms of structure, each Assembly would be composed of between 25 and 35 Assembly Members, elected by the same PR electoral system used in Welsh Senedd elections - the Additional Member System. Each Assembly would also have an Executive branch which would form part of the cabinet comprised of between 2 and 6 Executive Members (including the leader). In regard to competences, the Bill outlined that each Assembly would be granted powers over health (very limited), tourism, culture, economic and social development, transport, housing, and the environment. The overall framework of these Regional Assemblies was akin, to some extent, to the modest devolution offered to Wales in 1998 - both were based on the local Government structure, and both had minimal powers.

As set out by New Labour's 1997 election manifesto and the precedent set by the devolution referendums held in 1998 - referendums had to be held in each of the 8 English regions before the provisions in the above Bill could be realised. Thus, in preparation for holding these referendums, the Regional Assemblies (Preparations) Act 2003 was enacted. A date was set in November 2004 to pilot the first 3 of these referendums, which would take place in the North East, North West and Yorkshire and the Humber. The referendum in the North East was the only one ever to take place, however, as the Government at the time were of the mindset that this region would be the most likely to vote in favour of having an elected Regional Assembly.[28] In a surprise to the Government, the referendum resulted in an overwhelming rejection by the electorate (78%) at a turnout of just 48%.[29] The legal consequence of this result meant that there couldn't be another referendum in the region for seven years. In political terms, however, this rejection at such a scale brought an end to this branch of New Labour's constitutional reform programme.[30] It was clear that there was a lack of enthusiasm for regional governance in England. Since the Labour Government abandoned this idea, no other successive

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we-can-learn-from-the-cornish-assembly-campaign-and-why-an-english-tier-is-not-enough/> accessed 20 January 2020.

[26] '1997 Labour Party Manifesto' (*Labour-party.org.uk*, 1997) <http://www.labour-party.org.uk/manifestos/1997/1997-labour-manifesto.shtml> accessed 20 January 2020.

[27] 'Your Region, Your Choice: Revitalising The English Regions.' (2002) <https://dera.ioe.ac.uk/10161/1/Your_region_your_choice_-_revitalising_the_English_regions.pdf> accessed 20 January 2020.

[28] 'Case Study: Regional Assemblies In England' (*Britpolitics*) <https://www.britpolitics.co.uk/case-study-regional-assemblies-england/> accessed 20 January 2020.

[29] BBC, 'North East Votes 'No' To Assembly' (2004) <http://news.bbc.co.uk/1/hi/uk_politics/3984387.stm> accessed 20 January 2020.

[30] 'Elected Regions Hit The Buffers' (*Ucl.ac.uk*, 2005) <https://www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/monitor-29.pdf> accessed 20 January 2020.

UK Governments have made plans to re-test this constitutional experiment. However, the decentralisation of power from the centre remained an option.

2.2 Devolution deals

The 'localism' agenda concerning England did not wash away once New Labour left Government. Instead, the succeeding Coalition Government continued with the pursuit of realising this agenda. However, in drawing lessons from its predecessor, the Coalition Government shifted focus from decentralising power based on regional geography towards functional economic areas instead.[31] The output of this new approach was the establishment of the devolution deals / Combined Authorities system.[32] The Chancellor of the Exchequer at the time, George Osborne at a speech where he was talking about a 'Northern Powerhouse' outlined the purposes of this system:

> "We will hand power from the centre to cities to give you greater control over your local transport, housing, skills and healthcare. And we'll give [you] the levers you need to grow your local economy and make sure local people keep the rewards. But its right people have a single point of accountability: someone they elect, who takes the decisions and carries the can. So, with these new powers for cities must come new city-wide elected mayors who work with local councils. I will not impose this model on anyone. But nor will I settle for less." [33]

At its core, the system involves negotiations taking place between Local Authorities (LAs) and the UK Government, with the hope of securing a devolution deal, which would allow for the decentralisation of a set of bespoke powers and the reorganisation of Local Government in a county, city or region within England. Their structure tends to include the creation of a Combined Authority with a Metro Mayor, previously elected using the supplementary vote system.[34] Following the enactment of the Elections Act 2022, all Mayoral and Police and Crime Commissioner elections are now run using the first-past-the-post system used in UK general elections. There is currently no legal requirement for the Combined Authorities to have an elected Metro Mayor - in practice, though, Metro Mayors are imposed as a key condition for the devolution deals.[35] This is because the Government perceives these Metro Mayors as key figures who will enhance accountability and legitimacy to local governance. Moreover, they provide a single point of contact between the Combined Authority and the Government, especially over the contractual delivery of the agreed devolution deal.[36]

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[31] Brenton Prosser and others, 'Citizen Participation and Changing Governance: Cases Of Devolution In England' (2017) 45 Policy & Politics 251.

[32] George Jones, 'The Coalition Government's 'New Localism' Decentralisation Agenda May Well Undermine Local Government. A New Agreement Is Needed' <https://blogs.lse.ac.uk/politicsandpolicy/the-coalition-Government%E2%80%99s-%E2%80%98new-localism%E2%80%99-decentralisation-agenda-may-well-undermine-local-Government-a-new-agreement-is-needed/> accessed 20 January 2020.

[33] 'Chancellor On Building A Northern Powerhouse' (*GOV.UK*, 2015) <https://www.gov.uk/Government/speeches/chancellor-on-building-a-northern-powerhouse> accessed 20 January 2020.

[34] Tierney, Ibid n. 21

[35] Giovannini, Ibid n. 8, Pp. 150

[36] Arianna Giovannini, 'The 2021 Metro Mayors Elections: Localism Rebooted?' (2021) 92 The Political Quarterly 474.

The first area to reach an agreement for a devolution deal was Manchester. This resulted in the creation of the Greater Manchester Combined Authority in late 2014. Two other deals were announced before the 2015 general election, establishing the Sheffield City Region Combined Authority (renamed South Yorkshire Mayoral Combined Authority) and the West Yorkshire Combined Authority. These deals were also announced prior to the enactment of their legislative vehicle – the Cities and Local Government Devolution Act 2016 (CLGD).[37] The provisions within the Act make significant amendments to the Local Democracy, Economic Development and Construction Act 2009 (LDEDC). Moreover, the provisions are also deliberately generic to allow for the SoS, through secondary legislation, to implement the bespoke negotiated arrangements. For instance, section 16 empowers the SoS to transfer powers through regulation to a Combined Authority. In addition to this, section 6 of the Act, which amends section 105 of the LDEDC Act, allows for the extension of functions of the Combined Authorities beyond economic development, regeneration and transport. Moreover, section 2 of the Act amends section 107A of the LDEDC Act and provides that the SoS may, by Order, provide for an elected Mayor for the Combined Authority, who would also be the chair for that Authority. The provision also provides a default term limit of 4 years for a Mayor. Section 4 amends section 107d of the LDEDC Act and allows Mayors to exercise functions with other Combined Authorities. This crucial element can facilitate greater regional integration between the Combined Authorities. Section 14 amends the procedures set out in section 106 of the LDEDC Act concerning the establishment of or changes to a Combined Authority. Under this provision, Orders made by the SoS to add or remove an area to/ from a Combined Authority requires the consent of that relevant Authority and, if applicable, the Mayor.[38]

To enhance Government accountability within this system, section 1 of the CLGD Act requires the SoS to publish annual reports to Parliament about devolution in all areas in England. The report must include information on areas within England with agreements already and areas where deals have been proposed to the SoS. As of December 2022, 10 (active) areas have agreed to devolution deals, the most recent being the North of Tyne Combined Authority formed in late 2017. Several other deals have been proposed thus far, including in the following areas: East Midlands, North Yorkshire, and Greater Brighton. As a result of either Government or local council(s) rejection, several proposed devolution deals have collapsed in the following areas: North Midlands, One Yorkshire, East Anglia and Greater Lincolnshire.[39]

Akin to the UK's devolution framework, the devolution deals system is asymmetrical and dynamic. As a starting point, all areas with deals share the same core competences, which include powers over transport, housing, and some aspects of finance, employment, skills, employment and health. Beyond this, however, many areas are then provided with additional unique responsibilities, for instance, the police, fire service, children's services, and health and

[37] Ibid n. 3, Para 393.

[38]'Get In On The Act: Cities And Local Government Devolution Act 2016' (*Local.gov.uk*, 2016) <https://www.local.gov.uk/sites/default/files/documents/cities-and-local-governme-4d0.pdf> accessed 18 November 2021.

[39] Mark Sandford, 'Devolution To Local Government In England' (*Researchbriefings.files.Parliament.uk*, 2020) <https://researchbriefings.files.Parliament.uk/documents/SN07029/SN07029.pdf> accessed 16 November 2021.

social care integration.[40] In comparison to the other areas, the Greater Manchester Combined Authority has had the most decentralised competences. As aforementioned, the devolution deals system is dynamic, and this can be exemplified by the fact that 50% of the current Combined Authorities have had their original deals evolve on at least one occasion. For instance, the Liverpool City Region's Combined Authority deal, first agreed upon in November 2015, was revised in March 2016 to expand the Combined Authority's competences to include new powers over transport. Moreover, the Greater Manchester Combined Authority's deal, first agreed in 2014, has now been revised on four occasions, with the latest revision coming in March 2016, which granted the Metro Mayor powers over police and crime.[41]

In February 2022, the UK Government published its long–awaited White Paper titled 'levelling up the United Kingdom,' which set out plans to reform the above-mentioned devolution deals system. [42] The proposed new devolution framework for England laid out in the paper is aimed at areas seeking devolution deals. This proposed system is underpinned by the four principles: effective leadership (supporting 'localism'), sensible geography (extension beyond functional economic areas to include whole county areas), appropriate accountability (measures within the deals will include robust local scrutiny mechanisms), and flexibility. In demonstrating its flexibility, the framework sets out a three-level approach to devolution – maintaining the asymmetrical character of the current regime. At the highest level (3), the institutional setup is akin to the current system of having a single institution with a directly elected Mayor. This level is the preferred model for the UK Government. It also entails access to a much broader range of competences, including in the areas currently enjoyed by some of the Combined Authorities such as transport, police and crime commissioner responsibilities, and employment support programmes. Level 2 is a single institution without a directly elected Mayor. Areas within this level have far fewer, but significant competences, including a role in planning the UK Shared prosperity fund and bus franchising. The lowest level (1) constitutes Local Authorities working together across a functional economic area or whole county area. Areas within this level have access to three core competences covering the function of 'strategic role in delivering services.' Beyond outlining this framework, the White Paper sets out 12 national missions, including that by 2030, every area in England that wants a devolution deal will get one, with powers allocated coming as close to level 3 as possible. To achieve this, the White Paper commits to extending the current devolution deals by inviting 9 areas to agree to new County deals (which includes Cornwall, Hull and Norfolk), and 2 areas to agree to Mayoral Combined Authority deals (York and North Yorkshire). Moreover, the paper also proposes to further evolve some of the current devolution deals by opening negotiations for 'trailblazer deals.'[43]

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[40] Akash Paun, 'English Devolution: Combined Authorities And Metro Mayors' <https://www.instituteforGovernment.org.uk/explainers/english-devolution-combined-authorities-and-metro-mayors> accessed 20 January 2020.

[41] For a thorough analysis on the competences of each Combined Authority, see: Mark Sandford, 'Devolution to Local Government in England' (*Researchbriefings.Parliament.uk*, 2019) <https://researchbriefings.Parliament.uk/ResearchBriefing/Summary/SN07029#fullreport> accessed 20 January 2020.

[42] Ibid n. 5

[43] Levelling up White Paper : Local Government Association Briefing' (*local.Gov.Uk,* 2022) <https://www.local.gov.uk/parliament/briefings-and-responses/levelling-white-paper-lga-briefing> accessed 7 November 2022

The current devolution deals system and the proposed new reforms have received some scepticism regarding their ability to address the English question adequately. For instance, in its far-reaching report on English devolution, PACAC concluded that the current devolution deals system and the White Paper 's proposed reforms were "not sufficient" in addressing the English question.[44] As detailed below, the rationale of this conclusion stems from the fact that the devolution deals system is highly asymmetrical, patchy, and lacks proper autonomy.

In relation to its asymmetrical nature, there is a considerable distance between the size and powers afforded to areas like the Greater Manchester Combined Authority, with much smaller areas at the other end of the spectrum, such as the North of Tyne Combined Authority. Due to this nature, the current system has been described as 'a menu with specials.'[45] Moreover, the proposals in the White Paper only exacerbate this asymmetrical nature further, as each of the three levels has differing competences and institutional setup.

The current devolution deals system is often characterised as being patchy, and this arises from the fact that not all areas within England have a devolution deal in place, meaning then there are lot of gaping holes throughout the country.[46] As argued by Arianna Giovannini, this patchiness "is generating winners and losers, thus creating new divides instead of addressing existing ones."[47] By providing a coherent framework, the proposals listed in the White Paper do to some extent try and address the issue of patchiness. However, the proposals maintain the negotiating aspect of the devolution deals system, leaving room for patchiness. For example, the current system has demonstrated that negotiations are not always successful, and not every area is interested in negotiating a deal.

Arguably, the most significant limitation of the devolution deals system is that the powers afforded under the system (even at the highest level (3) as provided in the White Paper) are far weaker than those enjoyed by the devolved administrations in Wales, Scotland, and NI.[48] For instance, as outlined in chapter 1, the majority of powers devolved under the devolution settlements are under statutory basis and based on a reserved powers model. In comparison, the powers under the devolution deals system are decentralised rather than devolved. Essentially then, Scotland, Wales, and NI enjoy more power over policy direction. In contrast, under devolution deals, power is centred on execution, but the policy is directed by the UK

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[44]Ibid n. 4

[45] Mark Sandford, 'Devolution Deals And The Powers Offered To Localities: A Menu With Specials?' (*House of Commons Library*, 2015) <https://commonslibrary.Parliament.uk/Parliament-and-elections/devolution/devolution-deals-and-the-powers-offered-to-localities-a-menu-with-specials/> accessed 20 January 2020.

[46] See: John Shutt and Joyce Liddle, 'Combined Authorities In England. Moving Beyond Devolution: Developing Strategic Local Government For A More Sustainable Future?' (2019) 34 Local Economy: The Journal of the Local Economy Policy Unit 91. See also: Arianna Giovannini, 'The Uneven Governance of Devolution Deals in Yorkshire: opportunities, challenges and local (di)visions', in Craig Berry, and Arianna Giovannini (eds), *Developing England's North* (Springer 2018)

[47] Arianna Giovannini, 'Why is a Devolution Framework Needed To 'Level Up', And What Should It Look Like?' (*The Institute for Public Policy Research*, 2021) <https://www.ippr.org/blog/why-is-a-devolution-framework-needed-to-level-up-and-what-should-it-look-like> accessed 29 December 2021.

[48] Stephen Tierney, 'Brexit And The English Question' in Federico Fabbrini (ed), *The Law & Politics of Brexit* (Oxford University Press 2017).

Government.[49] As put forward by Michael Kenny and Tom Kelsey, “the term devolution is in some ways a misleading description of this model; delegation would perhaps be more accurate.”[50] Overall, owing to this the lack of autonomy, the UK Government retains its dual mandate as the Government of England and the UK. As discussed in chapter 6, this status quo is a critical factor behind the negative implications of the UKIMA 2020. Therefore, the devolution deals system would prove inadequate to resolve the English question and accommodate England in a post-Brexit constitution.

2.3 English Votes for English Laws (EVEL)

In tackling the West – Lothian question, the Conservative-led UK Government made changes in 2015 to the House of Commons procedures. These changes came in the form of EVEL. The proposals for EVEL were first detailed in a report by the Conservative Party’s Democracy Task Force in 2008. In their inquiry on answering the West – Lothian question, the task force found that since the introduction of devolution, changes to the procedural workings of the Commons had not changed to accommodate the issues associated with devolution. This was evidenced by several controversial HoC’s votes, including the vote on an amendment to the Health and Social Care (Community Health and Standards) Bill. The Bill was proposed in November 2003 during New Labour’s second term in Government. A key amendment to the Bill was proposed, which centred on the prevention of establishing foundation hospitals in England, a controversial issue at the time. 17 MPs rejected the amendment when voted on. However, among those representing English constituencies, the amendment would have passed by a majority of 17, thus preventing the establishment of foundation hospitals in England.[51] Additionally, the Higher Education Bill also proposed by Tony Blair’s Government in 2004 produced similar circumstances. The scope of the Bill itself was UK-wide, apart from a key provision related to the increase in University tuition fees in England (it could also apply in Wales, but the power to implement this was left to the Welsh Assembly). The Bill was passed by 316 votes to 311, reducing the Government's 161-seat majority to 5 - highlighting the controversial nature of the provision on tuition fees.[52] Similar to the Health and Social Care Bill, the Government would have been defeated by a majority of 15 among English MPs.[53] In concluding its report, the task force recommended for:

> “..a modified version of ‘English Votes for English Laws’, incorporating English-only Committee and Report stages but a vote of all MPs at Second and Third Reading…[the rationale for this proposal being that]…this proposal can remove the main source of

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[49] Michael Keating, 'Brexit And The Nations' (2018) 90 The Political Quarterly 167.
[50] Kenny and Kelsey, Ibid n. 23

[51] Daniel Gover and Michael Kenny, 'Answering The West Lothian Question? A Critical Assessment Of ‘English Votes For English Laws’ In The UK Parliament' (2018) 71 Parliamentary Affairs 760.
[52] 'Tuition Fees: How It Divided Labour' (*News.bbc.co.uk*, 2009) <http://news.bbc.co.uk/1/hi/education/7928436.stm> accessed 22 March 2021.

[53] Guy Lodge, 'Nations And Regions: The Dynamics Of Devolution.' (*Ucl.ac.uk*, 2004) <https://www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/centre_august_2003.pdf> accessed 20 January 2020.

> English grievance at the current devolution settlement without some of the risks to political stability that critics have seen in proposals for a completely English procedure."[54]

Further proposals on EVEL were detailed in the McKay Commission's 2013 report. The Commission was established by the Coalition Government to investigate the best approach for the HoC in dealing deal with 'England only' legislation. In a similar vein to the Conservative Party's Democracy Task Force, the Commission recommended the introduction of new HoC procedures, which feature:

> "an equivalent to a legislative consent motion (LCM) in Grand Committee or on the floor before second reading; the opportunity at report stage for amendments to be made to a Bill to implement compromises between the committee's amendments and the Government's view, or if necessary overriding in the House what was done in committee; the double-count of MPs in divisions, illustrating the views of England (or England and-Wales) MPs and UK MPs at second or third readings of Bills. This would not amount to a double lock by which legislation could only be passed if there is both a majority of MPs from England and a majority of the House of Commons as a whole in favour; Equivalent procedures for delegated legislation which might include a double count for MPs."[55]

Two months after the Conservative's majority win in the 2015 election, the new Commons procedures (EVEL) were introduced. These procedural innovations broadly reflected the recommendations of the Democracy Task Force and the McKay Commission, but with an express veto provided to English (and English and Welsh) MPs over primary and secondary legislation (in areas devolved elsewhere) that affected only their territories.[56] This meant then under EVEL, legislation affected by the new procedure must receive backing from both UK-wide MPs and also English (and English and Welsh) MPs, in order to pass – this is characterised as a 'double veto.'[57] The application of EVEL was not extended to the HoL, as the unelected members do not represent constituencies but rather sit as individuals in their own right – therefore, the procedures for the passage of legislation remained unchanged.[58]

Following its introduction, many considered EVEL as a viable solution to the English question, as it provided for both English governance and the recognition of England as a distinct unit.[59] Moreover, if the EVEL process had been applied to the aforementioned controversial Commons votes over the Health and Social Care (Community Health and Standards) Bill and the Higher Education Bill, English MP's via the legislative grand committee could have continued to withhold consent until the controversial amendments and provisions within each Bill were deleted. In the case of the Health and Social Care (Community Health and Standards) Bill, EVEL could have prevented the establishment of foundation hospitals in England. In

[54] 'Answering The Question Devolution: The West Lothian Question And The Future Of The Union' (*Devolutionmatters.files.wordpress.com*, 2008) <https://devolutionmatters.files.wordpress.com/2014/09/answering_the_west_lothian_question2.pdf> accessed 20 January 2020.

[55] Commission on the consequences of devolution for the House of Commons (McKay Commission) report (2013)

[56] Gover and Kenny, Ibid n. 51

[57] For a through discussion on the EVEL procedures see: 'How Does EVEL Work?' (*Project EVEL*) <http://evel.uk/how-does-evel-work/> accessed 20 January 2020. See also: Tierney, Ibid n. 21

[58] Gary Wilson, 'The 'English Question': Why 'English Votes' Are Not The Answer And The Better Alternatives Lack Force' (2015) 36 Liverpool Law Review 257.

[59] Richard Wyn Jones and Ailsa Henderson, *Englishness: The Political Force Transforming Britain* (Oxford University Press 2021). Pp. 168

relation to the Higher Education Bill, EVEL had the potential to prevent the increase in university tuition fees in England (and Wales).

However, in its full assessment, it can be concluded to some extent that EVEL did not fully address the English question. For instance, despite the 'veto' powers English MPs had, unlike in devolved legislatures, where laws passed are scrutinised and voted on by legislatures specific to that region, the EVEL process did not allow the same for English MPs, as non – English MPs still had a vote on English only matters before the legislation was passed. This also meant that English MPs could not force through legislation against the objection of non – English MPs, thus reinforcing the fact that English MPs remained in a much weaker legislative position than their devolved counterparts. [60] Therefore, the imbalanced nature of the UK's territorial constitution regarding English representation remained.

When David Cameron announced plans for EVEL in his Party's 2015 election manifesto, he claimed that the procedural reform would allow "English MPs to express their voice on matters affecting England only." [61] However, from assessing the operation of EVEL, it can be criticised that it provided a lack of an enhanced 'voice' to England and its MPs due to its focus on just the legislative procedure. By voice, this can be understood as Parliamentary business beyond legislative voting, such as the functions and mechanisms within Westminster that are mirrored within the devolved legislatures, which include holding debates and conducting formal inquiries. As put forward by Michael Kenny and Daniel Gover:

> "the design of EVEL has effectively buried the goal of providing 'voice' beneath the establishment of a right to 'veto' for English MPs. This is apparent from the way that the new 'legislative grand committees' (which take the main EVEL stages in the legislative process) have tended to work. So far, these stages have been almost entirely perfunctory. Most have lasted around two minutes, on average, and have not triggered substantive debates." [62]

Following the COVID 19 pandemic outbreak in April 2020, EVEL was suspended until Westminster abolished it in July 2021. The then Leader of the House of Commons, Jacob Rees-Mogg outlined some of the Government's key reasons behind this move, some of which reflect the above assessment:

> "… EVEL has been suspended for a year without any loss of effectiveness to the way the House operates, any loss to the constitution or any loss to MPs' ability to represent their constituents….The Government are of the view that EVEL is no longer a necessary process within the House of Commons, irrespective of the pandemic. It is not a pandemic related change but simply a recognition that it has not contributed to constitutional development in the way that may have been hoped." [63]

[60] Gover and Kenny, Ibid n. 51

[61] '2015 Conservative Party Manifesto' (*Ucrel.lancs.ac.uk*, 2015) <http://ucrel.lancs.ac.uk/wmatrix/ukmanifestos2015/localpdf/Conservatives.pdf> accessed 20 January 2020.

[62] Daniel Gover and Michael Kenny, 'One Year Of EVEL: Evaluating 'English Votes For English Laws' In The House Of Commons | British Politics And Policy At LSE' (*Blogs.lse.ac.uk*, 2016) <https://blogs.lse.ac.uk/politicsandpolicy/one-year-of-evel-evaluating-english-votes-for-english-laws-in-the-house-of-commons/> accessed 22 August 2021.

[63] Richard Kelly, 'English Votes For English Laws - Rescinding Standing Orders' (*Researchbriefings.files.Parliament.uk*, 2021) <https://researchbriefings.files.Parliament.uk/documents/CDP-2021-0125/CDP-2021-0125.pdf> accessed 16 November 2021.

In concluding this section, it is clear from the analysis conducted above that the English question remains unanswered, despite the differential attempts and solutions that the various UK Governments have brought forward since the establishment of devolution in 1998. The discussion below will move on to examine how Brexit has resulted in bringing about the English question back on the political agenda. With a very different rationale for addressing it – there is now a need to accommodate England in a post – Brexit reformed constitution.

3. Brexit and the English question

As highlighted above, thus far, the rationale for tackling the English question has primarily been based on the priorities of the various UK Governments. In recent times, Government action has prioritised the objective of achieving economic growth and regeneration – as evidenced by the abolishment of EVEL and the introduction and growth of the devolution deals system.[64] This section will argue that Brexit has resulted in the need to accommodate England in a post-Brexit reformed constitution. Thus, this priority needs to be reflected in Government approaches to addressing the English question and reforming how England is governed.

