
Department of Social Sciences

A Disunited Kingdom

The Legitimacy of Brexit in Light of
the Devolved Structure of the United Kingdom

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ABSTRACT

The tumultuous Brexit vote put the cohesiveness of the United Kingdom to the test by presenting each of its nations with an uneasy dilemma. In effect, the Brexit referendum acts as a catalyst from which the democratic competence of the modern United Kingdom's asymmetric power-structure can be analysed when faced with abnormal political circumstances. The following thesis attempts such an analysis, executed with the aim of identifying any underlying democratic deficit existing within the union's current devolved make-up. As such, it poses a number of constitutional questions regarding both the inherent democratic and judicial legitimacy of the 2016 Brexit referendum in light of the asymmetric devolutionary structure of the United Kingdom. The history and contemporary implementation of devolution is thoroughly researched, alongside a foundational understanding of democratic legitimacy through the philosophical works of Mills, Kant, and Aristotle. Upon its application to the events pertaining to the Brexit referendum, a number of democratic incompatibilities were identified, notably regarding Scotland's national rights, the disruption of Northern Ireland's peace process, and the referendum's inherent input legitimacy. Due to exceptions stipulated by the Sewel Convention, Brexit possesses no judicial incompatibilities with devolution, with the notable exception of the violation of the Belfast Agreement of 1998 at the hands of the British Government. The methods by which this democratic process was implemented brings to light a number of constitutional flaws. A greater issue resulting in perpetual judicial uncertainties.

PREFACE

This paper is made possible by those cherished individuals who provided me with such invaluable support throughout my time as a student at Bifröst University. I owe my parents Þór Þorsteinsson and Guðrún Björk Friðriksdóttir, along with my brothers Arnar and Egill Þórsson a sincere debt of gratitude for having supported me both financially and emotionally in this endeavour.

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1. Introduction

The year 2016 was one of democratic spectacles; as dramatic as they had been controversial. The Brexit referendum was one such example. Indiscriminate in its impact on all shapes of life, not only within the United Kingdom but further, beyond Europe and throughout the very modern globalized world the Union had been so instrumental in creating. Suffice to say, the referendum has had a notorious process, from its conception to its currently unforeseen end. The prospect of the United Kingdom turning its back on the European Union has filled the headlines of Western, and notably European media, ever since its proposal via a referendum back in 2016. The focus has largely been aimed at its circus-esque debates, both within Westminster as well as with the European Union. A fault of this sort of lens is that the issue has become intensely personality based, with coverage disproportionately shifting its focus between dismaying over May, criticising Corbyn, or simply duking it out with Johnson.

What appears to be lacking, however, is vital insight into its direct effects on the uniquely different moving parts which comprise the United Kingdom. What does Brexit mean to the people of Northern Ireland, Scotland, Wales, or England, respectively? Does the structure of their relationship with the supreme parliament in Westminster even allow for Brexit to be implemented in the manner its intended? If not, then how does Brexit impact said structure, and vice versa? What guarantees exist in place for both the United Kingdom's devolved structure and/or the Brexit process – And which supersedes the other in face of any judicial and democratic incompatibilities? The lack of clarity in light of these burning questions spells out troubling times ahead for not only the United Kingdom's constitutional soundness, but of the cohesiveness of their Union going forward in times uncertain.

This is quite a multi-faceted line of questioning, yet nevertheless best answered in unison due to their inextricable nature. As such, for the purpose of gathering what seems to be lacking in scholarly and journalistic literature and media, the research question will be phrased as follows:

“In what ways does the asymmetric devolutionary structure of the United Kingdom impact upon the legitimacy of the Brexit referendum?”

An observation of Brexit made through the lens of devolution will hopefully provide insight into what is to come and of what actions might be warranted.

2. Methodology

The following thesis is executed in the form of a desk research paper. As such, it utilizes pre-existing literature, data, and journalistic articles in order to formulate an understanding for the sake of its application into the events of the Brexit referendum. For that purpose, the asymmetrical devolved structure of the United Kingdom will be fully analysed from its origins in history to its contemporary legislative make-up. The works of famed British political scientist Vernon Bogdanor will be largely utilized in understanding the run-up of what would become devolution and of its distinction from federalism, the book “Beyond the Border” by Irish supreme judge Richard Humphreys for contemporary Irish Brexit matters, and official governmental guidelines on the devolved and reserved powers of each respective assembly/parliament.

Thereon, three different methods of defining and applying the concept of democratic legitimacy to give a rounded philosophical approach to a rather subjective term. These include the schools of Utilitarianism (Bentham/Mills), Duty Ethics (Emmanuel Kant), and of Virtue and Telos Ethics (Aristotle). The books “Justice” by Tom Campbell and “Justice: What’s the right thing to do” by Michael J. Sandel, both collections of different philosophical schools of politics and just actions, will be relied on for this introduction of legitimacy.

