



these ISLANDS

Continuity, Devolution,
and the EU Withdrawal Bill
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Withdrawing from the European Union poses, without question, the greatest legislative challenge the United Kingdom has faced in its democratic history. There is nothing in the recent history of Europe which compares in complexity to the ravel of laws, regulations, and administrations that must now be unpicked if this end is to be realised. In scale, the task at hand resembles more closely some of the major state-making projects of the second half of the twentieth century. Yet our case is more complicated still, since Britain does not have the liberty of starting anew on a blank slate. The disentangling of forty years of European statutes and treaties must be done without compromising the British constitution that lies beneath it – a task all the more formidable because the British constitution has developed substantially since the country joined the European Union. The patriation of the Canadian constitution in 1982 may be the only viable precedent, and while that event was not uncontested domestically, it benefitted from a far less fractious geopolitical dimension.

Protecting the British constitution during the Brexit process is a matter of supreme importance, affecting everyone in every part of these islands. Prosperity and treaties come and go; once destroyed, constitutions are gone forever. If withdrawal from the EU is handled imprudently, it will tear the United Kingdom apart. Prudence should therefore be the order of the day. Irrespective of their stance on Brexit, no one can disagree that the next few years will be a period of upheaval. This is not the time for radical innovation. It is certainly not the time to reconceive entirely the structures of sovereignty and power in the United Kingdom. Indeed, as we shall see, the principles at the core of the British constitution will be our greatest allies in ensuring an orderly withdrawal from the EU, providing the greatest level of certainty and security possible for individuals and businesses across the country.

During its second reading, the EU Withdrawal Bill served this purpose, and for that reason alone it deserves the support of unionists. This does not commit anyone to endorse every single clause in the legislation, but it does oblige us to recognise that the logic behind the repatriation of powers to Westminster is sound; that this does not constitute any re-reservation of powers from the devolved assemblies¹; and – chiefly – that preserving the Bill's devolution clauses as they stand is the most important legislative task at hand. This imperative touches on a central challenge to contemporary unionism. While unionists of all parties should be encouraged to turn their minds to grand ideas of common identity, and how to foster it, they must not lose sight of the practicalities of preserving the union we already have.

¹ The term 'devolved assemblies' is used in its formal sense: it denotes the Northern Irish and Welsh assemblies and the Scottish Parliament.

EU Law, Deficiencies, and Devolution

The crux of the challenge of withdrawing from the European Union is the fate of forty years of accumulated European law – the ‘*acquis communautaire*’ – after exit day. If this vast body of legislation were allowed to lapse, it would open great fissures throughout the British political, economic, and legal landscape, changing the country overnight. Common trading standards would vanish, threatening the seamless flow of trade within the United Kingdom. There would be no one to regulate the sale of pharmaceuticals and similar products. The judicial system would fold into confusion. Without so much as considering the fact that some consequences are unforeseeable, those examples that can be identified are innumerable: they are a catalogue of chaos.

In the interests of certainty and consistency, therefore, British law must be adapted so that it will look largely the same on exit day as the day before. The European Union (Withdrawal) Bill – widely known as the Great Repeal Bill – does so through the comprehensive incorporation of the *acquis* into British law, with the vital exception of those provisions that would keep the United Kingdom subordinate to the institutions of the EU.

Leavers should not be squeamish about this. British negotiators and lawyers laboured over these laws for almost half a century. Some are deeply indebted to traditions of British jurisprudence. The Brexit vote was about sovereignty: and there will be time to debate, revise, and reform these laws in Parliament in the years ahead. But exit day is not the time to do it – the scale of the task places that beyond the bounds of possibility. This is a holding action, not the end of the discussion.

Yet the incorporation of existing European legislation into British law will not always be a simple act of transcription. Some laws rely on EU frameworks, infrastructures, and institutions that will no longer be part of the picture after the UK’s withdrawal. These deficiencies will need to be remedied, sometimes through major steps like the creation of new regulators, sometimes by relatively minor alterations to the laws in question that would adapt them to domestic, British frameworks.

