

The Constitutional Tensions of Brexit

Oran Doyle, Aileen McHarg and Jo Murkens

INTRODUCTION

The United Kingdom's departure from the European Union on 31 January 2020 ran counter to recent trends of European history. Since the 1950s, European integration has included ever more countries with ever-softening borders between them. Progress was intermittent; the final destination both unclear and contested. But the direction of travel was set. In its apparent reversal of integration and its recreation of borders, Brexit is first and foremost a territorial event. The EU has lost one of its most powerful member states. The future relationship between the United Kingdom and the EU, while still unclear at the time of writing, will be markedly different from what has pertained hereto; the movement of people, goods, services, and capital (the four freedoms of the European Single Market) across borders will be considerably more difficult. Unsurprisingly, these effects are experienced most directly in the United Kingdom itself and in those EU member states closest to it, particularly Ireland, with whom it shares a land border and whose land-bridge to the rest of the EU now traverses a non-member state.

The consequences of Brexit will unfold across a myriad of domains over the next several decades, but constitutional consequences for the United Kingdom and Ireland have already come into focus. Within the United Kingdom, Brexit has involved the removal of a source of law – which the UK Supreme Court described as a ‘fundamental legal change’¹ – and its replacement with a new legal category: ‘retained EU law’.² It has also involved the removal of a layer of governance, and the consequent reallocation of internal decision-making competences. This has meant the disturbance of

¹ *R (Miller) v. The Secretary of State for Exiting the European Union* [2017] UKSC 5 at para. 83.

² European Union (Withdrawal) Act 2018. EU law continued to apply in the United Kingdom until the end of the so-called implementation period – i.e., 31 December 2020.

settled policy communities and familiar modes of regulation, creating considerable uncertainty about the future direction of legal and policy development, particularly given the removal of a major legal constraint on the powers of the UK Parliament. It has altered the status of EU nationals resident in the United Kingdom and of UK nationals living in other member states, and means that all UK nationals lose the citizenship rights flowing from EU membership – most notably, but by no means limited to, rights to free movement within the EU. And it has also entailed a reorientation of the United Kingdom’s external relationships, away from the relatively stable and predictable obligations and incidences of EU membership towards a new relationship with the EU and its member states, as well as new and unpredictable trade relations with the rest of the world.

Though less immediately and dramatically affected by Brexit, in Ireland too there have been significant political, and potentially also profound constitutional, implications. Ireland’s land border with the United Kingdom and the geographical interposition of the United Kingdom between Ireland and the rest of the EU would on their own suffice to render Ireland uniquely affected by Brexit. But the significance of these factors is overshadowed by the delicate relationship between Ireland, Northern Ireland and the rest of the United Kingdom brokered by the Belfast/Good Friday Agreement 1998 (the 1998 Agreement). The reintroduction of a hard border on the island of Ireland threatened to undermine the 1998 settlement and, in the view of the Irish government, posed an existential threat to the Irish state.³ Given the terms on which the United Kingdom ultimately departed the EU, Brexit has not had immediate constitutional implications for Ireland. It has, however, placed the issue of a united Ireland on the political agenda.

All of this was foreseeable in advance of the EU referendum of 23 June 2016, and the implications of Brexit – and its advantages and disadvantages – have been widely debated before and since, even if considerable uncertainties remain. What, though, was less foreseeable – or at least not foreseen – was the considerable strain that the *process* of leaving the EU would place on the United Kingdom’s constitutional order. One dimension of this was the EU’s adoption of Ireland’s concerns in relation to Northern Ireland as a critical negotiating objective. This was among the factors that made it difficult for the UK government to secure a parliamentary majority for a form of withdrawal that would be widely seen as respecting the referendum result. That three-way constitutional tussle between parliament, executive, and popular mandate,

³ Tom McTague, ‘How the UK Lost the Brexit Battle’, Politico.eu, 27 March 2019, www.politico.eu/article/how-uk-lost-brexit-eu-negotiation/.

exacerbated by the developing territorial tensions within the United Kingdom, meant that the Brexit process itself amounted to a full-spectrum test of the resilience of the UK constitution.