As aforementioned, England is the only UK territory without national devolution and constitutional recognition consequential to the English question. As a result of this constitutional nature, England remains governed by the central UK institutions – which then allows for English constitutional dominance through Parliamentary Sovereignty. Brexit has exposed and exacerbated the issues associated with this constitutional setup. This has been evidenced following the introduction of several post-Brexit constitutional reforms, including the (re)establishment of the UK internal market and changes to the UK's intergovernmental framework.

Starting with the former, as detailed in chapter 6, following the cessation of EU law supremacy in the UK's constitutional order, challenges to the integrity and stability of the UK's internal market emerged. To mitigate these challenges, the UK Internal Market Act, 2020 (UKIMA) was enacted. However, owing to England's size, and constitutional dominance, the UKIMA principles of mutual recognition and non – discrimination favour England – therefore, establishing an internal market dominated by England. This domination is detrimental to devolved regulatory autonomy. Moreover, the Scottish and Welsh Governments are utilising this effect to different ends. The Scottish Government have used it to further their calls for independence, and the Welsh Government have used it to enhance their calls for radical constitutional reform.

Moving on, as detailed in chapter 7, the competing constitutional visions exposed by Brexit, and the inadequacies within the UK's intergovernmental framework to accommodate these visions, and manage tensions, resulted in the emergence of an 'intergovernmental constitutional war,' not seen since the establishment of devolution in 1998.[65] The inadequacies within the

[64] Mark Sandford, ' Signing up to Devolution: The Prevalence of Contract over Governance in English Devolution Policy' (2016) 27 Regional and Federal Studies 62.

[65] Nicola McEwen and others, 'Intergovernmental Relations In The UK: Time For A Radical Overhaul?' (2020) 91 The Political Quarterly 632.

UK's intergovernmental framework result from the constitutional dominance of the UK Government over its devolved counterparts. Moreover, within the intergovernmental framework, the UK Government exercises a dual mandate, acting as the Government of England and the UK as a whole. This essentially grants England hegemony within the framework.[66] The UK Government's dual mandate comes at a price, however, as exemplified during the handling of the COVID – 19 pandemic. In October 2020, the UK Government, acting on behalf of England (and without consulting the Combined Authorities), introduced regional lockdowns, which caused tensions to arise between the UK Government and a few Metro Mayors, including Manchester and Liverpool's Metro Mayors. By publicly voicing their opposition to the regional lockdowns, these Metro Mayors in particular, were seen as protectors of the Northwest region. In comparison, the devolved administrations did not face similar issues, as they have full competences over health.[67]

In an attempt to manage the constitutional turbulence, the UK Government and its devolved counterparts commissioned a joint review on reforming the inadequate intergovernmental framework. In January 2022, the review published its report. The report introduced an overhaul of new reforms, including scrapping the Joint Ministerial Council and replacing it with a three-tier system of intergovernmental forums. Additionally, an independent intergovernmental relations Secretariat was established, whose role involves overseeing the new dispute resolution procedure .[68] By providing for independent mediation, this new procedure limits the UK Government's previous ability to act as a judge, jury, and executioner of intergovernmental disputes.[69] Despite the positive steps these reforms took in increasing the role and voices of the devolved territories within the UK's intergovernmental framework, they do not, however, overcome the aforementioned inadequacies. This is because just like the old regime, the new regime is governed by political conventions. Therefore, the UK Government's hegemony (and England's) is legally retained. Essentially, the new changes result in the return of old critiques that intergovernmental relations in the UK rely on the political will of the UK Government, at the expense of its devolved counterparts.[70] Moreover, given the continued failure of the UK's intergovernmental framework to address English representation, this leaves the UK Government continuing to exercise its dual mandate.[71]

Overall, as analysed within this section, the implications associated with the above post-Brexit reforms have resulted from failing to accommodate England and address the English question. With further constitutional changes expected, it is reasonable to assume that they will only exacerbate the current period of constitutional unsettlement. Consequently, there is an

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[66] Michael Kenny and Jack Sheldon, 'Green Shoots For The Union? The Joint Review Of Intergovernmental Relations - Bennett Institute For Public Policy' (*Bennett Institute for Public Policy*, 2022) <https://www.bennettinstitute.cam.ac.uk/blog/union-joint-review/> accessed 2 August 2022.

[67] See; Kenny and Kelsey, Ibid n. 23. And see also: Paul Anderson, 'The Covid-19 Pandemic In The United Kingdom A Tale Of Convergence And Divergence', in Nico Steytler (ed), *Comparative Federalism and Covid-19 Combating the Pandemic* (Routledge 2022). Pp. 152 -153.

[68]'The Review Of Intergovernmental Relations' (*Assets.publishing.service.gov.uk*, 2022) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1046083/The_Review_of_Intergovernmental_Relations.pdf> accessed 2 August 2022.

[69] Nicola McEwen, 'Intergovernmental Relations Review: Worth The Wait?' (*UK in a changing Europe*) <https://ukandeu.ac.uk/intergovernmental-relations-review/> accessed 2 August 2022.

[70] Paul Anderson and Johanna Schnabel, 'Review Of Intergovernmental Relations: The New Interministerial Structures Are A Step In The Right Direction' (*Blogs.lse.ac.uk*, 2022) <https://blogs.lse.ac.uk/politicsandpolicy/intergovernmental-relations-review/> accessed 2 August 2022.

[71] Kenny and Sheldon, Ibid n. 66

increasing need to accommodate England within the current and prospective post – Brexit constitutional reforms. For instance, as analysed in chapters 2 and 3, Brexit has increased the likeliness of Scotland seceding from the UK's Union and Ireland's (re)unification. Either possibility (or both) would certainly further increase the need for accommodating England.[72] Below, several constitutional proposals will be examined concerning accommodating England into a reshaped post – Brexit constitution.

4. Potential solutions to the English question post – Brexit

As (in)famously stated by the former Lord Chancellor, Lord Irvine of Lairg, the best way to deal with the West – Lothian (English) question was not to ask it – "there is no need to bang the drum or blow the bugle."[73] His approach seemed to suggest that either, there is no English question or its significance is over-inflated. Either way, the maintenance of the status quo is favoured. The inaction thus far to accommodate England in the reforms mentioned reforms seems to indicate that the UK Government deem the significance of this as being either over-inflated or not significant at all. However, as analysed in the section above, maintaining the status quo is increasingly becoming untenable. Therefore, the UK Government need to prioritise addressing the English question on the basis of accommodating England into a reshaped post – Brexit constitution. In this section, several possible solutions to the English question will be examined. In carrying out this task, it shall be acknowledged that at present, the UK Government does not have the appetite to realise such solutions. Nonetheless, with more constitutional reforms expected, the need to act on a solution will further increase.

Several proposals have been put forward concerning addressing the English question post-Brexit. Some of these include abolishing devolution or introducing national devolution in England. Both solutions would resolve the English question, establishing constitutional equality between the UK's four territories. It is acknowledged, however, that these solutions are highly controversial and could potentially destabilise the UK's Union. For instance, in their rejection of introducing national devolution to England, the HoL's constitution committee, in their report on devolution and the Union, stated:

> "The overwhelming size of England and thus the political and economic power of an English Government compared with the Scottish and Welsh Governments and Northern Ireland executive would not bring real symmetry to the system and could risk instability and resentment…the creation of an English Parliament would introduce a destabilising asymmetry of power to the Union… it is not a viable option for the future governance of England."[74]

Given their nature and possible implications, it is hard to perceive that they could ever be implemented as solutions to the English question. Not all solutions to the English question share this nature, however. Several alternative proposals are far less radical and share characteristics with what has been attempted previously. This includes establishing a dual mandate Parliament or evolving the current devolution deals system into regionalism. An analysis of both proposals will now be conducted below.

[72] Wyn Jones and Henderson, Ibid n. 59, Pp. 194
[73] See: Wilson, Ibid n. 58
[74] Ibid n. 3, Para 407

Parliament within a Parliament

The proposal of establishing a dual mandate Parliament (an English Parliament within Westminster) was first championed by William Hague, the then Leader of the Conservative party, right after devolution was implemented.[75] This proposed solution grants MPs from English constituencies with a dual mandate. Meaning that at specific periods, they meet as an English Parliament whilst remaining members of the HoC. Thus, the membership of this English Parliament would be made up of 533 MPs, far greater than the number of legislative members in Scotland (129 MSPs), Wales (60 MSs), and Northern Ireland (108 MLAs) combined. This could be justified based on England's population size – though a separate English Parliament would likely have far fewer legislative members. Essentially, this model can be dubbed as the EVEL procedure but at full strength, as it excludes members within the HoC that do not represent English constituencies from deciding on English-only matters. In theory, implementing this model would not be practically problematic, given that it already existed at half–strength through the EVEL procedure. Therefore, the model could be seen as a natural evolution from EVEL.[76] In addition, unlike the proposal for the creation of a separate English Parliament, this model could prove to be more desirable, especially amongst those who advocated for EVEL, and it also avoids "enormous costs to the taxpayer." [77]

However, the shortcomings of this model start to arise over the lack of an English Executive, as it only provides for legislative devolution to England. Given this, it would be expected that the UK Government would continue to exercise its dual mandate role by performing Executive functions for both England and the UK – retaining England's constitutional dominance. As mentioned in the previous section, this status quo is a key factor behind the adverse effects of the current post-Brexit constitutional reforms. Additionally, under this model, issues over Government accountability could arise due to the absence of a confidence relationship. For instance, the English Parliament could lose confidence in the Executive (the UK Government). However, unlike a vote of no confidence carried out in Westminster or the devolved legislatures, the loss of confidence within the English Parliament will not result in the removal of the Executive.[78] Furthermore, deadlock between the UK Government and English Parliament could emerge, especially in circumstances where the majority of English MPs are from the opposition party of the Government of the day.[79] Moreover, given the Scottish resistance to EVEL (spearheaded by the SNP), this solution would most likely face even greater Scottish resistance.[80]

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[75]See: 'Conservative Party Manifesto 2005' (*News.bbc.co.uk*, 2005) <http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/11_04_05_conservative_manifesto.pdf> accessed 20 January 2020.

[76] Vernon Bogdanor, 'The crisis of the constitution' (*Consoc.org.uk*, 2015) <https://consoc.org.uk/wp-content/uploads/2016/02/COSJ4072-Crisis-of-Constitution-2nd-Ed-12_15-WEB.pdf> accessed 20 January 2020.

[77] John Redwood, 'John Redwood MP: England Wants To Get EVEN. Now Hague Must Ensure That It Does.' (*Conservative Home*, 2015) <https://www.conservativehome.com/platform/2015/02/john-redwood-mp-england-wants-to-get-even-now-hague-must-ensure-that-it-does.html> accessed 20 January 2020.

[78] Bogdanor, Ibid n. 76

[79] Ibid n. 55

[80] Charlie Jeffery, Ailsa Henderson, Roger Scully, and Richard Wyn Jones 'England's dissatisfactions and the Conservative dilemma' (2016) 14 Political Studies Review 335.

Overall, owing to the above shortcomings, it would be very challenging to accommodate England in a post – Brexit constitution through this model.

Devolution deals into regionalism

Another potential solution to the English question could be to evolve devolution deals into regionalism. As discussed earlier in this chapter, the formation of devolution deals within England has been a prolonged and patchwork job - many local councils in England still lack devolution agreements with the UK Government. In addition, the devolution deals system is highly asymmetrical in terms of institutional setup and competences. Moreover, a considerable distance remains between the devolved jurisdictions and the Combined Authorities in relation to autonomy. Despite the UK Government's attempts to tackle these critiques, the proposals listed in the levelling up White Paper result in the return of the same critiques. Regionalism would be one possible way of overcoming some of these critiques. In line with New Labour's proposals, regionalism would allow the system to be more coherent, uniform and unpatched. It would also close the gap regarding autonomy with the devolved jurisdictions.

Devolution is often characterised as a process rather than an event. Therefore, it is reasonable to suggest that the natural evolution of the devolution deals could head towards regionalism. On an implementation basis, evolving devolution deals into building blocks for Regional Assemblies would be practical and possible. For instance, such a process could see the Greater Manchester Combined Authority merge with the Liverpool City Region Combined Authority and form the North West region. This process can continue until all the Combined Authorities within the North of England merge into one big central Authority for the North. As mentioned earlier in the chapter, provisions within the CLGD Act 2016 provide for integrating the Combined Authorities in terms of composition (section 14) and functions (section 4).

The proposal for a 'One Yorkshire' devolution deal was the first (and only) plan that headed towards a new system of devolution governance in England, similar to the above example.[81] The proposal was backed by all but two of the region's local councils (18 out of 20), placing it on a much wider regional scale than the other Combined Authorities. The two opposing councils were Sheffield and Rotherham, who opted for something similar but at a much smaller scale - the South Yorkshire solution.[82] As described by Arianna Giovannini, in comparison to other counterparts, the plan for a 'One Yorkshire' deal would entail "more powers, funding and policy capacity, stronger political leadership for the Mayor, and much greater leverage both at the centre and across the region."[83] Essentially, the 'One Yorkshire' plan overcame some of the issues that were associated with the devolution deals system in general, including issues over competences, funding and accountability.[84] The UK Government did, however

[81] Arianna Giovannini, 'Can 'Yorkshireness' Be Politicised? | Political Quarterly Blog' (*Political Quarterly Blog*, 2018) <https://politicalquarterly.blog/2018/04/16/a-yorkshire-wide-deal-would-usher-in/> accessed 20 January 2020.

[82]'Proposal To Establish A Combined Authority For The Areas Of Barnsley, Doncaster, Rotherham And Sheffield' (*Assets.publishing.service.gov.uk*, 2013) <https://assets.publishing.service.gov.uk/Government/uploads/system/uploads/attachment_data/file/240299/Combined_authority_for_South_Yorkshire_consultation.pdf> accessed 20 January 2020.

[83] Giovannini, Ibid n. 81

[84]See: 'One Yorkshire Devolution Executive summary' (*Westyorks-ca.gov.uk*, 2018) <https://www.westyorks-ca.gov.uk/media/2380/oy-summary.pdf> accessed 20 January 2020.

reject this proposal on the basis that "the plan did not meet our devolution criteria."[85] This rejection was expected given that the UK Government tends to prefer functional economic area (FEA) deals over wider geographic regional deals as proposed by the 'One Yorkshire' plan.

As aforementioned, a key mission within the UK Government's levelling up White Paper is to extend the devolution deals by expanding focus area beyond FEAs, and granting every area that wants devolution a deal by 2030. This leaves room for optimism in relation to realising the 'One Yorkshire' deal and, more broadly, evolving devolution deals into regionalism. If more deals similar to the South Yorkshire plan are agreed across England, then the building blocks towards a 'One Yorkshire' plan to then achieving the 'Northern Powerhouse' are the next natural progressive steps into achieving regionalism across England.

It must be acknowledged however, that due to its unpopularity at the time, regionalism was rejected during New Labour's term in Government. However, since the last public test on regionalism, England's constitutional landscape has changed with the establishment of Metro Mayors and Combined Authorities. As highlighted in chapter 1, the evolution of devolution in Wales demonstrates how public attitudes can shift over time. Public attitudes on devolution in Wales shifted from anti-devolution in the 1979 referendum to strongly supporting the strengthening of Welsh devolution in the 2011 referendum.[86] Therefore, it could be perceived that public attitudes on regionalism could have shifted. Even if this may not be the case, realising regionalism through the evolution of devolution deals would still arguably curb the unpopularity of regionalism. Since its inception, the devolution deals system has received a more favourable form of public support than regionalism. This can be evidenced by the May 2021 English local elections, which saw a growing public interest in the Combined Authority Mayoral elections. During this election, 6 of the 7 Combined Authorities that went to the polls were voting for their Metro Mayor for a second time. The level of turnout in each of these 6 Combined Authority Mayoral elections increased from the previous election (on the whole, the average was a 6% increase). These elections indicated that localism was rebooted and that:

> "metro mayors are maturing as institutions and they have started to take root in the public imagination….[moreover] CA mayors are becoming more embedded within the political landscape in England, and can act as institutions that help articulate not only local interests, but also identity, belonging, and civic pride. "[87]

Thus, given the increasing popularity of the Combined Authorities, evolving them into regionalism would likely increase support for this type of governance.

Regionalism would be a workable solution to accommodating England in a post-Brexit reformed constitution, as England's constitutional hegemony is diluted by the individual English regional bodies – the regions are not likely to all fully align on policy issues just because they are English. The North West could for instance be more aligned to Wales than to the South East. More significantly, regionalism would eradicate the UK Government's dual

[85] BBC, 'Government Rejects 'One Yorkshire' Devolution Deal' (2019) <https://www.bbc.co.uk/news/uk-england-47214592> accessed 20 January 2020.

[86] 'Bennett Institute for Public Policy at the University of Cambridge' (*Bennett Institute for Public Policy,* 2022) <https://www.bennettinstitute.cam.ac.uk/> accessed 7 November 2022

[87] Arianna Giovannini, 'The 2021 Metro Mayors Elections: Localism Rebooted?' (2021) 92 The Political Quarterly 474 .

mandate role, as the heads of the regional bodies will provide the English Executive functions. Moreover, it will also mean that the UK internal market is no longer a defacto 'English internal market.'

Nonetheless, the UK Government has yet to plan to extend the devolution deals into regionalism. As noted by the remarks of Michael Gove, the SoS for Levelling Up, Housing and Communities during the PACAC report inquiry, the UK Government's current aim is to offer "the highest existing levels of devolution within England"[88] – essentially, maintaining the status quo.

Conclusion

When Tom Dalyell first asked the English question in 1977, not many would have expected that the question would become a reality, let alone evolve and still be left unanswered over four and a half decades later. Since the inception of devolution in 1998, the various UK Governments have adopted differential approaches to tackling this question, often based on the priorities of the Government of the day. For instance, New Labour adopted a 'localism' agenda for England through regionalism, whilst the Conservative-led Government shifted focus away from decentralising power in England based on regional geography towards FEAs. In recent times, UK Government action has prioritised achieving economic growth and regeneration – as evidenced by the abolishment of EVEL and the enhancement of the devolution deals system. Nevertheless, despite the various attempted initiatives, no Government has thus far managed to address the English question fully. Moreover, approaches to resolving the English question often lack momentum, and progress is often stalled or slow, resulting in the characterisation of the English question as "the elephant in the room that we constantly ignore."[89]

As a result of Brexit, the UK's constitution is undergoing some necessary changes, including reforming its intergovernmental framework and (re)establishing its internal market. However, these changes have negatively impacted the UK's internal territorial dynamics, contributing to the current period of constitutional unsettlement. This implication(s) results from failing to accommodate England into these reforms – bringing the English question back on the political agenda, with a very different rationale for addressing it. With further constitutional changes expected, the need to accommodate England and address the English question increases. For instance, as analysed in chapters 2 and 3, Brexit has increased the likeliness of Scotland seceding from the UK's Union and Ireland's (re)unification. Either possibility (or both) would further increase the need to accommodate England. Several proposals have been put forward as solutions to accommodate England, including solutions that would bring about constitutional equality, such as abolishing devolution or introducing national devolution to England. However, it was acknowledged that such solutions were highly controversial and could potentially destabilise the UK's Union. Given this, the chapter then focused on less radical proposals that shared characteristics with what has been attempted previously – a dual mandate Parliament and evolving devolution deals into regionalism. Upon analysis, it was argued that evolving the devolution deals system into regionalism would be a viable solution to accommodating England in a post-Brexit constitution. Nonetheless, the UK Government do

[88] Ibid n. 5

[89] Ibid n. 2

not have the appetite for the realisation of such reform – they favour maintaining the status quo. Given this approach, the English question once again becomes “the elephant in the room that we constantly ignore.”[90] In the same vein, however, as mentioned above, the continuation of the status quo will only further exacerbate the current period of constitutional unsettlement - which will further intensify the need to act on a solution.

[90] Ibid

Chapter 6: The rolling back of devolution (?): Brexit and the UK Internal market

Introduction

Before Brexit, the EU exercised several competences in a wide range of policy fields on behalf of the UK Government and its devolved counterparts through its internal market framework. The framework limited the divergence between the UK's four territories and ensured the integrity and stability of the UK's internal market. Constitutional scholars and many others have found it difficult to conceptualise these powers that were exercised from Brussels into categories. This chapter addresses this difficulty by proposing that these powers can be grouped into two clusters: those that were plausibly– reserved and those that were plausibly– devolved. Policy areas under the first category included powers over customs, product safety, product standard, data, and consumer protection. Policy areas under the second categorisation included powers over human, animal and plant health, food standards and safety, regional development, fisheries, the environment, and agriculture. The above categorisation stems from the observation that if devolution was established outside of the framework scaffolding provided by the EU internal market, it would be reasonable to presume that some of these powers would be reserved, and the remainder de facto devolved. The objective of providing this categorisation is to first, provide new terminology in this area, as many scholars have not done so. Secondly, this categorisation helps for a better reading and understanding of the chapter's content, as a clear definition and explanation is provided over these two areas of competences, which the literature tends not to do.

In the aftermath of the decision to leave the EU, a significant constitutional question arose – how will the integrity of the UK's internal market be protected following the cessation of the supremacy of the EU's acquis in the UK's constitutional order?[1]Secondary to this question, during the Brexit referendum, the leave campaign's pseudo – constitutionalist call to 'take back control' captured and combined a range of issues including 'taking back control of our laws from Brussels.'[2] This then raised an additional constitutional question - once the powers are repatriated back from the EU, who will be responsible for their exercise? This question arose from the ambiguity surrounding the powers that were plausibly– devolved. These powers had an awkward status under the UK's devolution settlement, as they were presumably devolved within the context of EU membership. As a result, they were never exercised by the devolved administrations. Moreover, because they were exercised from Brussels, this ensured no issues of divergence ever arose.[3] As demonstrated in the previous chapters, many constitutional questions that have arisen due to Brexit have often been ignored. However, the UK Government placed a necessity on addressing the above-mentioned constitutional questions, as the ramifications of ignoring them would be grave and imminent. For instance, new internal barriers to trade would emerge, and a legal void would be left in the statute book. Focus then shifted to how these questions could be addressed, as the solutions would have a significant impact on the future of the UK's devolution settlements and the UK's intergovernmental

[1] Given the protections offered by the EU internal market, the UK internal market was a relatively new concept, which has increasingly become more significant over time, as shall be highlighted within this chapter.
[2] Michael Gordon, 'Brexit: A Challenge For The UK Constitution, Of The UK Constitution?' (2016) 12 European Constitutional Law Review 409.
[3] Vernon Bogdanor, *Beyond Brexit: Towards A British Constitution* (IB Tauris 2019). Pp. 213

relations. Prima facie, two contrasting possible conclusions were envisioned: the overall enhancement of the devolution settlements and the easing of tensions in intergovernmental relations, or the rolling back of devolution and the worsening of intergovernmental relations in the UK.[4] It is vital to note that the rollback does not refer to structures. Instead, it is in the context of competences being prevented from use.

Considering the above points, this chapter examines how the UK Government approached these constitutional questions and the impact of its solutions on devolution and intergovernmental relations within the UK. Thus, the main argument of this chapter will be that the process of re-establishing the UK internal market offered not only the opportunity for the devolution settlements to become more dynamic but also to improve the already strained intergovernmental relations between the UK Government and its devolved counterparts. In particular, the developments of the UK's common frameworks aided in realising these opportunities. However, these opportunities have since been lost following the enactment of a few of the UK Government's Brexit-related legislation, including the EU (Withdrawal) Act 2018 and the UK Internal Market Act 2020. These pieces of legislation have had the overall effect of rolling back devolved regulatory competences. Arguably, the rollback was avoidable, given that the common frameworks system works effectively to safeguard the UK's internal market. More broadly, however, this exposes the signs of systematic problems in devolution and over the UK Government's constitutional hegemony in intergovernmental relations.

In presenting the above arguments, the chapter will be divided into three main sections. Section one will focus on the constitutional question of who is responsible for exercising EU repatriated powers. This will involve examining the approaches taken by the UK Government and its devolved counterparts. In sections 2 and 3, the discussion will focus on the constitutional question of how the integrity of the UK's internal market can be protected. An analysis of the two arrangements (the UK common frameworks and the UK Internal Market Act 2020) introduced to address this question will be conducted. The aim of examining these arrangements is to uncover the implications they each have on devolved regulatory competences. In addition, the impact each of them has on intergovernmental relations. The chapter will conclude by stating that there has been a systematic failure to address the above-mentioned constitutional questions, which has exacerbated the current period of constitutional unsettlement in the UK.

1. Repatriated EU powers: Whose responsibility?

As mentioned in the introduction, following the loss of EU law supremacy in the UK's constitutional order, a fundamental constitutional question arose concerning the treatment of repatriated powers from the EU. In particular, over the plausibly– devolved powers. The answer to this question was an issue of contention between the UK Government and its devolved counterparts. As analysed within this section, the process and the ultimate tabled

[4] See: Thomas Horsley, 'Constitutional Reform by Legal Transplantation: The United Kingdom Internal Market Act 2020' (2022) 42 Oxford Journal of Legal Studies 1143.

solutions made devolution vulnerable to a rollback, further aggravating the already strained intergovernmental relations in the UK.

