

BREXIT AND THE TERRITORIAL CONSTITUTION:

*Devolution, Reregulation and
Inter-governmental Relations*

By Professor Richard Rawlings

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Executive Summary

Reregulation - in the general sense of regulating again or anew - is a key part of the Brexit narrative. For business and citizenry alike, and particularly for those concerned to see the UK survive and prosper, there cannot – must not – be a major legal vacuum as the EU epoch in domestic history comes to an end in the wake of the June 2016 referendum vote. Bearing as it does on the future health, perhaps even continued existence, of the UK's 'state of unions', one of the most important and challenging set of issues concerns reregulation and the territorial constitution. Common EU frameworks have had the effect of providing common UK frameworks, so promoting free and frictionless trade inside an otherwise increasingly differentiated polity. How then to substitute for EU-based regulation in order to ensure the proper functioning of the domestic market while at the same time respecting representative government systems in Scotland, Wales and Northern Ireland separately grounded through referendums in popular sovereignty?

There are powerful arguments for domestic common frameworks, not least in terms of a domestic single market, compliance with international obligations, negotiation of trade agreements, protection of common resources, and rights protection. At the same time there obviously is a sea of uncertainty over the outcome of the Brexit process. The tendency to sequencing - the temptation to treat the devolutionary aspects as if they were some kind of second front best frozen while supranational negotiations proceed, rather than to take them forward in tandem in a spirit of cooperation - must be firmly resisted.

EU common frameworks come in many shapes and sizes. It is futile to think in terms of a standard template for reading across. There is much in the EU by way of composite administration, in the inclusive sense of administration by co-dependent actors, network governance, and 'soft law' techniques of guidance, benchmarking, etc. Overlapping and mutually reinforcing, the key principles in EU administration of cooperation, coordination and communication constitute the essential 'wiring' of common EU frameworks, without which there would major losses of informational resources and steering capacity. Reregulation is not simply a legal endeavour.

There are many policy choices associated with reregulatory frameworks. When and according to which criteria should common UK frameworks be created? What should individual frameworks comprise? How should they be delivered and policed? Who should make the inevitable judgement calls? Where indeed are the boundaries of the 'UK single market' concept? Whither the further possibilities of 'GB' arrangements in some sectors in light of the economic and political geography on the island of Ireland? In territorial constitutional terms, this all puts a premium on effective and efficient forms of multilateral intergovernmental machinery, which are sadly lacking.

The domestic Brexit-driven development involves a powerful element of centralisation. While the scale and reach remains in question, especially given the practical realities of marketisation and globalisation, this clearly goes to the heart of the UK constitution in general and the territorial constitution in particular. It cannot be said too often that London stands to emerge from the Brexit process in a much more powerful position vis-a-vis the devolved nations. In view of the double-hatted character of Whitehall, the largescale functional fusion of UK Government with the government of England in a classically non-federal system, the perception that Brexit privileges England over the other constituent nations cannot be wished away. Mediating the overbearing

effects of Parliamentary Sovereignty coupled with UK and England governance structures is a constitutional imperative in the context of Brexit which a ministerial mantra of significant increases in devolved decision-making power should not obscure.

Underlying the current controversy over reregulation and devolution in the context of the European Union (Withdrawal) Bill are basic differences between the UK Government and, in their own ways, the Scottish Government and the Welsh Government in terms of constitutional perspective and understanding. An important new dynamic in the constitutional politics is coordinated and joint action between the two devolved governments, one which Whitehall would do well not to ignore. The protracted failure to re-establish power-sharing government at Stormont underscores the multiple challenges for devolution and the island of Ireland associated with Brexit.

The legislative strategy elaborated in the Withdrawal Bill has five main prongs: repeal the European Communities Act 1972; stabilise the legal situation; reprogram constitutional fundamentals; empower legislative changes; and, the realm of the so-called ‘devolution clauses’ (10 and 11), occupy legislative and executive space. The devolution clauses are among the most significant provisions in the Withdrawal Bill, going as they do to the heart of contemporary political and constitutional debates about the very nature and future of the UK. According to UK Ministers they denote a transitional process, but this is not made clear on the face of the Bill. One-sided and provocative, especially when read together with the extraordinarily wide-ranging powers for UK ministers elsewhere in the Bill, the devolution clauses represent a poor choice of model to which the devolved institutions cannot be expected to give legislative consent. Negotiating and elaborating agreed laws, rules and practices for reregulatory purposes may not always be easy. But it does not do to make a constitutional mountain out of possible political and administrative molehills. Aggressive exercise of Parliamentary Sovereignty should be the last – not the first – resort.

The Brexit process constitutes a thoroughgoing test of the UK’s territorial constitution. The question is sharply posed. How from the standpoint of an enlightened and prudent Union policy, one which puts a premium on effective and collaborative working of state and sub-state political institutions and on mutual respect, should UK ministers now address the subject-matter of devolution, intergovernmental relations and common frameworks? Legal, political and administrative initiatives all have a significant role to play, especially with a view to promoting trust and confidence among the several centres of legislative and executive authority.

The sooner there is legislative redesign the better. Amendments to the Withdrawal Bill proposed by Scottish and Welsh ministers are par for the course: no diversion of devolved competence to London such that repatriated powers would lie where they fall; UK Ministers unable unilaterally to change the two devolution settlements; UK ministers unable unilaterally to make provision within Scottish or Welsh Ministers’ executive competence; equivalence, whereby the powers of Scottish and Welsh ministers to modify the newly categorised body of ‘retained EU law’ would truly correspond to those of UK ministers. If however it is a firm political choice in Whitehall that special provision is required, the Withdrawal Bill might contain a power to add, remove or modify reservations in the devolved settlement(s) to reflect frameworks agreed with the devolved administration(s) for the realisation of the UK single market, subject to the approval of Westminster and the relevant devolved legislature(s). The devolved institutions would have a significant measure of protection and Whitehall and Westminster should have little to fear. Parliamentary Sovereignty would be harnessed to constitutional advantage as a reserve power, available to exercise in the

truly abnormal - hypothetical - case of necessity where the terms of a common framework prove impossible to agree.

There is an urgent need for multilateral forms of intergovernmental relations which are fit for purpose; and the more so, the more that UK ministers seek to develop innovative market and trading strategies for a post-Brexit world. The sudden resuscitation of the Joint Ministerial Committee (European Negotiations) after months of dormancy is a start but only a start. Reform could sensibly include the establishment of a new and more highly-g geared intergovernmental forum, the 'Joint Ministerial Committee (Domestic Single Market)'. Designed in part for ongoing purposes of policy coordination and supervision, such a body would help to fill an emergent institutional gap in the UK's territorial constitution.

The very recent agreement in the Joint Ministerial Committee on joint working to establish common approaches, and on the definition of, and general underpinning principles for, common frameworks, is a significant and welcome development. There is however much further to go in terms of a constitutional/political presumption of devolution, transparency, and, at another level, practical policy tools designed to facilitate careful and constructive analytical approaches. Soft governance techniques such as concordats and agreed guidelines, and benchmarking and peer review, have an important role to play in the reregulatory architecture.

The history of reservations in devolved legislation bears ample testimony to the innate capacities of individual Whitehall departments for power-hoarding through hard-edged legal expressions of institutional self-interest. The prospect at the expense of the devolved institutions of 'reregulation creep' via common frameworks is clear and immediate. Firm application of better regulation type disciplines of proportionality and targeting is required through a high-level and robust system of internal check at the heart of Whitehall. Such machinery has a discrete role to play in ensuring a suitably coherent, workable and rounded constitutional product from the reregulatory process, so caring for the big picture.

The common sense case for reregulatory frameworks is no excuse for constitutionally insensitive approaches to policy choice, institutional design and practical delivery.

Reregulation in prospect*

Reregulation - in the general sense of regulating again or anew - is a key part of the Brexit narrative. For business and citizenry alike, and particularly for those of us concerned to see the UK survive and prosper, there cannot – must not – be a major legal vacuum as the EU epoch in domestic history comes to an end in the wake of the June 2016 referendum vote. As the chief legislative vehicle for ensuring this, the current European Union (Withdrawal) Bill also serves to illustrate different forms and potentials of reregulation. Much is heard under the twin banners of ‘continuity’ and ‘correction’ of changes of legal form not substance and of more or less creative approaches to securing proper fit with the domestic statute books. Meanwhile, the promise of further Brexit-related Bills in the Queen’s Speech references the functional and/or political demand for separate, policy-laden, forms of reregulation in the functioning economy, as with measures on trade and customs, agriculture and fisheries.¹ The innate potential of (EU) regulation and (UK) reregulation to play differently in view of different constitutional and administrative cultures and institutional settings gives all of this an added twist.

Bearing as it does on the future health, perhaps even continued existence, of the UK’s so-called ‘state of unions’,² one of the most important and challenging constitutional issues concerns devolution and reregulation. Common EU frameworks have had the effect of providing common UK frameworks, so helping to secure free and smooth trading conditions inside an otherwise increasingly differentiated polity. How then to substitute for EU-based regulation in order to ensure the proper functioning of the domestic market while at the same time respecting representative government systems in Scotland, Wales and Northern Ireland separately grounded through referendums in popular sovereignty?

Single market and territorial constitution

In her speech at Lancaster House at the beginning of the year, the Prime Minister gave the issue political traction with a notably firm and wide-ranging assertion of policy oriented to a UK single market:

*Our guiding principle must be to ensure that – as we leave the European Union – no new barriers to living and doing business within our own Union are created. That means maintaining the necessary common standards and frameworks for our own domestic market, empowering the UK as an open, trading nation to strike the best trade deals around the world, and protecting the common resources of our islands.*³

Effectively referencing non-membership of the EU Single Market and, by extension, of the EU Customs Union,⁴ this according to Mrs May was the stuff of ‘a truly Global Britain’. As well as through ‘a modern industrial strategy’ featuring targeted public investment,⁵ hopefully it would

1 * I am grateful to Gordon Anthony, Andrew Blick, Sionaidh Douglas-Scott, Carol Harlow, Jo Hunt, Rachel Minto, Alan Page and Alison Young for comments on a draft. The usual disclaimer applies.

Prime Minister’s Office, *Queen’s Speech Briefing Notes* (21 June 2017).

2 James Mitchell, *Devolution in the UK* (Manchester: Manchester University Press, 2009).

3 Theresa May, Lancaster House speech, 17 January 2017.

4 See latterly, HM Government, *Future customs arrangements* (2017); HM Treasury, *Customs Bill: legislating for the UK’s future customs, VAT and excise regimes*, Cm. 9502, 2017.

5 HM Government, *Building our Industrial Strategy* (2017).

be buttressed by ‘a new, comprehensive, bold and ambitious’ free trade agreement with erstwhile European partners. So too, with a view to UK ministers negotiating effectively with international partners and guaranteeing compliance, the internal and external aspects of trade policy should be closely aligned.⁶ On from a template of ‘devolve and forget’,⁷ the Prime Minister spoke of preserving and strengthening ‘our precious Union’, most obviously in the face of demands for a second Scottish independence referendum. By way of informal constitutional guarantee, Mrs May added that ‘no decisions currently taken by the devolved administrations will be removed from them’.

The concept of ‘the UK single market’ has featured previously in the debate over Scottish devolution. Proceeding under the banner of ‘an economic Union’, the Calman Commission identified it as an important normative factor conditioning the territorial allocation of powers, reflected in turn in the pattern of reservations – financial and economic matters, trade and industry, much economic regulation, etc. - in the Scotland Act 1998.⁸ Usefully for the UK Government, the UK Supreme Court has similarly prayed it in aid for the purpose of interpreting devolution legislation.⁹ The approach is further underscored by a legislative mapping exercise conducted for the Scottish Parliament in the context of Brexit.¹⁰ With many areas of Europeanised competence reserved under the devolution legislation to Westminster, Whitehall thus stands to acquire much by way of policy responsibilities repatriated from Brussels, including core ones associated with the four ‘fundamental freedoms’ of movement of goods, people, services and capital, as well as the negotiation and conclusion of trade agreements. Horizontal or cross-sectoral frameworks such as competition law and policy are especially noteworthy in this regard.

Conversely however, in the absence of corresponding amendment to the devolution statutes, some major subject-matters of Europeanised competence stand to be fully exercised in Belfast, Cardiff and Edinburgh. These principally involve agriculture and fisheries, economic development, public procurement and transport, and environmental protection, as well as for Scotland and Northern Ireland aspects of justice and home affairs. The basic legal point that withdrawal from the EU would not itself alter the internal distribution of legislative competences appearing on the face of the devolution statutes needs emphasising. Duly adopted by the devolved governments, the relevant principle that ‘powers lie where they fall’ will be seen at the heart of the current constitutional and political dispute over Brexit and devolution.