The gathered information on the realities of the devolved structure of the United Kingdom and of political legitimacy will then be put to the test and applied to the policy of-, and to events pertaining to the 2016 Brexit referendum, for the purpose of comparing these political facts. Once achieved, the judicial and democratic legitimacy of said referendum in light of the United Kingdom’s structure shall be concluded respectively. The judicial legitimacy pertains to Brexit’s compatibility with pre-existing legislature, and the democratic legitimacy regards it in light of what amounts to just political action and process as idealized in political philosophy.

3. Devolution

The British Isles are a truly confused mixture of parliamentary systems, unevenly distributed powers and of chronic constitutional uncertainties. Anyone familiar with traditional state systems, be they federal or unitary, is rightly baffled by how such a perplexing method of governance came to be. The answer lies in its unique history of conquest, incorporation, divergent interests, and cultural clashes.

3.1. A Multinational Union – On How the Kingdom got its Name

The United Kingdom of Great Britain and Northern Ireland is unlike any other union. It came into existence not through the growth of a single national consciousness, but rather as the outcome of a series of fortuitous historical contingencies. Unlike with most countries which possess a written constitution, the United Kingdom was not result of any form of contract, drafted and signed by its citizens. It is an entity evolved by the expansion, and later contraction, of territorial power over the course of almost a thousand years (Bogdanor, 2001).

To be more precise, the history of how these four nations came to be entangled starts in the year 1283, when under king Edward I, England conquered and assimilated its western neighbour Wales. From that point on the two nations had, for all intents and purposes become one. They shared a king, church, common law, and later a parliament. Of note is the fact that local affairs were largely left in the hands of Welsh lords loyal to king Edward. This guaranteed the Welsh cultural identity to a degree and, along with its early and long-standing assimilation into the English state would come to greatly impact the Welsh national interest (Welsh, 2011).

For the sake of brevity, let us skip forwards in time to the year 1603 to the unfortunate death of Queen Elizabeth of England and Wales, the last monarch of the Tudor dynasty. Childless and with all her siblings having predeceased her, the line of succession passed the throne to James VI of Scotland and the two ancient crowns merged into one. Throughout the 17th century the two nations of England and Scotland strengthened ties whilst remaining distinctly two separate political entities. Each nation still possessed completely distinct legal systems, church authorities, and parliaments. It wasn't until a century later when, in 1706 and 1707, the two Acts of Union were passed and both the Scottish and English parliaments were dissolved, with members of both countries becoming represented in the parliament of the brand-new Kingdom of Great Britain in Westminster (Welsh, 2011).

While three of the four nation's incorporation into what would become the United Kingdom is seemingly rather straightforward, matters do get quite a bit more complicated once the lens is focused on Ireland, which for the lack of a better summation, was the kingdom's least willing participant (Bogdanor, 2019). Slightly earlier in the 16th century, England had fully conquered Ireland under king Henry IIX in a series of gruesome wars against different clans and historical kingdoms (Welsh, 2011). Unlike in the case of Wales, Ireland was from that point on run by a lord lieutenant as a subservient nation. It wasn't equal in the partnership by any means and unfortunately wasn't treated with a great deal of respect. This unfortunate situation remained up until the late 18th century when England had become embroiled in the French Revolutionary Wars against Napoleon. Gripping the British was the very real concern of Napoleon attempting to cross English channel and invade. It was commonly feared that if he would not be defeated if he managed to do so. The only alleviation of that fear was due to the confidence owed by Britain's unparalleled navy. However, it had become clear to members of parliament that in the case of Napoleon landing in Ireland he would most likely find himself with a larger army than he had landed with due to widespread Irish resentment against British occupation. From there on, he could easily cross the narrow Irish sea and beach on the British mainland. In an attempt to appease the Irish, the British enacted the 1801 Act of Union which finally gave the Irish representation in Westminster and establishing the United Kingdom of Great Britain and Ireland (Welsh, 2011).

Throughout the 19th century, the situation in Ireland became increasingly agitated. Various concessions were made, including allowing Catholics to attend parliament and even talks of Irish Home Rule had surfaced. But by that point it was simply too little, too late, and it became quite apparent that Ireland was going to become independent. However, many people in the region of Ulster (the north-easternmost of Ireland's historic kingdoms), largely the Protestant descendants of the Anglo-Scots plantation owners, identified as being British and detested the idea of Irish independence (Bew, 1994). The British government didn't wish to be in a situation in which they would grant Ireland independence, yet risk having to reinvade in order to protect the Protestant majority in Ulster and so decided that Northern Ireland would be exempt from independence. So it was in 1922, that the nation of Northern Ireland, alongside its southern sibling the Irish Republic were born and the Union finally became known as the United Kingdom of Great Britain and Northern Ireland (Bogdanor, 2019).