The battle of the Bills

The UK Government's initial approach on this matter was to adopt a conferred power model, whereby once repatriated, a majority of these powers would be, by default 're reserved' back to Westminster rather than to the devolved level. Their rationale was that this would be an efficient way of establishing a functioning UK internal market and also ensure that the Government would be able to negotiate international trade agreements without any issues arising.[5] This approach was formalised in 2017, following the introduction of the EU Withdrawal Bill (now Act), which set out to repeal the European Communities Act 1972, protect the integrity of the UK internal market, and guarantee legal continuity. As introduced, several clauses within the Bill touched upon devolved matters. The most significant (and controversial) of these was clause 11. The clause dealt with the aforementioned constitutional question. In response to the question, the clause provided that all categories of the powers currently exercised by the EU would initially be repatriated back to Westminster. After that, those powers that fall under the category of plausibly– devolved may then be decentralised based on Ministerial discretion through secondary legislation. In addition to this, under section 29(2)(d) of the Scotland Act 1998, section 6(2)(d) of the Northern Ireland Act 1998, and section 108(6)(c) of the Government of Wales Act 2006, the devolved legislatures were prohibited from passing any laws that infringed or were deemed incompatible with EU law. Clause 11 of the Bill modified this requirement by replacing EU law with the domestic 'retained EU law.'[6] This meant that competence limitations were placed on the devolved administrations over modifying retained EU law. The primary rationale of clause 11 was to establish UK-wide common frameworks that would replicate the EU's regulatory frameworks. These UK-wide frameworks would coordinate policy in areas such as the environment, agriculture, fisheries and aspects of justice and transport.[7] Ultimately, the common frameworks would have the effect of ensuring the stability, certainty and effective functioning of the UK's internal market see section 2 for a detailed analysis on the common frameworks).

Predictably, the UK Government's proposed EU Withdrawal Bill received heavy political backlash from the devolved Governments, who described it as a 'power grab' attempt that raised serious concerns about the future of the devolution settlements and the balance of power within the UK. These observations were mainly directed at clause 11 of the Bill, which the devolved Governments saw as a recentralising provision.[8] As put forward by Richard Rawlings:

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[5] Michael Keating, 'Brexit And The Nations' (2018) 90 The Political Quarterly 167.
[6] 'Devolution Clause 11 Of The European Union (Withdrawal) Bill' (*Parliament.uk*, 2017) <https://publications.Parliament.uk/pa/cm201719/cmselect/cmpubadm/484/48404.htm> accessed 18 February 2021.
[7] Akash Paun, 'Brexit, Devolution And Common Frameworks' <https://www.instituteforGovernment.org.uk/explainers/brexit-devolution-and-common-frameworks> accessed 18 February 2021.
[8] Rory O'Connell, 'Constitutional Power Grab? The European Union (Withdrawal) Bill 2017-2019' <https://brexitlawni.org/blog/constitutional-power-grab/> accessed 18 February 2021.

> "[The Bill] is a nicely dressed up, formal recentralisation of power and exercise of constitutional hierarchy in spades… When clause 11 is put together with the future trumping by Parliamentary Sovereignty of retained EU law, and more particularly with the central capacities to add to, or otherwise modify, that newly classified body of law, the scale of the potential shift in the constitutional balance as between the three Celtic lands and the UK Government…is made apparent." [9]

Given their concerns, the Scottish and Welsh Governments each put forward a Continuity Bill that replicated the purposes of the UK Government's EU Withdrawal Bill. In ensuring the legal continuity of Scottish and Welsh law after Brexit, the Scottish [10] and Welsh [11] Continuity Bills provided that the plausibly– devolved powers should be repatriated back to the devolved level and not to Westminster. In addition, the Bills empowered Scottish and Welsh Ministers to amend this new body of retained EU law through secondary legislation. And most controversial, the Bills provided competences to Welsh and Scottish Ministers to veto UK secondary retained EU law legislation adopted by UK Ministers that applied to Wales and Scotland. To protect the integrity of the UK internal market, the two Bills coincided with the UK Government's EU Withdrawal Bill in that they all agreed on the importance of establishing UK common frameworks. However, they differed in the process of establishing these frameworks. Unlike the EU Withdrawal Bill, the devolved Continuity Bills proposed that all four Governments should negotiate UK common frameworks rather than leaving it to UK Ministers to decide. In essence, the devolved Continuity Bills not only sought to protect devolved competences from a perceived power grab, but they also sought to enhance devolved competences further.[12]

The UK Government's immediate response to these Bills was to refer them to the Supreme Court, to test whether they were within devolved competences.[13]At the same time, and in attempts to secure legislative consent for the EU Withdrawal Bill, the UK Government tabled several amendments to the devolution clauses of the Bill. The amendments included that those powers that fall under the category of plausibly– devolved would be now repatriated back to the devolved and not UK level - unless specified to be temporarily held by the UK Government (to establish common, UK-wide rules).[14] As detailed in chapters 3 and 4, these amendments were sufficient enough to secure the legislative consent of the Senedd who then subsequently repealed the Law derived from the European Union (Wales) Act 2018. The Scottish

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[9] Richard Rawlings, 'Brexit And The Territorial Constitution : Devolution, Re Regulation And Inter-Governmental Relations' (The Constitution Society 2017) <https://consoc.org.uk/wp-content/uploads/2017/10/Brexit-and-devolution-final-2.pdf> accessed 18 February 2021.

[10] 'UK Withdrawal From The European Union (Legal Continuity) (Scotland) Bill' (*Parliament.scot*, 2018) <http://www.Parliament.scot/UK%20Withdrawal%20from%20the%20European%20Union%20(Legal%20Continuity)%20(Scotland)%20Bill/SPBill28S052018.pdf> accessed 18 February 2021.

[11] 'Law Derived From The European Union (Wales) Bill' (*Assembly.wales*, 2018) <http://www.assembly.wales/Research%20Documents/18-020/18-020-Web-English.pdf> accessed 18 February 2021.

[12] Richard Whitman, 'Devolved External Affairs: The Impact Of Brexit' (Chatham house 2017) <https://www.chathamhouse.org/sites/default/files/publications/research/2017-02-09-devolved-external-affairs-brexit-whitman-final.pdf> accessed 18 February 2021.

[13] For a full analysis on the Scottish Bill referral, see chapter 3 of the thesis.

[14] ' Welsh Government Agrees Deal On Brexit Bill That Respects Devolution' (*Gov.wales*, 2018) <https://gov.wales/newsroom/finance1/2018/item/?lang=en> accessed 18 February 2021.

Government remained firm in its rejection of the EU Withdrawal Bill. To further frustrate the Scottish devolved administration, Westminster passed the EU Withdrawal Act 2018 without Holyrood's legislative consent. Added to the Supreme Court clash over the Scottish Continuity Bill case, intergovernmental relations between the UK Government and its Scottish counterpart were further strained.

The EU (Withdrawal) Act 2018

The UK Government's proposed amendments were incorporated under sections 11 and 12 of the EU (Withdrawal) Act 2018. Section 11 empowers devolved Ministers to make regulations corresponding to the powers conferred on UK Ministers by sections 8 and 9 of the Act. However, the devolved Ministers cannot exercise these powers to the same degree as their UK counterparts. For instance, section 23 of the Act grants UK Ministers the power to make transitional or consequential provisions, which the devolved Ministers cannot do. Furthermore, under section 8(3)(b) of the Act, UK Ministers are empowered to make additional regulations to deal with deficiencies in EU retained law that is not identified in section 8. However, under paragraph 1(3), of Schedule 2 of the Act, devolved Ministers are prevented from doing the same.[15] Section 12 provides a reversal by the UK Government to treat the repatriated powers from an arrangement that reflects a confederal power model to a reserved powers model instead - powers outside of the plausibly– reserved category are by default returned to the devolved level. The section also eradicates the EU law compatibility requirement under the devolution statutes (the provisions were aforementioned). The requirement was replaced with the power for UK Ministers through regulations to temporarily freeze (in specified areas) devolved legislative competences over modifying retained EU law (freezing powers). Part 1, schedule 3 of the Act extended these freezing powers to cover devolved executive competences. Therefore, devolved Ministers were prohibited from modifying a frozen regulation made by a UK Minister. Modification, as provided by section 20(1) of the Act, included 'amend, repeal or revoke.' The competence limitations were also inserted under sections 6A, and 24 of the Northern Ireland Act 1998, sections 29, 30A and 57 of the Scotland Act 1998, and sections 80, 108A, and 109A of the Government of Wales Act 2006.

Nonetheless, these freezing powers would be exercised with some limitations. For instance, as provided under section 30A (9) of the Scotland Act 1998, section 109A(10) of the Government of Wales Act 2006, and section 6A(9) Northern Ireland Act 1998, regulations made using this power were subject to a sunset clause, which expired after 5 years. Furthermore, as provided by schedule 7 of the EU (Withdrawal) Act 2018, the freezing powers were subject to the draft affirmative procedure, whereby a freezing regulation could only be made if a draft had been scrutinised and approved by both houses of Parliament. Moreover, before laying down a freezing regulation for Westminster's approval, the UK Minister was required to engage with the relevant devolved legislative body, which would then make a consent decision concerning the proposed regulation. This procedure was similar to the operation of the Sewel Convention (discussed in chapter 3), which applies to primary legislation. If 40 days had lapsed, a consent

[15] 'Devolution Under The European Union (Withdrawal) Act 2018 | Practical Law' (*Practical Law*, 2021) <https://uk.practicallaw.thomsonreuters.com/w-016-9210?originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&firstPage=true > accessed 13 April 2021.

decision had not been made, or consent had been refused, this did not prevent the UK Minister from proceeding with the freezing regulation. This was provided by sections 30A (3), (4) and (11) of the Scotland Act 1998, sections 109A (4), (5) and (12) of the Government of Wales Act 2006, and sections 6A (3), (4) and (12) of the Northern Ireland Act 1998. Fundamentally, despite the explicit language of consent used in section 12 of the 2018 Act, the effect was that consent would not be binding or required, as the devolved administrations could not veto/prohibit the UK Ministers from laying down a freezing regulation. Therefore, consent, in this instance, meant consult.

Ultimately, as described by Mark Elliott, the 2018 Act, just like the original version of the Bill, "enables the UK Government to unilaterally limit devolved powers in this area."[16] Essentially, the 2018 Act authorised devolution to be vulnerable to a rollback. UK Ministers were empowered to limit the legislative and executive competences of the devolved administrations when modifying retained EU law. Thus, the UK Government was now in a statutory position to overrule the wishes of the devolved Governments - which was the case when the EU Withdrawal Act itself became la*w.*[17]

As provided under section 30A(7) of the Scotland Act 1998, section 109A (8) of the Government of Wales Act 2006, and section 6A (7) of the Northern Ireland Act 1998, the freezing power was subjective to a two-year period, which has now lapsed. As a result of this expiration, the devolved competence limits were repealed following the passing of *the* EU (Withdrawal) Act 2018 (Repeal of EU Restrictions in Devolution Legislation, etc.) Regulations 2022. Within those two years, the freezing power was never exercised, as the UK Government were keener to utilise other mechanisms, including common frameworks and the UK Internal Market Act 2020. Despite this, though, the damage had already been done, as for a significant period, devolution remained vulnerable to a rollback, and intergovernmental relations were further aggravated. As discussed in chapter 3, the Scottish Government utilised this episode as ammunition for their calls for indyref 2. Furthermore, this episode also begs the question, why would the UK Government willingly risk internal political and constitutional instability by imposing a mechanism they never made use of?

The Retained EU Law (Revocation and Reform) Bill

In September 2022, the UK Government introduced the Retained EU Law (Revocation and Reform) Bill to Parliament. The proposed Bill aims to conclude what happens to EU repatriated laws by abolishing this category of law that was termed by the EU (Withdrawal) Act 2018 as retained EU law. For the UK Government, removing all traces of EU law within the UK's statute book is seen as a crucial part of the Brexit process:

> "retained EU law was never intended to sit on the statute book indefinitely…. .the time is now right to bring the special status of retained EU law in the UK statute book to an end

[16] Mark Elliott, 'The European Union (Withdrawal) Act 2018' <https://publiclawforeveryone.com/2018/06/28/1000-words-the-european-Union-withdrawal-act-2018/> accessed 18 September 2018.

[17]Keating, Ibid n. 5. See also: Stephen Tierney, 'The territorial Constitution and the Brexit Process' (2019) 72 Current Legal Problems 59

> on 31st December 2023, in order to fully realise the opportunities of Brexit and to support the unique culture of innovation in the UK.” [18]

The devolved Governments strongly oppose the UK Government’s approach on this matter. This approach is unnecessarily rushed for them, as it risks significant laws from dropping off the UK’s statute book. The UK Government’s retained EU law dashboard estimates that the total count of retained EU law is 2417. Of which, a large number appear to fall within devolved remit – but this has not been specified by the UK Government just yet.[19] The burden of this seems to fall onto the devolved Governments, who might find it very challenging given their limited resources, and timescale(s) required by the Bill. As provided by clause 1(1) of the Bill, retained EU law will automatically expire (sunset) on the 31st of December 2023. Through secondary legislation, clause 2 empowers UK Ministers to extend this sunset period for specified retained EU law until June 2026 – the 10th anniversary of the Brexit referendum. Clause 1(2) provides that UK and devolved Ministers may make regulations specifying which retained EU law they wish to preserve – making it not subject to any sunset. Once retained EU law has expired, clause 6 provides that any remaining retained EU law will be renamed to assimilated law and formally removes any special status (such as EU law supremacy) previously attached to this body of law, making it much easier to amend. Clauses 12 – 16 provide that UK Ministers and their devolved counterparts (acting alone or jointly) can make regulations to amend, repeal, replace and update secondary retained EU law and assimilated law. These powers grant much discretion to the Minister to essentially do what they want, as the test is based on what the Minister deems appropriate. Only clause 15 is subject to an additional test. Clause 15 (5) provides that a Minister cannot use this power to increase regulatory burdens. In reaction to the Bill, the Scottish [20] and Welsh[21] Governments deemed it another potential power grab. In particular, clauses 12 – 16 allow UK Ministers to make secondary legislation in areas of devolved competence unilaterally. The Bill is silent on whether a UK Minister must seek consent or consult their devolved counterpart. Moreover, clause 15(5) provides a regulatory ceiling that may limit the devolved Governments' ability to enhance regulatory requirements in line with policy objectives. Essentially, the Bill amounts

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[18]'The Retained EU Law (Revocation and Reform) Bill Was Introduced to Parliament on 22nd September 2022' (*GOV.UK,* 2022) <https://www.gov.uk/government/news/the-retained-eu-law-revocation-and-reform-bill-2022> accessed 20 December 2022

[19] 'UK Government - Retained EU Law Dashboard' (*tableau.com, 2022*) <https://public.tableau.com/app/profile/governmentreporting/viz/UKGovernment-RetainedEULawDashboard/Guidance> accessed 20 December2022

[20] 'Retained EU Law Bill: Letter to the UK Government' (*GOV. Scot*, 2022) <https://www.gov.scot/publications/retained-eu-law-bill-letter-to-the-uk-government/> accessed 20 December 2022

[21] 'Written Statement: The Retained EU Law (Revocation and Reform) Bill' (*GOV.Wales,* 2022) <https://www.gov.wales/written-statement-retained-eu-law-revocation-and-reform-bill> accessed 20 December 2022

to an overall rollback of devolved regulatory competences.[22] As a result, the devolved Governments are calling for the UK Government to 'do away' with the Bill.

In concluding this section, it is evident that the UK Government's actions on tackling the treatment of repatriated EU powers through imposed (and at times unnecessary) solutions have resulted in causing more internal political and constitutional instability. In the remainder of this chapter, it will be noted that this is becoming a clear theme associated with the UK Government.

2. Protecting the integrity of the UK's internal market: Common Frameworks

As recognised by the EU (Withdrawal) Act 2018, the UK needed to establish its own legal common frameworks to ensure the functioning of the UK internal market. The frameworks would prevent or limit policy differentiation within the UK that would create barriers. At the fifth Joint Ministerial Committee (EU Negotiations), the Governments of the UK agreed that the UK common frameworks would be established through negotiation between them. They also agreed that these negotiations would be guided by existing conventions and practices, including the principle of respecting devolved competences. The UK's Governments also agreed that the process of establishing common frameworks would result in a power surge for devolution through the enhancement of shared decision-making powers.[23] Essentially, the common frameworks programme provided an overall positive effect for devolution and the opportunity to heal intergovernmental relations.[24] As concluded in this section, the common frameworks programme realised these positive opportunities, as the UK's Governments worked in a cooperative way that respected devolved competences when establishing the numerous common frameworks. However, these positive developments have been short-lived following the UK Government's legislative interventions. Specifically, the UK Internal Market Act 2020 cuts across many areas identified for the need for common frameworks. This will bring back into question why the UK Government would willingly risk instability for imposed (and arguably unnecessary) solutions.

In order to establish the common frameworks, the UK's Governments had first to identify the areas that fell under the plausibly-devolved group. A common frameworks analysis report by

[22] For a further analysis on the Bill and its interaction with devolved competences See: Sara Moran , '"Unfettered Authority"? The Retained EU Law (Revocation and Reform) Bill in Wales' (*Senedd research,* 2022) <https://research.senedd.wales/research-articles/unfettered-authority-the-retained-eu-law-revocation-and-reform-bill-in-wales/ > accessed 21 December 2022. See also: Michael Clancy, ' Second Reading Briefing: Retained EU Law (Revocation and Reform)' (*Law Society of Scotland,* 2022)<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjTjv6huIj8AhUNHcAKHV_PC8Q4ChAWegQIBhAB&url=https%3A%2F%2Fwww.lawscot.org.uk%2Fmedia%2F373661%2Fretained-eu-law-revocation-and-reform-bill-second-reading-briefing.docx&usg=AOvVaw2CoLpCCx_-t5zDGoPrtoPV > accessed 21 December 2022.

[23] 'Joint Ministerial Committee (EU Negotiations) Communique' (*gov.uk*, 2017) <https://assets.publishing.service.gov.uk/Government/uploads/system/uploads/attachment_data/file/652285/Joint_Ministerial_Committee_communique.pdf> accessed 22 February 2021.

[24] See: 'House of Lords Common Frameworks Scrutiny Committee – Common Frameworks: Building a Cooperative Union' (*Parliament.UK,* 2021) <https://publications.parliament.uk/pa/ld5801/ldselect/ldcomfrm/259/25902.htm> accessed 21 December 2022

the UK Government in November 2021 found 152 policy areas under this group.[25] The report grouped these policy areas into three categories. The first category dealt with policy areas where no further action was needed. Therefore no common frameworks would be created, but cooperation between the four Governments would continue. The report identified 120 areas for this category, including elements of consumer law, employment law, and voting rights and candidacy rules for EU citizens in local Government elections. The second category dealt with policy areas where non-legislative frameworks may be required, and 29 areas were identified. In these areas, powers would be repatriated to the devolved level, but with an agreement through a memorandum of understanding on how the different Governments would work together. In some areas within this category, retained EU law would be consistently fixed (through secondary legislation) to ensure the consistency of the legal framework across the UK. The policy areas within this category included company law, equal treatment legislation and commercial transport. The final category dealt with the areas where primary legislation may be needed in whole or part, alongside a non-legislative framework agreement. The category identified 3 of these areas - Emissions Trading Scheme (ETS), agriculture support, and fisheries management. The policy areas in this category were where regulatory consistency was deemed crucial. Legislation introducing standard rules surrounding these areas has already been enacted - the Finance Act 2020, the Agriculture Act 2020, and the Fisheries Act 2020. In all, the report identified a total of 32 policy areas where common frameworks would be required.

The delivery process of establishing common frameworks has five phases, and each framework moves through each phase at a different pace:

> "Phase 1: consists of engagement between the UK government and devolved government officials to focus on Frameworks, as well as to establish some of the key interdependencies that affect multiple Frameworks. Phase 2: Detailed policy development takes place, including joint work between the UK government and devolved government officials…this results in jointly drafted and agreed outline Frameworks. Phase 3: The UK government and devolved governments collaborate to further develop and finalise policy approaches…This phase results in a provisional confirmation of Frameworks by each administration. Phase 4: The UK government and devolved government officials…present the Frameworks for parliamentary scrutiny and review parliamentary recommendations. At the end of this phase, the provisional Framework receives approval from ministers in the policy-owning department and constitutional ministers where applicable. Phase 5: Post-implementation arrangements take place, including regular cycles of review and, if appropriate, amendment."[26]

The delivery process has an overall positive effect on devolution, as through each of the five phases a common framework goes through, the UK Government engages and works closely with the devolved Governments. Another positive effect the common frameworks process has had is over bringing about some renewed positivity in relation to the UK's intergovernmental

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[25] 'Frameworks Analysis 2021 Breakdown Of Areas Previously Governed By EU Law That Intersect With Devolved Competence In Scotland, Wales And Northern Ireland' (*Gov.UK*, 2021) <https://assets.publishing.service.gov.uk/Government/uploads/system/uploads/attachment_data/file/1031808/UK_Common_Frameworks_Analysis_2021.pdf> accessed 7 December 2021.

[26] 'An Update On Progress In Common Frameworks' (*gov.uk*, 2022) <https://www.gov.uk/government/publications/the-european-union-withdrawal-act-and-common-frameworks-26-september-to-25-december-2021/the-european-union-withdrawal-act-and-common-frameworks-26-september-to-25-december-2021 > accessed 22 December 2022.

relationship. As demonstrated throughout this thesis, since Brexit, the UK's intergovernmental relationship has been for the most part, strenuous and marked by a lack of cooperation and trust.[27] This sense of renewed cooperation and trust can be evidenced by the progress on the establishment of the common frameworks, which reflects newly established ways of working between the UK's Governments. Under part 2 of schedule 3 to the EU (Withdrawal) Act 2018, the UK Government must publish three-month interval reports on the progress of the developments of the common frameworks. At the time of writing, the most recent published report (March 2022), covers the period 26 September 2021 to 25 December 2021.[28] The report notes that during this reporting period, the company law framework had been provisionally agreed. This took the total of provisionally agreed frameworks to 29. In addition to this, 10 of these were now in phase 4. The already finalised Hazardous Substances (Planning) framework brought a total of 30 frameworks that were being used on an operational level during this reporting period. The report identifies this as good progress, given the disruptions and delays caused by the COVID-19 pandemic. Regarding coordination, the report states that, during the reporting period, three meetings of the UK Government-devolved administrations Frameworks Project Board were held, attended by senior cabinet ministers from the different UK Governments. The board 'monitors progress and facilitates agreement on the direction of the Common Frameworks programme.' In addition, there had been weekly meetings between the UK Government officials and their devolved counterparts where 'productive, collaborative work has been undertaken to support the detailed development of frameworks by policy officials.' There had also been multiple working group meetings on individual frameworks.

Overall, it is clear that there has been high-level coordination and cooperation between the UK Government and its devolved counterparts when it comes to developing common frameworks. Therefore, the common frameworks programme can be conclusively marked as a power surge for devolution, as the consensual nature of the process enhances shared decision-making powers. This shared decision-making process also managed to heal some strains on the UK's intergovernmental relationship. This was evidenced by the UK Government's preference of utilising the common frameworks process over their section 12 (EU (Withdrawal) Act 2018) freezing powers.[29] However, these positive developments have been short-lived following the UK Government's legislative interventions through specifically, the UK Internal Market Act 2020, which cuts across many of the areas identified for the need for common frameworks. As discussed further below, the UK Government's legislative interventions through the Act, and other pieces of legislation, such as the Subsidy Control Act 2022, mark a departure from

[27] Michael Dougan and others, 'Sleeping With An Elephant: Devolution And The United Kingdom Internal Market Act 2020' (2022) 138 Law Quarterly Review 650.