Resolving these deficiencies will be particularly thorny in areas of legislative competence that were previously split between the EU and the devolved assemblies – particularly areas like agriculture, fisheries, and environmental protection. This will reopen the devolution debate, and not without cause. For the way in which these particular deficiencies are resolved could fundamentally alter the basis of sovereignty in the United Kingdom. At worst, they could foster chaos in the short term and disintegration in the long term. At best, they could open a path to the rejuvenation of the British constitution, in a manner that combines the unique advantages of a unitary state with the benefits of devolution and localism.

The task is sizeable enough in itself, but we must also be alert to the fact that there are some who will try to use Brexit as an opportunity to advance radical separatist agendas within the United Kingdom. At this time more than any other, they threaten immense harm to the lives of all the people of Britain. Separatists will try to use the post-Brexit constitutional settlement to begin a progressive erosion of the bonds of our union. Prudence dictates that we must find a way to avert this disaster. The Great Repeal Bill does so in the form it took on its second reading. To sacrifice its provisions for brief convenience is to invite far greater peril in the future.

In this form, the EU Withdrawal Bill ensures that these deficiencies will be resolved in an efficient, orderly, and timely manner, *without* undermining the existing balance of devolved and reserved powers. Under this piece of legislation, not a single power currently held or exercised by any devolved assembly is returned to Westminster. Over the longer term, this holding action will likely precede the devolution of considerable powers repatriated from Brussels – but only where it makes sense to do so.

The most important matter at hand is to ensure that domestic trade and legal systems continue to function seamlessly after Brexit. Most importantly, without common commercial regulations, the United Kingdom's own single market will be gravely compromised, and the British government's capacity to make new commercial treaties with partners overseas – upon which no small measure of our future prosperity will depend – will be fatally undermined. Such an eventuality would not only undermine the union; it would be ruinous to all of its constituent parts, and especially the smaller nations. Hence, the Repeal Bill provides government ministers with the powers necessary to take up the slack left by the lapsing of EU jurisdiction on exit day, to ensure that common frameworks are sustained for the whole of the United Kingdom.

Reserved Powers, Repatriation, and the Council of Ministers

Some parties (not all of them avowedly nationalist) claim that these measures amount to a re-reservation of powers previously devolved – a power-grab by Westminster at the expense of the devolved assemblies. It is regrettable that some notionally impartial bodies have also misconstrued the fact that this is precisely what the bill guards against. Most notably, in its briefing on the second reading, the Scottish Law Society has asserted that the bill provides for Parliamentary interference in areas which were not formerly reserved to it – particularly agriculture, fisheries, and environmental protection.²

² *The European Union (Withdrawal) Bill: Second Reading Briefing by the Law Society of Scotland*, (August 2017), 13.

Yet the powers in question have never been held or exercised by the devolved assemblies, and this author is at a loss to understand how any power which has never been held, exercised, or even so much as claimed by an institution, can possibly be taken away from it. To appreciate the weakness of the nationalist argument, we must recall that devolution was undertaken in the context of EU membership, and how that membership constrained the devolution settlements. In other words, the question rests primarily on the order in which these historical events occurred.

All of the devolved assemblies – established under the Scotland, Wales, and Northern Ireland Acts of 1998 – were created after Britain joined the European Union.³ Under the terms of EU membership, the British government exercises some of its powers in concert with other European executives. The principal organ of this ‘pooled’ sovereign power is the Council of Ministers. Existing in a variety of configurations that cover different areas of policy, the Council brings together central government ministers in a process of collaborative decision-making. These are the origins of many of the common regulatory and administrative frameworks that are policed by the EU.