Relations with the EU and its institutions have been reserved under the devolution legislation to the UK - ‘Member State’ – level.¹¹ The devolved administrations have nonetheless had an important role to play in contributing to the UK policy line in Brussels, in their own paradiplomacy for example when promoting inward investment, and in implementing – invoking, observing and

6 See latterly, Department for International Trade, *Preparing for a future UK trading policy*, Cm. 9470, 2017.

7 Theresa May, speech to Scottish Conservative conference, 3 March 2017.

8 Commission on Scottish Devolution, *The Future of Devolution within the Union: A First Report* (2008), chapter 4. Some discern distant echoes of the 1707 Act of Union.

9 *Imperial Tobacco v Lord Advocate* [2012] UKSC 61, paras. 29-34; endorsing the opinion of Lord Reed in the Inner House, [2012] CSIH 9, para. 95. See also *Christian Institute v Lord Advocate* [2016] UKSC 51, para. 28.

10 Alan Page, *The implications of EU withdrawal for the devolution settlement* (Scottish Parliament, 2016).

11 See for example, Scotland Act 1998, Schedule 5, Part 1, para. 7. Schedule 2, para. 3 of the Northern Ireland Act 1998 contains an exclusion for Northern Irish legislation giving effect to cooperation within the framework of the North-South Ministerial Council.

applying – EU law in their evolving areas of responsibility.¹² Copious evidence of the implementation aspects appears in the interventions at UK Supreme Court level in the *Miller* case,¹³ with the devolved governments giving a long litany of EU-oriented measures, a very positive statement of legislative and executive action¹⁴ going in tandem with the overarching requirement in the devolution legislation not to transgress EU law.¹⁵ For its part, the Court of Justice (CJEU) has rejected a demand for domestic regulatory uniformity at the micro-level in the UK context,¹⁶ a sensible vindication of the subsidiarity principle¹⁷ whereby regulation in the EU should be pursued at the lowest level consistent with effectiveness.

Recent developments around the so-called ‘devolution settlements’ must be factored into the equation. The Scotland Act 2016 stands not only for more devolved competence but also for a constitutional design of shared and interconnecting powers between the state and sub-state levels,¹⁸ one which can sensibly have major traction in the Brexit context. In the name of a stronger, clearer, and fairer devolution settlement¹⁹ the Wales Act 2017 replaces a conferred powers model of devolution with a reserved one more akin to the Scottish arrangements, which in turn facilitates cooperation between the two devolved governments in constitutional politics.²⁰ As regards Northern Ireland, the protracted failure to re-establish power-sharing government at Stormont underscores the multiple challenges for devolution and the island of Ireland associated with Brexit, economic and legal as well as political.²¹ The supranational - financial support - framework provided by the EU is after all commonly credited with facilitating the peace process.²²

Sea of uncertainty

To say, as does the Exiting the EU Select Committee, that the outcome of the Brexit negotiation ‘is far from certain’,²³ is classic British understatement. In this respect, the EU’s insistence that talks on exit, especially around UK financial liabilities and citizens’ rights and the Northern Irish border, must precede talks on trade, serves to compound matters.²⁴ The possibilities of some form(s) of transition period, as played up by the Prime Minister in her recent speech in Florence,²⁵

12 For a recent discussion of the place and relationships of the devolved countries inside the EU, see Jo Hunt, ‘Devolution’ in Michael Dougan (Ed.), *The UK After Brexit: Legal and Policy Challenges* (Cambridge: Intersentia, 2017); and see generally, Michael Tatham, *With, Without and Against the State: How European Regions Play the Brussels Game* (Oxford: OUP, 2017).

13 *R (on the application of Miller and Dos Santos) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

14 See also Scottish Government, *Implementing EU obligations in Scotland* (2016).

15 For example, Scotland Act 1998, s. 29(2)(d).

16 Case C-428/07 *Horvath v Secretary of State for Environment, Food and Rural Affairs* [2009] ECR I-06355.

17 Treaty on European Union (TEU) Article 5(3) and Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality.

18 *Report of the (Smith) Commission for further devolution of powers to the Scottish Parliament* (2014).

19 HM Government, *Draft Wales Bill* (2015), Cm. 9144, p. 4.

20 Richard Rawlings, ‘The Strange Reconstitution of Wales’ (2018) *Public Law* (forthcoming).

21 For a useful introduction, see Irish Government, *Brexit – Ireland’s Priorities* (2017); and see further, Mary Murphy, *Northern Ireland and the European Union* (Manchester: Manchester University Press, 2014).

22 House of Lords European Union Committee, *Brexit: UK-Irish Relations*, HL 76 (2016-17). For a legal perspective, see Gordon Anthony, ‘“Britain Alone”: A View from Northern Ireland’ in Andrea Biondi and Patrick Birkinshaw (Eds.), *Britain Alone! The Implications and Consequences of United Kingdom Exit from the EU* (London: Wolters Kluwer, 2016).

23 House of Commons Exiting the European Union Committee, *The Government’s Negotiating Objectives*, HC 1125 (2016-17), p. 3.

24 European Council, *Guidelines following the United Kingdom’s notification under Article 50 TEU* (April 2017); European Commission, *Negotiating Directives* (COM (2017) 218 Final).

25 Theresa May, speech on Brexit, 22 September 2017. For discussion of the legal issues raised by a transitional arrangement, see Kenneth Armstrong et al, *Implementing Transition: How Would it Work?* (Cambridge: CELS, October 2017).

or of no deal on the terms of exit, as latterly hypothesised by the Prime Minister on the floor of the House of Commons,²⁶ duly jostle for attention in the public discussion. The inconvenient truth that nobody knows the eventual scale, patterns and timings of release from supranational frameworks has major implications for internal legislative and administrative design in the next period, not least as regards devolution. Assuming, that is, something called ‘Brexit’ actually happens.

The domestic constitutional saga has continued to unfold with the UK Supreme Court decision in *Miller* requiring statutory authorisation for the triggering under Article 50 TEU of the Brexit negotiations; the resulting European Union (Notification of Withdrawal) Act 2017; and, with the default position under Article 50 of exit after two years and the clock running, First and Second Readings²⁷ of the European Union (Withdrawal) Bill. The Committee of the whole House on this quintessential Bill of ‘first-class constitutional importance’ is still awaited at the time of writing.

The legislative politics are from the viewpoint of government business managers very challenging. Conditions are ripe for a substantial concessions strategy as well as forced elements of compromise. On from Conservative majority government at Westminster at the beginning of the year, such is the short history of snap General Election meant to secure Brexit policy lines, hung Parliament which continues to harbour much ‘pro-Remain’ sentiment, and weakened Prime Minister.²⁸ The resulting ‘confidence and supply’ agreement between the minority Conservative Government and the Democratic Unionist Party in Northern Ireland,²⁹ which extends to DUP support for ‘legislation pertaining to’ Brexit, speaks for itself. The constitutional challenge for Parliamentary authority and control presented by the unprecedented reach and ‘framework’ nature of the Withdrawal Bill is too a most fertile territory for lengthy deliberation and detailed amendment in the House of Lords.³⁰ The more so, it may be said, when with no majority government the Salisbury-Addison convention protecting manifesto Bills is not obviously in play,³¹ and when in an unusually long parliamentary session of two years³² the overriding discipline of the Parliament Acts is diluted.

The centre, however, must further contend with the rise and interplay of multi-polar forms of democratic scrutiny, a major developing theme in the UK’s territorial constitution given institutional expression in a new domestic Interparliamentary Forum on Brexit.³³ Moreover, the political and constitutional issue of legislative consent from the devolved authorities is liable to cast a long shadow over the discussions on the Withdrawal Bill. Together, the Scottish and Welsh Governments have been quick to conjure it.³⁴ And predictably so, not least because in the so-called devolution clauses UK ministers will be seen aggressively asserting control of the reregulatory process in the name of common frameworks, with the suggestion of autonomies through the ‘release’ of

26 *Hansard*, HC, vol. 629, cols. 43-44 (9 October 2017).

27 *Hansard*, HC, vol. 627, col. 464 (13 July 2017); vol. 628, cols. 342-422 and cols. 455-604 (7 and 11 September 2017).

28 See further, Vernon Bogdanor, *Britain and the EU: In or Out – One Year On* (Gresham College lecture, June 2017).

29 Agreement between the Conservative and Unionist Party and the Democratic Unionist Party on Support for the Government in Parliament (26 June 2017).

30 For the attempted pre-emptive strike, see House of Lords Constitution Committee, *The ‘Great Repeal Bill’ and delegated powers*, HL 123 (2016/17).

31 For the evolution, see Joint Committee on Conventions, *Conventions of the UK Parliament* HC 1212 (2006/07), chapter 3.

32 Officially by reason of the great weight of Brexit-related legislation:

<https://www.gov.uk/government/news/government-to-confirm-two-year-parliament-to-deliver-brexit-and-beyond>

33 Interparliamentary Forum on Brexit, statement on 1st meeting, 12 October 2017.

34 First Ministers of Scotland and Wales, Joint statement in reaction to the European Union (Withdrawal) Bill, 13 July 2017. And see below, at note 136.

competence. Proceeding as if the clock of the constitution can simply be turned back to 1972, it is the heavy, top-down way of the internal, territorial assertion of Westminster supremacy across all the areas of returning EU competence.

Enough has been said to highlight the importance of the UK single market dimension for the balance of power between the UK Government and the devolved administrations, as well as the scope, as time ticks by, for high stakes constitutional and legislative poker games. Against this backdrop, Section 2 considers both the reregulatory subject-matter of EU frameworks, pointing up their plural and multi-faceted character, and the need for better-developed UK inter-governmental machinery to deal with this. Section 3 views the proposed reregulation against the backdrop of wider trends in governance, so demonstrating the reverse dynamic of centralisation and the constitutionally hidden dimension of English difference. Juxtaposing this with competing prescriptions from the Scottish and Welsh Governments, it illuminates different constitutional visualisations as well as a basic lack of trust.³⁵ Section 4 discusses the legislative approach in the Withdrawal Bill from the territorial constitutional standpoint, focusing in particular on the devolution clauses 10 and 11. Both the fit with UK Government policy development and the disturbing features from a devolutionary perspective are examined. Section 5 considers ways of helping to accommodate Brexit-driven reregulation with the constitutional fact and value of devolution, emphasising the importance in an enlightened and prudent Union policy of a combination of legal, political and administrative initiatives. These involve a reworking of current legislative policy, whereby aggressive use of Parliamentary Sovereignty is a last, not a first, resort; enhanced multilateral forms of UK inter-governmental relations, as with a new ministerial forum on the domestic single market; open and principled approaches to the construction of reregulatory frameworks; and careful exercise of self-discipline at the centre.

Architectures

Frameworks

EU common frameworks come in many shapes and sizes. In building on the general Treaty canon of non-discriminatory access to markets, and in particular on major EU legal principles such as mutual recognition, the degree to which they require harmonisation of national laws and policies varies from sector to sector and over time in the light of countervailing constitutional, political and administrative demands for convergence and divergence.³⁶ Famously for example, the Common Agricultural Policy (CAP) has long seen certain aspects of regulation and subsidy being heavily Europeanised, but there also is a considerable history of changing patterns of shared management across the different supranational and domestic layers of governance. Or take public procurement, where a convoluted legislative development of a common framework encompassing nationally defined procedures grounds complex mixes of EU rules and state and sub-state discretions in front-line decision-making in the Member States. Further serving to illustrate the wider forces of globalisation, the now more detailed – assertive – style and substance of EU financial services

³⁵ Sections 2 and 3 are based on a presentation given at the Constitution Society in May 2017.

³⁶ Paul Craig, *EU Administrative Law* (Oxford: OUP, 2nd edn 2012); Carol Harlow and Richard Rawlings, *Process and Procedure in EU Administration* (Oxford: Hart Publishing, 2014).

regulation is largely a product of the recent global financial crisis and associated international demands for reregulation.

It is futile then in the current context to think in terms of a standard template for reading across. Indeed, the EU's internal market is described as an ambiguous legal concept, so underwriting the varying quality and intensity of the regulatory environment.³⁷ Comparative constitutional analysis further illuminates the broad spectrum of possible internal market architectures, from the determinedly unitary kind to a highly decentralised format featuring intense inter-territorial competition, and also the huge reservoir of constitutional and legal design techniques, including most famously perhaps the American-style enumerated commerce clause.