The three and a half years between the referendum and the United Kingdom's eventual – thrice postponed⁴ – formal withdrawal from the EU were punctuated by a series of disagreements over the location and proper exercise of constitutional authority, both to trigger withdrawal and to determine the consequences of withdrawal (see chapters by Petrie and Howarth). These included disputes about the constitutional authority and legitimacy of the referendum result (see chapter by Daly); about relations between the UK Parliament and executive (see chapters by Petrie, Howarth, and Tucker); about the principles of territorial authority and territorial consent (see chapters by Mitchell; Murray; Hunt; and Casanas Adam); and about the role of the courts as constitutional decision-makers, and the UK government's commitment to the rule of law (see chapters by Casey, and McCorkindale and McHarg). While the potential for a serious crisis of constitutional legitimacy⁵ has been averted by the eventual implementation of the referendum result, and the restoration of executive dominance in the UK Parliament following the December 2019 general election, the repercussions of these various constitutional conflicts rumble on. In particular, Brexit's reinvigoration of secessionist and irredentist pressures in Scotland,⁶ Wales,⁷ and Northern Ireland⁸ still has the potential to threaten the continuation of the UK state in its current form.

⁴ The negotiation period triggered the United Kingdom's formal notification of its intention to withdraw from the EU under Art. 50 TEU was initially supposed to expire on 29 March 2019. This was postponed initially to 12 April 2019, then until 31 October 2019, and finally until 31 January 2020.

⁵ See Aileen McHarg, 'Navigating Without Maps: Constitutional Silence and the Management of the Brexit Crisis' (2018) 16 *International Journal of Constitutional Law*, 952–68. For a sceptical view of the risk of constitutional crisis posed by Brexit see Eoin Daly, 'Constitutionalism and Crisis Narratives in Post-Brexit Politics' (2020) *Political Studies* (forthcoming); and see also Daly, in this volume.

⁶ Since the beginning of 2020, a series of opinion polls have put support for independence in Scotland at or above 50 per cent – see <https://whatscotlandthinks.org/questions/how-would-you-vote-in-the-in-a-scottish-independence-referendum-if-held-now-ask/?removed>.

⁷ According to the YouGov/ITV Welsh Barometer Poll in June and October 2020, 25 and 27 per cent of those surveyed backed a fully independent Wales – the highest level of support for Welsh independence ever recorded. Gareth Wyn Williams, 'Surge in support for Welsh independence gives hope to campaigners', *Daily Post*, 5 June 2020, https://docs.cdn.yougov.com/lvbjz3q4w9/Results_WelshBarometer_October2020_W.pdf.

⁸ Opinion polls in Northern Ireland over 2019 and 2020 show support for unification ranging between 25 and 46%. '51% of people in Northern Ireland support Irish unification, new poll finds', *thejournal.ie*, 11 Sept. 2019, www.thejournal.ie/lord-ashcroft-irish-unification-poll-4804

At one level, the constitutional upheavals occasioned by Brexit can be attributed to the way in which the EU referendum was conceived and conducted:⁹ the party political rather than constitutional motivation for the referendum; the relatively short and poor quality referendum campaign; the failure to take seriously the implications of a territorially divided result;¹⁰ the lack of planning for how withdrawal would be implemented; and the narrowness of the majority in favour of Leave.¹¹ These weaknesses may have contributed to a significant absence of ‘losers’ consent’ amongst Remain voters,¹² as well as a lack of realism about the choices and compromises that would need to be made in order to secure a withdrawal agreement. But these essentially procedural factors, important as they were, reflected and exacerbated much deeper tensions within the UK constitutional order. Indeed, Loughlin’s chapter in this volume traces the origins of what he calls the current period of ‘constitutional anxiety’ in the United Kingdom in certain persistent and deeper-seated ambiguities about the nature of the English and then UK state dating back as far as the Revolution of 1689. The 2016 referendum result also represents the culmination of at least two decades’ worth of increasing anti-European sentiment. In this introductory chapter, we explore these deeper tensions, addressing the United Kingdom’s position in the EU; the territorial tension within the United Kingdom; Ireland’s relationship with the UK; and the developing tensions at the core of the UK constitution.