The UK’s seat on the Council is filled by UK government ministers. This was the case both before the creation of the devolved assemblies and it remained so afterwards: the British government has never devolved its roles as part of the Council. The British government is alone liable for punishment in the event of infractions upon positions agreed by the Council, even by the devolved assemblies. Indeed, the devolved assemblies themselves have no direct link to the Council whatsoever: they are simply subordinate to the United Kingdom’s agreed position. This is the state of affairs which the Scottish and Welsh executives campaigned to preserve during the referendum on membership of the EU.

Health, education, social work, housing, justice, policing, agriculture, fisheries, the environment, sport, and transport – to name but the most significant – could only have been devolved insofar as was commensurate with European treaty obligations. Hence, it cannot be said that the devolution of these matters was absolute, because aspects of their administration were already lodged – and continued to be lodged – with institutions of the EU. The Scottish executive has itself acknowledged this fact. Their pamphlet on *Scotland’s Place in Europe* insists that areas like ‘agriculture and fisheries must remain fully devolved’ when powers related to these areas are ‘repatriated from Brussels’. But the very fact that those powers were held in Brussels

³ There is no institutional continuity between the Northern Irish assembly established in the 1920s, which was dissolved in the 1970s, and that which exists today.

at all demonstrates that the devolution of these competencies cannot possibly have been ‘full’.⁴

While substantial elements of agriculture and fisheries policy were devolved, the devolved assemblies remained subordinate to the position created by the British government through the Council’s Agriculture and Fisheries (Agrifish) formation. Justice and policing are similarly devolved, but within the confines of the Council’s Justice and Home Affairs (JHA) formation via the same logic. The devolution of healthcare and social work is bounded by the remit of the Economic, Social Policy, Health, and Consumer Affairs (EPSCO) formation. Aspects of economic development were devolved, but the Council’s Economic and Financial Affairs (Ecofin) and Competitiveness (COMPET, formerly Internal Market, Industry, and Research) continues to make provision for common regulatory frameworks to sustain the internal market. Environmental policy was devolved, but only insofar as the assemblies complied with the Council’s Environment (Env) formation. Education and sport remained subject to the Council’s Education, Youth, Culture, and Sport (EYC) formation.

Hence, to argue that repatriating those functions to the British Parliament amounts to the re-reservation of powers is simply untenable. For Westminster has never renounced or ceased to exercise these powers, and they were certainly never devolved; it simply chose to exercise them in concert with other European executives through the Council of Ministers for a period of time, according to a series of international treaties. In all cases, EU matters are reserved to the Parliament of the United Kingdom as matters concerning the constitution and foreign affairs. The list of devolved powers outlined by schedule 5 of the Scotland Act 1998, schedule 7 of the Government of Wales Act 2006, and schedules 2 and 3 of the Northern Ireland Act 1998, must thus be understood within the limitations imposed by Britain’s concurrent membership of the European Union. When that state of affairs comes to an end with the United Kingdom’s withdrawal from the EU, Parliament will regain the powers that it had previously been content to pool. It is this fact that the devolution clauses of the Repeal Bill serve to clarify.

In his report on the devolution implications of Brexit for the Scottish Parliament’s Europe and External Relations Committee, Professor Alan Page recognised that ‘most existing EU competencies are reserved to the UK Parliament’, as a natural reflection of ‘the fact that the devolution settlement, like the EU, is based on a “single market” in goods, persons, services, and capital’.⁵ Yet in light of the British government’s role in administering common markets and regulations through the Council of Ministers,

⁴ *Scotland’s Place in Europe*, (December 2016), 4.

⁵ Alan Page, *The Implications of EU Withdrawal for the Devolution Settlement, Prepared for the Culture, Tourism, Europe, and External Relations Committee*, (October, 2016), 20.

the idea that any common frameworks should disintegrate into sub-national competencies as a result of withdrawal appears to be a non sequitur. Is it conceivable that a British Parliament intended to abandon control over Scottish fisheries (for instance) so completely that it might one day be incapable of ensuring that Scottish salmon can be sold in Pembrokeshire?