3.2. The Devolution of the United Kingdom

Throughout the 20th century there remained agitation as Irish republican and unionist extremists in Northern Ireland engaged in a series of protracted political conflicts which became colloquially known as The Troubles. This rather grim state of affairs finally concluded with The Belfast Agreement in 1998, leading to a power-sharing arrangement in between nationalist and unionist political parties in a brand-new, devolved Northern Ireland Assembly in the nation's capital of Belfast – the first of its devolutionary kind (Bew, 2000).

The Belfast Agreement, more commonly known as the Good Friday Agreement, was a historic peace treaty between the governments of both the United Kingdom and the Republic of Ireland, signed on Good Friday, on the 10th of April 1998. The Agreement was instrumental in establishing peace between the long-warring communities of Northern Ireland and received overwhelming support in both Northern Ireland and in the Republic (71% and 94%) (Humphreys, 2018). For this purpose, the Agreement laid out a number of laws and institutions with an emphasis of three main strands:

The **first** strand deals with internal matters in Northern Ireland by founding the Northern Ireland Assembly as well establishing its defining power-sharing structure between the province's two communities (McCrudden, 2018). Additionally, this strand of the Agreement stipulates that cross-community support is mandatory for the enactment of any decision or policy affecting Northern Ireland as a whole. The **second** strand deals with all matters pertaining to relations between the province of Northern Ireland and the Republic of Ireland. It established pan-Irish governmental institutions encouraging cooperation between the two regions such as the North/South Ministerial Council, the closest thing to a pan-Irish government body and consequently is the foremost political institution of Ireland as a whole (Laffan & O'Mahony, 2008). The Agreement stipulated the North/South Ministerial Council to be completely interlocking and interdependent with the Northern Ireland Assembly, making it so that neither can function without the other. The Special EU Programmes is an appendix to the North/South Ministerial Council and was established to implement European Union legislation on the island, notably on matters regarding the border (McCrudden, 2018). The **third** strand deals with matters pertaining to British-Irish relations. Foremost of the organizations established by this strand of the Agreement is the British-Irish Intergovernmental Conference, which requires the Irish and British governments to address matters of co-

operation and stipulates that all decision-making with a bilateral impact shall be unanimously agreed upon (The Belfast Agreement, 1998).

These strands provided for the basis of the peace process and thus are integral to maintaining it (Humphreys, 2018). While far from perfect, the Good Friday Agreement's influence on increased cooperation, legislative conformity, and most importantly peace has proven to be greatly beneficial for the island by making what had seemed impossible a reality. The institutions born out of the Agreement have proven essential for the provision of a safe and effective platform for deliberation between the province's grieving communities.

Of note is the fact that as of the St. Andrew Arrangement of 2006, the Northern Ireland Act provisions were modified to shape a new power-sharing arrangement in which political parties in Northern Ireland must register their affiliation-, or lack thereof, with either the nationalist or unionist branches of government for the purpose of an implementation of checks and balances between the two. In essence, the implementation of devolution in Northern Ireland was and remains primarily motivated by the establishment and maintenance of peace between its two communities (Laffan & O'Mahony, 2008). Additional provisions were put into place requiring cross-community support on all policy matters affecting the entirety of Northern Ireland. This requirement has fostered province-wide solutions and makes the notion of one community undermining the other through policy legislatively unfeasible (Humphreys, 2018).

The Scottish Parliament thankfully came to be in a different fashion. While Scottish nationalism wasn't as strong- nor as prevalent in political discourse as it was in Ireland in the 1960-70s, a majority of Scots had begun to desire some form of increased autonomy over their own matters (Bogdanor, 2001). This had usually been considered to be due to people feeling that Westminster was slightly too remote from Scottish daily life until plentiful oil had been discovered in the North Sea, between the coasts of Scotland and Norway. This had given the Scottish an economic incentive for increased devolved powers from Westminster, with the Scottish National Party (SNP) even launching the political campaign "Scotland's Oil" to make a case of Scottish complete independence from the United Kingdom (The Economist, 2014). It became apparent that a discourse on the matter needed to be held, so in 1979, the then Labour government held a referendum to ask the Scottish people whether they wanted more powers devolved to a revived Scottish parliament. Despite a majority of those polled voted yes (51.6%), the turnout was relatively low and the proposal failed due to less than 40% (32.9%) of the total electorate had voted yes (Dardanelli, 2005). Cut to the mid-90s, when Labour party

leader Tony Blair states in this election manifesto that he would hold another referendum for Scotland and support devolution if that were to be voted for. In 1997, he succeeds in establishing a Labour government in Westminster and a referendum is held on the 11th of September that same year. The referendum passes with an astounding majority, albeit with a low voter turnout once again. Nevertheless, Scotland revives its long discontinued parliament in Edinburgh (Hill & Le Corre, 2015).