THE UNITED KINGDOM IN THE EU: AN UNEASY MEMBERSHIP

In order to join the European Economic Community in 1973, alongside Ireland and Denmark, the United Kingdom had to overcome political and psychological obstacles that are encapsulated in the observation by US Secretary of State Dean Acheson in 1962 that Britain had lost an empire and had not yet found a role. When the United Kingdom looked to the East, it expressed reservations about supranationalism and about full-hearted support for European cooperation and integration. These misgivings were shared by President de Gaulle, who twice – in 1963 and in 1967 – vetoed the UK

372-Sep2019/; ARK Northern Ireland Life and Times Survey: www.ark.ac.uk/nilt/2019/Political_Attitudes/REFUNIFY.html.

⁹ See Saskia Hollander, ‘The Politics of Referendum Use in European Democracies’ (London: Palgrave Macmillan, 2019) chap. 7; McHarg, ‘Navigating Without Maps’, p. 956.

¹⁰ 62% of voters in Scotland and 56% of voters in Northern Ireland voted to remain in the EU.

¹¹ 52% of voters overall opted to leave the EU.

¹² See Richard Nadeau, Éric Bélanger and Ece Özlem Atıkan, ‘Emotions, Cognitions and Moderation: Understanding Losers’ Consent in the 2016 Brexit Referendum’ (2020) 30 *Journal of Elections, Public Opinion and Parties* (forthcoming).

government's applications to join the EEC. When the United Kingdom looked to the West, it envisioned transatlanticism and a special relationship with the USA. That vision was shared in Washington, on condition, however, that the United Kingdom join the EEC and embrace European integration. For the USA, until the Trump presidency began in 2017, non-EU membership of the United Kingdom has always been 'politically awkward'.¹³

In the second half of the twentieth century, Britain's role in the world lay in managing the tension between European integration and American domination. British political leaders have carefully nurtured the United Kingdom's self-perceived outsider status with respect to European policy formation resulting in fault lines that continue to run through the main political parties. In the 1970s, the Labour party was divided on the question of accession to the EEC and on holding a referendum on the issue. From around the time of the Maastricht Treaty (1993) onwards, the Conservative Party has been in a 'near permanent civil war on the issue of membership of the European Union'.¹⁴ The 'Maastricht Rebels' subsequently operated alongside single-issue political parties that were advocating withdrawal from the EU: the Referendum Party in the 1990s; the UK Independence Party (especially from 2004–2016); and the Brexit Party (since 2019).¹⁵ Euroscepticism is also readily apparent in the editorial stances of the British press, with their phony wars against Euro-myths (from bent bananas and curved cucumbers to banning prawn cocktail crisps), and their hostility towards European institutions and politicians (from Jacques Delors to Jean-Claude Juncker). Whereas the press was virtually unanimous in its support for UK membership of the common market during the 1975 referendum, after the Maastricht Treaty (1993), British politicians effectively handed over leadership on European matters to 'a uniquely powerful and Eurosceptic popular press'.¹⁶ The splits in the electorate in 2016 were mirrored in the divisions in the party-political landscape and in British newspapers (with the Eurosceptic tabloids reaching a larger audience),¹⁷ which in

¹³ Desmond Dinan, *Europe Recast: A History of European Union* (Houndsmills: Palgrave Macmillan, 2014), p. 100.

¹⁴ Martin Holmes, 'The Conservative Party and Europe', *The Bruges Group*, Paper No. 17.

¹⁵ Julie Smith, 'The European Dividing Line in Party Politics' (2012) 88:6 *International Affairs* 1277–95.

¹⁶ Charles Grant, 'Why is Britain Eurosceptic?' *Centre for European Reform*, Dec. 2008; Oliver Daddow, 'Performing Euroscepticism: The UK Press and Cameron's Bloomberg Speech', in Karine Tournier-Sol and Chris Gifford (eds.), *The UK Challenge to Europeanization: The Persistence of British Euroscepticism* (London: Palgrave Macmillan, 2015).

¹⁷ Georgi Gotev, 'Britain's newspapers take sides on Brexit', euractiv.com, 22 June 2016, www.euractiv.com/section/uk-europe/news/britains-newspapers-take-sides-on-brexit/.

turn reflected the indecisive attitudes towards Europe that British political leaders have always adopted.