Several general features of EU governance are also very relevant.³⁸ A product of the changing demands of a bigger and more complex Union, the administrative system is sprawling and fragmented and heavily weighted to the domestic level. As against traditional – state – forms of hierarchy, so-called ‘network governance’ is of the essence of a dynamic and flexible development, with the European Commission a hub for multiple and diverse forms of institutional groupings and with much reliance on specialist committees and latterly EU agencies. Going beyond the older dichotomy of ‘direct’ (supranational) and ‘indirect’ (Member State) administration there is today much by way of ‘composite’ administration, in the inclusive sense of administration by co-dependent actors, as well as multiple ‘soft law’ techniques of guidance, benchmarking, etc. Overlapping and mutually reinforcing, the key principles in EU administration of cooperation, coordination and communication constitute the essential ‘wiring’ of common EU frameworks, without which there would be major losses of informational resources and steering capacity. Reregulation is not simply a legal endeavour.

Looking forwards, an acid test of the Brexit development will be the extent to which in different policy fields the UK chooses - or is required - to vacate the so-called ‘European administrative space’. The concept is a notably flexible one,³⁹ as shown by the involvement in some regulatory fields of other neighbouring - non-EU - countries, as for example in environmental protection in the light of the Aarhus Convention,⁴⁰ or even generally or horizontally, as with the single market tie-up with European Free Trade Association (EFTA) members in the European Economic Area (EAA). Attention is further drawn to the scale of the demand for revamped domestic frameworks as in part a function of the kind of Brexit that emerges. Different but related are debates around the particular economic and political attractions at state and/or sub-state levels of shadowing EU regulation in important policy domains for reasons of market access and valued relationships, transitionally or otherwise.

Preliminary scoping work in Whitehall further serves to illuminate the broad ambit of the policy discussion. In the case of Scotland for example, over 100 areas of intersection of EU competences with devolution are identified, some but not all of which may be expected to ground domestic common frameworks. Predictably, there are large clusters to do with agriculture and environmental quality, and also in law enforcement and judicial cooperation and data sharing, as well as

37 Stephen Weatherill, *The Internal Market as a Legal Concept* (Oxford: OUP, 2017).

38 *Process and Procedure in EU Administration*, chapters 1-2.

39 Herwig Hofmann, ‘European administration: nature and developments of a legal and political space’, in Carol Harlow et al (eds.), *Research Handbook on EU Administrative Law* (Cheltenham: Edward Elgar, 2017).

40 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998).

items as diverse as rail franchising, free movement in healthcare, and migrant access to benefits.⁴¹ Demonstrating too the rule of thumb that the more generous the pre-existing devolution settlement, the greater is the potential bite of reregulatory frameworks, the list suitably highlights the possibilities of common arrangements constructed other than in terms of the UK's four constituent nations. In the case of Wales for example, the equivalent list is inevitably smaller in view of the old 'England and Wales' paradigm in justice matters. Meanwhile, in the inherently charged political context of Northern Ireland, UK ministers speak hopefully of both avoiding any physical border infrastructure with the neighbouring EU member state and preventing any new barriers to doing business between Northern Ireland and Great Britain.⁴² Issues concerning local cross-border production chains, all-Ireland markets, and the Irish Sea ports loom large, yet at the same time cannot mask deeper concerns.⁴³

Drilling down, there are good functional arguments to support a thoughtful and creative approach to domestic common frameworks.⁴⁴ Not least from the standpoint of stakeholders in the business community, where the concept of a level playing field is naturally a vital consideration. In view of understandable commercial anxiety about regulatory differentials, common minimum trading standards appear high on the agenda; likewise, specifically with a view to ensuring fair competition, basic rules on state aids and business support. Issues of equality and/or employment law, the need perhaps for a common framework going beyond the Equality Act 2010 post-Brexit, further serve to highlight the important role of rights-based approaches ranging beyond the promotion of a single market rationale. Questions of policy effectiveness, more especially in terms of externalities and the cross-border effects of both UK and devolved policies, command particular attention. Environmental protection naturally features prominently, as with air quality and emissions trading, extending in turn to matters of product compliance such as chemicals regulation, and again to matters only tangentially connected with a single market rationale such as bathing water quality.⁴⁵ Other powerful examples such as food standards or animal health and welfare further serve to illustrate the related arguments in terms of compliance with international obligations and, more prosaically, of administrative cost and capacity.⁴⁶ Once again, however, it is a mistake to think only in terms of policy – let alone administrative – uniformity. The EU does not, so why should Whitehall?

Unpacking the different components of EU frameworks, better to appreciate the challenges and opportunities presented by Brexit, is a valuable exercise. Not least when the *dominium* power – the deployment of wealth in aid of policy objectives – is in play, as notably in areas of devolved responsibility such as agricultural support and regional or structural funding. As part of the quest for a less top-down approach to reregulation, the Welsh Government has already gone down this route, so pointing up the 'wide spectrum of options and regulatory mechanisms to be consid-

41 Letter from Scottish Government minister Michael Russell to the Scottish Parliament Finance and Constitution Committee, 19 September 2017. For further details, see Institute for Government, *Brexit, devolution and common frameworks* (October 2017).

42 Northern Ireland Office and Department for Exiting the European Union, *Northern Ireland and Ireland – position paper* (August 2017).

43 Cathy Gormley-Heenan and Arthur Aughey, 'Northern Ireland and Brexit: Three effects on the "border in the mind"' (2017) 19 *British Journal of Politics and International Relations* 497.

44 For discussion along these lines at devolved level, see Scottish Parliament Finance and Constitution Committee, Brexit evidence session, 14 June 2017; also, National Assembly for Wales External Affairs and Additional Legislation Committee, *Implications for Wales of Leaving the European Union* (January 2017).

45 See for example, Victoria Jenkins, *Brexit and Environmental Law* (Bristol: UK Environmental Law Association, 2017).

46 Institute for Government, *The civil service after Article 50* (2017).

ered'.⁴⁷ This is the stuff, at one level, of legislative provision, governance structures, and strategic policy direction; at another level, of management plans and standard-setting; and, at another level again, of the hard administrative grind across the regulatory cycle of registration and licensing, monitoring and inspection, and enforcement and sanctions. Carefully tailored approaches to common frameworks are of the essence of this approach.

Enough has been said to indicate the scale of the policy choice associated with reregulatory frameworks in the context of Brexit. When and according to which criteria should common UK frameworks be created? What should individual frameworks comprise? How should they be delivered and policed? Who should make the inevitable judgement calls? Where indeed are the boundaries of the 'UK single market' concept?⁴⁸ Whither the further possibilities of 'GB' arrangements in some sectors in light of the economic and political geography on the island of Ireland? Reregulation in the broad sense of substituting domestic institutions, laws and practices for EU governance counterparts is seen too as a major recipe for change in the light of different constitutional, political and administrative understandings, and/or the relative internal 'closeness' of the UK.

Rhetoric and reality

In constitutional terms, this all puts a premium on effective and efficient forms of intergovernmental machinery: in part, to build agreement around shared frameworks; in part, for ongoing purposes of policy coordination and supervision. The UK Government documentation itself is replete with references to the need for close and constructive engagement with colleagues. Looking across the piece, the 2017 Queen's Speech began with Her ministers' commitment to working with Parliament, the devolved administrations, business and others, 'to build the widest possible consensus' on the UK's future outside the EU.⁴⁹

Reverting however to New Labour's devolutionary reforms at the turn of the century, the intergovernmental system centred on the Joint Ministerial Committee (JMC) represented a proverbial 'black hole' at the heart of the constitutional architecture.⁵⁰ Precepts of cooperation, communication and consultation appeared in 'soft law' terms⁵¹ in the agreed memorandum of understanding⁵² and concordats between the several administrations. But the associated processes were disjointed and unstable, discretionary and ripe for central domination, and lacking in transparency and accountability. Institutional forms of political and multilateral - pan-UK - coordination were evidently not a priority in the conditions of largescale New Labour hegemony. The emphasis placed on bilateral processes at departmental or operational level also fitted with a highly asymmetrical approach to devolved competence.⁵³

47 Welsh Government, *Brexit and Devolution* (June 2017), pp. 13-14.

48 An aspect highlighted by the voluminous Scotch whisky litigation on alcohol minimum pricing and the respective roles of (devolved) health and (EU) free movement and trade policies.

49 <https://www.gov.uk/government/speeches/queens-speech-2017>

50 Richard Rawlings 'Concordats of the Constitution' (2000) 116 *Law Quarterly Review* 257.

51 In the broad sense of rules of conduct or pointers and commitments which are not directly legally enforceable. See Richard Rawlings, 'Soft Law Never Dies' in Mark Elliott and David Feldman (Eds.) *The Cambridge Companion to Public Law* (Cambridge: CUP, 2015).

52 *Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee* (1999). The current version of the MoU dates from 2013.

53 See further, Nicola McEwen et al (eds.), *Governments in Opposition? Intergovernmental Relations in the UK* 4 *British Journal of Politics and International Relations* (2012) special issue; Institute for Government, *Governing in an Ever Looser Union* (2015).

One advantage of the JMC machinery is the institutional flexibility of convening in different formats: as with JMC (Domestic) on internal relations; and JMC (Europe), a typically busier vehicle for EU-oriented policy discussions and information sharing. Yet little has been done to resolve the underlying weaknesses. Rather, there is a never-ending litany of complaint from parliamentary committees about fragmentation, organisational skews in favour of London, and too little democratic oversight. Near the end of the last Parliament, for example, the Public Administration and Constitutional Affairs Committee spoke of the need to imbue the formal machinery ‘with a sense of purpose’, called on the UK Government ‘to show a genuine receptiveness to the concerns and suggestions put forward by the devolved administrations’, and recommended ‘guaranteed... minimum standards of transparency.’⁵⁴ The lack of institutional reform fits with the essentially reactive and patchy approach to territorial constitutional change generally characterising the UK development.⁵⁵

There was a flurry of intergovernmental activity in the aftermath of the Brexit referendum vote. As well as informal ministerial quadrilaterals, a new forum was established, the Joint Ministerial Committee (EU Negotiations). Appearing to represent a step-change in UK intergovernmental relations, the agreed terms of reference of JMC (EN) raised expectations of an inclusive, pan-UK approach to, and oversight of, the Article 50 negotiations through collaboration in a dedicated work programme.⁵⁶ A follow-up report by the European Union Committee makes for dismal reading however.⁵⁷ Far from in the Prime Minister’s words ‘full engagement’ with the devolved administrations, it is a catalogue of political obstruction and administrative shortcomings on the part of the UK Government, such that inputs by the devolved governments are the more notable by their absence. Minimal engagement with the devolved administrations over the drafting of the Withdrawal Bill is in turn par for the course.

To insist on bilateral forms of political engagement, as UK ministers have typically done since the recent General Election, hardly squares with the logic of common frameworks. So too, the hiatus in Northern Irish governance hardly justified a general suspension of multilateral arrangements at this most critical juncture of British history. As regards Northern Ireland itself, Brexit matters cannot be immune from the concerns generated by the Conservative/DUP pact about a lack of even-handedness by UK Ministers. Privileged forms of inter-party communication, after all, are part and parcel of such an agreement. The parallel development through Sinn Fein electoral success and abstentionism of no nationalist representation from Northern Ireland in the House of Commons makes for a stark contrast.⁵⁸

54 Public Administration and Constitutional Affairs Committee, *The Future of the Union: Inter-institutional relations in the UK*, HC 839 (2016-17), paras. 65, 67, 78. See also, House of Lords Constitution Committee, *Inter-governmental relations in the United Kingdom*, HL 146 (2014-15).

55 See House of Lords Constitution Committee, *The Union and devolution*, HL 151 (2015-16); and, for non-official views, Bingham Centre for the Rule of Law, *A Constitutional Crossroads* (2015), and Constitution Reform Group, *Draft Act of Union Bill* (2016).

56 JMC communiqué, 24 October 2016. See also, Institute for Government, *Four-nation Brexit* (2016).

57 House of Lords European Union Committee, *Brexit: devolution*, HL 9 (2017-19); and see *Hansard*, HL, vol. 785, cols. 25-44, 68-100 (9 October 2017).