Nationalism doesn't resonate as closely at heart for the Welsh as it does with the Northern Irish, and especially the Scottish. This is reflected in the Welsh nationalist party, Plaid Cymru, being considerably smaller than its equivalents in Scotland and Northern Ireland. This is most likely due to having shared a much longer history with its neighbour England as was discussed in the previous sub-chapter. However, with devolution occurring in both Scotland and Northern Ireland, and with Wales having a similar population to the latter, it only made sense to devolve powers to Wales as well (Bogdanor, 2001). In England, people had been constantly fighting tides of nationalism coming from its northern neighbours. There prevailed a threat of them seceding from the Union. We must bear in mind that when we talk about seceding from the United Kingdom, we are generally talking about breaking away from England, as it possesses over 85% of the Union's population and hosts the supreme parliament. Therefore, whatever England wants they can vote through on any non-devolved matters and this has been the cause of resentment among the remaining three nations (Bogdanor, 2001).

3.3. The Current Implementation of Devolution

As a primarily unitary parliamentary state, the United Kingdom maintains the right to reserve legislative powers over a number of matters, applying to each of the devolved Assemblies. These include- , but are not limited to: powers over foreign affairs, defence, immigration, macroeconomic matters, international trade and financial markets, international developments, national minimum wage, competition, and legislation regarding intellectual property. In contrast, the Union has devolved to each Assembly the rights over health and social services, education, local government, housing, agriculture, environment, transport, tourism, sport and culture. This is in many ways similar to the arrangements found in most federal governmental systems. However, owing to the asymmetrical power-structure of the United Kingdom, each respective devolved region either possesses-, or is reserved from, further powers meant to fit to each's needs and wishes (Blick, 2017).

Today, Scotland remains the United Kingdom's most devolved nation, a fact reflecting its historic tendency and persistence towards its own nationalistic interests within the Union, as well as their assimilation through treatise rather than conquest (Blick, 2017). The Scottish Parliament currently resides at Holyrood, in Scotland's capital of Edinburgh. It consists of a single chamber of some 129 Members of the Scottish Parliament, commonly short-handed as MSPs. These representatives of Scottish interests are elected to a four year term through mixed-member proportional representation. Leading the Scottish Government is the First Minister, the office holder currently being Nicola Sturgeon of the Scottish National Party (SNP), who may appoint an executive cabinet, in a manner similar to fully sovereign parliaments around Europe. This cabinet consists of Senior-, and Junior Ministers, as well as Law Officers who assist the First Minister in leading a further staff of some 11,500 civil servants and bureaucrats across Scotland and at key International Hubs on all matters devolved to the Scottish Government (United Kingdom Civil Service, 2020). For all intents and purposes, the parliament at Holyrood operates in a similar way to most sovereign parliaments around Europe, with but one important distinction.

Since the Scotland Act of 1998, the Scottish devolved government has operated using a reserved powers model, according to which certain matters have been either devolved to be governed by the Scots or reserved under the sovereignty of the U.K. parliament at Westminster. The subsequent Scotland Acts of 2012 and 2016 have further devolved quite significant powers to the Scottish government. In addition to those previously mentioned rights devolved to all Assemblies, Scotland maintains the legislative right over justice and policing, taxation (including stamp duty land tax and some income tax – with the ability to set rates and thresholds), abortion, as well as *some* social security elements. Of note being the source of pride for many Scots, is the fact that Scotland fully operates its own, rather successful, branch of the National Health Service (NHS). In contrast to these powers, Scotland possesses no right over the *majority* of social security matters, employment law, energy, and its civil service (Scottish Parliament, 2018).