Although the United Kingdom was technically an insider for the duration of its membership, it saw itself, and was viewed by other member states, as an ‘awkward partner’.¹⁸ The United Kingdom signed up to the *acquis communautaire* and to the supervisory jurisdiction of the Court of Justice of the EU like every other member state. However, more than any other member state, the United Kingdom negotiated and obtained opt-outs and special clauses. It demanded its ‘money back’ and fought symbolic battles, for instance against the inclusion of the word ‘federal’ in the draft European Constitution, but then acquiesced to text which referred to the functionally identical concepts of ‘subsidiarity’ and ‘communautaire’.¹⁹ No other member state was as detached from the core project of integration.

The United Kingdom’s fraught relationship with the project of European integration is partly explained as an attempt to manage the geopolitical pressures exerted by Europe and the USA. But it also has a domestic dimension characterised by tension between economic necessity, national identity, and constitutional politics. The economic case for membership has not changed. After World War II, the United Kingdom’s per capita GDP was almost a third larger than the average of the original six member states. It declined steadily until 1973, when it had fallen to 10% below the average. Membership in 1973 put an end to the decline, and per capita GDP was relatively stable between 1973 and 2010.²⁰ In 2016, the EU was the United Kingdom’s largest trading partner and its largest export market for services. The London School of Economics’ Centre for Economic Performance estimated that the long-term cost to the United Kingdom from reduced trade and lower productivity after withdrawal could be as high as 9.5% of GDP—a figure similar to the United Kingdom before accession.²¹ In Autumn 2019, UK in

¹⁸ Stephen George, *An Awkward Partner: Britain in the European Community* (Oxford: Oxford University Press, 1990).

¹⁹ Valéry Giscard-d’Estaing: ‘I knew the word “federal” was ill-perceived by the British and a few others. I thought that it wasn’t worth creating a negative commotion, which could prevent them supporting something that otherwise they would have supported. . . . So I rewrote my text, replacing intentionally the word “federal” with the word “communautaire”, which means exactly the same thing’, cited in *Wall Street Journal*, 7 July 2003, www.wsj.com/articles/SB105752135945040000. See generally, Steven G. Calabresi and Lucy D. Bickford, ‘Federalism and Subsidiarity: Perspectives from U.S. Constitutional Law (2014) 55 *Nomos* 123–89.

²⁰ Nauro F. Campos and Fabrizio Coricelli, ‘EU Membership, Mrs Thatcher’s Reforms and Britain’s Economic Decline’ (2017) 59:2 *Comparative Economic Studies* 169–93.

²¹ Swati. Dhingra et al., *The Consequences of Brexit for UK Trade and Living Standards* (London: LSE, 2016).

a Changing Europe (an independent research organisation on United Kingdom-EU relations) calculated that the negative impact over ten years would be 8.1% of GDP for no deal or 6.4% for the deal then advocated by Boris Johnson.²²

The economic argument was determinative for the United Kingdom joining the common market. Prime Minister Harold Macmillan identified economics as the focus of the Treaty of Rome. The common market was exactly that: a common market, not a political entity: 'I ask hon. Members to note the word "economic". The Treaty of Rome does not deal with defence. It does not deal with foreign policy. It deals with trade and some of the social aspects of human life which are most connected with trade and production.'²³

But the economic case, although still clear, was not determinative in 2016. One die-hard Leaver captured the mood at the time: 'I don't think we'll be poorer out, but if you told me my family would have to eat grass I'd still have voted to leave'.²⁴ The motivation to vote leave was governed by something stronger than money. It was primarily a matter of national identity, specifically – as we shall see below – English national identity within a weakening Union.

The question of (British) national identity had featured in every major speech on Europe given by a prime minister since 1945. Even the most pro-European prime minister, Edward Heath, balanced the recognition of 'our common European heritage, our mutual interests and our European destiny' by stressing 'our national identity and . . . the achievements of our national history and tradition'.²⁵ A whole raft of binary divisions were subsequently subsumed underneath the two EU and UK mastheads. Margaret Thatcher's Bruges speech in 1988, for instance, developed the oppositions that were nascent in Heath's speech, with Europe characterised as liberal, intergovernmental, bureaucratic and formal, protectionist and parochial, and politically unstable, whereas the United Kingdom is seen as free, independent, pragmatic and democratic, free trading and global, and politically stable.²⁶

Brexit has not made the task of 'finding a role' any easier. For a start, the USA's dominance is no longer unrivalled. China has emerged as another player of great-power politics, and the United Kingdom once again finds itself

²² 'The Economic Impact of Boris Johnson's Brexit Proposals', *The UK in a Changing Europe*, October 2019.