[28] Ibid n. 26

[29] Lucy Valsamidis, 'UK Common Policy Frameworks: The Story So Far' (*Senedd.wales*, 2020) <https://research.senedd.wales/research-articles/uk-common-policy-frameworks-the-story-so-far/> accessed 22 February 2021.

managing prospective regulatory divergence through cooperation and consensus to an approach better characterised as command and control.[30]

3. Protecting the integrity of the UK's internal market: the UK Internal Market Act 2020

Given the progress made and the positives associated with the common frameworks programme, it was assumed that this would remain the main (if not only) mechanism of ensuring the functionality of the UK's internal market. However, this assumption became challenged in July 2020 when the UK Government (without consulting its devolved counterparts) published a White Paper discussing its intention to introduce a Bill to regulate the UK internal market.[31] In September 2020, the UK Government introduced to Parliament, the UK Internal Market Bill (now Act). In setting out its rationale for the Bill, the UK Government accepted that it would cut across many areas where common frameworks were due to be developed. However, for the UK Government, the need to introduce legislation on the UK internal market was to guarantee the integrity of the entire UK internal market, as common frameworks on their own could not do so. On the basis that they are primarily sector-specific, and do not address the totality of economic regulation or the cumulative effects of divergence.[32]

In setting out the legal framework of the UK's internal market, the provisions set out in the Bill sought to 'legally transplant' the EU's internal market.[33] For instance, the Bill enshrined prospectively, the trade law market access principles of mutual recognition and non – discrimination. Both principles were taken directly from the EU's internal market framework. The EU applies the principle of mutual recognition on the sale of non – harmonised goods, which include food stuffs, furniture and vehicles. Under the principle, goods sold legally in one EU country can be sold across the EU. As set out in the Bill, in the UK context, provided that regulatory standards are met, goods sold in one of the UK's jurisdictions would be able to be sold in the rest of the UK's jurisdictions. As put forward by the UK Government, the fundamental aim of mutual recognition within the UK's internal market was to avoid a double regulatory burden. [34] The principle of non – discrimination is applied by the EU to ensure that member states do not discriminate, both directly (for instance, requiring that imports must bear a label that domestic goods need not) and indirectly (for instance, requiring that service

[30] Thomas Horsley, and Jo Hunt , 'In Praise of Cooperation and Consensus under the Territorial Constitution: The Second Report of the House of Lords Common Frameworks Scrutiny Committee' (*UK Constitutional Law Association*, 2022) < https://ukconstitutionallaw.org/2022/07/26/thomas-horsley-and-jo-hunt-in-praise-of-cooperation-and-consensus-under-the-territorial-constitution-the-second-report-of-the-house-of-lords-common-frameworks-scrutiny-committee/> accessed 2 December 2022.

[31] 'UK Internal Market' (*gov.uk*, 2020) <https://assets.publishing.service.gov.uk/Government/uploads/system/uploads/attachment_data/file/901225/uk-internal-market-white-paper.pdf> accessed 22 February 2021.

[32] 'The European Union (Withdrawal) Act And Common Frameworks' (*gov.uk*, 2020) <https://assets.publishing.service.gov.uk/Government/uploads/system/uploads/attachment_data/file/941711/The_European_Union__Withdrawal__Act_and_Common_Frameworks.pdf> accessed 22 February 2021.

[33] Horsley, Ibid n. 4

[34] Ibid n. 31

providers must reside in a particular locality) between domestic and imported goods and services.[35] As set out by the Bill, this principle would be applied to the UK internal market. This meant then that UK businesses or individuals trading within the UK internal market would be protected against being directly and indirectly treated differently from local traders based on the grounds of residence or geographical origin. For example, Scottish regulations on how goods should be displayed on shop shelves cannot provide for better treatment of local goods. If they do, then these regulations are declared to be of 'no effect.'[36] The UK Government justified the application of this principle on the basis that it would ensure that any discriminatory barriers are addressed.[37]

As provided by the Bill, in terms of scope, the UK's market access principles would apply to services and professional qualifications in all four jurisdictions, in addition to goods coming in from NI into GB. However, these principles would not apply to goods going from GB into NI due to the Protocol on Ireland / Northern Ireland (enshrined under the EU (Withdrawal Agreement) Act 2020). As mentioned in chapter 3, NI (but not GB) is placed into the EU's customs and regulatory territory under the Protocol. For instance, the Protocol provides for the continued application in NI (on a dynamic basis) of swathes of EU law, listed in Annex 2 of the Protocol.[38] The application of these laws is to ensure that NI is sufficiently aligned to the acquis of the EU's internal market, thus providing for the maintenance of a seamless land border on the island of Ireland.[39] Therefore, the Bill only operates on a full GB – wide basis. This then raises the question about the importance and need for a UK internal market, given that businesses cannot trade unhindered with and in every part of the UK.[40] In this chapter, the provisions relating to the Ireland / Northern Ireland protocol will not be examined, as this was conducted in chapter 3.

Schedules 1 and 2 of the Bill provided a list of what would be excluded from the application of these market access principles. Schedule 1 stated that these principles would not apply where there were threats to human, animal or plant health. Schedule 2 then detailed out the exclusions list for services - legal services would be excluded from the mutual recognition principle, whilst financial services would be excluded from both market access principles. Compared to the EU's internal market, the proposed exclusions under the Bill were much narrower.[41] To identify

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[35] Michael Dougan, 'Briefing Paper: United Kingdom Internal Market Bill: Implications For Devolution' (*Liverpool.ac.uk*, 2020) <https://www.liverpool.ac.uk/media/livacuk/law/2-research/eull/UKIM,Briefing,Paper,-,Prof,Michael,Dougan,15,September,2020.pdf> accessed 22 September 2020.

[36] Stephen Weatherill, 'Will The United Kingdom Survive The United Kingdom Internal Market Act?' (*Ukandeu.ac.uk*, 2021) <https://ukandeu.ac.uk/wp-content/uploads/2021/05/Will-the-United-Kingdom-survive-the-United-Kingdom-Internal-Market-Act.pdf> accessed 1 June 2021.

[37] Ibid n. 31

[38] Michael Dougan, 'So Long, Farewell, Auf Wiedersehen, Goodbye: The UK'S Withdrawal Package' (2020) 57 Common Market Law Review 631.

[39] Stephen Weatherill, 'The Protocol On Ireland/ Northern Ireland: What It Says Is Not What It Does' (*Eulawanalysis*, 2020) <http://eulawanalysis.blogspot.com/2020/03/the-protocol-on-ireland-northern.html> accessed 8 July 2021.

[40] Jo Hunt and others, 'UK Internal Market Bill, Devolution And The Union' (*Ukandeu.ac.uk*, 2020) <https://ukandeu.ac.uk/wp-content/uploads/2020/10/UK-internal-Market-Bill-devolution-and-the-Union.pdf> accessed 22 February 2021.

[41] Daniel Wincott, Collin Murray and Gregory Davies, 'The Anglo-British Imaginary And The Rebuilding Of The UK'S Territorial Constitution After Brexit - Unitary State Or Union State?' (2021) 9 Territory, Politics, Governance 696.

exemptions from the market access principles, the EU's internal market regime uses the proportionality test. The test aims to balance the competing objectives of market access and market regulation. This allows for greater a scope of regulatory autonomy for Governments.[42] For instance, in the *Scotch Whisky Association case*,[43] the applicant argued that the Scottish Government's minimum unit pricing for alcohol policy, under the Alcohol (Minimum Pricing) (Scotland) Act 2012, was contrary to EU law (Article 34, and the Single CMO Regulation (EU) No 1308/2013). The Scottish Government introduced the policy in line with their public health objectives. In its conclusions, the Supreme Court held that the policy was contrary to the above provisions. However, the policy could be justified based on the protection of public health. This rationale stemmed from the Court's application of the proportionality test, which concluded that the policy was proportionate enough, given that there were no less restrictive measures to achieve the Scottish Government's public health objectives.[44]

As introduced, the Bill granted extensive unilateral delegated powers to UK Ministers. For instance, Clauses 10 and 17 empowered the SoS to change schedules 1 and 2 through secondary legislation, subject to the affirmative procedure. In addition, Clause 8(7) of the Bill empowered UK Ministers, via regulations made under the affirmative procedure, to alter the list of recognised legitimate aims that qualify when local rules indirectly discriminate. The list included the protection of human, animal and plant health or life and the protection of public safety or security.[45]As explored further below, with devolution in mind, these particular clauses were very controversial. This was because devolved consent was not required despite the significant consequences these extensive powers had (such as the ability to change what defines a legitimate aim in clause 8). This took on a different approach to the other order-making clauses in the Bill that required the UK Ministers to at least consult their devolved counterparts.[46]

Despite cutting across many areas where common frameworks would be developed, the Bill did not refer to the common frameworks programme. This, therefore, meant that the mutually agreed common frameworks would be subordinate to the market access principles. During its legislative process, the Bill received heavy backlash from the devolved Governments and the House of Lords (HoL), who agreed that the Bill in its current form would negatively impact the exercise of devolved competences. In an attempt to protect devolved competences, the HoL played a crucial role in bringing about amendments to the Bill. For instance, the HoL tabled an

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[42] Charles Livingstone, 'Brexit, The UK Internal Market Bill And Devolution' (*Law Society of Scotland*, 2020) <https://www.lawscot.org.uk/members/journal/issues/vol-65-issue-10/brexit-the-uk-internal-market-bill-and-devolution/> accessed 22 February 2021.

[43] Scotch Whisky Association v Lord Advocate [2017] UKSC 76

[44] Angus MacCulloch, 'Minimum Alcohol Pricing Is Appropriate & Necessary: Scotch Whisky Association V Lord Advocate [2017] UKSC 76' (*Eulawanalysis.blogspot.com*, 2021) <http://eulawanalysis.blogspot.com/2017/11/minimum-alcohol-pricing-is-appropriate.html?m=1> accessed 14 October 2021.

[45] Kenneth Armstrong, 'Governing With Or Without Consent – The United Kingdom Internal Market Act 2020' (*UK Constitutional Law Association*, 2020) <https://ukconstitutionallaw.org/2020/12/18/kenneth-armstrong-governing-with-or-without-consent-the-united-kingdom-internal-market-act-2020/> accessed 2 February 2021.

[46] 'Law Society Of Scotland Response: United Kingdom Internal Market Bill Second Reading Briefing' (*Lawscot.org.uk*, 2020) <https://www.lawscot.org.uk/media/369433/13092020-united-kingdom-internal-markets-bill-second-reading-and-committee-stage-briefing.pdf> accessed 14 October 2021.

amendment requesting that the Bill provide that in areas where common frameworks are established and allow for policy divergence, the UK market access principles should not apply. The HoL also tabled amendments to the power given to UK Ministers under clauses 10 and 17 of the Bill. They proposed that this power be replaced with the requirement of primary legislation instead. However, the UK Government rejected these amendments and instead tabled its own. The Government's amendments were inspired by the HoL, as they sought to address the devolution issues the HoL had raised. [47]

These amendments were sufficient enough to gain the HoL's legislative approval, allowing for the Bill to become the UK Internal Market Act 2020 (UKIMA).[48] Under sections 10 and 18 of the Act, UK Ministers are now required to seek the consent of their devolved counterparts before exercising their exclusionary powers previously provided under clauses 8(7), 10 and 17. In addition to this, sections 10(3) and 18(3) provide that these exclusionary powers may be used to give effect to the agreements that emerge from the common frameworks. Similar to section 12 of the EU (Withdrawal) Act 2018, the consent requirement is subject to a month, after which the regulation may be made without consent. Thus, the consent requirement is reduced to consultation. Therefore, the UK Government retains ultimate control on the scope of the market access principles. [49]

Despite the UK Government's tabled amendments, the devolved Governments remained firm in opposing the proposed statutory framework. For the Scottish[50] and Welsh[51] Governments, the Bill resulted in the overall rolling back of devolution as it recentralised control over developing the internal market - subordinating the consensual common frameworks programme. Essentially for the two Governments, the statutory framework goes too far and is unnecessary as the common frameworks programme is sufficient to ensure the functionality of the UK internal market. [52] Due to these conclusions, Holyrood and the Senedd withheld their legislative consent to the Bill. As discussed in chapter 4, the Welsh Government went further and lodged judicial review proceedings against the UKIMA. However, the Welsh Government's legal challenge failed on the grounds of prematurity, and the Supreme Court rejected the Welsh Government's application for appeal on the same grounds.[53]

[47] John Curtis and others, 'UK Internal Market Bill: Lords Amendments Explained' (*House of Commons Library*, 2020) <https://commonslibrary.Parliament.uk/research-briefings/cbp-9051/> accessed 22 February 2021.
[48] Ibid.
[49] Horsley, Ibid n. 4

[50] 'UK Internal Market White Paper : Initial Assessment By The Scottish Government' (*Gov.scot*, 2020) <https://www.gov.scot/binaries/content/documents/govscot/publications/factsheet/2020/08/uk-internal-market/documents/uk-internal-market-initial-response/uk-internal-market-initial-response/govscot%3Adocument/UK%2Binternal%2Bmarket%2Binitial%2Bresponse.pdf> accessed 22 February 2021.
[51] 'The UK Government's White Paper On A UK Internal Market Welsh Government Analysis' (*Senedd.wales*, 2020) <https://business.senedd.wales/documents/s103942/Correspondence%20from%20the%20Counsel%20General%2014%20August%202020.pdf> accessed 30 January 2021.
[52] Charles Livingstone, 'Brexit, The UK Internal Market Bill And Devolution' (*Law Society of Scotland*, 2020) <https://www.lawscot.org.uk/members/journal/issues/vol-65-issue-10/brexit-the-uk-internal-market-bill-and-devolution/> accessed 22 February 2021.
[53] The Counsel General for Wales, R (On the Application Of) v The Secretary of State for Business Energy and Industrial Strategy [2021] EWHC 950 (Admin)

3.1. Embryonic federalism: Concurrency and the UKIMA 2020

As highlighted in chapter 1, power relations under the UK's territorial constitution are primarily based on the reserved powers model. As a result, policy areas that are reserved (and excepted in NI), are the matters solely for the centre (UK Government and Parliament), which include defence, immigration, the constitution, and foreign affairs. The remaining policy areas not reserved or excepted under schedule 2 of the Northern Ireland Act 1998, schedule 5 of the Scotland Act 1998, and schedule 7A of the Government of Wales Act 2006, are policy areas of competence exercised by NI, Scotland, and Wales respectively. Thus, multi-level governance in the UK is primarily based on the boundaries set out in the above-mentioned Devolution Acts.

Under the UK's reserved powers model, the shared exercise of competences is achievable through the Sewel Convention, and the UK's intergovernmental relations (IGR) framework. However, shared rule is not guaranteed for the devolved jurisdictions as the above-mentioned ways are governed politically and rely on the good-will of the centre. Section 2 of this chapter exemplified this point well – the UK Government's unilateral legislative intervention subjected the cooperatively agreed common frameworks programme (soft law) to the UKIMA 2020 (hard law) – which side stepped the Sewel Convention when enacted.

Prior to Brexit, IGR in the UK occurred in two main spaces – the UK focused (internal) space and the EU-related (external) space. As explored further in chapter 7, for the most part, IGR in the internal space has been ineffective in achieving shared rule. From 1997 until the end of the tenure of the last Labour UK Government - IGR were cordial and cooperative.[54] This was owed in part to the fact that during that period, Labour, the architects of devolution, formed the UK, Welsh, and Scottish Governments. Following on from this period, relations very slowly began to deteriorate given that by 2010, each Government in the UK was now run by a different party, with differing political ideologies.[55] This deterioration was then accelerated following the Brexit referendum in 2016, whereby relations became severely strained, and political disputes more common.

In contrast, IGR in the EU-related space was much more effective. Arrangements for the handling of devolved jurisdictions' interests on the EU were set out in the 'Concordats on Co-ordination of European Union Policy Issues' (EU Concords). The EU concords recognised that the devolved jurisdictions would have an interest in EU policy making in relation to devolved matters, notably where implementing action by the devolved jurisdictions would be required. In setting out the UK's EU policy process, the EU concords outlined a four-stage process that included: policy formulation, negotiation, implementation, and enforcement. At each of these stages, the UK Government were committed to working

[54] Joanna George, 'UK Intergovernmental Relations: Pre Vs Post-Brexit Dynamics' (*Constitutional Law Matters*, 2022) <https://constitutionallawmatters.org/2022/06/uk-intergovernmental-relations-pre-vs-post-brexit-dynamics/> accessed 2 August 2022

[55] Nicola McEwen, Wilfried Swenden and Nicole Bolleyer, 'Introduction: Political Opposition In A Multi-Level Context' (2012) 14 The British Journal of Politics and International Relations 187.

with the devolved jurisdictions – despite the non-legally binding nature of the concords.[56]As noted by Andrew Scott, the EU concords:

"Provided for effective cooperation and coordination in policy processes characterised by shared competence (i.e. concurrent powers), or with respect to policies where the actions of one administration will impact on the policy environment of the other administration.[57]

Essentially, through the EU concords, the UK Government and its devolved counterparts were able to operate in a shared regulatory space, regardless of the formal boundaries of reserved, excepted or devolved. As a result of this, shared rule in areas of EU competence was very effective.[58] As provided by Trench, the existence of this shared regulatory space provides 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." [59]

The UKIMA 2020 introduces – domestically - a new type of power model – the concurrent power model. By definition, the concurrent power model entails the exercise of competences by the centre and the constituent units in the same policy areas.[60] By legally transplanting the shared regulatory space provided by the EU's internal market, the UKIMA recognises domestically, an internal market that contrasts the formal boundaries of reserved, excepted and devolved, by providing for a shared regulatory space for the exercise of UK and devolved competences concurrently. For instance, similar to the EU's internal market, when exercising their regulatory competences, the UK's four jurisdictions have to be (prospectively) in compliance with the market access principles of mutual recognition and non- discrimination. The introduction of concurrency into the UK's territorial constitution is a significant constitutional development given that the concurrent power model is a key feature of federal governance.[61] Thus, this constitutional development points to embryonic aspects of federalism emerging within the pre-existing devolution structures.[62] Moreover, this constitutional development feeds into the real politick aspect of the main argument of chapter 7, that proposes for the UK's territorial constitution to adopt a hybrid federal model – which the UKIMA 2020 builds towards.

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[56] 'Memorandum of Understanding and Supplementary Agreements' (*Gov.UK*, 2013) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/316157/MoU_between_the_UK_and_the_Devolved_Administrations.pdf > accessed 16 July 2023.

[57] Andrew Scott, 'The Role of Concordats in the New Governance of Britain: Taking Subsidiarity Seriously?' (2010) 5 Edinburgh Law Review 21.

[58] Roger Masterman, 'Brexit and the United Kingdom's Devolutionary Constitution' (2022) 13 Global policy 58.

[59] Alan Trench, 'Devolution and the future of the union' in Guy Lodge and Glen Gottfried (eds) *Democracy in Britain: Essays in honour of James Cornford* (IPPR 2014) Pp. 123

[60] Nico Steytler (ed) *Concurrent Powers in Federal Systems: Meaning, Making, Managing* (Brill Nijhoff 2017). Pp. 1 – 7.

[61] See chapter 7 for a detailed conceptual analysis on federalism.
[62] Horsley, Ibid n. 4

Nevertheless, the existence of this new power model in the UK's territorial constitution does not translate into the enhancement of devolved regulatory competences, however. As shall be examined in the next section, the centre constitutionally dominates the shared regulatory space established by the UKIMA 2020, resulting in the potential rolling back of devolved regulatory competences.

3.2 Mis-sold power surge? The effects of UKIMA 2020 on devolved regulatory competences.

In contrast to the devolved Governments, the UK Government perceive the UKIMA as a power surge for devolution.[63] Their rationale is that unlike the EU's internal market, whereby the devolved legislatures could not enact laws incompatible with EU law, the UKIMA allows for the devolved legislatures to enact legislation that is incompatible with the market access principles. Though, the legislation would only affect local producers and service providers and not on incoming goods and services that meet the regulatory requirements of another part of the UK. Nonetheless, the devolved administrations now have greater control over devolved policy areas previously exercised by the EU.[64] This section will evaluate that the UKIMA has the opposite effect on the UK Government's perception – it weakness devolved regulatory competences.

As aforementioned, at the core of the UKIMA is the trade law market access principles of mutual recognition and non – discrimination. As put forward by Michael Dougan:

> "it is crucial that the principles of trade law…take into account the unique features of the specific internal market under consideration. The needs and preferences of the US are very different from those of Australia; while the situation of and challenges facing Canada are very different from those of and facing the EU." [65]

The market access principles guiding the UK's internal market are taken directly from the EU's internal market framework, without consideration of the unique features of both Unions.[66] Within the EU's Union, none of the 27 member states predominate, meaning then, the effect of these market access principles are symmetrical. By contrast, within the UK's Union, England dominates economically, constitutionally and by population size. In addition, section 54 of the UKIMA protects the Act from modification, which prevents the devolved legislatures from amending or repealing the Act in order to diss-apply these market access principles. Within the EU's Union, none of the 27 member states predominate, meaning then, the effect of these market access principles are symmetrical.[67] In comparison, when legislating for

[63] 'UK Internal Market Bill Introduced Today' (*gov.uk*, 2020) <https://www.gov.uk/Government/news/uk-internal-market-bill-introduced-today> accessed 22 February 2021.
[64] Jo Hunt and others, Ibid n. 40
[65] Dougan, Ibid n. 35
[66] As highlighted in the earlier discussions, the principles are not fully applied in the same way e.g., there is greater scope for derogations from these principles in the EU's framework in comparison to the limited derogations in the UK's own framework. See also: Horsley, Ibid n. 4

[67] Nicholas Kilford, 'The UK Internal Market Act's Interaction With Senedd Competences: The Welsh Government'S Challenge' (*UK Constitutional Law Association*, 2021)

England, Westminster will not be bound by such constraints (due to Parliamentary Sovereignty). Overall, the effect of applying these market access principles is inherently asymmetrical.[68] This means that the effectiveness and innovation of devolved policy will be limited and subjective to market competition.[69] For instance, given the size of the English market, and owing to competition, regulations made in England will most likely, by default, apply across the whole of the UK. This is because the devolved Governments might need to adjust regulatory standards to align with market demands rather than pursue policy objectives.[70]

For example, to pursue targeted environmental objectives, the Welsh Government wants to introduce a ban on a wider range of single-use plastic items. Given that this will be a new regulatory item, it would be subject to the market access principles. As mentioned above, the UKIMA will not prevent the Senedd from enacting legislation on this matter. However, due to mutual recognition, the territorial scope of this legislation will be limited to only local producers and not to incoming goods that meet the regulatory requirements of another part of the UK. In addition, due to its narrow exclusions, the UKIMA does not provide a relevant ground for Wales to derogate from the application of mutual recognition. Essentially, English goods would not need to comply with the new Welsh requirements. In the instance that English standards are lower than the Welsh regulations, this would have detrimental impacts on Wales' regulatory objective. In addition, this would place Welsh products at an economic disadvantage. Thus, for the purposes of competition, Wales would need to divert from its regulatory objective on the environment. The overall effect is that Wales' ability to legislate according to its own needs and preferences would be subverted, which goes against the purposes of devolution.[71]

As exemplified above, the Act can potentially result in a race to the bottom. Given whichever jurisdiction in the UK with the lowest level or no regulation will set the tone for the rest of the UK. Therefore, pursuing higher standards would become a worthless endeavour. This exposes the Act's deregulatory scheme. In addition to this, the Act alters the geographical basis of devolved competences. For instance, referring to the example above, the Welsh ban would only apply to local producers based in Wales within the market and not to the whole activity of that local market. This means that devolved regulations no longer apply to the whole activity within the market in that devolved territory. Instead, the regulations now only apply to the local producers within the territory.[72] Ultimately, it becomes apparent that the UKIMA fails to balance out frictionless trade and regulatory autonomy adequately. As the Act has a solid structural bias towards market access, to the detriment of regulatory autonomy.[73] More broadly,

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<https://ukconstitutionallaw.org/2021/02/23/nicholas-kilford-the-uk-internal-market-acts-interaction-with-senedd-competences-the-welsh-Governments-challenge/> accessed 23 February 2021.

[68] Jo Hunt and others, Ibid n. 40
[69] Jess Sergeant and Alex Stojanovic, 'Institute For Government Report: The United Kingdom Internal Market Act 2020' (*InstituteforGovernment.org.uk*, 2021) <https://www.instituteforGovernment.org.uk/sites/default/files/publications/internal-market-act.pdf> accessed 4 March 2021.

[70] Armstrong, Ibid n. 45
[71] Jo Hunt and others, Ibid n. 40
[72] Dougan and others, Ibid n. 27
[73] Jess Sargeant and Maddy Jack, 'The UK Internal Market: Balancing Frictionless Trade And Regulatory Autonomy' (*InstituteforGovernment.org.uk*, 2021) <https://www.instituteforGovernment.org.uk/sites/default/files/publications/uk-internal-market.pdf> accessed 8

the Act gives effect to the rolling back of devolution by undermining the effective regulatory autonomy of the devolved repatriated competences.[74]

Similar to the market access provisions, parts 6 and 7 of the Act also give effect to the rolling back of devolution.[75] Concerning part 6, as a result of the UK Government's plans to replace EU Structural Funding with the UK Shared Prosperity Fund, this provision allows for UK Ministers to directly fund any person in the UK to provide infrastructure, and economic development in the UK. This provision essentially provides UK Ministers with unilateral spending powers in devolved policy areas such as infrastructure and housing – therefore giving the effect of potentially undermining devolved spending choices in devolved policy areas. Exemplified by the M4 relief road project in Wales, whereby the UK Government conflicted with the Welsh Government over the decision to build the road.[76] In providing legal clarity over the dispute surrounding subsidy control / state aid powers and to allow for the UK Government to design an internal state aid regime, part 7 of the Act amends the devolution statutes to reserve these powers as a matter for the centre.[77] This is contrary to the view of the devolved Governments, who saw subsidy control as a devolved matter.[78] In order to develop the framework for the internal state aid regime, the Subsidy Control Act 2022 was enacted.