58 This is not to overlook the work of the British-Irish Council, an undervalued body.

Constitution and governance

Reverse dynamic

Much has been heard in recent times of ‘the hollowing out of the state’,⁵⁹ a political science metaphor highlighting the apparent depletion of central government functions by transfer ‘upwards’ to the EU, and latterly ‘downwards’ to the devolved administrations, as well as ‘sideways’ to agencies or the private sector. This is highly simplistic given the multiple tangled webs of contemporary governance, but it serves to illuminate the domestic Brexit-driven development as very much a reverse dynamic, one of centralisation of legislative and executive power or, to replay the metaphor, of ‘infilling’. While the scale and reach remains in question, especially given the practical realities of marketisation and globalisation, this ‘government turn’ clearly goes to the heart of the UK constitution in general and the territorial constitution in particular.

The key policy White Paper on exit from and partnership with the EU⁶⁰ was nothing if not ambitious. Published ahead of the triggering of Article 50, it expounded a set of 12 principles that would guide the UK Government’s Brexit strategy:

1. Providing certainty and clarity
2. Taking control of our own laws
3. Strengthening the Union
4. Protecting our strong historic ties with Ireland and maintaining the Common Travel Area
5. Controlling immigration
6. Securing rights for EU nationals in the UK and UK nationals in the EU
7. Protecting workers’ rights
8. Ensuring free trade with European markets
9. Securing new trade agreements with other countries
10. Ensuring the United Kingdom remains the best place for science and innovation
11. Cooperating in the fight against crime and terrorism
12. Delivering a smooth, orderly exit from the EU

For present purposes, the template serves to underscore the central place in the policy development of the ‘Global Britain’ idea, as well as the overarching constitutional and political concerns relating to the nature and conduct of the process, to the Union, and to Ireland. Further illuminating the particular interest in common frameworks, the section on ‘strengthening the Union’ spoke of ‘the importance of trade within the UK to all parts’ as the chief parameter for engagement with the devolved administrations.⁶¹ In edging beyond the bare promise of no diminution of devolved competence, the exit and partnership White Paper also spoke of ‘an opportunity to determine the

59 Roderick Rhodes, ‘The hollowing out of the state: The changing nature of the public service in Britain’ (1994) 65 *Political Quarterly* 138.

60 HM Government, *The United Kingdom’s exit from and new partnership with the European Union* Cm. 9417, 2017. See also House of Commons Exiting the European Union Committee, *The government’s negotiating objectives*.

61 *Ibid.*, paras. 3.6-3.7.

level best placed to make new law and policies’, ‘ensuring power sits closer to the people of the UK than ever before’.⁶² This is a pale reflection of the principle of subsidiarity.

The second White Paper on legislating for withdrawal from the EU,⁶³ published immediately after Article 50 was triggered, laid bare the scale of the legal challenge – an unprecedented ‘leg-fest’. The analysis of ways forward was notably uneven however, with only brief consideration of ‘interaction with the devolution settlements’⁶⁴ and hence of a functional legal framework for the UK single market. Nonetheless, in following classical, pre-devolutionary or neo-unitary lines of legal authority, it signalled the current conflict with the devolved institutions.

To this effect, a tightly-controlled approach of repatriation and partial redistribution of competence presages the devolution clauses in the Withdrawal Bill. Hence the talk was of replicating the common EU frameworks through UK legislation; beginning intensive discussions with the devolved administrations on the where and what of future retention; and minimising any changes in the interim. In this regard, ‘the expectation of the Government’ of ‘a significant increase in the decision-making power of each devolved administration’ was never likely to satisfy them.⁶⁵ To the contrary, an inherently centralist and hierarchical conception of the UK constitution repeatedly shines through. As for example with the economical presentation of Whitehall representing the whole of the UK’s interests in the multiple and consensus-building processes of setting EU frameworks; or, in the face of constitutional and political entrenchment through referendums, the notion that the devolution settlements, reflecting as they do European integration, are therefore premised on EU membership.⁶⁶ Perhaps most telling however is the absence in the legislation White Paper of any mention of the four constituent nations of the UK. Twenty years of devolution on, this was hardly apt to inspire confidence.

UK and England

The perception that Brexit privileges England over the other constituent nations cannot be wished away.⁶⁷ As regards the current legislative position, replacing the ‘UK’ label with ‘England’ reveals two different forms of EU-oriented legal corsetry among the four countries. On the one hand, the statutory rule that devolved provision incompatible with EU law ‘is not law’; on the other hand, with Westminster legislating for England, the judicial methodology from the famous *Factortame* case⁶⁸ of ‘disapplication of law’.⁶⁹ Nonetheless, on a day-to-day basis in a rule of law society, these disciplines are not dissimilar when structuring and confining legislative policy. Conversely in a system traditionally premised on Parliamentary Sovereignty, part of the Brexit-type logic is that in future England runs free, while by the very nature of devolution the other constituent nations remain legislatively constrained to a greater or lesser extent. To give this a hard practical

62 Ibid., para. 3.5.

63 Department for Exiting the European Union (DEEU), *Legislating for the United Kingdom’s withdrawal from the European Union*, Cm. 9446, 2017.

64 Ibid., chapter 4.

65 Ibid., paras. 4.4-4.5.

66 Ibid., paras. 4.1-4.2; see to the contrary, *Miller*, paras. 129-130. For further discussion, see National Assembly for Wales, External Affairs and Additional Legislation Committee, *The Great Repeal Bill White Paper: Implications for Wales* (June 2017), chapter 4; also Scottish Parliament Finance and Constitution Committee, Brexit evidence sessions, June 2017.

67 At the same time, failure to consider the implications of Brexit for the internal governance of, and devolution in, England is a recurring feature of the UK Government policy documentation.

68 *R v Secretary of State for Transport, ex p. Factortame No 2* [1991] 1 AC 603.

69 Subject to domestic judicial respect for constitutional fundamentals: *R (HS2) Action Alliance Limited v Secretary of State for Transport* [2014] UKSC 3.

edge, the risk of costly and enervating legal challenge by powerful commercial interests looms large for the three Celtic lands; and the more so if, echoing the contribution of the CJEU, the UK Supreme Court set about securing and fostering domestic single market development through forceful common law doctrine.⁷⁰ Meanwhile, the political-legislative mechanism of ‘English votes for English laws’⁷¹ is apt to have particular prominence in this context, and, irrespective of the balance of Parliamentary forces, cannot offer the same element of control on territorial - English - divergence. These are troubling elements for a state of unions.⁷²

The prospect of essentially ‘English’ departments taking on UK-wide responsibilities by dint of the repatriation of EU competences naturally raises concern elsewhere in the Union about conflicts of interest and/or adverse institutional ethos, orientation and networks.⁷³ Attention is drawn to the double-hatted character of Whitehall, the largescale functional fusion of UK Government with the government of England in a classically non-federal system.⁷⁴ The fact today of a whole cluster of high-spend and/or important regulatory departments grounded in an English territorial or spatial component is after all one dimension of the ‘hollowing out’ dynamic. The evident weakness of the UK territorial departments, historically bit-part players in Whitehall terms and downgraded still further in the wake of devolution, must also be factored in. Voices for the Celtic lands yes, but a commanding presence across central government the Scotland, Wales and Northern Ireland Offices cannot be. The official UK Governance Group, established in 2015 to lead Whitehall’s work on constitutional and devolution issues, and placing under one command the UK Cabinet Office’s Constitution Group and Scotland and Wales Offices, has a challenging role to play in this context.⁷⁵

The reregulatory role and responsibilities of DEFRA will be an acid test. In this regard, it does not do to underestimate the particular place in the devolutionary endeavour of subject-areas such as agriculture, environment and sustainable development. In these fields especially, the reasonable quest for common frameworks cannot obscure the fact of divergent interests among the constituent nations and, further, the good reasons for recognising and facilitating them on grounds of subsidiarity. Intertwined with issues of subsidy and technical regulation, the broader economic, social and cultural implications for local and rural communities already feature prominently in the territorial democratic scrutiny.⁷⁶

An aspect which should not be overlooked in the context of the Withdrawal Bill is the way in which Brexit is apt to breathe new life into a hierarchy of UK ministerial powers of intervention. All three devolution settlements enable the Secretary of State to order sub-state ministers to take action, or not take action, with a view to ensuring compliance with any international obligations.⁷⁷ The Scottish and Welsh statutes further provide for an order prohibiting submission of a Bill

70 See for harbingers, above note 9.

71 For the UK Government’s viewpoint, see *Technical Review of the Standing Orders Related to English Votes for English Laws and the Procedures they Introduced*, Cm. 9430, 2017.

72 See further, on the role of ‘Englishness’ in the Brexit referendum vote, Ailsa Henderson et al, ‘How Brexit was made in England’ (2017) 19 *British Journal of Politics and International Relations*.

73 Notwithstanding particular counter examples, as in *R(Rotherham MBC) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 6.

74 Richard Rawlings, ‘A Coalition Government in Westminster’ in Jeffrey Jowell et al (Eds.), *The Changing Constitution* (Oxford: OUP, 8th edn. 2015).

75 For the insider’s view, see Philip Rycroft, Evidence to National Assembly Constitutional and Legislative Affairs Committee, 25 September 2017. And see below, at note 162 on.

76 See for example, *Implications for Wales of Leaving the European Union*, chapter 3.

77 Northern Ireland Act 1998, s. 26; Scotland Act 1998, s. 58; Government of Wales Act 2006, s. 82.

for Royal Assent if the Secretary of State has reasonable grounds to believe that the content is incompatible with any international obligations.⁷⁸ Particularly noteworthy for present purposes is the parallel control in Northern Ireland, which specifically references legislative provision considered adversely to affect ‘the operation of the single market in goods and services within the United Kingdom’.⁷⁹ Not surprisingly perhaps in view of the EU-oriented restrictions on legislative and executive competence, this battery of powers has been a low-lying feature on the territorial constitutional landscape. Post-Brexit however things could look very different in the context, first, of centralisation on the basis of international trade as a reserved matter in the devolution statutes;⁸⁰ and, second, of trade deals with non-EU states, and possibly with the EU itself, operating as a source of international obligations.⁸¹

This could well prove a major flashpoint, with constitutional tensions being fuelled by hard economic and commercial considerations. From the UK perspective, a major external driver for domestic common frameworks is engaged. The ability of UK ministers to guarantee full implementation of trade deals is part and parcel of the Prime Minister’s ‘Global Britain’ approach.⁸² On the other hand, territorial divergences of interest in policy fields like agriculture and environmental protection are again easy to envisage, as for example over genetically modified organisms or, perhaps in the shadow of WTO rules, export and import tariffs. The shift in the forms of territorial corsetry, from EU-oriented rule of incompatibility and judicial interpretation to broadly-based ministerial judgement and political threat, is itself significant. While defensive litigation by the devolved administrations is a possibility, the terms of engagement for the three Celtic lands are recast. By way of contrast, UK-level intervention against England remains a constitutional contradiction in terms.

Constitutionally-speaking, the prospect of democratically legitimated devolved policy being overridden from elsewhere by executive power is an unhappy one, more especially in the double-hatted situation. A further premium is placed on developed forms of intergovernmental relations with a view to direct inputs by the devolved administrations into the evolving lines of UK external trade policy post-Brexit; and the more so, the more that Whitehall pursues a distinctive ‘Global Britain’ approach outside existing parameters. This means moving beyond top-down Whitehall engagement with ‘stakeholders’, as UK ministers appear to envisage with a new Board of Trade,⁸³ to close and continuing political and administrative dialogue on a pan-UK basis.⁸⁴

Competing conceptions

In the period leading up to the Withdrawal Bill, the Scottish and Welsh Governments both published papers on their broad policy preferences in the wake of the Brexit referendum.⁸⁵ Laying bare basic divergences with the UK Government in terms of constitutional perspective and understanding, these attempts at shaping the debate are also indicative of the lack of trust surrounding the Bill’s devolution clauses. The different starting positions on repatriated powers and common frameworks - greater or lesser mixes of central and devolved competence with agreements to share

78 Scotland Act 1998, s. 35; Government of Wales Act 1998, s. 114.

79 Northern Ireland Act 1998, s. 14.

80 For example, Scotland Act 1998, Schedule 5, Part 1, para. 7(1).

81 An aspect illuminated in the Withdrawal Bill in clauses 8 and 9: see below, at note 114.

82 House of Commons International Trade Committee, *UK trade options beyond 2019*, HC 817 (2016-17).

83 *Preparing for a future UK trading policy*, pp. 22-23; Department of Trade, press release, 12 October 2017.