²³ *Hansard*, Harold Macmillan, HC Deb, vol. 645, col. 1481, 2 August 1961.

²⁴ Reported in 'Brexit: the Conservatives and their thirty years' war over Europe', *Financial Times*, 14 December 2018, www.ft.com/content/odee56co-fdfa-11e8-acc0-57a2a826423e.

²⁵ Speech by Edward Heath, Brussels, 22 January 1972, www.cvce.eu/content/publication/2001/9/14/45bb74bd-554c-49d4-8212-9144ce2e8cid/publishable_en.pdf.

²⁶ Chris Gifford, *The Making of Eurosceptic Britain: Identity and Economy in a Post-Imperial State* (Farnham: Ashgate, 2nd edn., 2014), p. 97.

caught in the middle. In January 2020, the UK government decided to allow the Chinese telecoms giant Huawei to help build the domestic 5G network. The decision angered the US administration and it was reversed in July 2020, meaning that UK mobile providers are now banned from buying Huawei equipment in the future. The United Kingdom may have taken control back from Brussels but exercising sovereignty in a globalised world still requires difficult decisions and strategic alliances.

THE UNITED KINGDOM: AN UNEASY UNION

Certain members of the British political class always claimed that national identity was threatened by Europe and only secured through rebates, opt-outs, vetoes, and ultimately through the threat and actualisation of withdrawal. However, the United Kingdom that left the EU was a much more complex territorial entity than the one that joined in 1973. The programme of devolution to Scotland, Wales, and Northern Ireland in the late 1990s had heightened consciousness of regional identities – in England as well as in the devolved territories²⁷ – and brought in its wake significant political divergence²⁸ and markedly differentiated attitudes towards the EU.²⁹ Far from revealing a coherent national unit capable of ‘taking back control of our borders, money and laws’,³⁰ the 2016 referendum result revealed instead a set of divisions that represented different attitudes towards EU membership, and also reflected deep splits with respect to education, age, geography, and political citizenship.³¹ 70% of voters whose only academic qualification was GCSE or lower voted to leave, and 68% of voters with a university degree voted to remain. As many voters under the age of fifty voted to remain (62.5%) as those above fifty voted to leave (62%). It also represented geographical divisions: in England, every region apart from London voted to leave, whereas Northern Ireland and Scotland voted to remain.

²⁷ See Richard Wyn Jones, Guy Lodge, Charlie Jeffery, Glenn Gottfried, Roger Scully, Ailsa Henderson and Daniel Wincott, *England and its Two Unions: The Anatomy of a Nation and its Discontents* (London: Institute for Public Policy Research, 2013).

²⁸ By 2016, there were different political parties in power in each of the United Kingdom’s four governments.

²⁹ Ailsa Henderson et al., ‘How Brexit was Made in England’ (2017) 19:4 *British Journal of Politics and International Relations* 631–46.

³⁰ HM Government, ‘EU Exit: Taking back control of our borders, money and laws while protecting our economy, security and Union’, November 2018, Cm 9741.

³¹ ‘How Britain voted at the EU referendum’, YouGov, 27 June 2016.

As a post-imperial identity, Britishness does not have the force of an ‘overarching, civic national identity’.³² Instead, it has become a byword for English dominance. Ultimately, ‘Brexit was made in England’.³³ It is true that Wales also voted to leave; however, the final result was not dependent on the Welsh vote. Regional divergences notwithstanding, Prime Minister Theresa May interpreted the referendum result as a decision by ‘the people of the United Kingdom’ to ‘restore, as we see it, our national self-determination’.³⁴ Yet ignoring regional disparities was not a long-term strategy. That kind of crude nation building from the centre may have succeeded in late nineteenth century Europe. But as an imperial identity, ‘Britishness’ sits alongside sometimes stronger regional identities in Scotland and Wales, and especially Northern Ireland, where European and Irish identities are thrown into the mix.³⁵ Come 2016, the project of restoring self-determination and identity from the centre was not going to work.