Following Scotland is Wales, whose assimilation into the United Kingdom is not only the oldest but also the most seamless. The Welsh have historically become further intertwined with the English, and by extension the British nation as a whole, than the Scottish. This is evident in considerably fewer devolved powers and institutions presiding over Wales than can be seen in Scotland (Bogdanor, 2019). The National Assembly of Wales, recently renamed Senedd Cymru (e. the Welsh Parliament) as of the 6th of May 2020 going forward in a reflection of

their emphasis on Welsh cultural and linguistic interests, is to be found in a number of buildings located in the Welsh capital of Cardiff (United Kingdom Civil Service, 2020). The Assembly is made up of a single chamber, located in the Senedd building of Cardiff Bay, and currently holds sixty Assembly Members, or AMs. The Welsh Assembly Members are elected for a five-year-term through mixed-member proportional representation, in contrast to the Scottish Minister's four years. The Welsh Government is led by a First Minister, consisting of a cabinet of some twelve other Ministers alongside a Counsel General (Leeke, Sear, & Gay, 2003). The recent Wales Act of 2017 implemented numerous changes to the Welsh devolutionary model and devolved more powers to the Welsh Government, alongside further legislative competence and executive powers over a number of policy matters, such as the adoption of tax raising powers, including new powers over income tax (United Kingdom Civil Service, 2020). As part of the Welsh emphasis on the preservation of their distinct cultural and linguistic identity above matters of national sovereignty, they have additionally been devolved the rights to work with global linguistic institutions to guarantee the state use of the Welsh language, as well as implementing it into its devolved education system. Nevertheless, Westminster still reserves powers over most aspects of Welsh governance. These include things such as justice and policing, postal services, all social security matters, energy, and employment law (United Kingdom Civil Service, 2020).

The United Kingdom is often erroneously characterized to be comprised of four nations. This is untrue as Northern Ireland is in fact not a nation but is rather akin to a province or a region, containing two separate and conflicting communities distinguished by their respective religious affiliations and national identities (Blick, 2017). The current majority protestant Unionist community prides itself on belonging to the British nation, similar how anti-separatist Scots consider themselves to be both Scottish and British. In stark contrast, the minority catholic Nationalist community regards itself as belonging to the Irish nation and considers the Irish identity to be incompatible with being British. Resulting from this paradox, neither the Unionists nor the Nationalists can, by definition, consider Northern Ireland to be a nation. It must either be an integral part of the British nation or a set of counties illegitimately separated from the Irish nation (Humphreys, 2018). Northern Irish devolution has therefore been mostly centred around the implementation and preservation of balanced power-sharing within the province, rather than around nationalistic or cultural ideals such as in Scotland and Wales.

In Northern Ireland the word *transferred* is used instead of devolved. This is not simply a semantics issue but is rather indicative of Ulster's unique, and rather complicated position

within the Union. In principle, the Northern Ireland Assembly can legislate in respect of matters traditionally reserved for Westminster. This power is subject to various consents, of course, but is ultimately intended for those extreme circumstances the province is known for. However, unlike in Scotland and Wales, Westminster holds indefinitely the right over *excepted* matters which apply solely to Northern Ireland, notably in regards to taxation, arms regulations, currency, treason as well as honours, immigration and nationality. Rights transferred to Northern Ireland include its own police and justice system, social security, and notably its own NI-Civil Service. Aside from the excepted matters previously stated, Westminster has reserved the classification of weapons prohibition (United Kingdom Civil Service, 2020).

The Northern Irish Assembly currently sits in Parliament Buildings in the Stormont Estate outside of Belfast and holds 90 Members of the Legislative Assembly, or MLAs. Five MLAs are elected through a single-transferable-vote system from each of the eighteen constituencies in the province. Unlike in the other devolved assemblies or even most parliamentary structures, the executive in Stormont is a mandatory coalition of parties affiliated with either the Unionist or Nationalist branches of government. Meaning that leading this coalition are actually two chairs: the First Minister and the deputy First Minister, each representing one of the two communities in Northern Ireland. They, alongside eight Executive Ministers, are nominated by the Assembly in both an accordance with procedures specified in the Northern Ireland Act of 1998, as well as in a reflection of the relative strength of each political party (United Kingdom Civil Service, 2020).

When considering England, most people do not know that it is in fact devolved to a degree. Unlike in Scotland and Wales where devolution grants nation-wide legislative rights and powers, English devolution is centred around the empowerment of local governments in its culturally- and economically diverse urban cities. This is indicative of the exclusive English orientation within the UK of identifying with one's home city or township, rather than one's region or nation (Condor, 2010). English devolution is considered to have begun with the Greater Manchester Agreement in 2011 which gave funding its Combined Authorities, a series of planning policies offering a strategic authority with powers over matters such as public transport, housing, waste management, and planning permissions. In the years following this agreement, further Combined Authorities have been established in nine other urban areas around England (Local Government Association, 2016). A majority of which are located the historically industrial areas of Northern England, as well as the Midlands. Each area of a Combined Authority legislates on a case-by-case basis, as opposed to the one-size-fits-all

approach found in Scotland, Wales, and Northern Ireland, respectively. Due to the varying nature of these city authorities, it becomes quite difficult to analyse them in one concise text. However, typical powers for such mayoral devolutions typically do share certain elements, including additional investment funding, devolved transport budgets, strategic planning and housing powers, education budget funding, and a relatively increased local influence on employment support (United Kingdom Civil Service, 2020).