The disintegration of common regulative frameworks is not the natural consequence of Brexit, but a technical deficiency which the Great Repeal Bill serves to correct in the swiftest manner possible. These matters are too important to the social and economic life of the United Kingdom to be left unclear until settled – if they ever are settled – by the unpredictable rulings of judges. By the same token, they are too important to be left as fodder for grievance-mongers.

Nevertheless, the repatriation of powers from Brussels to Westminster will itself give Scottish, Welsh, and Northern Irish representatives greater power to scrutinise common frameworks, without recourse to the devolved assemblies. As things have stood, the British government fills its own seat on the Council of Ministers and appoints a member of the Commission. The only scrutiny of the behaviour of these committees by representatives of Scottish, Welsh, or Northern Irish voters comes from the thirteen MEPs from those countries that sit in the 750 member EU Parliament. With the powers in question repatriated to Westminster, that scrutiny will be undertaken by the 110 MPs from Scotland, Wales, and Northern Ireland who hold the balance of power in the 650 member House of Commons of the United Kingdom.⁶

Meanwhile, the Scottish, Welsh, and Northern Irish assemblies and executives will continue to exercise the same powers over fisheries, agriculture, and the like that they have exercised since the inception of devolution. The EU Withdrawal Bill provides devolved ministers with powers to correct deficiencies arising from the absorption of the *acquis* into British law in all cases where those deficiencies pertain entirely to matters which have actually been devolved. The legislation at hand makes no inroads whatsoever into the powers that the assemblies have been exercising for almost two decades.

On the contrary, its purpose is to *preserve* those powers, by ensuring that the common EU frameworks within which they currently exist continue to function at a United Kingdom level after exit day. It is an open question whether devolution has already eroded the equality of rights between all British citizens to healthcare and education; this uncertainty could be magnified many fold if the plethora of common standards currently policed at a European level lapse in the middle of 2019. This must be avoided at all costs.

⁶ Nominally (if absentee Sinn Fein MPs were to be included) 117.

Moreover, the incorporation of the *acquis* into British law is part of a holding strategy, not a permanent settlement. It reflects the fact that the creation of entirely new frameworks is not only unnecessary, but a prohibitively enormous task at a time already rife enough with uncertainty. There will be time to debate these repatriated powers and to devolve some of them to regional and local authorities in the years to come. But that time is after, not during, the negotiation of Brexit itself – to say so is not a matter of policy, but of common sense. The solution outlined in the EU Withdrawal Bill offers the only guarantee of coherent national frameworks in place on exit day itself. Once again, the author must endorse an argument advanced by Mrs Sturgeon’s administration last December: these issues ‘will require a much longer timeframe [than that provided by Article 50] if they are to be tackled properly’.⁷

Union and Unity

In contrast to the principles of prudence and consistency that sit at the heart of the Repeal Bill, the reports of the Scottish Law Society and others propose a bewilderingly radical slip road to legislative, regulatory, and judicial chaos. It suggests removing the constraint imposed by EU law on devolved matters entirely, and replacing it with new common frameworks established by agreement between the British government and the devolved administrations.⁸ The Scottish and Welsh executives have been flirting with such ideas for some time. The SNP’s vision for Brexit centres upon a fragmented union, half within the EU and half outside, casting doubt over the most elementary aspects of commerce and even migration within the United Kingdom.⁹

It is not Westminster that wants to turn Brexit into a power grab, but the nationalists. Such movements have given up any pretence of providing security and comfort to individuals and businesses during a time of considerable upheaval. Instead, the effect of their proposal is to abandon future security and prosperity to wild speculation about future arrangements and new frameworks that may never be agreed. This reckless vision cuts to the central danger posed by contemporary separatism in the United Kingdom, and it is to this threat that we now turn.