The regime established by the Act encompasses more policy areas than the EU's state aid regime, including agriculture and fisheries subsidies. These two areas, in particular, intersect with the Agricultural Support framework and the Fisheries Management and Support framework. Therefore, this establishes a new statutory reserved governance regime that sits above the shared decision-making common frameworks programme. In addition, the Act also empowers the SoS to act in areas of devolved competences, as exemplified by part 4 of the Act, which empowers the SoS to refer subsidy awards or schemes in policy areas under devolved competences to the Competition and Markets Authority. As a result, the Act has the overall effect of rolling back devolved regulatory competences. Unsurprisingly, the devolved legislatures withheld their legislative consent to the Act[79]

Overall, the UKIMA sought to fix a problem that the common frameworks system was already addressing. In addition, rather than providing a solution to the problem, the UKIMA, in reality, has brought about more problems. Ironically, the common frameworks programme can

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June 2021. See also; Kenneth Armstrong, 'The Governance Of Economic Unionism After The United Kingdom Internal Market Act' (2021) 84 The Modern Law Review 635.

[74] Weatherill, Ibid n. 36
[75] Dougan and others, Ibid n. 27

[76] 'After Brexit: The UK Internal Market Act & Devolution' (*Gov.scot*, 2021) <https://www.gov.scot/binaries/content/documents/govscot/publications/strategy-plan/2021/03/brexit-uk-internal-market-bill-scotlands-future/documents/brexit-uk-internal-market-act-devolution/brexit-uk-internal-market-act-devolution/govscot%3Adocument/brexit-uk-internal-market-act-devolution.pdf> accessed 24 December 2021.

[77] Part 2 of Schedule 5 to the Scotland Act 1998, Schedule 2 to the Northern Ireland Act 1998 , and Part 2 of Schedule 7A to the Government of Wales Act 2006

[78] Ibid n. 67

[79]'House of Lords Common Frameworks Scrutiny Committee - Common Frameworks: An unfulfilled opportunity?'(*Parliament.UK, 2021*) <https://publications.parliament.uk/pa/ld5801/ldselect/ldcomfrm/259/25902.htm> accessed 21 December 2022

mitigate some of these problems. For instance, to achieve a better balance between market access and market regulation, further positive harmonisation (the joint adoption of common standards) is required, which can be achieved through common frameworks.[80] This then brings back into question why the UK Government would utilise its hegemony to willingly exacerbate instability for imposed (and arguably unnecessary) solutions?

Conclusion

The protections offered by the EU's internal market framework ensured that issues of internal divergence on policy were never a concern for the UK's Union. Following the cessation of this framework and to limit policy divergence that would create barriers, the concept of a UK internal market increasingly became significant over time. Two key constitutional questions arose from this concept. First, how would the integrity of the UK's internal market be protected? And secondary to this, who will be responsible for their exercise once the powers are repatriated back from the EU?

As highlighted within the chapter, the UK Government and its devolved counterparts differed on the solution(s) to these questions. For the UK Government, the best way to address these questions was through centralised control, whilst for the devolved counterparts, the best approach was through cooperation and consent. The contrast in approaches fuelled an 'intergovernmental regulatory war' between the two opposing sides. With the battle lines drawn, it became apparent that the conclusions to the above constitutional questions would result in either the overall enhancement of the devolution settlements and the easing of tensions in intergovernmental relations or the rolling back of devolution and the worsening of intergovernmental relations in the UK.

In dealing with the constitutional question over the treatment of repatriated powers, the UK Government, whilst exercising its hegemony, set the tone for the expected conclusion. Its tabled legislation – the EU (Withdrawal) Act 2018, and the Retained EU Law (Revocation and Reform) Bill, had the effect of causing further internal political and constitutional instability. In tackling the second question, the UK Government, in a departure from its first approach, agreed with its devolved counterparts to establish cooperatively agreed common frameworks. This development provided some needed political and constitutional positivity, as it made devolution more dynamic and healed some of the strains within the UK's intergovernmental relations. However, these positive developments were short-lived following the UK Government's imposed legislative interventions on this matter – specifically through the UKIMA. As a result, both constitutional questions have concluded with the overall rolling back of devolution and the worsening of the UK's intergovernmental relations. As analysed in the chapter, this conclusion was arguably avoidable, which begs the question, why would the UK Government utilise its hegemony to willingly exacerbate instability for imposed (and at times unnecessary) solutions? Overall, this ties back into the broader argument of this thesis, which is that the UK Government has systematically failed to adequately address the internal

[80]For a further analysis on this see: Kenneth Armstrong, 'The Governance of Economic Unionism after the United Kingdom Internal Market Act' (2021) 84 The Modern Law Review 635. See also: Dougan and others, Ibid n. 27

constitutional questions raised by Brexit, resulting instead in exacerbating the current period of constitutional unsettlement.

Chapter 7: A Reunited Kingdom? Brexit and the future of the UK's territorial constitution

Introduction

As highlighted throughout the previous chapters in this thesis, the asymmetrical constitutional effects of Brexit in each territory have placed the UK's Union in flux. Thus far, these effects have exacerbated the current period of constitutional unsettlement. Additionally, there has been a systematic failure to address these constitutional effects adequately. The combination of these factors leads to the conclusion that Brexit has revealed "the nakedness of our unprotected constitution"[1] and that "today the United Kingdom appears united in name only."[2]

Given the systematic failure, each of the previous chapters noted that there was now an increased need to depart from current constitutional practices and establish a new way forward in dealing with these challenges. Secondary to this, each of the previous chapters proposed several potential solutions that could mitigate these challenges, broadly focusing on introducing reforms that would depart from the current thinking on intergovernmental relations, devolution and the Union. However, it was concluded that these proposals would be difficult to realise under the current constitutional status quo. The key obstacle is that the current default position of those that can implement constitutional change (the UK Government) has been to maintain the status quo, and any calls for reform have been nullified. More broadly, this demonstrated that executive parliamentary dominance is a key limitation within the UK's constitution when introducing constitutional reform. In that, calls for constitutional reform outside Government are of limited practical significance.[3]

Nonetheless, as evidenced within the thesis, the UK Government's approach of often maintaining the status quo and side-lining the interests of its devolved counterparts is increasingly becoming untenable - threatening the UK's territorial integrity. This further increases the need to explore alternative constitutional solutions to resolve this current period of constitutional unsettlement exacerbated by Brexit. Moreover, the shifted focus on alternative solutions also brings with it greater consideration for proposals that would once be considered radical but are now becoming more practical and plausible. For instance, many constitutional

[1] Vernon Bogdanor, 'Brexit And Our Unprotected Constitution' (*Consoc.org.uk*, 2018) <https://consoc.org.uk/wp-content/uploads/2018/02/Brexit-and-our-unprotected-constitution-web.pdf> accessed 27 April 2021.

[2] 'Gordon Brown Proposes UK People's Constitutional Convention' (*The Office of Gordon & Sarah Brown*, 2016) <https://gordonandsarahbrown.com/2016/11/gordon-brown-proposes-uk-peoples-constitutional-convention/> accessed 27 April 2021.

[3] Rodney Brazier, 'How Near Is A Written Constitution' (2001) 52 Northern Ireland Legal Quarterly 52.

actors[4] and legal scholars[5] now subscribe to the above argument regarding the need for a departure from the current status quo. A great majority of these are also of the opinion that the alternative approach should be based on symmetrical constitutional reforms, as asymmetry is the reason why problems related to Brexit manifested in the first place (alongside the inevitable hierarchies in devolution vs the centre).[6]

However, this chapter argues against this narrative. Instead, it proposes that a more robust argument exists in suggesting that the alternative way forward could be through constitutional reforms that introduce a combination of both symmetrical and asymmetrical solutions. For instance, relations at the centre would be reformed symmetrically, whilst, among the constituent units, asymmetrical and differentiated reforms would be introduced, which tailor to each unit specific posts – Brexit constitutional needs. Based on the evidence provided in the previous chapters, realising these solutions under the current devolution framework could prove impossible, as devolution cannot be stretched so far. Therefore, this chapter proposes that reforming the UK's constitution under a 'hybrid federal' framework would suffice (the rationale behind this argument will be detailed further in the subsequent sections).

The overall argument in this chapter is that the UK Government, in its approach, has thus far failed to mitigate the asymmetrical constitutional effects of Brexit in each territory. This systematic failure has been the central catalyst behind this current period of constitutional unsettlement. Consequently, there is now a greater need to explore alternative ways to mitigate these effects. Furthermore, one such alternative proposal is 'hybrid federalism.' In the past, such a solution would have been deemed too radical. However, with the constitutional status quo's continued failure, it is increasingly becoming more practical and plausible.

In presenting this argument, the chapter will be structured into five main sections. Section one will provide a summary overview of the key effects of Brexit in each of the UK's territories, demonstrating the asymmetrical nature of these effects and the UK Government's failure to address them. This discussion will also provide some context as to why symmetrical solutions would not be ideal as an alternative way forward. In section two, the discussion will provide a conceptual analysis of the proposed alternative solution. In section three, the rationale for and the applicability of hybrid federalism in the UK will be provided before moving on to section four, where the discussion will analyse how hybrid federalism provides a workable solution to the current period of constitutional unsettlement. The final section of the chapter will discuss the various methods available in constitutionally recognising hybrid federalism in the UK. In concluding the chapter, it will be acknowledged that the ultimate decision on whether to adopt an alternative way forward and what that way forward might entail rests with the UK Government. What remains unambiguous for now is that the effects of Brexit have tested the

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[4] See for example: 'Act Of Union Bill [HL]' (*Publications.Parliament.uk*, 2018) <https://publications.Parliament.uk/pa/bills/lbill/2017-2019/0132/18132.pdf> accessed 27 April 2021.

[5] See for example: Mark Elliottt, 'The United Kingdom's Constitution And Brexit: A 'Constitutional Moment'?' (*SSRN.com*, 2020) <https://poseidon01.ssrn.com/delivery.php?ID=754103009004066113104087126031097111121055086045016032125100092098082075089114125076096031059124007061000025005113088123099073024041045040023009012121094116125092119066005079088089087089065126070024095093003117088112116109106071010071094073114075029125&EXT=pdf&INDEX=TRUE> accessed 23 June 2021.

[6] See for example: Bruce Ackerman, 'Why Britain Needs A Written Constitution - And Can't Wait For Parliament To Write One' (2018) 89 The Political Quarterly.

limits of the UK's constitutional order and that the maintenance of the status quo is increasingly becoming untenable – further edging towards a constitutional crisis. This will only intensify the need for an alternative way forward that could look like the proposal listed above.

1. Differentiated Brexit: Explaining the asymmetrical effects of Brexit

As evidenced throughout the previous chapters, Brexit has resulted in a series of constitutional enigmas in each territory that need to be resolved. These chapters also demonstrated that these constitutional enigmas are distinct from each other. In this section, an explanation of the asymmetrical character of these effects will be provided. This explanation will also provide the rationale against introducing entirely symmetrical solutions.

It is often commonly accepted that the asymmetrical character of the effects caused by Brexit can be attributed to the inherently unbalanced nature of the UK's Union.

As discussed in chapter 1, the constitutional positions of the UK's territories have evolved on an asymmetrical basis and, for historical reasons, are also idiosyncratic. When devolution was (re)established in 1998, the institutions and powers that were introduced in NI, Scotland, and Wales were unequal, based on bespoke responses to local grievances and aspirations. These settlements have evolved but remain insecure in that they are subjective to the Sovereignty of the crown - in -Parliament. Moreover, devolution has not been extended to every territory - England is the only territory without national devolution / constitutional recognition, which is consequential to the English question. Therefore, England remains governed by the central UK institutions – which allows for English constitutional dominance through Parliamentary Sovereignty.

As a result of this constitutional patchwork and territorial inequality, many constitutional issues that face the UK tend to have asymmetrical effects. Moreover, the solutions to these effects tend to also be bespoke, as they are often tailored to resolving the specific effects felt in each territory. For instance, a prominent constitutional issue the UK's Union has faced since its inception has been nationalism (exemplified by the struggles for home rule/devolution and secession). Nationalism has had (and continues to have) asymmetrical effects in the UK's four territories. In tackling this issue, differential solutions have been employed over time in each of the UK's four territories to accommodate nationalism. The process of accommodating nationalism helps to explain, to a great degree, the asymmetrical nature of the devolution framework.

The recent major constitutional issue, Brexit, also exemplifies the above. As the constitutional effects that have arisen in each of the UK's territories have further exposed and exacerbated the imbalanced and unequal nature of the UK's territorial constitution.[7] However, Brexit induces a new type of imbalance in that the effects of Brexit are not just an exacerbation of the asymmetrical nature of the UK's territorial constitution. Instead, there is parallel asymmetry of what's at stake in EU membership. To further elaborate, Brexit is unique compared to the other constitutional issues the UK has thus far faced. In that, each territory has its own special stake

[7] Michael Keating, 'Brexit and the Nations' (2018) 90 The Political Quarterly 167.

/ unique set of interests and priories in EU membership that need protection.[8] Therefore, as the UK withdraws further from close relations with the EU, the strains within its own Union increase.[9] Essentially, the asymmetrical effects caused by Brexit are a result of not just one source of asymmetry, instead the asymmetry is cumulative or compounded by the nature of the impact between the two of them. This was uncovered to some extent in each of the dedicated chapters of this thesis.

For instance, as highlighted in chapter 2, Brexit resulted in the loss of the operation of the EU's border regime on the island of Ireland. This loss was significant because the EU's border regime helped ensure the border was seamless, which was paramount, given the political sensitives that arise in NI. Ultimately, this loss resulted in the Irish border conundrum – now the dominant constitutional issue within NI, resulting from Brexit. From the genesis of the Brexit withdrawal process, resolving the border conundrum was a key objective for both the UK Government and the EU. Moreover, the UK Government's acceptance and willingness to seek a unique and imaginative solution for NI was made more significant given the UK Government's consistent reluctance to offer such differential treatment to the other devolved jurisdictions, despite calls for similar arrangements from Scotland. Following a lengthy process, which also saw the rejection of numerous proposals, the UK Government and the EU finally agreed to an imaginative solution – the Ireland / Northern Ireland Protocol. However, the viability of the Protocol as a long-term solution to the Irish border conundrum has been questioned. This is owed to the combination of first, the lack of cross-community support in NI for the Protocol, as the two main political parties are divided over its operation, and secondly, the weakening of trust and partnership over the implementation of the Protocol, following several disputes between the UK Government and the EU. These challenges have had an overall impact on bringing about the current period of constitutional unsettlement in NI. The continuation of the status quo not only risks the potential of the emergence of a 'hard border' in Ireland but also brings into question the future of the UK's territorial constitution.

In chapter 3, the discussion demonstrated how Brexit presented an opportunity for the Scottish Government to not only seek and maintain a deep and closer relationship with the EU but also seek an opportunity to exit from the UK's Union. The Scottish Government have justified their post – Brexit constitutional objectives based on the constitutional developments that have occurred since the independence referendum in 2014, which includes the Brexit referendum, and the UK Government's unilateral approach to the Brexit process. Regarding the objective of maintaining a close and deep relationship with the EU, during the early stages of the Brexit withdrawal process, the Scottish Government advocated for a 'differentiated solution' for Scotland if the UK drifts away from the status quo at the time. Short of this, the Scottish Government favoured Scottish independence with EU membership. However, due to the constitutional dominance of the UK Government and Parliament, both opportunities have thus far been nullified. For instance, the UK Government refused to afford Scotland with similar

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[8] An overview of this was discussed in chapter one. See also; Jo Hunt and Rachel Minto, 'Between Intergovernmental Relations And Paradiplomacy: Wales And The Brexit Of The Regions' (2017) 19 The British Journal of Politics and International Relations 647.

[9] See; Nicola McEwen and Mary Murphy, 'Brexit And The Union: Territorial Voice, Exit And Re-Entry Strategies In Scotland And Northern Ireland After EU Exit' (2021) 43 International Political Science Review 374.

arrangements to NI. Moreover, the Scottish Government's plans to keep pace with EU Law through section 1 of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 have been curtailed by several Westminster Brexit-related pieces of legislation that grant UK Ministers, secondary powers to potentially divert from EU law (including areas covered by devolved competences). Regarding the Scottish Government's secession objective, the UK Government have on numerous occasions refused to grant Scotland the powers to hold a second independence referendum, despite the electoral mandate the SNP-led Scottish Government has. The UK Government's overall approach of maintaining the status quo and ignoring the interests of the Scottish Government has fuelled tensions between the two Governments. With no signs of the tensions easing, there is now an ever-growing possibility that this could result in the eruption of a constitutional crisis.

In chapter 4, it was noted that the UK Government's approach to the Brexit process had the overall effect of undermining devolution. This effect has provided the Welsh Government with evidence to support their calls for introducing radical constitutional reforms to strengthen devolution. The Welsh Government's calls present a contrasting vision of Brexit than the other Governments in the UK as they are the only devolved Government making proposals to preserve the Union and strengthen devolution after Brexit. Their proposals can be characterised as a middle ground, as they are not advocating for secession or maintaining the status quo. However, given the hegemony of the UK Government and Parliament in relation to introducing constitutional reform, it is challenging for the Welsh Government to secure their constitutional objectives over Brexit. However, the maintenance of the status quo only serves to weaken the devolved settlements further.

Chapter 5 observed that, due to Brexit, the need to address the English question fully has increased. For instance, the devolved territories have, at some point, voiced their national preference over Brexit, whereas England has not. England's lack of 'voice' and representation in the UK's constitutional framework is owed to the failure to address the English question fully. Thus, given the current political and constitutional climate, where the UK seems to be only united in name, it is key for England to take part and express its own preferences. More significantly, though, there is a need to accommodate England in a post – Brexit reformed constitution. As noted in chapter 6, post – Brexit constitutional reform is already taking place with reference to the creation of a UK internal market. However, due to not fully addressing the English question, the effects of the UK Internal Market Act 2020 resulted in the creation of an internal market dominated by England, which is also detrimental to devolved regulatory autonomy. Moreover, as future constitutional changes are to be expected, the need further increases. For instance, as analysed in chapters 2 and 3, Brexit has increased the likeliness of Scotland seceding from the UK's Union and Ireland's (re)unification. Either possibility (or both) would certainly further increase the need for accommodating England.[10] Worth noting too is that either (or both) of those outcomes is also likely to further invigorate discussions around Welsh independence, particularly Scottish secession.[11]

[10] Richard Wyn Jones and Ailsa Henderson, *Englishness: The Political Force Transforming Britain* (Oxford University Press 2021). Pp. 194

[11]Welsh Labour ministers including the First Minister Mark Drakeford, have previously suggested that their support for the Union was not 'unconditional,' particularly if Scotland were to go.

2. Federalism: A brief conceptual analysis

As evidenced throughout this thesis, the UK Government's systematic failure to resolve the asymmetrical effects of Brexit in each territory has brought about this current period of constitutional unsettlement. It is now clear that maintaining the status quo is increasingly becoming untenable. Consequently, there is now a greater need to explore alternative ways to mitigate these effects. The main argument in this chapter is that one potential alternative proposal is hybrid federalism. In the past, such a solution would have been deemed too radical. However, with the constitutional status quo's continued failure, it is increasingly becoming more practical and plausible. In this section, a conceptual analysis of federalism will be provided. The analysis will pay particular focus on my proposed typology of federal models: 1) symmetrical federalism, 2) asymmetrical federalism, and 3) hybrid federalism. Greater importance will be placed on what the final model entails, as it ties in with the chapter's main argument.[12]

A variety of influences and pressures play a part in a state deciding to adopt a federal-type system. According to Stephen Tierney, we can distinguish between two main rationales for the need to establish a federal state:

> "One justification for a division of Governmental power along territorial lines is that this is needed to accommodate strong ethnic or cultural distinctiveness. Another rationale applies regardless of the existence of deep diversity within the state and considers that territorial decentralization is a value in itself, either because localised decision making can lead to more efficient Government and/or because democracy, in keeping with the principle of subsidiarity, is enhanced if decisions are made at the most local level feasible for their effective execution."[13]

For instance, the introduction of federalism in Belgium and India mirrors the first model. In both states, federalism was introduced to accommodate nationalism and 'hold the state together.'[14] Focusing on Belgium specifically, in constitutional efforts to mitigate ethnolinguistic tensions, several state reforms between 1970 until 1993 transformed Belgium from a multinational unitary state into a fully-fledged federal state.[15] On the other hand, the establishment of federal arrangements in the United States of America (USA), and in Germany reflect (in very differing ways), the second model.[16] For instance, regarding the latter, the general principle that guides the division of powers in Germany is that of subsidiarity.[17] This principle is contained in Article 30 of the Basic Law of Germany which states that 'Except as

[12] The terms within the typology, such as asymmetrical, symmetrical, and hybrid, are often discussed within the literature, but never together as done in this thesis. Moreover, the meaning behind the term hybrid federalism when discussed within the literature often differs but is never discussed to mean the same thing as in this thesis. Hybrid federalism, in this instance, will be defined further in the section.

[13] Stephen Tierney, 'Federalism in a Unitary State: A Paradox too far?' (2009) 19 Regional & Federal Studies 237, 238.

[14] Alfred Stepan, *Arguing Comparative Politics* (Oxford University Press 2001). Pp. 320-321

[15] Wilfried Swenden, 'Belgian Federalism: Basic Institutional Features And Potential As A Model For The European Union' (*Chathamhouse.org*, 2003) <https://www.chathamhouse.org/sites/default/files/public/Research/Europe/swenden.pdf> accessed 23 June 2021.

[16] Tierney, Ibid n. 15

[17] Arthur Gunlicks, *The Länder And German Federalism* (Manchester University Press 2003). Pp. 55

otherwise provided or permitted by this Basic Law, the exercise of state powers and the discharge of state functions is a matter for the Länder.' In the USA context, this principle has no explicit constitutional guarantee. Instead, respect for the principle is left to the political process. In practice, the federal-level institutions for the most part, tend to respect this principle.[18]

2.1. The core principles that underpin federalism

When defining federalism, many constitutional scholars subscribe to Daniel Elazar's definition, which states that federalism is "constitutionalised power sharing through systems that combine self-rule and shared rule."[19] From the definition, we first understand that federalism is a system of government that involves power sharing between the centre and the constituent units. The principle of power-sharing is a core federal principle, and as put forward by Kenneth Wherea, the principle is the "yardstick according to which any system of government that claimed it was federal must be judged."[20] Power sharing in a federal system, where different levels of government have their respective spheres of authority, can also be seen as a form of pluralism. As the power-sharing principal allows for federal systems to be effective in facilitating diverse representation and opinion within the decision-making process. For instance, in a federal system, each level of government acts as a check on the other, preventing any one level from accumulating too much power. Moreover, power sharing fosters the competition of ideas and policies – generating innovative and constructive outcomes.[21]

From Elazar's definition, we also understand that federalism involves the combination of self-rule, and shared rule. In the context of federalism, self-rule is a principle that allows constituent units to exercise a degree of autonomy and authority over their own affairs.[22] Thus, certain powers are reserved for the centre (often relating to defence, foreign affairs, and currency), and the constituent units retain powers over matters not expressly listed in the constitutional framework (such as education, health, and local governance). The principle of self-rule is synonymous with the principle of subsidiarity. As MacCormick notes:

"The doctrine of subsidiarity requires decision-making to be distributed to the most appropriate level. In that context, the best democracy - and the best interpretation of popular sovereignty - is one that insists on levels of democracy appropriate to levels of decision-making." [23]

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[18]See; George Bermann, 'Subsidiarity as a Principle of U.S. Constitutional Law' (1994) 42 The American Journal of Comparative Law 555. See also; Herbert Wechsler, 'The Political Safeguards of Federalism: The Role Of The States In The Composition And Selection Of The National Government' (1954) 54 Columbia Law Review 543.