Lastly, there is the London Assembly, which predates this current phase of Combined Authorities. The Assembly was established in 2000 and currently sits in City Hall in Southwark. It consists of some 25 Assembly Members and possesses the capacity to amend the London Mayor's budget and veto upon their strategies. Additionally, the Assembly may make proposals on numerous matters, such as policing, transport, economic development, and emergency planning (Local Government Association, 2016).

3.4. Devolution vs. Federalism

Before we venture further, it is vital to understand that though similar in many ways; devolution is **not** the same as federalism. There are essentially two types of government commonly found throughout the democratic world: A unitary state which has a single supreme government and a federal state in which government is divided into two tiers – a central and a regional government. At first glance it seems that the United Kingdom falls perfectly in the latter category. It has a central government in Westminster alongside three devolved assemblies in Scotland, Wales, and Northern Ireland. However, there is more to the definition of federalism. While a federal government does require a two-tier government, as is the case with the United Kingdom, they also require a parity between them. This does not mean that those tiers are meant to be perfectly equal (in fact, one is always bound to be stronger or more influential than the other), but it does mean that they both possess constitutional rights which guarantee them certain rights, such as to exist (Bogdanor, 2019). For example, the right of the Bavarian State Diet to exist cannot be taken away by the German federal government, nor can the United States government deprive Texas of their own state legislature. In other words, neither the federal nor the state/regional government is sovereign but instead, sovereignty lies in a codified and *entrenched* constitution given to both the federal and regional governments. This is the federal principle of dividing powers so that the general and regional governments are each within a sphere of co-ordinate and are thus respectively independent. The United Kingdom, however, does not possess a written constitution at all, let alone one which defines powers to

each assembly. Westminster is ultimately sovereign and thus cannot be seen as a federal state. The existence of the Scottish parliament, and the Welsh, and Northern Irish assemblies depends on powers being granted to them by the unitary U.K. government (Bogdanor, 2019).

During what is referred to as “normal circumstances”, Westminster refrains from exercising supreme power and legislate on matters devolved to non-English nations (United Kingdom Civil Service, 2020). The exact nature of these devolved powers will be further discussed in the coming chapter but for now it will be said that at first glance they seem similar to those authorities which federalized states are able to exercise. For example, much like the mutual guarantees you would find in a federal system, the Scotland Act of 2012 declared that the Scottish Parliament and Scottish Government sovereignty are a permanent part of the UK’s constitutional arrangements, much is typically constitutionally guaranteed by a federal government. Meaning that they are not to be abolished except by means of a referendum at the hands of the Scottish people. Similarly, a further Government of Wales Act in 2017 imitated this Scottish Act in recognizing that the National Assembly for Wales is to be a permanent part of the UK (Bogdanor, 2019). Under these given “normal” circumstances, the difference between devolution and federalism do not really matter at all. Devolution would simply refer to a stable governmental relationship, in which two-tiers of political institutions exercise mutually exclusive powers in the same territory. However, the nature of the gradually evolving devolution legislation has always sought to preserve the sovereignty of Westminster. Guaranteed by the Sewel Convention, which was added as a cautionary measure to the Scotland Act of 1998 by the House of Lords, is the motion that Westminster holds the right to legislate on any matter they see fit (Bogdanor, 2001). This includes measures as extreme as abolishing all devolved institutions of Scotland, Wales, and Northern Ireland, under whatever would be considered as “abnormal” circumstances. In a federal government, there typically would be a constitutional court to resolve such “abnormal” matters. There exists a compact in which the partners are usually juridically equal. In Britain however, Westminster can be both judge and jury in its own case. The courts are empowered to determine the competence of any legislation, devolved or otherwise, and any legislation made which happens to entrench upon an existing legislation could simply be overruled. So were Westminster to abolish the Scottish parliament the Scots would have no justiciable complaints, regardless of how morally sound their case for sovereignty would be. This is because Westminster would not have actually broken any compact by entrenching on these legislative rights of the Scots, since no compact had ever been formalized in the first place. During these ill-defined ideas of “abnormal circumstances”,

Westminster is fully able to exercise its supreme authority on literally any matter of state (Bogdanor, 2001). There is another important distinction between devolution and federalism, which is the fact that the United Kingdom's devolutionary structure is severely asymmetrical. While the ability of Westminster to exercise supreme authority could easily be justified in a system in which there was more-or-less equal representation of each nation, the fact is that England holds an 85% population majority within the United Kingdom. This means that the will of the English could easily be passed through parliament and ratified with an astounding majority (O'Neill, 2019).