84 See further below, at note 154.

85 The then First Minister and Deputy First Minister of Northern Ireland jointly wrote to the Prime Minister about their concerns over the Irish border post-Brexit: Arlene Foster and Martin McGuinness, letter to Theresa May, 10 August 2016.

in particular circumstances, as against UK-style centralisation mediated by agreed distributions of autonomy in the light of common frameworks - are made abundantly clear.

The title of the White Paper *Scotland's Place in Europe*, published in December 2016 at the height of SNP electoral fortunes, is instructive. Founded on the strong Scottish vote against Brexit, this firmly nationalist policy document spoke in descending order of preference of an independent Scotland in the EU; of the UK as a whole remaining in both the Single Market and the Customs Union; and of separate Scottish participation in the Single Market and the European Economic Area coupled with free trade with the rest of an exited UK. Though couched terms of 'good faith and a spirit of compromise' by First Minister Nicola Sturgeon,⁸⁶ the not so subliminal message was the demand for a second independence referendum when, as could clearly be anticipated, the other options were rejected by London or proved impossible to achieve.

In praying in aid a particular history of constitutional diversity or 'principle of differentiation', and then venturing the need for 'a fundamental reconsideration of the nature of the UK state' in light of the Brexit vote, the Scottish White Paper also pointed in the direction of a much looser, confederal-type, set of domestic constitutional arrangements.⁸⁷ As regards the key litmus test of repatriation of powers, hitherto EU matters falling within areas of devolved competence would naturally be for the Scottish Parliament.⁸⁸ To which should be added protection of rights in such areas as employment, equalities and consumer law; devolved responsibilities for reregulation around the four 'fundamental freedoms' and scope for international engagement should also be on the agenda.⁸⁹ Recalling earlier terminology on the hollowing-out of central government responsibilities, it all amounts to a new variant on the theme of so-called 'devo-max'.⁹⁰

Even so, Scottish ministers were already envisaging a significant role for domestic 'cross-border' frameworks in an overarching intergovernmental context of much cooperation. The standard listing of key 'affected' areas such as agriculture, food and environmental protection effectively recalls the major imperatives in terms of smooth trade, standards and externalities. Emphatically, it 'should be a matter for negotiation and agreement between the governments concerned, not for imposition from Westminster'.⁹¹ Joint working on UK-wide frameworks on hitherto reserved matters such as employment law was the suggested next step, a hopeful counterstroke evidently designed to promote greater autonomy.⁹²

The parallel title *Securing Wales' Future* reflects the particular challenges for a local economy as seen by a formerly 'Remain' government in a sub-state polity voting contrariwise. The emphasis throughout is 'on preserving and promoting prosperity while recognising the majority wish to leave the EU'; and in particular, on maintaining 'full and unfettered' access' to the EU single market, and on replacement UK budgetary support for this net recipient of EU funding.⁹³ It is then

86 *Scotland's Place in Europe* (2016), p. v.

87 *Ibid.*, paras. 112-3, 177; and see Sinead Douglas-Scott, 'Brexit, Article 50 and the Contested British Constitution' (2016) 79 *Modern Law Review* 1019.

88 *Ibid.*, para. 179.

89 *Ibid.*, paras. 182, 184.

90 See further, Andrew Blick, 'The 2016 European Union Referendum and the territorial constitution of the United Kingdom' in Michaelina Jakala et al (Eds.), *Consociationalism and Power-Sharing in Europe* (Basingstoke: Palgrave Macmillan, forthcoming).

91 *Scotland's Place in Europe* (2016), para. 179.

92 *Ibid.*, para. 183.

93 Welsh Government with Plaid Cymru, *Securing Wales' Future* (2017), pp. 4, 6-7.

a case of close and constructive engagement with the centre along challenging policy lines. The Welsh Government, after all, is the only devolved government fully committed to the UK.

Notably, however, the approach also reflects the so-called ‘new Union’ mind-set championed by Welsh Labour First Minister Carwyn Jones.⁹⁴ Building on, and ranging beyond, the operational realities of quasi-federalism,⁹⁵ this is shorthand for a less hierarchical set of UK constitutional arrangements in which, grounded in popular sovereignty, the several representative systems in a multi- (pluri-) national state⁹⁶ pursue self-rule and shared rule in cooperative fashion.⁹⁷ As subsequently elaborated in the policy paper *Brexit and Devolution* on grounds both of defence of (Welsh) devolution and long-term health of ‘our Union’, this inevitably involves combatting ‘any retreat towards a monolithic and centralised UK’ in the current context.⁹⁸ To the contrary, in constitutional and governance ideas blending innovation with experience, the Welsh Government envisaged ‘a shared governance approach’ founded on agreement between the four administrations and building ‘on the traditions of co-operation built up during the years of EU membership’.⁹⁹

A receptive approach to common frameworks couched in terms of parity of esteem and subsidiarity fits with a strong sense of interconnection between the devolved and non-devolved layers of governance. As such, the Welsh Government readily accepted the political obligation ‘to reach agreements which benefit all and harm none’ in areas of devolved competence. With a view to promoting policy legitimacy, and where necessary policy integration, across the UK, intergovernmental dialogue and consensus-building on the basis of shared interest was likewise seen as an important aspect of non-devolved market reregulation.¹⁰⁰ Taking institutional design to new heights, the quest for ‘deeper and sustained co-operation’ founded proposals for negotiation and co-decision on common frameworks through a ‘UK Council of Ministers (‘UKCoM’) loosely modelled on the EU Council. As against the ramshackle JMC machinery, the Welsh Government thus envisaged much by way of horizontal and sector-specific forms of political coordination and joint working, ultimately premised on a ‘UK plus one devolved administration’ rule for affirmative decisions.¹⁰¹ Inherently demanding, a monolithic, top-down approach to institutional politics this is not.

The scope for common cause between the Scottish and Welsh Governments is also made evident. Fast-forwarding, their growing cooperation in constitutional politics despite, or perhaps because of, the receding prospect of a second Scottish independence referendum and weakened SNP representation at Westminster following the June 2017 General Election, is an important new dynamic in the maelstrom of the Brexit process. This already extends to parallel procedural action on legislative consent and joint drafting of amendments to the Withdrawal Bill.¹⁰² Welsh Ministers had helped to pave the way via legislative consent for the reserved powers model of the Wales

94 See for example, Carwyn Jones, Institute for Government speech, October 15, 2014.

95 Vernon Bogdanor, *The New British Constitution* (Oxford: Hart Publishing, 2009); and see for comparative public law perspectives, Amnon Lev (Ed.), *The Federal Idea* (London: Hart Publishing, 2017).

96 Alain-G Gagnon and James Tully (Eds.) *Multinational Democracies* (Cambridge: CUP, 2001); Michael Keating, *Plurinational Democracy* (Oxford: OUP, 2004).

97 For discussion, see Richard Rawlings, ‘Riders on the Storm’.

98 Welsh Government, *Brexit and Devolution* (2017), p. 4; linking in turn to the call for a pan-UK Constitutional Convention made part of Labour’s 2017 General Election Manifesto.

99 *Ibid.*, p. 6.

100 *Ibid.*, p. 14.

101 *Ibid.*, pp. 17-18.

102 See below, at notes 130 and 143-144.

Act 2017. The prospect of enhanced political leverage in the context of Brexit through closer alignment with the Scots was an important consideration.¹⁰³

Legislative policy

Five prongs

Expanding on the official explanations, the legislative strategy elaborated in the Withdrawal Bill may be said to have five main prongs. Each of these not only contributes to a complex set of inter-connecting provisions,¹⁰⁴ but also bears more or less directly on the issues around devolution and common frameworks. From the standpoint of the territorial constitution, the so-called ‘devolution clauses’ (10 and 11) are the chief focus but only that.

As the constitutionally historic totem of in the famous slogan ‘take back control’, *repeal* of the European Communities Act 1972 on exit day¹⁰⁵ obviously is the first main policy thrust (clause 1). More particularly, in the language of the *Miller* case, it means closure of the ‘conduit pipe’ of ECA section 2 for domestic effect of directly applicable EU law and the domestication of other EU norms.¹⁰⁶ From the territorial constitutional viewpoint the particular twist is the raising of the constitutional expectation of repatriated powers lying where they fall unless contrary provision is made.

The reregulatory demand to *stabilise* the legal situation is a recurring theme. A case explained the legislation White Paper of largescale technical conversion of the EU acquis into EU-derived law, after which the rules might be re-set domestically by – unspecified – democratically-elected representatives.¹⁰⁷ Behind this lies the comparative constitutional principle of continuity of laws, ironically well-attested in the British retreat from Empire.¹⁰⁸ Yet as some fiendishly complicated provision in the Bill amply attests, practical application of the principle is peculiarly challenging in the supranational - multi-faceted - context of European legal integration, with multiple technical manoeuvres being required to deal with different types of EU norms and implementation methods. Not least the preserving of the large amounts of secondary legislation made under section 2(2) of the 1972 Act, including by the devolved administrations,¹⁰⁹ which would otherwise fall away on repeal, and the converting of thousands of hitherto directly applicable EU regulations into domestic law, as well as the restatement for domestic purposes of many years of jurisprudence. Subject to exceptions headed (controversially) by the EU Charter of Fundamental Rights, clauses 2-6 duly conjure various categories of ‘retained EU law’ designed to secure stability through freezing effects on exit day: ‘EU-derived domestic legislation’; ‘direct EU legislation’ (ranging through EU regulations, decisions and tertiary legislation); other ‘rights, etc. under s. 2(1) of the ECA’ (including directive effective rights arising under the treaties and EU directives); ‘retained case law’ (relating to the previous categories); and ‘retained EU general principles of law’. Then again, ‘retained EU law’ also wears the character of living law; in defining it, clause 6(7) speaks

103 ‘The Strange Reconstitution of Wales’.

104 House of Lords Constitution Committee, *European Union (Withdrawal) Bill: interim report*, HL 19 (2017-19).

105 A seemingly moveable feast; see clause 14.

106 *Miller*, para. 80.

107 Legislation White Paper, para. 4.2.

108 Clause 34 of the Scottish Government’s 2014 draft Scottish Independence Bill provides contemporary illustration.

109 Paradoxically, section 20 of the Wales Act 2017 provides for general empowerment of Welsh ministers to implement EU law.

of a ‘body of law... added to or otherwise modified by or under this Act or by other domestic law from time to time’.

From the standpoint of the territorial constitution, this whole new conceptual apparatus has a very particular relevance. It is further deployed against the devolved institutions, so being used to redefine their legislative and executive competence in restrictive fashion.¹¹⁰ This is also apt to have significant ripple effects. Given the unprecedented and wide-ranging nature of the exercise, difficult controversies inevitably arise around the reach, bite and status of the legislative classifications,¹¹¹ a source in turn of instability for the devolution settlements and magnet for litigation. Here as elsewhere, tough legislative scrutiny of the Bill is vital.

The evident need to *reprogram* constitutional fundamentals is highlighted in clauses 5-6 and Schedule 1. Hence rejection of the principle of supremacy of EU law, such that later UK statutes may effectively trump retained EU law. More particularly, ending of the CJEU’s general jurisdiction and preliminary reference procedure; equivalent status for previous CJEU decisions with UK Supreme Court ones, and so the possibility of domestic overruling; and, *RIP Factortame*, a stop on disapplication of later Acts of Parliament. Conversely, in terms of reconciling the twin policy imperatives of withdrawal and stability, trumping by retained EU law of pre-exit domestic legislation continues. As previously indicated however, from the territorial constitutional standpoint the dual Westminster freedom to reregulate on a pan-UK and EVEL-type basis is particularly noteworthy: a case, at least in part, of back to the future with the Great Victorian A. V. Dicey and his notably English doctrine of Parliamentary Sovereignty.¹¹²

Trumpeted in clauses 7-9, the further call to *empower* legislative changes ‘in connection with withdrawal’ naturally adds to the constitutional ferment. The urgent need for efficient and effective means of ensuring properly functioning statutes in a post-EU legal system can hardly be gainsaid in the present state of affairs.¹¹³ Confronted by myriad scenarios, and no doubt with an eye to the concessions game, the legislative architects have predictably adopted an extraordinarily broad framework approach in the unique circumstances of Brexit. Future constitutional historians will surely marvel at the panoply of order-making powers originally envisaged for Ministers of the Crown. Such provision as the minister considers ‘appropriate’ to prevent, remedy or mitigate ‘deficiencies’ in EU retained law (clause 7); to prevent or remedy any breach of international obligations arising from withdrawal (clause 8); and, helping ‘to provide the flexibility necessary to respond to all eventualities of the negotiation process’,¹¹⁴ for the purposes of implementing a withdrawal agreement with the EU (clause 9). Since all this translates as the use on an industrial scale of ‘Henry VIII clause’ powers to repeal, amend and modify primary legislation,¹¹⁵ the determinedly technical gloss and inclusion of specific protections and sunset clauses cannot hide the potential for significant forms of ministerial rule-making on the sly. As the debates on Second Reading duly signal, and multiple proposed amendments testify, arguments about the expanse of powers and sifting and scrutiny procedures will run and run, not least in the House of Lords.¹¹⁶

110 See below, at note 121.

111 For the early marker, see House of Commons Library, *European Union (Withdrawal) Bill*, BP 8079 (September 2017).

112 A. V. Dicey, *Introduction to the Law of the Constitution*, John Allison (Ed.), (Oxford: OUP, 2013).

113 For chapter and verse, see the official *Delegated Powers Memorandum* on the Bill.

114 Legislation White Paper, para. 1.16.

115 Clause 17 contains a further Henry VIII clause power to make consequential provision.

116 See more particularly, House of Lords Delegated Powers and Regulatory Reform Committee, *European Union (Withdrawal) Bill*, HL 22 (2017/19); also, Hansard Society, *Taking Back Control for Brexit and Beyond: Delegated Legislation, Parliamentary Scrutiny and the EU (Withdrawal) Bill* (September 2017).