[19] Daniel Elazar, *Federalism: an overview*, (HSRC 1995). Pp. 2

[20] Wheare K, 'What Federal Government is' in *Federal Tracts* (Macmillan 1941) Pp. 33

[21] See: Erin Ryan, 'Federalism as legal pluralism' in Paul Berman (ed) *The Oxford Handbook of global legal pluralism* (Oxford University Press 2020)

[22] Mikhail Filippov, Peter C Ordeshook and Olga Shvetsova, *Designing Federalism: A Theory of Self-Sustainable Federal Institutions* (Cambridge University Press 2004) Pp. 68. See also: See: Stephen Tierney, *The Federal Contract: A Constitutional Theory of Federalism* (Oxford University Press 2022). Chapter 7

[23] Neil MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford University Press 2002). Pp. 135

Shared rule is a principle that involves cooperation and collaboration by the two levels of government (the centre and the constituent units) on various matters, whilst still respecting the division of powers outlined in the constitutional framework. In most federal states, shared rule is often achieved through the concurrent power model, which helps facilitate the constituent units to engage in shared decision making through the central organs of the state.[24] As discussed in chapter 6, the concurrent power model entails the exercise of competences by the centre and the constituent units in the same policy areas.[25]

As highlighted above, Elazar's definition speaks on the fundamental principles that underpin federalism. However, one of the key limitations of this definition is that it fails to distinguish federalism from devolution. There are clear conceptual differences between these two systems of Government. For instance, as highlighted in chapter 1, the two elements of shared rule and self-rule are also visible in the UK's devolution system (to a limited extent), whereby the devolved territories have autonomy over non–reserved powers. And participate in shared decision-making with the centre through the UK's IGR framework, the Sewel Convention, and more recently, through the UK Internal Market Act 2020 framework.[26] However, federalism provides firmer boundaries to self-rule and shared rule – it's not dynamic like UK devolution. More significantly, federalism involves the formal division of sovereignty in clearly defined terms between the centre and the constituent units, whereas devolution in the UK is subject to the sovereignty of Westminster.[27] By failing to encompass these conceptual differences, Elazar's definition becomes limited in regard to fully understanding the core principles that underpin federalism.

In a federal system, sovereignty is seen through two perspectives – internal and external.[28] Through the internal lens, each of the constituent units possess a level of sovereignty within their designated jurisdiction. This sovereignty is recognised and protected by the constitutional framework of the state, ensuring that the centre cannot unilaterally encroach upon the sovereignty and powers of the constituent units.[29]For example, in Australia, the

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[24] See: Adam Tomkins, 'Shared Rule: What the UK Could Learn from Federalism' in Robert Schutze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018); Carl Joachim Friedrich, *Trends of Federalism in Theory and Practice* (Frederick A. Praeger Publishers 1968); Cheryl Saunders, 'Challenges of Multilevel Constitutionalism' in Elizabeth Fisher, Jeff King and Alison Young (eds) *The Foundations and Future of Public Law: Essays in Honour of Paul Craig* (Oxford University Press 2020)

[25] Nico Steytler (ed) *Concurrent Powers in Federal Systems: Meaning, Making, Managing* (Brill Nijhoff 2017). Pp. 1 – 7.

[26] For a detailed comparative analysis on devolution and federalism see: Stephen Tierney, 'Drifting Towards Federalism: Appraising the Constitution in Light of the Scotland Act 2016 and the Wales Act 2017' in Robert Schütze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018); Neil Walker, 'Beyond the Unitary Conception of the United Kingdom Constitution?' (2000) Public Law 384; Nick Barber, *The United Kingdom Constitution: An Introduction* (Oxford University Press 2021). Chapter 18.

[27] For a thorough analysis on this distinction see for example; Vernon Bogdanor, *Devolution In The United Kingdom* (Oxford University Press 2001); Matthew Flinders, 'Constitutional Anomie: Patterns Of Democracy And 'The Governance Of Britain'' (2009) 44 Government and Opposition 385; Andrew Gamble, 'The Constitutional Revolution In The United Kingdom' (2006) 36 Publius: The Journal of Federalism 19.

[28] See: Martin Laffin and Alys Thomas, 'The United Kingdom: Federalism in Denial?' (1999) 29 Publius: The Journal of Federalism 89; Stephen Tierney, *The Federal Contract: A Constitutional Theory of Federalism* (Oxford University Press 2022). Chapter 7

[29] Neil Walker, 'Beyond the Unitary Conception of the United Kingdom Constitution?' (2000) Public Law 384

constituent units have plenary legislative power, which entails that the central legislature does not legislate on matters within the competence of the constituent units, or seek to modify their competences, without the consent of the relevant constituent unit.[30] The plenary power model is similar to the operation of the Sewel Convention. As discussed in chapter 1 however, the key difference is that the Sewel Convention is non – legally binding, thus requires the good will of the centre. And as evidenced by the Brexit process, it can be side-stepped with no legal ramifications. From an external perspective, the state's sovereignty is formed on a unified whole.[31] As a result of this, federalism is often described as being located halfway between the absolute nature of unitary arrangements (whereby power is concentrated at the centre) and confederal arrangements (whereby power is held among the constituent units).[32]

Another core feature associated with federalism is constitutional codification. Federal systems typically have a written constitution that outlines the division of powers between the centre and the constituent units and serves as the supreme law of the state. Additionally, as aforementioned above, the constitution serves as a legal framework that safeguards the autonomy of the constituent units, preventing an undue concentration of power from the centre. Moreover, federal systems often include an independent judiciary that is tasked with policing the power boundaries outlined in the constitution.[33]

2.2.Institutionalising federalism

The institutionalisation of multi-level governance is another key federal principle - whereby internally, power and sovereignty are shared between two tiers of Government: the federal level (the centre) and among the constituent units. As noted by Ronald Watts, there is no single institutional model for federalism, rather federalism can be realised institutionally through a broad category of constitutional systems that combine (to varying degrees) elements of shared rule at the federal level, and self-rule among the constituent units.[34] In setting out this argument, Watts analyses the constitutional frameworks of twelve federal states (this included Canada, India, Pakistan, Belgium, the USA, Germany), and manages to identify a 'spectrum of federal political systems.'[35] From the various constitutional models within the spectrum (and more broadly within the literature), this thesis identifies and proposes a typology of federal models: 1) symmetrical federalism, 2) asymmetrical federalism, and 3) hybrid federalism.

[30] For a detailed analysis of Australia's constitutional arrangements see: Gabrielle Appleby, Nicholas Aroney and Thomas John, *The Future Of Australian Federalism* (Cambridge University Press 2012).
[31] Martin Laffin and Alys Thomas, 'The United Kingdom: Federalism in Denial?' (1999) 29 Publius: The Journal of Federalism 89.

[32] Preston King, *Federalism And Federation* (Croom Helm 1982). Pp. 140

[33] Daniel Elazar, *Exploring Federalism* (University of Alabama Press 1987) Pp. 159; Preston King, 'Federation and Representation' in Michael Burgess and Alain-G Gagnon (eds), *Comparative Federalism and Federation: Competing Traditions and Future Directions* (Harvester Wheatsheaf 1993) Pp. 96

[34] Ronald Watts, *Comparing Federal Systems in The 1990s* (McGill-Queen's University Press 1996). Pp. 7. See also: Stephen Tierney, 'The territorial Constitution and the Brexit Process' (2019) 72 Current Legal Problems 59

[35] Ibid Pp. 6 -15, and 57 – 63.

Regarding the first model, this constitutional framework establishes an entirely symmetrical system at the federal level and among the constituent units. This means, at the federal level, there is equality in regard to shared decision-making between the centre and the constituent units. Additionally, there is equal participation among the constituent units within the shared decision-making process. At the constituent unit level, there is full equality regarding competences. Full equality means that all the constituent units are afforded the same powers. An example of this model is Australia. One of the main ways shared decision-making in Australia is achieved is through the bicameral federal Parliament. The Upper House (Senate), which allows for the legislative representation of the constituent units, comprises an equal number of directly elected members from each state. And away from the centre, each of the states has equal levels of autonomy.[36]

The constitutional framework of the second model is based on an entirely asymmetrical system both at the federal level and among the constituent units. At the centre, there are different degrees of influence over the shared decision-making process. One party (the federal institution) dominates the shared decision-making process, and/or one or more constituent units have a more significant role in the shared decision-making process over the others. Among the constituent units, power is decentralised on an uneven basis. An example of this model is Canada. At the centre, the bicameral Canadian Parliament ensures shared decision-making through the Upper House (the Senate), allowing for the constituent units' legislative representation. However, on an uneven basis, each of Canada's constituent units is entitled to several seats within the Senate. For instance, provinces such as Ontario and Quebec have far more senators (24 each) than all other provinces, including British Columbia and Manitoba (which each have six senators). Therefore, Quebec and Ontario have the most significant influence over the shared decision-making process. Away from the centre, there are differences regarding the autonomy enjoyed by each of Canada's constituent units. This is mostly owed to the dynamic nature of Canada's federalism, which has allowed, through judicial decisions and bilateral federal–provincial agreements, the extension of powers for some of the provinces. For instance, through various bilateral agreements with the centre, Quebec has extensive autonomy over several concurrent powers, including in policy areas such as immigration and pension plans.[37]

The final model establishes a hybrid federal system that combines a mixture of both symmetrical and asymmetrical arrangements. This could include, for instance, the combination of asymmetrical arrangements at the centre with symmetrical arrangements among the constituent units. An example of this model is Germany. The German federal council (the Bundesrat) achieves shared rule at the centre. The Bundesrat is the legislative chamber representing Germany's 16 constituent units (Länder). Within the Bundesrat, the number of votes each Länd is allocated is based on population size. This means that the Länder with the bigger population sizes (such as Bavaria and lower Saxony) have a higher allocation of votes than the Länder with much smaller population sizes (such as Bremen and Hamburg). Therefore, the Länder, with the bigger population sizes, have the most significant influence over the shared

[36] For a detailed analysis of Australia's constitutional arrangements see: Gabrielle Appleby, Nicholas Aroney and Thomas John, *The Future Of Australian Federalism* (Cambridge University Press 2012).

[37] For a detailed analysis of Canada's constitutional arrangements see; Garth Stevenson, *Unfulfilled Union: Canadian Federalism And National Unity* (5th edn, McGill-Queen's Press 2009).

decision-making process. Away from the centre, autonomy is provided equally for each of the 16 Länder.[38]

Alternatively, a hybrid federal system could combine symmetrical arrangements at the centre with asymmetrical arrangements among the constituent units. An example of this model is Russia. Shared decision-making in Russia is formally provided through the bicameral federal Assembly. The Upper House (the Council of the Federation), which allows for the legislative representation of the constituent units, comprises an equal number of members from each of Russia's constituent units. Away from the centre, there are differences in institutional set up, and autonomy enjoyed in each of Russia's 85 constituent units. For example, compared to the other federal subjects, the 22 autonomous republics are granted the most competences because they are 'ethnic homelands.' The powers decentralised within these republics are also asymmetric.[39] This version of hybrid federalism is the one this thesis proposes as a possible alternative way forward in the UK. As explained further in the chapter, the primary rationale is that symmetry at the centre will manage to ease intergovernmental tensions brought about by Brexit. Moreover, asymmetry among the constituent units would be the default, given the cumulative or compounded nature of the two sources of asymmetry Brexit has exposed and exacerbated. Reflecting more broadly on hybrid federalism, it shall be highlighted in the succeeding sections that this model is distinct from the common and often rejected federalism proposals in the UK. Moreover, hybrid federalism is consistent with the traditions in UK constitutional reform.

3. The rationale for introducing hybrid federalism in the UK

Following the above conceptual analysis of federalism, this chapter will now discuss the rationale for considering hybrid federalism in the UK. Federal proposals have a long history in the UK. Usually, during most periods of constitutional unsettlement in the UK, federalism is often one of the ideas – albeit a minority one – proposed by constitutional actors and scholars. For instance, during the Irish home rule battles in the early 19th century, federalism was proposed as an option to accommodate Irish nationalism.[40] More recently, in the build-up to the 2014 Scottish independence referendum, federalism was once again proposed as a solution and concession to the growth in Scottish nationalism.[41] On both and most occasions, these issues have been accommodated through the further decentralisation of power through devolution, without the consideration for federalism. This approach reinforces the argument in chapter 1 that devolution in the UK was established (and to some extent evolved) mainly on the 'accommodation' rationale.

[38]For a detailed analysis of Germany's 's constitutional arrangements see: Gunlicks, Ibid n.19

[39] For a detailed analysis of Russia's constitutional arrangements see; Steven Solnick, 'Federal Bargaining In Russia' (1995) 4 East European Constitutional Review 52.

[40] See for example; John Kendle, *Ireland And The Federal Solution: The Debate Over The United Kingdom Constitution, 1870-1921* (McGill-Queen's University Press 1989).

[41] See for example; Eve Hepburn, 'Degrees Of Independence: SNP Thinking In An International Context', in Gerry Hassan (ed), *The Modern SNP: From Protest to Power* (Edinburgh University Press 2009).

However, as highlighted throughout this thesis, devolution has thus far failed to accommodate the differential territorial issues arising from Brexit. Moreover, the subsidiary argument in each of the dedicated chapters provided potential solutions that could help mitigate some of these issues through the devolution framework. However, it was concluded that devolution could not be stretched so far to accommodate these issues. For example, in chapter 3, it was observed that the options for reforming Scotland's devolution settlement are minimal. In this instance, a reformed Scottish devolved settlement cannot go far enough to halt demands for indyref 2.

These shortcomings of devolution can be attributed to "a lack of autonomy and a failure to create suitable pathways for representation in decision making." [42] For instance, concerning the former, despite the devolution of extensive powers, there remain significant areas where powers are not devolved. In particular, the devolved administrations do not have competences over foreign affairs, as this is a reserved matter. Therefore, the devolved administrations cannot enter into international legal agreements on their own behalf – something which a few other sub-state entities in federal countries can do, including Belgium and Denmark.[43] In the context of Brexit, this also means that the devolved administrations cannot negotiate their own EU relationship, based on the above-mentioned territorial agenda's. Moreover, the devolved administrations have no powers over altering the UK's constitution. Again this is a reserved matter. In many federal states, such as the USA, consent must be granted from the sub-states before any constitutional changes occur. If this applied during the 2016 Brexit referendum, then consent would have been required from Scotland and NI (who both voted majority no).[44] In relation to devolved representation in decision-making, given the inherent constitutional dominance of the centre, the devolved administrations rely on the goodwill of the UK Government and Parliament for involvement in shared decision making. As demonstrated by the Brexit process, the centre has utilised its hegemonic power to the disadvantage of its devolved counterparts. This has signified the failures of the UK's intergovernmental framework and the Sewel convention regarding ensuring shared decision-making. For example, the Withdrawal Agreement signed by the EU and the UK was negotiated without devolved input nor support – hence why all three devolved administrations refused to grant legislative consent for the EU (Withdrawal Agreement) Act 2020.

In all, unlike the past periods of constitutional unsettlement in the UK, devolution has thus far failed to accommodate the asymmetrical effects of Brexit. Furthermore, the key theme in the conclusions in most of this thesis's chapters is that even if reformed, devolution cannot be stretched far enough to accommodate most of the Brexit-related constitutional issues currently contributing to this period of constitutional unsettlement. Further in this chapter, an evaluation of how hybrid federalism, unlike devolution, can provide a solution to the current period of constitutional unsettlement will be conducted. Before that, though, the next section below will analyse some key criticisms against introducing federalism in the UK.

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[42] Tierney, Ibid n. 15

[43] Jo Hunt, 'Devolution' in Michael Dougan (ed), *The UK After Brexit: Legal and Policy Challenges* (Intersentia Ltd 2021).Pp 42.

[44] Vernon Bogdanor, *Beyond Brexit: Towards A British Constitution* (IB Tauris 2019). Pp. 172

3.1 Federalism as a workable concept in the UK

Despite the various periods of constitutional unsettlement in the UK, federalism has remained an idea that has never been attempted or realised. Every time the proposal re-emerges, it tends to have more detractors than promoters. For instance, the Kilbrandon commission (discussed in chapter 1), in their final report on the constitution in 1973, heavily dismissed and characterised federalism as "a strange and artificial system," and opted instead for devolution as a solution to providing territorial stability at the time.[45]

The majority of those who argue against federalism in the UK often base their rationale on two main factors. The first factor is ideological in nature. In that several critics of federalism in the UK argue that dividing sovereignty away from the unitary centre would weaken the authority of Parliament and this weakness would threaten the unity of the UK. For example, when analysing the constitutional proposals that were presented as potential solutions to the Irish home rule debates in the early 19th century, John Kendle put forward that any solution that weakened the central authority of the Union (which included federalism) would result in "a weakening of both the United Kingdom and the Empire." [46] Similar reservations were made by the critics of devolution, but these were softened on the basis that devolution allows for both the dispensation of power and more, significantly, the retention of sovereignty at the centre.[47]

The second factor is functional in nature. In that, a significant number of critics of federalism in the UK put forward that the institutional framework of federalism would create territorial instability because of England's dominance within the Union. Lessons can be drawn from the examples of the USSR, Yugoslavia, and Czechoslovakia – whereby in a federal system where one country dominates, the settlement will most likely collapse.[48] Furthermore, as evaluated in the chapter on England, an English Parliament and Government would rival the UK Parliament and Government, potentially weakening the authority of the centre (which then ties back to the above argument).

In response to the ideological criticism, the 'fusion of powers' in the UK's constitutional order has "produced a curious contradiction: legislative supremacy in theory eclipsed by executive control in practice." [49]As highlighted in the previous chapters of this thesis, executive parliamentary dominance has been the central cause for most of the constitutional issues exposed and exacerbated by Brexit.[50]And at the current trajectory, it will only continue to contribute to this period of constitutional unsettlement. Thus, rather than strengthening the UK's Union, the UK Government's ability to rely on Parliamentary Sovereignty has had the opposite effect of being the central catalyst currently weakening the UK's Union. In response to the functional criticism, chapter 5 of this thesis argued that one way of accommodating

[45] Royal Commission on the Constitution (Kilbrandon Report) (1973).
[46] Kendle, Ibid n. 29. Pp. 16

[47] For further discussion on this see; John Kendle, *Federal Britain: A History* (Routledge 1997).

[48] Bogdanor, Ibid n. 33.Pp.186
[49] David Kenny and Conor Casey, 'The Resilience of Executive Dominance in Westminster Systems: Ireland 2016-2019' (2021) Public law 355.

[50] See: Gianfranco Baldini, Edoardo Bressanelli and Emmanuel Massetti, *The Brexit Effect: What Leaving the EU Means for British Politics* (Routledge 2023). Pp. 47 – 50.

England in a post – Brexit constitution would be to extend the devolution deals into regionalism. The newly divided regional constituent units would be institutionally similar to Scotland, Wales and NI. This proposal would overcome the fears of territorial instability concerning English dominance. As put forward by Erk and Anderson, "the general observation seems to be that federalism tends to be more stable with multiple constitutional units rather than two or three large units or a single dominant one." [51]

In addition to the above, as discussed in chapter 6, the UK Internal Market Act 2020 introduces – domestically – an internal market as a shared regulatory space for the exercise of UK and devolved competences concurrently. This points to embryonic aspects of federalism emerging within / around existing devolution structures.

Overall, it is clear that the key criticisms around introducing federalism in the UK can be convincingly countered - federalism can provide a workable constitutional framework in the UK, albeit with reforms being made to the governance of England. In addition to this, embryonic elements of federalisms are beginning to emerge in the UK's post- Brexit territorial constitution.

4. A hybrid federal UK

As exemplified in the chapter, when federalism in the UK is proposed, it is often based on the assumption of an entirely symmetrical federal model. In addition to this, most of the criticisms aimed at federalism in the UK, are again, often based on the assumption of symmetrical federalism.[52] This heavy focus on symmetrical federalism can be attributed in part to the fact that most discussions on federalism and its application in the UK, fail to explicitly identify and/or acknowledge the existence of the other distinct institutional models of federalism.

In this current period of constitutional unsettlement, the above approach seems to have been continued. As aforementioned, for the most part, the proponents of federalism in the UK post – Brexit favour symmetrical federalism. The rationale for this approach is often based on the consequences of failing to consider the other federal models. In addition, a prevailing argument towards symmetrical federalism in the UK is based on the view that the inherent asymmetrical nature of the UK's territorial constitution is a problem. Therefore, we need to eliminate the asymmetry and replace it with symmetrical or overarching systemic solutions. One such proponent of this argument is Ackerman, who proposes that to avoid a dis-United Kingdom, the UK's territorial constitution should be transformed from the current asymmetrical arrangements, to a fully symmetrical federal arrangement.[53]

[51] Jan Erk and Lawrence Anderson, 'The Paradox Of Federalism: Does Self-Rule Accommodate Or Exacerbate Ethnic Divisions?' (2009) 19 Regional & Federal Studies 191.

[52] For instance, as mentioned above, the Kilbrandon commission rejected federalism. The rationale behind their rejection reflected the assumption that they saw federalism in the UK as being entirely symmetrical.

[53] See for example: Ackerman, Ibid n. 6.

However, this thesis strongly argues against Ackerman's proposal. Instead, it proposes that a hybrid federal framework would be more suitable. As detailed further in this section, full equality among the constituent units cannot be fully realised – given the cumulative or compounded nature of the two sources of asymmetry Brexit has exposed and exacerbated. Essentially, asymmetry among the constituent units becomes the default. Over time nevertheless, I envision that the asymmetrical nature of this model will be progressive and soften as the effects of Brexit fade. Therefore, full-strength asymmetry would become unnecessary as time progresses, leaving only the pre-existing historical and inherent asymmetries. At the centre, opportunities for symmetrical reform are welcomed, as they will help address and manage several Brexit-related effects, including the severely strained intergovernmental relationship between the UK Government and its devolved counterparts.

The implementation of the hybrid federal model in the UK would require the workings of the state, both at the centre and at the constituent units to be revisited. Thus, this section will discuss the issues that would need to be considered when setting out the hybrid federal framework – regarding principles, competence allocation, and institutions.

4.1 Hybrid federal framework: Issues for consideration at the centre

To maximise the effectiveness of this hybrid model to the challenges Brexit presents, the workings of the state, both at the centre and at the constituent units, need to be revised. This would entail reforming and establishing new constitutional principles and institutions. At the federal level, revising the relationship between the centre and the constituent units would involve fully realising shared decision-making. As detailed below, this would include rebalancing the constitutional understanding of Parliamentary Sovereignty and reforming the institutional set-up and functions of the central Executive and Legislature.

Rebalancing the understanding of Parliamentary Sovereignty

As discussed earlier in the chapter, the principle of shared rule underpins federalism. Currently, the UK devolution framework allows for the realisation of shared rule, but this is subject to the principle of Parliamentary Sovereignty. Thus, for shared rule to be established and unfettered in a hybrid federal UK – there would need to be a consideration on rebalancing Parliamentary Sovereignty.

As mentioned in section 2 of chapter 1, devolution can be understood through two contrasting views in relation to how it affects and fits into the UK's constitution. These two contrasting readings of the constitutional understanding of devolution can be summarised under the umbrella of first, the traditional understanding of devolution through constitutional theory, and secondly, the contemporary understanding of devolution through practice and political reality.[54] The first reading views devolution through the lens of the 'Diceyan' understanding of Parliamentary Sovereignty (PS), which views devolution and its institutions as subsidiary to

[54] Mark Elliott, 'The British Constitution, Devolution And "Doublethink"' <https://publiclawforeveryone.com/2012/09/13/the-british-constitution-devolution-and-doublethink/> accessed 3 December 2018.

Westminster.[55] Alternatively, the contemporary reading views devolution through the lens of the 'political reality' understanding of PS. Through this reading, devolution is viewed as placing political limitations on Parliament's law-making powers in practice, and this can be exemplified by the Sewel Convention, and the referendum locks under section 1 of the Scotland Act 2016, and section 1 of the Wales Act 2017.[56] The courts also accept this practical reality of PS, as confirmed by Lord Hope in the *Jackson* case.[57]

The UK Government and its devolved counterparts differ on which reading they subscribe to, and this became more pronounced during the Brexit withdrawal process. The UK Government's actions made it clear that they subscribed to the traditional reading, whilst the devolved Government's actions in opposition to the UK Government made it clear that they subscribed to the contemporary reading. Additionally, when the traditional approach was challenged by the contemporary, the former often had the upper hand, as exemplified by the enactments of certain Brexit-related pieces of legislation (in particular, the EU (Withdrawal) Act 2018, the EU (Withdrawal Agreement) Act 2020, and the UK Internal Market Act 2020). These clashes underline the fact that the traditional understating is the dominant approach, and it is still very much applicable in modern times.[58]

As put forward by the Welsh Government in their White Paper titled 'Reforming our Union: Shared governance in the UK,' Brexit has exposed that the traditional understanding of PS is no longer fit for purpose - therefore, the understanding of the doctrine needs to be "adjusted…just as it was adjusted to take account of the UK's membership of the European Union."[59] This thesis agrees with the Welsh Government and adds that for the hybrid federal system to operate effectively in the UK, the 'Diceyan' understanding of PS should be eroded. As PS, through this understanding, makes the constituent units/devolution settlements unequal and insecure since "each and every part of [the constitution] is changeable at the will of Parliament." [60] This was exemplified when Westminster exercised its sovereignty when it abolished devolution in NI in 1972. More significantly, though, as aforementioned, executive parliamentary dominance through the 'Diceyan' understanding of PS has been the central cause for most constitutional issues exposed and exacerbated by Brexit.