At the heart of the separatists’ Brexit agenda – whether the ratchet-nationalism to which the SNP has resorted or the ‘soft nationalism’ that characterises some elements of the major parties – is a promise to replace the ‘unitary’ British state with

⁷ *Scotland’s Place in Europe*, 4.

⁸ An example of this kind of speculation may be found in Richard Rawlings, *Brexit and the Territorial Constitution: Devolution, Reregulation, and Inter-governmental Relations*, (London, 2017).

⁹ *Scotland’s Place in Europe*, 24-38. C.f. *Securing Wales’s Future: Transition from the European Union to a New Relationship with Europe*, (January 2017).

something vaguely described as ‘federalism’.¹⁰ In the words of one recent report, echoing the position adopted by the Welsh First Minister, Carwyn Jones, Britain now requires ‘a union state not a unitary state’. This, it is alleged, would herald ‘the end of devolution in Scotland, Wales, and Northern Ireland and a move to a more overtly federal or quasi-federal framework’.¹¹

For one, this claim is conceptually flawed: a federation is a form of unitary state, not an alternative to it. Certainly, federal constitutions tend to have more elaborate systems of regional government than the United Kingdom had for most of the twentieth century. Nevertheless, they imitate familiar British practice closely by reserving matters of common interest – from international agreements, defence, and national security, to commerce both internal and external – to the central government, without the possibility of veto by the localities. Indeed, historically, federal principles have been chiefly employed to *strengthen* the reach of central authorities, especially across vast territories, rather than to limit them. The United States is the archetype of this experience. Mr Jones and others are proposing something far weaker than federalism; the sort of *confederal* system – a loose alliance of smaller, weaker states beneath a feeble central power – that mainstream constitutional theory superseded in the eighteenth century.

At first glance, confederal politics might seem an attractive antidote to the more aggressive strains of national separatism; but their drawbacks are significant enough to make such schemes self-defeating. Bluntly stated, it is no accident that every union erected on the principle of diffused sovereignty has either fallen apart or been forced to centralise. The EU itself, the most significant confederal experiment in recent history, has made no secret of its preference to replace gradually this model with an ‘ever closer union’. The United States and Germany were once confederacies: secure prosperity came to them only after they adopted more unitary forms of federation. In America, a constitution once intended to give extensive powers to the states has been repeatedly modified to concentrate power at the centre. Such action, it has transpired, is the only way to meet the expectations of those who live in modern democracies. Diffused sovereignty is no way to achieve ambitious, national programmes like the Affordable Care Act (‘Obamacare’) – let alone something as vast, complex, and expensive as the NHS. All of these unions, it should be remembered, are imitating a model pioneered by England, Scotland, and Wales over the last three centuries: there is no reason to row against this tide.

¹⁰ The term ‘separatist’ is favoured over ‘nationalist’ because separatists do not own a monopoly on national identity in the United Kingdom, and over ‘pro-independence’ because neither Scotland, nor Wales, nor Northern Ireland is a dependent of the United Kingdom. Unionists have been dangerously reticent in accepting the language of separatist movements.

¹¹ *The UK’s Changing Union: Towards a New Union*, (February 2015), 3.

It is unsurprising that confederacies have been almost wholly eclipsed by unitary models in the modern world. The lengthy negotiations required to reach consensus make them prone to indecision, while they lack the command of national resources necessary to implement policies of national importance. At the same time, the resulting arguments and failures have a tendency to foster resentments between their component parts. As a consequence, unions without strong central governments are poorer and slower at spreading wealth and opportunity, they struggle to implement common standards, and they offer less protection to their citizens.