Much will be heard of the threats to the rule of law and separation of powers or the relationship of Parliamentary Sovereignty and Executive imperium, and rightly so.¹¹⁷

From the standpoint of the territorial constitution this is not all.¹¹⁸ In the case for example of the so-called ‘correcting’ power in clause 7, the expansive drafting serves to underscore concerns about possible reallocations of decision-making functions under the broad centralist rubric of administrative convenience. This is especially so given a lack of provision for devolved scrutiny of the exercise of clause 7-9 powers in devolved areas. Clause 7(6) concerning restrictions on the correcting power gives matters a particular twist. Protection of the Northern Ireland Act 1998 against repeal or amendment is included, an appropriate feature since, as the Delegated Powers Memorandum puts it, ‘that Act is the main statutory manifestation of the Belfast Agreement’.¹¹⁹ Conversely however, in the absence of the wider constitutional and international law components of the peace process in Northern Ireland, the Scottish and Welsh devolution legislation is denied this immunisation from Henry VIII clause power. The prospect is raised of changes to reservations of competence taking place outside the ambit of legislative consent. So much in Whitehall’s view for constitutional statutes which themselves are grounded in positive expressions of popular sovereignty.

Occupation of legislative and executive space at the expense of the devolved authorities is the fifth main prong, the realm of clauses 10 and 11. This most obviously involves diverting repatriated powers that would otherwise go to Belfast, Cardiff and Edinburgh, to London. At one with the concept of the domestic single market, UK ministers speak here of establishing a holding pattern of repatriated competences with a view to elements of reregulation through common frameworks. Hence the Explanatory Notes and Delegated Powers Memorandum on the Bill refer to ‘a transitional arrangement’ giving space for intergovernmental discussions, as well as ‘certainty after exit’.¹²⁰ This is not made clear however on the face of the Bill.

The devolution clauses

– *Lock and key*

Let us consider the two devolution clauses in reverse order. Clause 11 is couched strongly in terms of legal continuity - ‘retaining EU restrictions in devolution legislation etc.’ Hence, in place of the existing constitutional lock of no competence to legislate incompatibly with EU law, each of the devolution statutes would be amended so as to include a general limitation on modifying EU retained law by legislative and (via Part 1 of Schedule 3) executive means.¹²¹ It is here then that the novel classification of legal norms in clauses 2-6 of the Bill has real bite.

In light of the Prime Minister’s earlier promise, the legislative architects are clearly concerned to demonstrate no roll-back of devolved competence. The revised constitutional lock ‘does not apply so far as the modification would, immediately before exit day, have been within the legislative competence of the Scottish Parliament’ for example. As such, the situation is different from the element of roll-back recently observed with the Wales Act 2017, where the UK Government’s motivation for moving from a conferred to a reserved powers model was in part to sharpen the

117 Not forgetting possible judicial counterstrokes; see especially, *R(Public Law Project) v Lord Chancellor* [2016] UKSC 39, paras. 25-28.

118 The issue of corresponding powers for the devolved institutions is discussed in the following section.

119 Delegated Powers Memorandum on the European Union (Withdrawal) Bill, para. 40.

120 Explanatory Notes, para. 11; Delegated Powers Memorandum, para. 68.

121 Part 2 of Schedule 3 works to cleanse the devolution statutes of other EU-oriented references.

boundary of legislative competence and so reduce the pre-existing devolved capacity to range across.¹²² But this is not the full story because clause 11 is also the instrument for dashing the major constitutional expectation of repatriated powers lying where they fall. Being bound in EU law, the devolved institutions have no cause for complaint about being rebound in domestic law: so goes the not so subliminal message.

At one with the suggestion of a ‘holding pattern’ is the inclusion in clause 11 and Part 1 of Schedule 3 of a set of Order in Council procedures providing, in the words of the Explanatory Notes, ‘a power to release areas from the limit on modifying retained EU law where it is agreed that a common approach established by EU law does not need to be maintained and can be changed’.¹²³ As presented by UK ministers this then is the stuff of domestic sequencing. In process terms, the freezing of territorial distribution of competence under the twin banners of clarity and continuity; political and administrative space to resolve regulatory issues of common frameworks; use of Order in Council procedure, notably perhaps after exit day, such that the revised constitutional lock ‘does not apply so far as’ is provided. As one would expect, exercise of the power is subject to approval by both Houses of Parliament and by the relevant devolved legislature.¹²⁴

By its very nature, this process does not establish positive duties on the part of the UK Government to devolve. Legally-speaking, suggested ‘transitional’ elements could so easily become permanent features. Nor need one be an expert in game theory to appreciate the way in which clause 11 stacks the cards in favour of the centre when negotiating the different design choices with common frameworks: ‘when’, ‘how’, ‘what’, etc. Though the devolved authority has a veto power, in the absence of an agreed ‘release’ plan the default position is bar on competence. And 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 and government of England is made apparent. At one and the same time, Westminster and Whitehall are freed up to shape a post-Brexit world in crucial respects, and the devolved institutions are locked down and required to wait for partial release. However nicely dressed up, this is formal recentralisation of power and exercise of constitutional hierarchy in spades. A tightly defined sunset clause, one of the usual suspects in the search for concessions, would offer only the limited relief of determinate sentence.

There is too a notable lack of clarity with regard to the conceptual character of clause 11 ‘release’. An attributed competence or conferred powers approach to devolution is suggested by the dynamics of sequencing. More precisely, the designation of areas of legal autonomy, which the centre has first denied, subject to exceptions phrased in terms of common frameworks, which do after all require territorial competence on which to bite.¹²⁵ There are echoes here of the ‘legislative competence orders’ used in an earlier conferred powers phase of Welsh devolution, which were rightly criticised on grounds of bureaucratic and convoluted process and, cutting against policy coherence, bitty and arcane provision.¹²⁶ Yet further, the spectre arises of complex amalgams

122 In the wake of generous Supreme Court interpretation: *Agricultural Sector (Wales) Bill – Attorney General Reference* [2014] UKSC 43.

123 Explanatory Notes, para. 36.

124 The relevant provision for Scotland is contained in Schedule 3.

125 In this regard, the provision resembles, but is different from, existing powers in the devolution statutes for devolving responsibilities; Scotland Act 1998 s. 30 for example.

126 See latterly, David Moon and Tomos Evans, ‘Welsh devolution and the problem of legislative competence’ (2017) 12 *British Politics* 1.

of reserved and conferred powers models of devolution in the light of hitherto domestic or EU competence.¹²⁷ This is again highlighted in the case of Wales, where the approach threatens to reverse the gains in terms of accountability and clarity and accessibility of law associated with adoption of the reserved powers model in the Wales Act 2017.¹²⁸ Giving constitutional matters a market edge, it is then a matter of concern for end-users and especially business.

– *Battery of constraints*

Clause 10 and Schedule 2 are packaged in terms of ‘corresponding powers involving devolved authorities’. Following up on the legislation White Paper,¹²⁹ there is then a series of devolved, joint and concurrent powers to make regulations dealing with legislative deficiencies, international obligations and any withdrawal agreement, so paralleling in the territorial constitutional context the UK-level provision in clauses 7-9. Concerns are again raised about the scrutiny of the exercise of such Henry VIII clause powers,¹³⁰ which itself appears a formidable test of the maturation of the devolved polities.

In this context however, ‘corresponding’ means at most analogous, certainly not equivalent. Hence the detailed content is largely about what the devolved administrations cannot do, with Schedule 2 envisaging a battery of constraints on their use of the new-found powers. As well as the strict rule that no such regulations may be made unless every provision of them is within devolved competence, these notably include no power to modify retained ‘direct EU legislation’, and, further, a bar on making regulations inconsistent with any such modification made by a UK minister. Other examples are no power to confer functions associated with EU tertiary legislation and UK ministerial consent requirements for regulations coming into force before exit day and for the removal of EU-type reciprocal arrangements.

As with clause 11, the dry and technical language cannot disguise the constitutional and political significance of proposals pursued in the name of legal certainty and continuity. Whereas both state and sub-state ministers could correct implementing measures authored by domestic institutions (‘EU-derived domestic legislation’), UK ministers would have the chief monopoly of reworking hitherto directly applicable EU regulations. Hence, in that category alone, large numbers of legal instruments within areas of devolved competence would not be capable of fixing action in Belfast, Cardiff or Edinburgh but would be in London. The complex nature of EU frameworks is also very relevant. Legislative scrutiny of clause 10 can be expected to point up perverse or unintended consequences in view of the many varied and dynamic mixes of EU regulations and directives and tertiary legislation, and domestic implementing legislation.

Clause 10 further serves to highlight a basic lack of trust on the part of the UK Government. Elements of pre-emption (no counter-correcting) and of tutelage (UK ministerial consent), as well as the repeating sense of hierarchy and occupation of legal and policy space, are clearly on show. And when all this is juxtaposed with the very wide powers claimed by UK ministers in clauses 7-9, the potential shift in the balance of the UK’s territorial constitution is once again thrown into sharp relief.

127 This is not to overlook the distinctive categorisation of devolved and non-devolved competence in Northern Ireland.

128 As the devolved administration has promptly complained: Welsh Government, written evidence to the National Assembly for Wales External Affairs and Additional Legislation Committee (25 September 2017).

129 Legislation White Paper, para. 4.6.

130 See for example, National Assembly for Wales, External Affairs and Additional Legislation Committee, *The Great Repeal Bill White Paper: Implications for Wales* (June 2017), chapter 3.

Long shadow

As set out in the Explanatory Notes, the UK Government's approach to legislative consent is carefully phrased. Echoing previous debates over the recognition of the Sewel convention in the Scotland Act 2016 and the Wales Act 2017,¹³¹ the distinction is drawn between the convention of Westminster not normally legislating within devolved competence without the consent of the devolved legislature, and what is labelled 'the practice of the Government' to seek the consent of the devolved legislature for alterations to legislative or executive competence. Nonetheless, much of the Withdrawal Bill clearly is subject to the sub-state procedures, including, respectively, the preservation and conversion of law and the retained EU law limit and correction-type powers.¹³²

The sub-state procedures are easily misunderstood and underestimated. Through a blend of rule and discretion, standing orders permit an elongated process:¹³³ a Legislative Consent Memorandum laid early, and a Legislative Consent Motion put down towards the end of the proceedings on the UK legislation, perhaps on the basis of a supplementary Legislative Consent Memorandum. Allowing for the continued exercise of leverage through both inter-governmental and inter-parliamentary exchanges during the formal law-making process, this is an obvious tactic, shown for example in the case of the Wales Act 2017.¹³⁴ In the case of Northern Ireland there is the further possibility of a 'petition of concern', whereby legislative consent could require cross-community support.¹³⁵

It would have been strangely weak-kneed had the Scottish and Welsh Governments not promptly signalled refusal of legislative consent to the Withdrawal Bill as presented to Parliament. Yet the vehemence of their joint and coordinated responses is striking: 'naked power grab'; 'attack on the founding principles of devolution'; 'entirely one-sided conversation'; even 'could destabilise our economies'.¹³⁶ The two Governments have also kept in play the possibility of their own pre-emptive strike: so-called 'Continuity Bills' converting existing EU law within devolved areas into the bodies of Scottish law and Welsh law¹³⁷ prior to passage of the Withdrawal Bill.¹³⁸ Adapting comparative constitutional terminology,¹³⁹ this would be an escalatory element of 'uncooperative devolution'.