In contrast, the contemporary approach allows for resolving some of these issues. For instance, the Welsh and Scottish Governments have advocated for the Sewel Convention to be legally entrenched (meaning Westminster cannot unilaterally pass legislation that overlaps with devolution without devolved consent). As exemplified in chapters 3, 4, and 5, their rationale is that Westminster has sidestepped the Sewel Convention several times. This has resulted in the devolved administrations voicing that their competences are being eroded. The

[55] Roger Masterman and Colin Murray, *Constitutional And Administrative Law* (2nd edn, Pearson Education Limited 2018) pp.131
[56] See: Vernon Bogdanor, *Devolution In The United Kingdom* (Oxford University Press 2001).
[57] Jackson v Her Majesty's Attorney General [2005] UKHL 56, para 120
[58] See: Gianfranco Baldini, Edoardo Bressanelli and Emanuele Massetti, 'Back To The Westminster Model? The Brexit Process And The UK Political System' (2021) 42 International Political Science Review 329. See also: Stephen Tierney, 'The territorial Constitution and the Brexit Process' (2019) 72 Current Legal Problems 59.

[59] 'Reforming Our Union: Shared Governance In The UK' (*Gov.wales*, 2019) <https://gov.wales/sites/default/files/publications/2019-10/reforming-our-union-shared-governance-in-the-uk.pdf> accessed 2 April 2020.

[60] Albert Dicey, *Introduction to the study of the law of the constitution* (London: Macmillan 1915) pp. 85-86

SNP-led Scottish Government have gone further and utilised this as an additional reason for independence. Reading the constitution through the contemporary approach institutes a principle, which is the respect of the autonomy of the individual devolved jurisdictions.[61] This principle is embedded under the Sewel Convention. If the contemporary approach were dominant, the UK Government would have arguably acted differently, as there would be a higher obligation to strictly adhere to the principle of respecting the autonomy of the subunits.[62]

In all, under a hybrid federal UK, there will need to be serious consideration on rebalancing the dominance of the 'Diceyan' approach to PS, in order to allow the contemporary approach to take precedence. Loughlin and Tierney and put forward a similar argument, as they state that due to the political limitations (and other factors including Parliament's delegation of open-ended secondary law-making powers), the understanding of PS through the Diceyan view should be qualified.[63]

Institutionalising shared rule in a hybrid federal UK: Executive

As noted earlier in the chapter, in the context of federalism, the principle of shared rule is institutionalised at the central/ federal level. As shall be examined below, in comparison, shared rule is limited on an institutional level in the UK. Thus, for shared rule to be fully realised on an institutional level under a hybrid federal UK, consideration would need to be given on how to reform the central Executive and Legislature to realise this.

In many federal states, such as Belgium, the intergovernmental framework, and in particular, the shared decision mechanism, is governed under a statutory basis, with all constituent units represented.[64] As shall be explored further below, in the UK context, the intergovernmental framework is governed by political conventions, the UK Government is hegemonic, and not all of the constituent units are represented. Thus, for shared rule to be institutionalised under a hybrid federal UK, consideration would need to be given on how to reform the central Executive.

As discussed in chapter 1, intergovernmental interactions in the UK take place in a number of formal and informal structures, and processes for bilateral and multilateral agreements at both vertical (involving the centre) and horizontal (between the constituent units) levels.[65] Following the establishment of devolution, and up until early 2022, the central IGR machinery was the Joint Ministerial Council (JMC). This executive infrastructure was chaired by the PM, with meetings attended by the SoS for each devolved jurisdiction and the devolved heads of

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[61] Royal Commission on the Constitution (Kilbrandon Report) (1973).

[62] See: Mark Elliottt, 'United Kingdom: Parliamentary Sovereignty under Pressure' (2004) 2 International Journal of Constitutional Law 545.

[63] Martin Loughlin and Stephen Tierney ' The Shibboleth of Sovereignty' (2018) 81 Modern Law Review 989.

[64] For a thorough analysis on the legal nature of IGR in Belgium see: Johanne Poirier, 'Formal Mechanisms of Intergovernmental Relations in Belgium' (2002) 12 Regional and Federal Studies 24.

[65] Paul Anderson, 'Plurinationalism, Devolution And Intergovernmental Relations In The United Kingdom' in Yonatan Fessha, Karl Kossler, and Francesco Palermo (eds), *Intergovernmental Relations in Divided Societies* (Palgrave Macmillan 2022) Pp. 97 - 100

Government. Other UK Government ministers and their devolved counterparts were invited to attend.

Despite being established to provide a platform for the execution of shared decision-making, the JMC did not allow for the guaranteed participation and execution of shared decision-making for the devolved territories. Instead, input mostly amounted to no more than a consultative role. From 1997 until the end of the tenure of the last Labour UK Government, this was not problematic, however, given that Labour, the architects of devolution, formed the UK, Welsh, and Scottish Governments. This ensured that IGR were cordial and cooperative and operated mainly through informal channels.[66] Following on from this period, relations very slowly began to deteriorate given that by 2010, each Government in the UK was now run by a different party, with differing political ideologies.[67] This deterioration was then accelerated following the Brexit referendum in 2016, whereby relations became severely strained, and political disputes more common.[68]

The inability of the IGR framework to provide for consensual decision making became much more pronounced during the Brexit withdrawal process, whereby devolved concerns were mainly ignored by the UK Government, further contributing to the already heightened IGR tensions. For instance, the JMC (EU Negotiations), which was established to facilitate intra-UK negotiations and coordination related to Brexit, proved the inadequacies in the UK's IGR framework. In that, despite the unprecedented levels of intergovernmental interactions, following the Brexit referendum, the JMC(EN) failed to meet its objective of achieving a UK – wide approach to Brexit. This was because there were limited opportunities for IG compromise, resulting from the ad hoc and weak nature of the JMC(EN) and, more broadly, UK IGR channels.[69] This ad hoc and weak nature of the UK IGR can be owed to the inherent constitutional dominance of the UK Government over its devolved counterparts. Deriving from the fact that the IG framework is governed by conventions (therefore non-legally binding), moreover, the devolved Governments have no veto powers, and the UK Government have the final say over decisions.[70]

Given the competing constitutional visions exposed by Brexit and the inadequacies within the IGR framework to accommodate these visions and manage tensions, there was a clear need for substantive reform in order to manage the constitutional turbulence and rebuild the IGR.[71] As

[66] Joanna George, 'UK Intergovernmental Relations: Pre Vs Post-Brexit Dynamics' (*Constitutional Law Matters*, 2022) <https://constitutionallawmatters.org/2022/06/uk-intergovernmental-relations-pre-vs-post-brexit-dynamics/> accessed 2 August 2022.

[67] Nicola McEwen, Wilfried Swenden and Nicole Bolleyer, 'Introduction: Political Opposition In A Multi-Level Context' (2012) 14 The British Journal of Politics and International Relations 187.

[68] During the Brexit withdrawal process, there were some promising signs of positive developments in the UK's IGR, as evidenced in chapter 6, by the excellent progress made by the common frameworks. However, this was short lived, due to the adhoc nature of IGR channels in general, as shall be discussed further below in the chapter.

[69] Paul Anderson, 'Plurinationalism, Devolution And Intergovernmental Relations In The United Kingdom' in Yonatan Fessha, Karl Kossler, and Francesco Palermo (eds), *Intergovernmental Relations in Divided Societies* (Palgrave Macmillan 2022). Pp. 92 – 105

[70] Nicola McEwen, 'Still Better Together? Purpose And Power In Intergovernmental Councils In The UK' (2017) 27 Regional and Federal studies 667.

[71] Paul Anderson, 'Plurinationalism, Devolution And Intergovernmental Relations In The United Kingdom' in Yonatan Fessha, Karl Kossler, and Francesco Palermo (eds), *Intergovernmental Relations in Divided Societies* (Palgrave Macmillan 2022). Pp. 93

a result, in 2018, the UK Government and its devolved counterparts commissioned a joint review on reforming the inadequate IG framework, and in January 2022, the review published its report.[72]

The overhaul of reforms listed in the report brought about significant changes to the old order. For example, the new reforms scrapped the JMC and replaced it with a three-tier system of IG forums, which will take place on a more structured and regular basis rather than on an ad-hoc basis. The top tier, known as the 'Prime Minister and Heads of Devolved Governments Council,' is where the heads of the UK's Governments meet, and the PM chairs this. The bottom tier consists of Interministerial Groups (IMGs), which engage in portfolio-level areas of mutual interest, such as the IMG (Trade). With a rotating chair and venue, IMG's are far less hierarchal than the top tier. The middle tier is the Interministerial Standing Committee (IMSC), which considers and resolves any issues that escalate from the lower tier and brings together strategic considerations affecting many different domestic and international portfolios. An additional key element to this new structure is the establishment of an independent IGR Secretariat, whose role involves overseeing the new dispute resolution procedure. By providing for independent mediation, this new procedure limits the UK Government's previous ability to act as a judge, jury, and executioner of IG disputes.[73] Decisions under this new machinery will be consensual based and built on the principles of "maintaining positive and constructive relations, based on mutual respect for the responsibilities of the governments and their shared role in the governance of the UK."[74]

These reforms ultimately increase the role and voices of the devolved territories within the UK's IGR. They also create a sense and culture of joint and equal partnership amongst all Governments. However, these reforms fail to guarantee that the devolved voices are incorporated into shared decision-making. Mainly because the new IGR machinery, like the JMC, is governed by political conventions. Therefore, the hegemony of the UK Government is legally retained – reinforcing the hierarchical nature of devolution. Overall, the new changes result in the return of old critiques that IGR in the UK relies on the political will of the UK Government at the expense of its devolved counterparts.[75] In addition, the new reforms fail to address English representation, which leaves the UK Government to continue to 'wear two hats.' This essentially grants England hegemony within the framework.[76]

As evidenced above, the current reforms fail to realise shared rule at the Executive level in the UK fully. The main two issues are in relation to the constitutional hegemony of the centre and the failure to accommodate England. Thus, for a hybrid federal UK, consideration could be

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[72]'The Review Of Intergovernmental Relations' (*Assets.publishing.service.gov.uk*, 2022) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1046083/The_Review_of_Intergovernmental_Relations.pdf> accessed 2 August 2022.

[73] Nicola McEwen, 'Intergovernmental Relations Review: Worth The Wait?' (*UK in a changing Europe*) <https://ukandeu.ac.uk/intergovernmental-relations-review/> accessed 2 August 2022.

[74] 'The Review Of Intergovernmental Relations' (*Assets.publishing.service.gov.uk*, 2022) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1046083/The_Review_of_Intergovernmental_Relations.pdf> accessed 2 August 2022.

[75] Paul Anderson and Johanna Schnabel, 'Review Of Intergovernmental Relations: The New Interministerial Structures Are A Step In The Right Direction' (*Blogs.lse.ac.uk*, 2022) <https://blogs.lse.ac.uk/politicsandpolicy/intergovernmental-relations-review/> accessed 2 August 2022.

[76] Michael Kenny and Jack Sheldon, 'Green Shoots For The Union? The Joint Review Of Intergovernmental Relations - Bennett Institute For Public Policy' (*Bennett Institute for Public Policy*, 2022) <https://www.bennettinstitute.cam.ac.uk/blog/union-joint-review/> accessed 2 August 2022.

made on governing the UK's IGR framework under a statutory basis, with all subunits represented.[77] Concerning English representation, this could be achieved by incorporating the leaders of the reformed Combined Authorities (as discussed in the chapter on England) into the IGR framework. This would however raise the issue of 'who speaks for England?' As mentioned in the England chapter nonetheless, the 'problem' of England regarding Brexit is not over constitutional recognition and thus voice for England, rather it is the governance of England. Therefore, reforming the UK's IGR, as above, would help to some extent deal with the constitutional issues associated with the UK internal market. In particular, the effects of the UKIMA 2020, as analysed in chapter 6. The thesis agrees with the devolved administrations and several constitutional scholars in that the common frameworks are an effective tool for safeguarding the UK's internal market.[78] Thus, by accommodating the devolved English regions within the IGR framework, the constitutional effects associated with the UK internal market will be diminished - English dominance, and the rolling back of devolved regulatory competences.

Institutionalising shared rule in a hybrid federal UK: Legislature

A common feature in most Upper Houses of bicameral federal Parliaments is the representation of the constituent units. This is exemplified in the USA (Senate) and Australia (senate), where members are directly elected. Also, in Austria (Bundesrat) and India (Rajya Sabha), where members are indirectly elected by the members of the subunit's legislatures. In addition, in Germany (Bundesrat), where members are drawn from the subunit Governments, and in Canada (Senate), where members are appointed centrally.[79] This feature allows for a vast majority of competences to be concurrent or shared, which ensures strong participatory rights in the legislative making at the centre.[80] In the UK context, the House of Lords (HoL) does not provide for the legislative representation of the subunits. Nonetheless, the House of Commons (HoC) provides for Welsh, Scottish, English, and NI seats. Significantly however, unlike the Upper Houses of most federal Parliaments, the HoC does not provide for concurrency. Thus, under a hybrid federal framework in the UK, there would need to be consideration over reforming the HoL to provide for legislative shared rule.

Reforming the HoL has been on the agenda within the UK for many years. Despite limited progress on the matter, there have been some significant breakthroughs, including the enactments of Parliament Acts 1911 and 1949, which dictated the subordinate nature of the chamber. Moreover, the Life Peerages Act of 1958 allowed female peers for the first time and introduced the creation of life peers appointed by the Government. And the House of Lords Act 1999, which significantly reduced the HoL's membership by removing most of the

[77] For a thorough analysis on the legal nature of IGR in Belgium see: Johanne Poirier, 'Formal Mechanisms of Intergovernmental Relations in Belgium' (2002) 12 Regional and Federal Studies 24.
[78] See: Kenneth Armstrong, 'The Governance Of Economic Unionism After The United Kingdom Internal Market Act' (2021) 84 The Modern Law Review 635. See also: Michael Dougan and others, 'Sleeping With An Elephant: Devolution And The United Kingdom Internal Market Act 2020' (2022) 138 Law Quarterly Review 650.
[79] Meg Russell, *Reforming The House Of Lords: Lessons From Overseas* (Oxford University Press 2004). Pp.51
[80] Tanja Börzel, 'What Can Federalism Teach Us About The European Union? The German Experience' (*Chathamhouse.org*, 2003) <https://www.chathamhouse.org/sites/default/files/public/Research/Europe/borzel.pdf> accessed 27 April 2021.

remaining hereditary peers.[81] The overall trajectory of HoL reform since 1911 can be summarised as follows:

> "The Second Chamber began the twentieth century as a hereditary body; by its end, it was a predominantly appointed one. At the start of the twentieth century, peers were, because of their aristocratic nature, very much a mixed bag when it came to capabilities, knowledge, and experience; by the close of the century, the Lords contained world-class experts from business, education, medicine, science, etc… The House of Lords began the twentieth century with the power to veto any Government's legislation and budget; it ended the century with its veto over ordinary legislation confined to a one-year delay and its ability to block financial Bills removed entirely, so that its legislative capacity focused mostly on non-binding amendments. At the start of the twentieth century, the Second Chamber operated according to a relatively simple set of procedural guidelines and rules; by the century's close, it had instituted far more rigorous scrutiny procedures and developed significant specialisation through the development of a highly respected select committee system, both of which had greatly enhanced its ability to apply expert insights to much of its Parliamentary work." [82]

Since the House of Lords Act 1999, significant reforms have yet to be made to the HoL. The last major Government attempt to reform the HoL was during the coalition Government's tenure. The Government introduced the HoL reform Bill 2012, which among other reforms, would alter the composition of the HoL. The Bill proposed establishing a HoL, predominantly (80%) but not fully elected. Most members would be elected via proportional representation, using regional boundaries – therefore, the peers would represent a specific region within the UK. In addition, the new proposed HoL would be much smaller in terms of membership. Members would also serve 15-year, non-renewable terms. Nonetheless, following strong opposition from within the Conservative party backbenchers, the coalition Government withdrew the Bill.[83]

Following the December 2019 general election, the discussion of reforming the HoL has gained renewed attention. For instance, the Conservative party's manifesto in the election flagged the subject as a possible matter for discussion for the Commission on the constitution, democracy, and human rights – a Commission which was proposed to investigate 'the broader aspects of our constitution.' The subject matter also featured in a report by the Labour Party's Commission on the UK's Future. The report recommended for the replacement of the HoL with an elected Assembly of the Nations and Regions.[84] This is similar to the Labour party's 2015 manifesto proposal for the establishment of an elected Senate of the Nations and Regions. The introduction and evolution of devolution has increased the focus on establishing a UK territorial Upper House. As developments on devolution occur, connections are made with developments of HoL reform. Alongside Labour, the other major political parties in the UK have at some

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[81] Ibid, pp.12 -15

[82] Peter Dorey and Alexandra Kelso, *House Of Lords Reform Since 1911- Must The Lords Go?* (Palgrave Macmillan 2011). Pp. 217

[83] Meg Russell, *The Contemporary House Of Lords* (OUP Oxford 2013). Pp. 266

[84] 'A New Britain: Renewing Our Democracy and Rebuilding Our Economy. Report of the Commission on the UK's Future.' (*Labour.org.uk, 2022*) <https://labour.org.uk/wp-content/uploads/2022/12/Commission-on-the-UKs-Future.pdf> accessed 14 December 2022

point voiced their support for this model. For instance, following the December 2019 General election, the Conservative UK Government, in its efforts to 'cement the Union,' put forward a proposal for the establishment of a model that allows for legislative representation of the subunits.[85] Moreover, the Liberal Democrats sponsored 2012 HoL reform Bill opted for similar arrangements, as discussed above. Nonetheless, one of the biggest hurdles to realising this model thus far has been in regard to the lack of devolved structures in England.[86] However, as advocated for in the England chapter, by accommodating England through regionalism in a post – Brexit constitution, realising this model will not be as challenging.

In terms of composition, the newly reformed chamber could be indirectly elected by members of the subunit's legislatures (as in India and Austria). This is because the alternatives – direct election or central appointment raise several issues. Regarding the former, many proposals that advocate for HoL reform propose for direct election (for example, the HoL reform Bill 2012). This is arguably because England has no devolution structure to nominate people. So, the indirect election becomes plausible in a reformed hybrid federal state that accommodates England. Moreover, if members are directly elected (as in USA and Australia), this would result in Party dominance, where members vote strongly along party lines. In addition, an elected Upper House would compete with the legitimacy and power of the HoC - which, as mentioned above, following the Parliaments Acts of 1911 and 1949, dictated the subordinate nature of the Upper chamber. In terms of central appointments (as in Canada), the reputation of the Upper chamber "as a territorial chamber is damaged by the fact that appointments are made by the federal prime minister with no provincial input." [87]

Regarding territorial seat share in the Upper chamber, each subunit could be granted equal representation regardless of population size (as in USA and Australia) and not be based on disproportionate weight being given to smaller subunits (as in Austria). This is because, as put forward by Iain McLean, "the principle of territory gives equal votes to each territory regardless of population."[88] Moreover, this newly reformed body is there to provide a representation of the subunits on an equal basis, whilst the HoC remains to provide weighted representation based on population size.

Many proposals for HoL reform focus more on composition and miss out on functions and powers.[89] This suggests that many favour keeping the formal powers of the chamber as they are now. The HoL enjoys more formal powers than many Upper chambers in the world. For instance, apart from its legislative function, it can block some policies - Bills originating in the chamber and secondary legislation, and it can also delay Bills originating in the HoC for up to a year.[90] This chapter agrees that it is best not to alter the functions and formal powers of the

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[85] Meg Russell, 'Lords Reform Is Back On The Agenda: What Are The Options?' (*The Constitution Unit Blog*, 2020) <https://constitution-unit.com/2020/02/23/lords-reform-is-back-on-the-agenda-what-are-the-options/> accessed 27 April 2021.

[86] Meg Russell, 'Attempts To Change The British House Of Lords Into A Second Chamber Of The Nations And Regions: Explaining A History Of Failed Reforms' (2018) 10 Perspectives on Federalism 268.

[87] Ibid.

[88] Iain McLean, Arthur Spirling and Meg Russell, 'None Of The Above: The UK House Of Commons Votes On Reforming The House Of Lords, February 2003' (2003) 74 The Political Quarterly 298.

[89] Meg Russell, 'A Stronger Second Chamber? Assessing The Impact Of House Of Lords Reform In 1999 And The Lessons For Bicameralism' (2010) 58 Political Studies 866.

[90] Ibid.

reformed territorial Upper chamber, which then also ensures the supremacy of the lower chamber - a common feature in most bicameral Parliaments.[91]

4.2 Hybrid federal framework: Issues for consideration at the constituent level

As aforementioned, the asymmetrical effects caused by Brexit result from two sources of asymmetry - the inherent constitutional imbalance of the UK's territories and the differential stakes in EU membership. As a result, entirely symmetrical solutions among the constituent units will not be plausible. For instance, owing to the cumulative or compounded nature of these two sources of asymmetry, it has been demonstrated that unique solutions are required to resolve the Irish border conundrum, which only applies to NI. Moreover, solutions that provide ways in which England could be accommodated in a post – Brexit constitution would not apply to the other jurisdictions. Thus, under a hybrid federal UK, constitutional reform among the constituent units would be carried out through asymmetrical solutions. Nonetheless, as aforementioned, I envision that the asymmetrical nature of this hybrid model will be progressive and soften as the effects of Brexit fade. Therefore, over time, full-strength asymmetry would become unnecessary – leaving only the pre-existing historical and inherent asymmetries.

When it comes to the constitutional reforms among the constituent units, a central part for discussion will be over the implementation of the principle of self – rule. As mentioned earlier in the chapter, at the core of federalism is the principle of self-rule. The principle allows the constituent units to exercise a degree of autonomy and authority over their own affairs. In the UK context, this principle is evidenced by the Devolution Acts, which outline a clear division of powers between the centre and the devolved jurisdictions. Concerning the specific competences, NI enjoys the powers currently not reserved or excepted under Schedule 2 of the Northern Ireland Act 1998. For Scotland, they currently enjoy the powers that are not reserved under Schedule 5 of the Scotland Act 1998. For Wales, they enjoy the powers that are not currently reserved under Schedule 7A of the Government of Wales Act 2006. As highlighted in chapter 1, these powers are asymmetrical in that between the three bespoke arrangements, the Welsh model has significantly more reservations, and the Scottish model has the fewest reservations. Some of these asymmetrical powers (especially in key policy areas) are based on stark pre–existing differences. For instance, powers over policing and justice are reserved in Wales, whilst in Scotland and NI, they are devolved. Moreover, social security benefits are fully devolved in NI, partially in Scotland, and reserved in Wales. Additionally, each devolved jurisdiction has varying levels of power over some taxes, with Scotland having the most devolved tax powers. Finally, in NI, powers over employment law and the civil service are devolved, whilst, for Scotland and Wales, such powers are reserved.

Rather than carrying over the existing UK reserved powers model, a hybrid federal UK will offer an opportunity to reconsider the allocation and sharing of competences (the opportunities for the latter have already been discussed in the previous section of this

[91] Meg Russell, *The Contemporary House Of Lords* (OUP Oxford 2013). Pp. 266

chapter). As shall be detailed below, this opportunity stems from the combination of federal related principles and the impacts of Brexit on the UK's territorial constitution.

The division of powers between the centre and the constituent units varies between federal states. The choice tends to depend on the local context, local preferences, the overall design of the federal state and the purpose of structuring the state as a federation. [92]For example, the constituent units in Belgium, Austria, and the United Arab Emirates have competences over foreign affairs, whilst in the USA, Canada, and Australia, foreign affairs is an exclusive power for the centre.[93] Furthermore, in Ethiopia, the constituent units have an explicit right to secession, which is uncommon in many federal states.[94] Moreover, in Germany, the constituent units have far less explicit competences than their counterparts in most federal states. However, due to the organisation of the state, the constituent units are able to concurrently exercise federal level powers through the Bundesrat.[95]

Under a hybrid federal UK, there are a number of issues that would form a central part of fresh discussions on the ex-ante competence allocation. To begin with, there would need to be some consideration on what competences would be allocated to the English regions. For instance, should the English regions be provided competences in the policy areas in which all three devolved territories currently enjoy? These policy areas include, for example, health, local government, the environment, education, housing and transport. Granting all the constituent units with similar powers boosts multilateral engagement (and reduces the need for bilateral engagement) when it comes to shared decision-making.[96] This arrangement would also prevent the English question from being "asked and re- asked."[97] Nonetheless, these powers are far greater than those proposed in the Draft Regional Assemblies Bill 2004 and currently enjoyed by the Greater London Authority and the Combined Authorities. As provided by Fabbrini, the principle of subsidiarity offers a general guide for the division of powers in a federal state. The principle suggests that matters should be handled at the most local level of government possible while still maintaining effective governance.[98] Thus, this principle (which guides the

[92] Cheryl Saunders C, 'The division of powers in Federations' (Institute for democracy and electoral assistance) < https://constitutionnet.org/sites/default/files/2020-02/divisions-of-powers-in-federations.pdf> accessed 29 June 2023.