The principal weakness of the confederal model lies in its feeble decision-making process. Without a single sovereign authority set over the rest and representing the whole, there is precious little guarantee that a council of equal partners will reach consensus on matters of mutual concern – like the common frameworks of administration and regulation that Britain must have in place on the fast-approaching day when it leaves the EU. As the career of the Joint Ministerial Committee has already demonstrated conclusively, it is more likely than not that under such circumstances, Westminster and the devolved governments would only fall into paralytic strife with each other. The EU, a confederation which proved incapable of alleviating the strains that led to Brexit, itself exemplified this limitation. In the end, perhaps the most probable outcome of this tussle for power would be the domination of the largest constituent – unhealthy and destructive for all concerned. This must be set alongside a constitution which, despite the overwhelming demographic superiority of England, drew more than a third of the Prime Ministers who have served since 1900 from other parts of the union.

By concentrating the powers necessary, strong central governments have proven vastly more effective in achieving the four central duties of modern democratic states than their competitors:

- I. the central government acts as a single voice in foreign affairs, ensuring comprehensive and coherent defence and security policies, while guaranteeing that international treaties are honoured by all parts of the union;
- II. it has the power to redistribute wealth between regions and to fund projects beyond the capacity of individual localities, ensuring a basic level of prosperity for all;
- III. it implements common regulatory standards that enable seamless trade within the internal UK market and with partners abroad – vital, not least, for future commerce with the EU; and

- IV. it provides and preserves common rights for all citizens, in whichever part of the union, from their natural, human rights to their access to public services, including welfare, healthcare, and education.

Much has been said in recent times about the ‘four freedoms’ of the European Union. They are not really liberties, but the clauses of a commercial treaty, governing not so much the movement of people and assets as the trade in labour and merchandise. While they are renegotiated, we must not lose sight of another four freedoms of far greater importance. These four freedoms are the marrow of democratic political discourse, for those on the right and the left. Franklin Roosevelt, perhaps the twentieth century’s foremost champion of prosperity at home and safety abroad, once listed them as freedom of speech, freedom of worship, freedom from want, and freedom from fear.

It is precisely these freedoms that the British unitary state has evolved to preserve, from NHS funding to defence spending, from unhindered domestic trade to equal employment laws, to name but four examples. Only with a strong central government can we be sure that common regulatory frameworks for trade, workers’ rights, and environmental protection – to say nothing of national security – will be upheld. These are the principles that the EU Withdrawal Bill is designed to serve, as it empowers the British government to translate the relevant common frameworks from European to domestic contexts, without the uncertainty of chaotic, fractious, party-political wrangling between Westminster and the devolved assemblies.

The greatest of ironies is that devolution is itself best served under a unitary state than beneath some feebler alternative. Only with a strong central government can devolved assemblies in poorer parts of the country be assured of the funds they need to serve their constituents. Only with a strong central government can malicious hierarchies of identity and insular ‘mononationalisms’ be dispensed with: in a unitary state, overlapping identities can flow together in a common stream. To weaken the bonds of the United Kingdom is to drive a wedge between four nationalities; to strengthen those bonds should be to protect the individual in however many affinities they wish to hold. Herein lies the superiority of the unitary state over the mere union of states – one is a merging of complementary spirits into a rich and vibrant whole, the other a mere contract between alien parties; it is the difference between marriage and alimony. The principal failing of British devolution has been the all too frequent casting of the Westminster government as an opponent of the devolved assemblies, rather than a common arbiter, ensuring that every local and regional administration runs smoothly.

The EU Withdrawal Bill is the first step in what will be a long journey of disengagement from the European Union. It seeks to begin this immensely complicated process on the strongest possible basis – by ensuring that Britain’s own

constitutional frameworks provide the most robust foundations possible. It does so by the most obvious means at our disposal: the preservation of the existing balance of competencies between Westminster and the devolved assemblies, the very national frameworks that are the strength and stay of not only the union, but of devolution too. There will yet be a time for further reflection on the United Kingdom's constitution, and at that point imaginative proposals may well become useful; but that time is not in the next year and a half. In the months ahead, it is imperative that the foundations of our constitution, our freedom, and our prosperity are not sacrificed to the temptations of fleeting legislative convenience, or undermined by separatists.

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