Of course, as all the actors know, the Supreme Court in *Miller* robustly stated that legislative consent is for the political, not legal, sphere, even when the convention is recognised on the face of the devolution legislation.¹⁴⁰ The formal legal capacity of Westminster to proceed without devolved legislative consent, or indeed to override devolved 'Continuity Bills', is naturally a factor in the different calculations and strategies. Conversely however, in a situation of continued crisis in the

131 See House of Lords Constitution Committee, *Scotland Bill*, HL 9 (2015/16), paras 37-41.

132 Explanatory Notes, paras. 68-70 and Annex A; and for a yet more capacious view, Scottish Government, Legislative Consent Memorandum (12 September 2017), Annex B.

133 See for example, Scottish Parliament Standing Orders (May 2017 version), chapter 9B.

134 'The Strange Reconstitution of Wales'.

135 Northern Ireland Act 1998, s. 42; Northern Ireland Assembly Standing Orders (2016 version), 42 A.

136 First Ministers of Scotland and Wales, Joint statement, 13 July 2017; Scottish Government, Legislative Consent Memorandum (12 September 2017), Welsh Government, Legislative Consent Memorandum (12 September 2017).

137 For the recent legislative recognition of the concept of Welsh law, see Wales Act 2017, s. 1.

138 For plenary discussion, see for example National Assembly for Wales, *Record of Proceedings*, 18 July 2017.

139 Jessica Bulman-Pozen and Heather Gerken, 'Uncooperative Federalism' (2009) 118 Yale Law Journal 1256.

140 *Miller*, paras. 136-151. For legal/political analysis, see Aileen McHarg and James Mitchell, 'Brexit and Scotland' (2017) 19 British Journal of Politics and International Relations 512.

territorial constitution,¹⁴¹ one to which the Brexit process is seen adding mightily, the wider risks to the UK of thereby fostering resentment - sowing the seeds of yet more discord - can scarcely be overlooked. It is in this charged context that the Scottish and Welsh Governments are latterly seen attempting to progress matters through a raft of possible amendments to the Withdrawal Bill.¹⁴²

Statecraft

The Brexit process constitutes a thoroughgoing test of the UK's territorial constitution. Will the general direction of travel in favour of a quasi-federal system be maintained, halted or reversed? Alternatively, with potentially enormous implications for the future governance of the UK, how far will the new 'in-filling' dynamic of centralisation run? More particularly, will there be substantial new elements of executive devolution grounded and structured in Westminster 'framework' legislation? Advocates of a 'constitutional moment'¹⁴³ in the guise of a formal federal system¹⁴⁴ stand to be disappointed however. Familiar and powerful objections concerning governability with an English Parliament, as well as excessive legalism,¹⁴⁵ continue to resonate. Nor for advocates of Scottish independence, or a united Ireland, is the Brexit process an obvious prompt in favour of some formally codified federal project: quite the opposite.

It does not do to be naïve. The roots of the current controversy over devolution, reregulation and inter-governmental relations are seen to lie in very different constitutional visualisations and political calculations, including among public powers committed to the UK. Meanwhile, reflected in the huge demands placed on Whitehall, the challenges of navigating a Brexit-type sea of uncertainty are tremendous. Nonetheless, it has to be said: UK ministers have so acted as to promote a thoroughgoing constitutional dispute with the devolved institutions. The bottom line is that asking First Ministers to recommend legislative consent merely on the basis of 'trust us' is not reasonable and responsible statecraft.

Reset

The question is sharply posed. How from the standpoint of an enlightened and prudent Union policy, one which puts a premium on effective and collaborative working of state and sub-state political institutions and on mutual respect, should UK ministers proceed to address the subject-matter of devolution, inter-governmental relations and common frameworks? Legal, political and administrative initiatives all have a significant role to play in this reset, especially with a view to establishing at least a modicum of trust and confidence among the several centres of legislative and executive authority. It was after all the Prime Minister who spoke in Florence of 'a tone of trust, the cornerstone of any relationship'.¹⁴⁶

141 Vernon Bogdanor, *The Crisis of the Constitution* (London: Constitution Society, 2nd edn 2015).

142 See below, at notes 149-150.

143 Dawn Oliver, 'Politics, Law and Constitutional Moments in the UK' in David Feldman (Ed.), *Law in Politics, Politics in Law* (Oxford: Hart Publishing, 2013).

144 For example in recent times, David Melding, *The Reformed Union: The UK as a Federation* (Cardiff, Institute of Welsh Affairs, 2013); and David Torrance, *Britain Rebooted: Scotland in a Federal Union* (Edinburgh: Luath Press, 2014). See also Constitution Reform Group, *Draft Act of Union Bill* (2016).

145 Royal Commission on the Constitution 1969-1973, Vol. 1, Report, Cmnd. 5460, 1973 (the Kilbrandon Commission).

146 Theresa May, speech on Brexit, 22 September 2017.

In light of the discussion it is appropriate to focus here on four related aspects: legislative redesign, multilateral intergovernmental relations, ordering principle and policy tools, and internal discipline.¹⁴⁷

– *Redesign*

The sooner clause 11 is cast aside, the better. Constitutionally maladroit, it warps the dialogue about the role and place of the domestic market concept post-Brexit. As such, the occupation of legislative and executive space in the Withdrawal Bill appears not only a risky venture but also a lazy one. An unthinking form of ‘Greater England’ unionism, which assumes only limited territorial difference,¹⁴⁸ would be another way of characterising this.

In light of the previous discussion, the package of amendments proposed by the Scottish and Welsh Governments is eminently predictable. First and foremost, no diversion of devolved competence to London such that repatriated powers would lie where they fall. Second, a measure of constitutional security: UK Ministers unable unilaterally to change the two devolution settlements. Third, protection of executive space: UK ministers unable unilaterally to make provision within Scottish or Welsh Ministers’ executive competence. Fourth, equivalence: whereby the powers of Scottish and Welsh ministers to modify retained EU law would truly ‘correspond’ to those of UK ministers. Sitting comfortably with an assertion of democratic control and accountability, this would all go in tandem with curbs on the wide Henry VIII clause powers currently proposed by Whitehall.¹⁴⁹ In order to prevent a new form of asymmetry, a similar package of amendments would be required for Northern Ireland.

Explained as a ‘constructive contribution’,¹⁵⁰ the approach correlates closely with Welsh Government constitutional thinking. Indeed, when contrasted on the one hand with the legislative blunderbuss of the UK Government’s devolution clauses, and on the other hand with the Scottish Government’s initial demands for differentiation, it might be described as a constitutional middle way. More prosaically, but no less important for that, to proceed on the basis of most but significantly not all repatriation of powers to the centre denotes a more balanced set of incentives in the intergovernmental negotiations than does clause 11.

If however it is a firm political choice in Whitehall not simply to accept the Scottish and Welsh amendments, another approach is preferable to clause 11 and all its works. Specifically designed to prioritise agreement through partnership working if at all possible, it involves working with the grain of reserved powers, while opening up to close democratic scrutiny the possibilities of more or less constraint on devolved competence in different policy domains. The Withdrawal Bill would contain a power to add, remove or modify reservations in the devolved settlement(s) to reflect frameworks agreed with the devolved administration(s) for the realisation of the UK

147 This part of the report draws on a presentation given at the UK Cabinet Office in August 2017.

148 Colin Kidd, *Union and Unionisms* (Cambridge: CUP, 2008); Linda Colley, *Acts of Union and Disunion* (London: Profile Books, 2014).

149 Scottish and Welsh Governments, *Proposed Amendments to the European Union (Withdrawal) Bill* (September 2017). The amendments were tabled on 5 October 2017 in the names of various opposition backbench MPs.

150 First Ministers of Scotland and Wales, joint letter to the Prime Minister, 19 September 2017. For discussion and at the devolved level, see especially Scottish Parliament Finance and Constitution Committee, 20 September and 4 October 2017; and for further development, see National Assembly for Wales External Affairs and Additional Legislation Committee, letter to Welsh MPs, 13 October 2017.

single market, subject to the approval of the relevant legislature(s).¹⁵¹ Meanwhile formal legal frameworks already agreed would be found in reservations on the face of the statute book where they best belong: perhaps via the Withdrawal Bill itself, perhaps through the other substantive measures heralded by Her Majesty. The devolved institutions would have a significant measure of protection and Whitehall and Westminster should have little to fear. As against the aggressive assertion of central power in advance, Parliamentary Sovereignty would in turn be harnessed to constitutional advantage as a reserve power. Available to exercise in the truly abnormal - hypothetical - case of necessity where terms prove impossible to agree; and so subject, in light of the general principle of devolved legislative consent, to the most rigorous demands for public justification.

– *Multilateralism*

There is an urgent need for multilateral forms of intergovernmental relations which are fit for purpose. And the more so, it may be said, the more that UK ministers seek to develop innovative market and trading strategies for a post-Brexit world under the banner of ‘a truly global Britain’. A sudden resuscitation of JMC (EN) after months of dormancy is welcome.¹⁵² But this cannot disguise the deeper political and institutional failings, or indeed the damage done to the status and legitimacy of the existing infrastructure (such as it is). Then again, proposals for comprehensive, executive-style arrangements of the kind suggested by the Welsh Government appear unlikely to gain traction at the centre – too grand for Whitehall’s taste.

Happily, the Memorandum of Understanding between the several administrations provides for review of arrangements, including the JMC machinery.¹⁵³ In light of the Brexit process, it is high time this happened – in creative and transparent fashion. Sitting comfortably with the Prime Minister’s declared policy lines, reform could sensibly include the establishment of a new and more highly-g geared intergovernmental forum, called say ‘JMC (Domestic Single Market)’. As a determinedly multilateral arrangement, designed in part as a vehicle for building trust and confidence, such a body would help to fill an emergent institutional gap in the UK’s territorial constitution. Indeed, without this type of forum how can the four constituent nations collectively and individually make the best of the many market challenges and opportunities in a post-Brexit world? Further referencing the ‘Global Britain’ approach, ‘JMC (DSM)’ could go in tandem with a new ‘JMC (International Trade)’.¹⁵⁴

‘JMC (DSM)’ would be appropriately tasked with developing and elaborating common frameworks; with sustained shaping and systemic supervision and review of the reregulation; and more generally with promoting cooperation and coordination between the several administrations on the basis in Her Majesty’s words of ‘the widest possible consensus’. Hence in importing elements of shared governance it would meet a functional market as well as constitutional imperative. In terms of reach, ‘JMC (DSM)’ would properly take the form of an umbrella covering, and in turn facilitating joined-up policy approaches among, the broad range of reregulatory market domains. Especially in light of the many complexities and nuances of the EU single market concept, various

151 An approach in line with existing powers to modify the devolution boundary: see for example, Scotland Act 1998, s. 30.

152 Joint Ministerial Committee (EU Negotiations), Communiqué, 16 October 2017. In view of the continued breakdown in power-sharing at Stormont, attendees included the Head of the Northern Ireland Civil Service.

153 Memorandum of Understanding (2013 version), para. 31.

154 A forum suggested in light of the Canadian experience by the Institute for Government, *Taking back control of trade policy* (May 2017).

mixes of executive and consultative functions may also be envisaged, based on new and more detailed concordats constructed explicitly in terms of the reregulation. At one with the close interplay between reserved and non-reserved powers or intertwined competence, clear and continuing acceptance of the devolved administrations as legitimate interlocutors in decision-making at the UK level which bears directly on their interests would be a vital element.

Early information-sharing, regular meetings, dedicated work streams, and more: it should hardly need saying. As for the further issue of a statutory base,¹⁵⁵ an option clearly taking on added appeal in the light of recent experience, it would be important to avoid too much prescription. Some formal constitutional and institutional guarantees would not go amiss however: for example territorial as well as UK rights to invoke such machinery; a permanent independent secretariat; and interrelated legal duties to consult, whereby the devolved administrations' involvement would be built in. As part of a wider reset, reform along the lines of a new intergovernmental forum must be one in which the fact of Westminster and Whitehall as the chief beneficiaries of repatriation of competence, irrespective of how the issue of devolution and common frameworks plays out, is reflected and not obscured.