4. The Concept of Legitimacy

Having reviewed the current asymmetric structure of the United Kingdom, as well as the historical course which led to it, one might think to finally understand its impact upon Brexit and vice versa. But what does one measure the impact to? To be able to tout whether this or that is legitimate or not one must understand by what means we understand political legitimacy in the first place. In order to do so we must consult some of the most vital political philosophers who have come to shape our modern political culture. By delving into their understanding of correct political conduct we can hope to later compare the facets of Brexit's impact upon the Union.

4.3. Utilitarianism

Is legitimacy bound to consequence?

The moral school of utilitarianism revolves almost exclusively around the simple assumption that morality consists in weighing the cost and benefits of any given action. The highest principle of morality being to tip the scale in favour of pleasure over pain, therefore creating *utility* (or, excess pleasure against pain). So, if we were to conclude whether any given action could be considered morally just, which to its application to politics would regard its legitimacy, then we would have to measure the resulting balance of pain versus pleasure (Campbell, 2010).

This school of thought was launched by English jurist and social reformer Jeremy Bentham (1748-1832), who has since had a compelling hold on the thinking of policy-makers, economists, and everyday citizens alike to this very day. His argument for this principle takes the form of a bold, yet enthralling assertion: there being no logical grounds for rejecting it. This might seem like a very daunting assertion at first, yet Bentham holds that people would have

no basis to defending duties and rights unless they believed that respecting them would maximise human welfare. Thus, all moral arguments are attempts to propose just how to apply the utilitarian principle. Would an alternative try to shape a world in which happiness and welfare wasn't its end goal? To illustrate this, Bentham provides an amusing question: "Is it possible to move the earth? – Yes; but one must first find another earth to stand upon." This earth, the only starting point for any moral argument, is the principle of utility (Sandel, 2009). Despite Bentham's bold claim; utilitarianism did, nevertheless, receive numerous objections, notably that this doctrine does not adequately respect individual rights and human dignity. What is a human life if, in any case, it goes against the interests of everyone else? Bentham's protégé, John Stuart Mill (1806-1873) strenuously attempted to reconcile these objections. His book, *On Liberty* (1859) demonstrates the classic defence of individual rights. It's central principle being that people should be free to do whatever they wish in order to maximise their utility, given that they do no harm to others. The individual is to be respected, even if his basic rights go against the interests of others, as is demonstrated in the following quote:

"Independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign" – (Mill, 1859)

According to Mill, governments may not interfere with individual liberty. Whether this be to protect a person from himself or, more importantly, to impose the majority's beliefs about how best to live. One might think that this statement goes against utilitarian morals. If a majority imposes its will onto a minority then surely it would create greater utility for said majority. This is where Mill disagrees, further distancing himself from his mentor. He believes that we should maximise utility, not case by case, but rather in the long run. Respecting individual liberty will, over time, eventually lead to the greatest human happiness. Allowing the majority to have its way by censoring debate, free-thinking, and any opposing dissenters might maximize utility in the short-term, but it will undoubtedly make society worse off in the long-term. He refers to this phenomenon as the *Tyranny of the Majority*. Mill offers a few reasons for why guaranteeing individual liberty and the right to dissent will always eventually provide for the welfare of society:

First, the opposing opinion might turn actually out to be true, and so offer an alternative to amend prevailing opinion. Additionally, a society which forces its members to embrace homologous customs and conventions is at risk to fall into stagnant conformity, deprived of the vitality which prompts social improvement. Lastly, subjecting prevailing opinion to a fair

debate, discussion, and criticism will prevent it from being reduced to dogma and prejudice (Sandel, 2009).

4.4. Immanuel Kant

Is legitimacy bound to the selfless fulfilment of duty?

Some are not satisfied with the idea that moral legitimacy is bound by an action's consequences. Not only is it much too vague to offer any effective code to live by but it also raises the question of whether an action done in good spirit which, by pure coincidence, lead to horrific consequences is ultimately morally unjustified. Same goes for a malicious action which lead unintentionally to a positive result. Prussian lecturer Immanuel Kant (1724-1804) offers an alternative account, one which became one of the most influential any philosopher has produced (Campbell, 2010).