[93] Ayman El-Dessouki, 'Domestic Structure And Sub-National Foreign Policy: An Explanatory Framework' (2018) 3 Review of Economics and Political Science 102.

[94] Weller M, 'The UK Supreme Court Reference on a Referendum for Scotland and the Right to Constitutional Self-determination: Part II' (Blog of the European Journal of International Law, 2022) < https://www.ejiltalk.org/the-uk-supreme-court-reference-on-a-referendum-for-scotland-and-the-right-to-constitutional-self-determination-part-ii/> accessed 2 July 2023.

[95] Arthur Gunlicks, *The Länder And German Federalism* (Manchester University Press 2003). Pp. 55
[96] The increasing trend of bilateral practice in UK devolution reduces the possibility of cooperation on a multi-lateral basis. For detailed analysis see; Nicola Mcewen and Bettina Petersohn, 'Between Autonomy And Interdependence: The Challenges Of Shared Rule After The Scottish Referendum' (2015) 86 The Political Quarterly 192.

[97] Richard Wyn Jones and Ailsa Henderson, *Englishness: The Political Force Transforming Britain* (Oxford University Press 2021). Pp. 185
[98] Federico Fabbrini, 'The principle of subsidiarity', in Takis Trimidas T, and Robert Schutze, (eds) *Oxford Principles of EU Law* (OUP 2016)

devolution framework to some extent) could be utilised in the consideration of English regional competences.

Another issue for consideration would be on matters to do with foreign affairs – for Scotland and NI. According to Michael Keating, devolved and federated Governments are increasingly involved in external actions driven by the below motives:

> “functional, that is the external extension of domestic competences, notably in economic development and cultural matters; political, which includes striving for recognition as nations, and a search for alliances and influences among other devolved and federated territories; ethical, including promotion of human rights, environmentalism and help for developing countries; policy learning and exchange; this can include learning about institutions and strategies as well as policies.” [99]

This is undoubtedly true for Scotland, as evidenced by the Scottish Government’s published policy paper, ' Scotland’s place in Europe.’[100] As discussed in chapter 3, in protecting Scotland’s national interests after Brexit, the paper set out several proposals to place Scotland’s position within the EU single market. To achieve this, the Scottish Government’s first preference was for independence with EU membership. Failing this, the second option was to persuade the UK Government to negotiate a Withdrawal Agreement with the EU that would see the UK as a whole, remain within the single market and customs union. If these two options were not viable, the paper then argued for ’a differentiated solution’ for Scotland – which would entail continued membership of the EU’s internal market for Scotland whilst the rest of the UK remains out. This would place Scotland in a similar position to NI – which achieved this status via the Ireland/Northern Ireland Protocol.[101] Providing Scotland with such high autonomy would arguably weaken Scottish nationalist sentiments of seceding from the UK’s Union – as demonstrated by the example of Quebec in Canada. Despite many spells in Government, the secessionist party in Quebec, Parti Quebecois has not managed to lead the province to independence successfully. This is owed to Canada’s containment strategy, embodied under its federal framework, which allows for high levels of autonomy and central representation.[102]

In the context of NI, as concluded in chapter 2, the political process has thus far failed to reach a conclusive imaginative solution to the Irish border conundrum. This is due to the two main challenges the current border regime (the Protocol) faces. As a result of these challenges and the associated implications, there is now a clear need for a new way forward, as the status quo is increasingly becoming untenable. As argued in chapter 2, one possible way forward is to introduce constitutional reforms which would allow for establishing a direct and meaningful role and voice for the cross-community in NI over the negotiations surrounding the future of the Irish border. However, under the current constitutional status quo, devolution in NI cannot

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[99]Michael Keating, 'The International Engagement Of Sub-State Governments' (*scottish.Parliament.uk*, 2010) <http://archive.scottish.Parliament.uk/s3/committees/europe/inquiries/euDirectives/documents/IntEngSubStateGovernmentsNov2010.pdf> accessed 22 June 2021.

[100] 'Scotland’s Place In Europe' (*Gov.scot*, 2016) <http://www.gov.scot/Resource/0051/00512073.pdf> accessed 16 April 2021.

[101] This would not however replicate the Irish border conundrum, as the Scottish context does not give rise to the political sensitives found in the NI context – which have been central to the conundrum.

[102] Stephen Tierney, 'Federalism in a Unitary State: A Paradox too far?' (2009) 19 Regional & Federal Studies 23

be stretched so far to allow for this. However, under a hybrid federal UK, such constraints (on competences) could be overcome to allow for the realisation of this proposal. Affording such powers for NI would allow for the current challenges to be addressed, and also ensure that the new border regime is shaped by the interests of the cross-community in NI, and not just the UK Government, whose unilateral action has thus been based on the purist of party-political interests.[103]

The principle of self-rule has a close link with the principle of self -determination in that they both revolve around the concept of a group of people or community having the right to govern themselves and make decisions about their own affairs. The principle of self – determination extends this concept however, to include broader decisions on constitutional status from an internal and external form. Decisions on the latter include independence, and unification with another state, and for the former, a new form of political arrangement within the existing state.[104] The principle of self-determination is recognised in international law, and is enshrined under the UN Charter, UN General Assembly Resolution 1541 (XV), and Article 1 of the UN Covenants on Human Rights. In the UK context, the recognition of the principle of self-determination has been complex. As mentioned in chapter two, the Northern Ireland Act 1998 includes provision for external self -determination in NI. Section 1 of the Act provides the people of NI with a right to determine their constitutional status and provides mechanisms for a border poll. Aside from this, there are no other express statutory recognitions or guarantees in the UK for the principle of self -determination. Rather, aspects of self – determination have been observed in several referendums ran in the devolved jurisdictions including the 1998 devolution referendums, the 2011 Welsh devolution referendum, and the 2014 Scottish independence referendum – whereby, the people of the respective devolved jurisdictions, decided on their constitutional future.[105]The UK Supreme Court in the Scottish referendum Bill case dealt with the issue of the external form of self – determination in relation to Scotland. Their conclusion entailed that the UK's constitution does not recognise external self – determination unless the UK Government and Parliament have consented to it or allowed for its constitutional recognition.[106]

As discussed in chapter 3, the UK's constitution is now clashing with the SNP's electoral mandate to hold a second impendence referendum. This clash has resulted in exacerbating the UK's state of constitutional unsettlement – further edging towards a constitutional crisis. Thus, under a hybrid federal UK there would need to be some serious consideration on potentially allocating Scotland powers to do with the UK's Union.

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[103] David Phinnemore, 'The Protocol On Ireland/ Northern Ireland: A Flexible And Imaginative Solution For The Unique Circumstances On The Island Of Ireland?' in Martin Westlake (ed) *Outside the EU: Options for Britain* (Agenda Publishing 2020). Pp 170

[104]Yonha Alexander and Robert Friedlander, (eds) *Self-determination: national, regional, and global dimensions* (Routledge 2019). Chapter 1.

[105] See for example: Elisenda Adam , 'Self-determination and the Use of Referendums: the Case of Scotland' (2014) 27 International Journal of Politics, Culture, and Society 47.

[106] Reference by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998 [2022] UKSC 31

In concluding this section, it is clear to see that hybrid federalism would offer an opportunity to significantly rethink the UK's constitutional order - beyond the boundaries of devolution, and in light of the current period of constitutional unsettlement. As demonstrated in the previous chapters of this thesis, the devolution framework cannot be stretched far enough to be able to introduce some of the potential reforms identified to address the asymmetrical constitutional issues exposed and exacerbated by Brexit. For instance, as discussed in chapter 2, the proposed solution to the process on resolving the Irish border conundrum would require the decentralisation of matters to do with foreign affairs – which under the current devolution framework is highly unlikely. Furthermore, the devolution framework preserves the hegemony of the centre, allowing for unilateral action often at the detriment of the devolved jurisdictions as noted in chapters 3,4, and 6 in particular. Furthermore, as discussed in chapters 5 and 6, the current devolution framework has failed to accommodate England in the current post – Brexit constitutional reforms - resulting in the rolling back of devolved regulatory autonomy. As noted in this section, the principles that will guide the hybrid federal framework will be able to go beyond the boundaries of devolution, and better address the asymmetrical constitutional effects of Brexit. For instance, the realisation of the principles of self-rule and shared rule will allow for a rebalancing of power relations in the UK, preventing for instance unilateral action from the centre, and the rolling back of competences. Furthermore, these principles would allow for the realisation in full of some of the proposed solutions mentioned in the jurisdictional chapters e.g., the proposed reforms mentioned in chapter 2 on the process of addressing the Irish border conundrum. In chapter 3, it was noted that central to the calls for indyref 2 in Scotland was the 'broken vow,' which involved treating Scotland as an 'equal partner' within the Union. Hybrid federalism would provide space for treating Scotland as an equal partner, and more broadly, the full realisation of the background assumptions made in the vow. Hybrid federalism also aligns with some of the constitutional demands raised by the Welsh Government as noted in chapter 4. In all, the principles that will guide hybrid federalism will provide the necessary space required to rethink the UK's constitutional order in light of the current period of constitutional unsettlement – something which the devolution framework does not currently provide.

I do accept that hybrid federalism is open to criticism and obstacles. For instance, this model might include not only the refusal by the centre but also the constituent units to engage in such reform – as there is an acknowledged risk that this model might not end up pleasing any or everyone. For example, the centre might not want to sacrifice its existing hegemonic power. The constituent units might feel that the principles that guide the scheme go too far, or not far enough. However, it must also be acknowledged that this model does provide both a practical and plausible solution to the current period of constitutional unsettlement. Especially given that no perfect alternative model has thus far been developed or tried, and those that have been proposed such as entirely symmetrical reforms - reproduce the effects they are trying to resolve.

5. Power to the people: Constitutionally recognising hybrid federalism in the UK

As highlighted in the above sections, realising hybrid federalism in the UK would require implementing radical constitutional reforms. At present, the UK's unitary constitution is unentrenched and uncodified, which means that it is easily amendable, and there is no single comprehensive document that sets out the structure of the state. Instead, the constitution derives from several sources, including statute law, common law, constitutional conventions, the royal prerogative, authoritative works, and, previously, EU law. Before the wide range of statutory

changes made to the constitution post-1997, the common law provided the basis of the constitution. As put forward by Sedley at the time

> "our constitutional law remains a common law ocean dotted with islands of statutory provision…the common law is the main crucible of modern constitutional law." [107]

However, post-1997, this view became nullified. This is because many constitutional reforms in the UK are now established through statute law. For example, the Devolution Acts of 1998, the Human Rights Act 1998, the Constitutional Reform Act 2005, the EU (Withdrawal) Act 2018, and the UK Internal Market Act 2020. Moreover, owing to the doctrine of Parliamentary Sovereignty, of all the UK's constitutional sources, statute law is the most important source, as it can override all other sources, including common law. For example, the War Damages Act of 1965 reversed the common law decision in the *Burmah Oil* Co case.[108] Given this, the constitutional implementation of hybrid federalism in the UK could be realised via the choice of two main ways: enacting a new piece of legislation(s) or by drafting a codified constitution.

Regarding the first route via statute law, this would see the enactment by Westminster of either a single Act (Act of Union) or several Acts specific to each jurisdiction. A new Act of Union would most certainly be a very comprehensive statute that could be de facto considered the new 'constitution.' This would be similar to Canada's Constitution Act of 1867 and New Zealand's Constitution Act of 1986. Nonetheless, enacting a new Act of Union would be best suited for wholesome symmetrical reform, and under this hybrid model, that would entail reforms at the federal level. Thus, enacting several different Acts specific to each constituent territory would be more suitable in clarifying the new asymmetrical regimes established away from the centre. As discussed in chapter 1, this legislative method follows the example of how devolution was brought about. As the devolved settlements have evolved, either amendments have been made to the original 1998 Acts (through secondary legislation) or entirely new Acts have been introduced that repeal or amendment the 1998 Acts. Such Acts include the Government of Wales Act 2006, the Northern Ireland (St Andrews Agreement) Act 2006, and the Scotland Act 2016). In this instance, this would mean realising hybrid federalism via amendments to and/ or enacting a new Wales Act, Scotland Act, Northern Ireland Act, England and the regions Act, and a new Act of Union (to introduce the reforms at the centre). To enhance the legitimacy of this process, these pieces of legislation should first be subjected to a referendum and the Sewel Convention. The biggest issue to comprehend if hybrid federalism was to be realised through this process, however, is the 'Diceyan' reading of PS. Thus far, the Brexit process has evidenced that this is the dominant reading. This approach highlights that devolution and its institutions are constitutionally not equal to Westminster, as the latter can at any point unilaterally interfere and even quash the former. On that basis, this would mean, for example, that these new constitutional reforms would be vulnerable to being abolished or regressed by any subsequent UK Parliament.[109] As already argued, to safeguard against this,

[107] Stephen Sedley, 'The Sound Of Silence: Constitutional Law Without A Constitution' (1994) 110 Law Quartley Review 270.

[108] Burmah Oil Co v Lord Advocate [1965] A.C. 75

[109] See Ackerman, Ibid n. 6. And also: Andrew Blick, *Stretching The Constitution: The Brexit Shock In Historic Perspective* (Hart 2019).

the reading of PS needs to be rebalanced and allow for the contemporary approach to take precedent.

Alternative to the above legislative process, the hybrid model could also be adopted through codification. As a result of Brexit, an increasing number of constitutional scholars are now advocating for adopting a codified constitution.[110]But before this can be realised, and to enhance legitimacy, a newly codified constitution needs to be approved via a referendum. For example, the codified constitutions of Australia, the Republic of Ireland, Spain, and Switzerland were all adopted following referendums.[111] The biggest issue with codification, however, is that it would bring an end to a long-standing constitutional principle - Parliamentary Sovereignty.[112] This would arguably make it a harder option to sell as a way to introduce hybrid federalism.

In the absence of a universally agreed method of legitimacy, referendums are often perceived as the most legitimate way to introduce significant constitutional reforms.[113] This is why the requirement for a referendum is an integral feature of the two options mentioned above. However, the way in which the referendum is run would be crucial. For instance, if the referendum is run as a single UK-wide referendum, there is the potential that democratic issues, such as the ones raised during the 2016 Brexit referendum, could arise. For example, if Scotland is the only constituent part to vote no, and the overall majority vote is yes to these new arrangements, then imposing a new constitution onto Scotland would be a very odd way to counter Scottish nationalism and aspirations for independence. An alternative would be holding a separate vote in each subunit of the UK - a similar process to what occurred during the devolution referendums held in 1979 and 1997/8. However, the biggest issue with this option is the potential that a subunit could vote against the proposed constitutional arrangements. This would be akin to what occurred during the 1979 devolution referendums in Scotland and Wales. The former voted majority yes, whilst the latter voted majority no. If it weren't for the Cunningham amendment (the 40% threshold), these results would have meant that devolution would have been realised in Scotland and not Wales. A reoccurrence of this would make it impossible to realise the hybrid federal model. Therefore, amendments would be required until consent is granted, as in Australia.

Federal arrangements in Australia only entered into force following the consent of the constituent units' electorates. This consent was granted following a series of referendums that were held between 1898 – 1900 in each of the six colonies that would become the states of Australia. In 1898 the first round of the referendums was held in four colonies, including New South Wales. All four colonies delivered a majority 'Yes' vote, though the majority in New South Wales fell below the minimum 'Yes' vote threshold. This resulted in a process that saw amendments proposed by New South Wales made to the constitution. Following these amendments, a second referendum was held in five of the six colonies, and all voted majority Yes – including New South Wales. However, on this occasion, the requirement was a simple

[110] See for example; Bogdanor, Ibid n.1
[111] Swenden, Ibid n.17
[112] See: Gordon, Ibid n. 87
[113] For a detailed analysis on constitutional legitimacy, see; Randy Barnett, 'Constitutional Legitimacy' (2003) 103 Columbia Law Review 111.

majority. In 1900, the last of the colonies voted in favour of the proposed Commonwealth Constitution Bill, resulting in the realisation of the federation.[114]

It must be acknowledged that the application of the Australian example could result in a process that is lengthy and/ or could be blocked. Nonetheless, I am hopeful that, just like in Australia, these reforms would be adopted by all the constituent units (subject maybe to several amendments). More generally, though, given that referendums are universally accepted as a democratic way to legitimise the introduction of major constitutional reform, any other process of conducting the referendum(s) would, therefore still face similar obstacles, such as further negotiations, delays and/ or the potential for the reforms to be blocked.

In all, the analysis of this section has evidenced that it is possible to recognise hybrid federalism within the UK constitutionally. The recognition process boils down to two main ways, both of which have obstacles that can arguably be overcome. A vital feature of either option is the requirement for a referendum to be held. As argued, the most democratic and legitimate way to hold this referendum is to follow the Australian example, whereby a referendum is held in each UK subunit, and a simple majority is required in each before the constitutional proposals can be realised. If consent cannot be attained, then amendments should be made, and the process repeated.

Conclusion

The overall gradual evolution of the UK's territorial constitution can be characterised primarily as a reactive response by the political elites to events and developments rather than a proactively agreed plan. This gradual evolution and adaptation are mostly owed to the flexible nature of the UK's constitution through Parliamentary Sovereignty. However, as highlighted throughout the thesis and in part one of this chapter, the asymmetrical constitutional effects of Brexit in each constituent territory have placed the UK's (legal) unitary Union in flux. Despite the flexibility of the UK's constitution, these effects have proved too grave to be mitigated under the current constitutional status quo. This, therefore, provides sufficient evidence for the need to start considering alternative means to resolve the current period of constitutional unsettlement and deal with the effects of Brexit.

Given this, there has now been an increase in focus from both constitutional actors and scholars on what this alternative option could be. An often-cited approach is a proposal for introducing wholesale symmetrical reforms, as asymmetry within the constitution is blamed for bringing about these effects that have been exposed and exacerbated by Brexit. However, this chapter argued against this narrative because, given their asymmetrical nature, adopting a 'one glove fits all' approach would not adequately address these challenges but further exacerbate them. Moreover, due to the inherently imbalanced nature of the UK's Union, entirely symmetrical solutions would and tend to breed inequality, as exemplified by the effects of the UK Internal Market Act 2020 and the precedent of the USSR, Yugoslavia, and Czechoslovakia. As a result, the chapter proposed that a more robust argument exists in proposing that one possible way forward is to introduce symmetrical (at the centre) and asymmetrical (among the constituent

[114] Zachary Gorman, 'Birthplace Of A Nation? Why Sydney Voted No To Federation' (2020) 27 Agenda - A Journal of Policy Analysis and Reform 125.

units) constitutional reforms under a hybrid federal framework. The rationale for this is that the hybrid framework manages to overcome the issues associated with entirely symmetrical reforms while providing flexibility in ensuring that the constitutional reforms address the differential effects of Brexit. In addition, the chapter then argued that there are two main ways of constitutionally recognising this alternative solution: statute law or a new codified constitution. A vital feature of either option is the requirement for a referendum to be held in each subunit. The rationale is that referendums are seen as the most legitimate way to introduce significant constitutional reforms and that no new reforms are imposed without consent.

Overall though, given the current political climate and the absence of any constitutional roadmap, the thesis accepts that such comprehensive constitutional reform may never be realised in part or in full. Furthermore, additional obstacles to this model might include not only the refusal by the centre but also the constituent units to engage in such reform – as there is an acknowledged risk that this model might not end up pleasing any or everyone. For example, the centre might not want to sacrifice its existing hegemonic power. The constituent units might feel that the scheme should be more equivalent in terms of competences and/or request further competences beyond those stated. However, it must also be acknowledged that this model does provide both a practical and plausible solution to the current period of constitutional unsettlement. Especially given that no perfect alternative model has thus far been developed or tried, and those that have been proposed such as entirely symmetrical reforms - reproduce the effects they are trying to resolve.

In all, as the current period of constitutional unsettlement becomes increasingly untenable, the UK Government may soon, willingly or not, need to start thinking and acting on alternative ways to resolve the effects of Brexit. The choice of an alternative method will remain ambiguous until the UK Government decides, and that choice could look like the proposal listed above.

Thesis conclusion

The thesis began in chapter 1 by exploring the historical trajectory of the UK's territorial constitution through the lens of devolution, concluding that the UK's Union was inherently imbalanced. As a result of this nature, it was observed that many constitutional issues that affect the UK's territorial constitution, such as struggles for home rule/devolution, and secession, tend to have asymmetrical effects in each of the UK's four territories. The recent major constitutional issue, Brexit, also exemplified this constitutional phenomenon. As the thesis demonstrated however, Brexit induces a new type of imbalance in that the effects of Brexit are not just an exacerbation of the asymmetrical nature of the UK's territorial constitution – but rather there is parallel asymmetry of what is at stake in EU membership. Essentially, the asymmetrical effects caused by Brexit are a result of not just one source of asymmetry, rather the asymmetry is cumulative or compounded by the nature of the impact between the two of them. Therefore, as the UK withdraws further from close relations with the EU, the strains within its own Union increase. This was uncovered to some extent in each of the dedicated chapters of this thesis. As discussed in chapter 2, in NI, Brexit resulted in replacing the EU's border regime with the Ireland / Northern Ireland Protocol. This new border regime has had the effect of indefinitely paralysing NI's power-sharing devolution settlement. Chapter 3 demonstrated that Brexit has had the effect of re-energising calls for independence in Scotland. Chapter 4 confirmed that Brexit has heightened the Welsh Government's calls for the need to strengthen devolution through radical constitutional reforms. Chapters 5 and 6 evidenced that the failure to accommodate England in a post – Brexit constitution has brought the English question back onto the political agenda and, more significantly, has resulted in the overall rolling back of devolved regulatory competences. In combination (and at times in isolation), these asymmetrical effects have had the overall effect of exacerbating the current period of constitutional unsettlement in the UK – further questioning the future of the UK's territorial integrity.

The approach the UK Government adopted to tackle these challenges was also uncovered in the thesis. The thesis demonstrated that the UK Government's hegemonic and unilateral approach of often maintaining the status quo, and ignoring the concerns raised by its devolved counterparts, has resulted in an overall systematic failure in mitigating the asymmetrical effects of Brexit. It was also established that the continuation of the status quo is increasingly becoming untenable. In Scotland, the row over a second independence referendum has left the UK's constitutional law clashing with the SNP-led Scottish Government's democratic mandate to hold indyref 2. In Wales, for the first time since the inception of devolution, the Welsh Government have departed from its traditional 'good unionist' approach to adopt an approach that challenges fundamental UK constitutional principles. As a result, political and legal clashes between the UK and Welsh Governments are now becoming more frequent – this was unprecedented before Brexit. In NI, the UK Government's failure to engage with the cross-community in NI has been a key factor behind the current paralysis of the power-sharing institutions. Moreover, the failure of the UK Government to accommodate England in a post – Brexit reformed constitution, especially in the context of developing the UK internal market through the UKIMA 2020, has had the overall effect of 'rolling back' devolved regulatory competences. This, therefore, provides sufficient evidence for the need to start considering alternative means to resolve the current period of constitutional unsettlement and deal with the effects of Brexit.

Within the space created for constitutional reform proposals, the thesis in chapter 7 put forward one possible alternative way forward, which involves the introduction of symmetrical (at the centre) and asymmetrical (among the constituent units) constitutional reforms under a 'hybrid federal' framework. As analysed in the chapter, this model provides both a practical and plausible solution to the current period of constitutional unsettlement. However, it was acknowledged that this proposal would also be open to criticism in terms of some viewing it as too radical or not far-reaching enough. However, the analysis throughout the thesis has indicated that resolving the effects of Brexit is complex. Given the asymmetrical nature of these effects and the differential interests adopted, finding an alternative solution that pleases everyone is also difficult. Overall, it was concluded that the ultimate decision to change course and what that new course may look like rests with the UK Government. What remains unambiguous for now is that the asymmetrical effects of Brexit have tested the limits of the UK's constitutional order and that maintaining the status quo is increasingly becoming untenable. This will only intensify the need for an alternative way forward that could look like the proposal set out above.

Reflecting more broadly on constitutional studies, this thesis has uncovered two key observations. Firstly, the thesis has revealed that there are difficulties in bringing about universally accepted constitutional reforms and solutions to identified problems. This is because there are many different actors, at different levels, with competing objectives, making it nearly impossible to deliver reform that would satisfy all these actors when they disagree. This phenomenon can be identified not just from a territorialised perspective but on a UK-wide basis too. The Irish border conundrum in NI and establishing the UK's internal market exemplify this well. Moreover, due to the competing aims of the different constitutional actors, a perceived need for reform does not correlate with the deliverability of reform. This can be evidenced by the UK Government's response to the constitutional concerns raised by the Scottish and Welsh Governments, respectively. The second observation from the thesis is over the understanding of the state of constitutional unsettlement. As defined by Walker in 2014 (before Brexit), this constitutional order is perennial and permanent. However, as analysed in this thesis, Brexit induces a new type of instability which has exacerbated the state of constitutional unsettlement – bringing into question the perennial and permanent characterisation of the state of constitutional unsettlement.

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