– *Principle*

An agreed set of considerations for determining, structuring and elaborating common frameworks should have been agreed and published much earlier in the political and administrative process. How otherwise could the intergovernmental negotiations progress effectively and efficiently, representatives in the several legislatures exercise proper scrutiny, and business and civil society clearly and fully contribute? Better late than never, the revived JMC (EN) shows acceptance of the need to pave the way through some general underpinning principles.¹⁵⁶

According to the Communiqué, the parties are agreed on joint working to establish common arrangements in 'some' areas currently governed by EU law but otherwise within devolved competence. There is recognition of the scope for different kinds of common frameworks in different contexts, with mention of common goals and minimum or maximum standards, harmonisation or mutual recognition, as well as hard and soft law techniques for implementation. 'The aim of all parties' in the discussions will be 'to agree where there is a need for common frameworks and the content of them'. A key parameter naturally pressed by UK ministers, outcomes will be 'without prejudice' to the UK's negotiations and future relationship with the EU. Effectively building on the Prime Minister's speech at Lancaster House, the communiqué adds to the interlinked policy rationales of domestic market and common resources, and international obligations and trade policy, the safeguarding of UK security and access to justice in cases with a cross-border element. Conversely, the Communiqué speaks briefly and more vaguely of 'close working' between the UK Government and the devolved administrations on non-devolved matters which 'impact significantly' on devolved responsibilities, most obviously in this context trade policy.

Frameworks, it is said, will respect the devolution settlements and the democratic accountability of the devolved legislatures and will therefore be based on established conventions and practices, including that devolved competence will not 'normally' be adjusted without consent; maintain, as a minimum, equivalent territorial flexibility for tailoring policies as is afforded by current EU rules; and, again echoing the legislation White Paper, lead to a significant increase in devolved

¹⁵⁵ See in this vein, House of Lords Constitution Committee, *Inter-governmental relations in the United Kingdom*, paras 77-86; also, Bingham Centre for the Rule Law, *A Constitutional Crossroads*, chapter 2.

¹⁵⁶ Joint Ministerial Committee (EU Negotiations), Communiqué, 16 October 2017.

decision-making powers.¹⁵⁷ In particular, frameworks will ‘ensure recognition’ of the economic and social linkages between Northern Ireland and Ireland, and of the unique fact of their land border, while also adhering to the Belfast Agreement. The very fact of all this is a significant step forward. Yet clearly there is much further to go. Nothing is said about amendments to the devolution clauses.

Perhaps it is not surprising that the ‘subsidiarity’ word goes missing in the UK Government policy documentation in view of the connotations of, and vexed legal history in,¹⁵⁸ EU governance. Domestically in the Brexit context a constitutional/political presumption of devolution is the better way forward. A case, it may be said, at one level of promoting constitutional legitimacy or territorial sense of ‘ownership’ in difficult conditions; at another level, of underwriting the twin potentials of devolution as protective instrument and policy laboratory; and at another level again, of tying decision-making responsibility to established territorial sources of knowledge and expertise. To give a simple example, it is not immediately obvious why DEFRA, the Department for Environment, Food and Rural Affairs in London, should take sole command of such matters as local charges and levies, regional management of quotas, and day-to-day enforcement, in a post-Brexit fishing industry. To the contrary, the case for the devolved administrations working productively and responsively in their own ways with their own local communities is a compelling one.

It cannot be said too often that London stands to emerge from the Brexit process in a much more powerful position vis-a-vis the devolved nations. Mediating the overbearing effects of Parliamentary Sovereignty coupled with UK and England governance structures is a constitutional imperative which the mantra of significant increases in devolved decision-making power must not be allowed to obscure. UK ministers can in a very real sense afford to be generous, not least with a view to a more strategic focus at the centre. Further, the knee-jerk response that because policy responsibilities have been raised to the EU level for reasons of collective interest, they must perforce be for the UK level post-Brexit, has to be guarded against. There will often be convincing reasons for read-across, but it would be odd in the context of Brexit to ignore the distinctive political and administrative drivers of particular EU arrangements.

The definitional framework belatedly agreed in JMC (EN) needs much fleshing out. On from the scoping of intersection of EU competences with devolution, some draft listings of areas where UK ministers consider new reregulatory frameworks necessary is next required, followed by some prompt and detailed illustration of possible arrangements, not least for the purpose of informed legislative debate in the several centres of representative government. The good governance principle of transparency in this novel and important form of constitution-making demands nothing less.

In recent times, UK ministers have placed great store on impact assessment for the purpose of legislative policy-making. As explained by the National Audit Office in a classic statement of so-called ‘better regulation’, a basic template for officials includes purpose and intended effect; risks; costs; benefits; options for compliance; impact on small business; public consultation; monitoring and evaluation.¹⁵⁹ Given that common frameworks come in all shapes and sizes, such technolo-

157 Ibid.

158 Gabriel Moens and John Trone, ‘The Principle of Subsidiarity in EU Judicial and Legislative Practice’ (2015) 41 *Journal of Legislation* 65.

159 National Audit Office, *Better Regulation: Making good use of regulatory impact assessments*, HC 329 (2001-2).

gy could prove particularly useful in shaping the reregulatory design(s), not least the testing of whether pan-UK legal provision is required.

Let us give matters a hard practical edge. When advising ministers on possible situations where UK-wide approaches and decision-making structures may be considered appropriate, officials should address a series of constitutional design questions concerned with policy justification and the presumption of devolution, and, further, with good governance or rule of law principles of coherence, clarity and accessibility of the law.¹⁶⁰ Reflecting the major role for non-legal forms of ‘wiring’ in reregulatory governance systems and networks, especially with a view to the three key elements of cooperation, coordination and communication, and also the experience of reserved powers,¹⁶¹ the questions could usefully include those listed below. Acknowledging the problems of trust on different sides, they effectively constitute a set of policy tools designed to facilitate careful and constructive forms of analysis of possible common frameworks.

1. Is the creation of a common reregulatory framework necessary to support a fully functioning UK single market? Is coordination of controls required to ensure the UK meets international standards?
2. Is a failure to establish a common framework apt to produce major adverse externalities or spill-over effects across territorial boundaries?
3. Is there a close dependency between devolved and non-devolved policy domains? If so, how may discrete territorial interest best be protected?
4. Can the common objectives be sufficiently achieved through soft governance techniques such as concordats and agreed guidelines, benchmarking and peer review?
5. Is there a need for formal legal provision; and, if so, with what parameters and with what level of detail? Can enhanced forms of executive devolution be developed under UK-wide framework legislation? Can concurrent powers be provided?
6. Does the achievement of common objectives require the central allocation of funding? For shared administrative arrangements, are there significant gains in terms of efficiency and expertise?
7. Does creation of a formal legal framework cut against the workability and/or stability of the devolution settlements? Is there a role for mutual recognition? Is there a particular and compelling need for general, transversal legislation?
8. Is the proposed framework expressed in terms that go no further than is necessary to give effect to its purpose and/or that avoid unjustifiable interference with the exercise of devolved functions?
9. Does creation of a common framework make the governance of the UK less clear or comprehensible? Does the proposed design affect the coherence of the package(s) of devolved powers and functions?
10. Does the overall package of common frameworks constitute a coherent, consistent package? Does its overall impact make for effective or ineffective law-making and public administration in a post-Brexit world? Will its coherence make it comprehensible and accessible to lawmakers, business and the public at large?

¹⁶⁰ Tom Bingham, *The Rule of Law* (London: Penguin Books, 2011).

¹⁶¹ Wales Governance Centre and The Constitution Unit, *Challenge and Opportunity: The Draft Wales Bill 2015* (Cardiff: 2016), p. 44. See also, *Brexit and Devolution*, chapter 6.

– *Discipline*

The demand for sectoral experience and expertise in the redesign of common frameworks does not obviate the need for a strong central coordinating role: quite the reverse. Maintaining a properly disciplined approach among Whitehall departments both individually and collectively, one which pays due regard to the constitutional considerations, is of the essence of the political and administrative task in London. Solid arguments for common frameworks must not be an excuse for clunky, opaque and erratic forms of legal restriction in the different policy domains.

Perhaps the designated role of the First Secretary of State in ‘overseeing devolution consequences of EU exit’¹⁶² heralds some welcome movement in this direction. The smack of a day-to-day supervisory function, with the suitable imprint of the UK Cabinet Office, has yet to be demonstrated however. In the course of democratic scrutiny, most obviously in this instance by the House of Commons Public Administration and Constitutional Affairs Committee, parliamentarians should expect to learn of a high-level and robust system of internal check and peer review at the heart of Whitehall. Reverting to the list of constitutional design questions, such machinery has a discrete role to play in ensuring a suitably coherent, workable and rounded constitutional product from the reregulatory process, so caring for the big picture.¹⁶³

Since it is so easily overlooked amid the high political - legislative – disputing, the practical policy aspect deserves a special emphasis. The history of reservations in devolved legislation bears ample testimony to the innate capacities - predilection - of individual Whitehall departments for power-hoarding through hard-edged legal expressions of institutional self-interest.¹⁶⁴ The prospect at the expense of the devolved institutions of central ‘gold-plating’, or what may appropriately be dubbed ‘reregulation creep’, is clear and immediate. This too must be guarded against. Firm application of ‘better regulation’ type concepts of proportionality and targeting¹⁶⁵ will be a vital test of the role and capacities of the UK Governance Group in the UK Cabinet Office in the next period.

Sense and sensitivity

In conclusion, the pragmatic and institutional drivers of the European Union (Withdrawal) Bill are very powerful ones. The demands for legal continuity and certainty in general, and for efficient and effective reregulatory frameworks in particular, are real and substantial; meanwhile, the Whitehall machine is self-evidently under huge pressure. Yet the tendency to ‘sequencing’ - the temptation to treat the devolutionary aspects as if they were some kind of ‘second front’ best frozen while supranational negotiations proceed, rather than to take them forward in tandem in a spirit of cooperation - should be firmly resisted. The devolution clauses themselves are among the most significant provisions in the Withdrawal Bill, going as they do to the heart of contemporary political and constitutional debates about the very nature and future of the UK. They represent a poor choice of model. Negotiating and elaborating agreed laws, rules and practices for reregulatory purposes may not always be easy. But it does not do to make a constitutional mountain out of possible political and administrative molehills. Aggressive exercise of Parliamentary Sovereignty should be the last – not the first – resort.

162 First Secretary of State, ‘Ministerial role’ (June 2017).

163 See especially items 7, 9 and 10.

164 As most recently in the convoluted history of the Wales Act 2017; for details, see *Challenge and Opportunity*, chapter 7.

165 See item 8 on the list of constitutional design questions.

Trust among the several governments is evidently in short supply and in view of contemporary political conditions predictably so. At the same time, the chief responsibility of the UK Government and government of England to act constructively and reasonably in an uncodified constitution featuring Parliamentary Sovereignty is magnified in the context of Brexit. Whitehall still has much to do by way of principled, transparent and joined-up proposals on common frameworks, and more generally on the relationship of reserved and non-reserved powers, with a view to (re-) building trust and confidence. However challenging the sea of uncertainty around the Article 50 negotiations appears, short-term exigencies should not crowd out more balanced and longer-term perspectives in a partial and convoluted process of devolving repatriated competence. A clear focus on the general or holistic quality of the constitutional product is essential.

Much valuable time has been lost through a failure properly to engage in multilateral forms of intergovernmental relations. This is at one both with a pervasive sense of drift in UK government policy in difficult political circumstances in the wake of the Brexit referendum, and with an established Whitehall preference for seemingly less threatening forms of bilateral workings. By their very nature however, in the case of common frameworks the failure is particularly acute. The policy concern not only of meeting the many challenges presented by Brexit but also, as emphasised by the Prime Minister, of making the most of whatever opportunities are on offer, underscores this. The resuscitation of JMC (EN) and agreed statement on common frameworks should be seen as a start but only a start. Now more than ever the constitutional and political machinery of UK intergovernmental relations needs to be taken seriously by the central powers.

Writing in the wake of the hard-fought Scottish independence campaign, I observed that without joined-up constitutional thinking at UK level along the lines of mutual benefit, comity and parity of esteem, the next period of our constitutional futures was even more likely to prove tempestuous.¹⁶⁶ With a view in the Prime Minister's words to preserving and strengthening 'our precious Union', this needs saying more strongly in the context of Brexit. 'Take back control' is no guide to the internal distribution of competence. The UK Government proceeding as if centralisation is the default position smacks of Unionist folly. The common sense case for reregulatory frameworks is no excuse for constitutionally insensitive approaches to policy choice, institutional design and practical delivery.

166 Richard Rawlings, 'Riders on the Storm'.