Furthermore, the United Kingdom still operates as a highly centralised state on the world stage. The doctrine of the legislative supremacy of the UK Parliament and the absence of a written constitution still buttress the Westminster model of government. EU withdrawal was a matter of high (foreign) policy, tightly controlled and determined by central government. Whilst Theresa May initially promised that the devolved governments would be fully involved in determining the timing and shape of Brexit,³⁶ the Art. 50 withdrawal process was triggered without consulting – let alone securing the agreement of – the devolved governments. Key pieces of legislation – the European Union (Withdrawal) Act 2018 and the European Union (Withdrawal Agreement) Act 2020 – were enacted in the face of the express refusal of devolved consent (see Chapter 2 by Casanas Adam); and proposals for post-Brexit legislation to bolster the United Kingdom’s internal market present a significant threat to devolved autonomy (see Chapter 1 by Hunt). Since the process of EU withdrawal affects state and society at every level, the involvement of the Celtic regions, and especially the Northern Ireland question, has added layers of constitutional complication that cannot be resolved

³² Eva-Maria Asari, Daphne Halikiopoulou and Steven Mock, ‘British National Identity and the Dilemmas of Multiculturalism’ (2008) 14:1 *Journal Nationalism and Ethnic Politics* 1–28.

³³ Henderson et al., ‘How Brexit was Made in England’.

³⁴ Prime Minister’s letter to Donald Tusk triggering Art. 50, gov.uk, 29 March 2017, www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-triggering-article-50.

³⁵ See, e.g., Patricia Burke Wood and Mary Gilmartin, ‘Irish Enough: Changing Narratives of Citizenship and National Identity in the Context of Brexit’ (2018) 22 *Space and Polity*, 224–37.

³⁶ See Akash Paun and George Miller, *Four-Nation Brexit: How the UK and Devolved Governments Should Work Together on Leaving the EU* (London: Institute for Government, 2016), p. 7.

by the resurgence of a particularly muscular and centralising form of unionism³⁷ that brooks no opposition to the authority of UK-level institutions in their attempt to assert ‘national identity’ and ‘take back control’. Tensions between the assumptions of centralised governance and the devolution of primary law-making power to Scotland, Wales, and Northern Ireland, as well as the acceptance of the principle of popular consent in the context of future constitutional changes, have been exacerbated by Brexit and will continue to characterise the United Kingdom’s territorial constitution. These territorial tensions are particularly intense in Scotland, where the Brexit vote followed a narrow loss for Scottish nationalists in the 2014 independence referendum (and where the question of continued EU membership had been an important part of that referendum debate), and in Northern Ireland, where a new land border between the EU and the United Kingdom would resuscitate disagreements on the island of Ireland that had largely been silenced by the 1998 Agreement.

IRELAND AND THE UNITED KINGDOM:
AN UNEASY RELATIONSHIP

Brexit was the most significant territorial event in the United Kingdom’s constitution since the departure of twenty-six counties of southern Ireland in 1921. It is perhaps unsurprising therefore that the terms of Ireland’s departure from the United Kingdom should have exerted so much influence, nearly 100 years later, on the terms of the United Kingdom’s departure from the EU. Legislatively united with Great Britain in 1800, Ireland was a separate and restive part of the United Kingdom. Irish MPs at Westminster advanced the cause of ‘home rule’ from the 1870s onwards, against intense opposition from unionists in the northeast of Ireland. The religious-demographic make-up of this part of Ireland was markedly different, reflecting the success of plantations in Ulster of British Protestants some 250 years previously.³⁸ The province of Ulster consisted of nine counties, four with a large Protestant majority, two with a narrow Catholic majority and three with a large Catholic majority. The Liberal government eventually used the Parliament Act 1911 to force through the Government of Ireland Act 1914, establishing home rule for the entirety of Ireland. However, by this point, World War I had commenced. Prime

³⁷ See 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) 68 *Political Studies* 1–20.

³⁸ Jonathan Bardon, *A History of Ulster* (Belfast: The Blackstaff Press, 2nd edn., 2001), chap. 5.