Kant's *Groundwork of the Metaphysics of Morals* (1785) challenges utilitarianism, arguing that morality doesn't revolve around maximising utility, but rather respecting persons as ends in themselves. Appearing in between the American- and French revolutions, *Groundwork* came to offer a powerful basis for what the revolutionaries called "The Rights of Man", which evolved to what we in the 21st century refer to as "Universal Human Rights". Considering that Kant's work shaped a cornerstone of our current understanding of respect towards human rights, as well as having been a strong advocate of connecting justice and morality to freedom, one is hard-pressed to delve into it in order to gather an understanding of political legitimacy (Campbell, 2010). Examining his work is not simply a philosophical exercise, it is also a way of examining and understanding some of the key assumptions implicit in our public life. It informs much of contemporary thinking about politics, even if we are unaware of it.

Kant's definition of freedom, and its inherent tie to morality, is not as free as one would assume. In fact, his concept of freedom is quite demanding. Kant reasons that to act freely is not to choose the best *means* to any given *end*; it is to choose the *end* for its own sake. When we seek pleasure we aren't truly acting freely. Our actions, and the freedoms we hope to exercise through them, are then bound to our appetites and desires. This lack of awareness of true freedom goes hand-in-hand with what Kant describes as *heteronomous determination*; the act of doing something solely for the sake of doing something else. This challenges the inherent freedom of, for example, getting a good grade – for the sake of getting a job – in order to make money – to spend on this – so you can do that – for the purpose of being able to this. We only act autonomously when we do something for its *own* sake, as an end in itself. Through practicing this ability we cease to be instruments of purposes bestowed outside us. It is this ability to act autonomously, not for the sake of the means but of the end, which gives human

life its dignity and worth. For Kant, respecting human dignity is the highest form of morality. To treat them as persons, as ends in themselves. Not to use them as a means to achieve an end they are not a part of (Campbell, 2010).

From this starting point of essential human dignity, Kant further defines the moral worth of an action to consist exclusively in the intentions from which the act is done. The motive has to be fuelled by duty, irrelevant of self-interest, for the sake of the larger picture. An extreme example would be lying. One can think of countless examples in which lying could serve one's self-interest. Lying could, under the right circumstances, even result in positive consequences. However refraining from lying, regardless of its consequence, serves a greater end: allowing for more trust, for society to function, to uphold integrity and transparency, etc.

Key to Kant's argument is that an action must be carried out for its own sake and nothing else in order to be considered morally legitimate. If we act out of some motive *other* than duty then our action lacks moral worth. Kant calls these "motives of inclination" and poses that doing the right thing but for the wrong reasons simply doesn't cut it. This rule has the benefit of being able to analyse which action is, in fact, morally justifiable when the "right thing" is subject to objectivity. In other words, when a policy-maker touts about the empowering of sovereignty, one can look to whether those proposals benefit said politician in any other way than out of duty to his beliefs and profession (Campbell, 2010).

4.5. Aristotle

Is legitimacy that which realizes something's ideal purpose?

Let us further dial the discussion back in time and into the cradle of Western philosophy, ancient Greece, in an attempt to discover some of the core principles of political thinking which came to define our modern political thinking. Central to the development of the political philosophy we have come to understand today were the works of Macedonian philosopher Aristotle (384-322.BC), star pupil of the famed Plato. Aristotle published numerous influential works on the matters of politics, notably regarding its inherent purpose (Stanford Encyclopedia of Philosophy, 2015).

Key to understanding Aristotle's ethics and political thinking is the idea that justice is *teleological* – meaning, essential to defining the legitimate course of action regarding a given thing something one is required to figure out the *telos* (e.g. the purpose, goal, or essential nature) of said thing. This reflects the common worldview of the time, as ancient Greeks

commonly believed there to be an intrinsic and intended purpose to all things, unlike the more mechanistic view more commonly found today. Paired with this idea is the notion that justice is *honorific*. What Aristotle means by this is essentially giving people whatever they are due, what they deserve, based on the merits which they possess. These ideas could be summarised together as being “the true nature of things and the persons to whom they are assigned”. But what is a person due? What are the relevant grounds of merit, or lack thereof. Well, it depends on whatever is being distributed. So in our case, what is to be distributed would be political authority and rights. But before we can hope to understand how to distribute such goods we must inquire into the *telos*, or the inherent purpose of political authority.

These days, we do not really consider politics to have any single, particular end, but rather being open to the multiple different ends that citizens may espouse. This reluctance of ours to decide a determinate *telos* for politics reflects a concern for individual freedom. As we see it, politics is merely a procedure we must endure in order to allow people to collectively choose their ends for themselves. If we were to define it as such then the answer seems quite obvious – political rights and authority should be distributed equally. But Aristotle does not see it this way. In his mind, the intrinsic purpose of politics is not to set up such a framework of equality among all from which we can disagree on all matters but to form good citizens and cultivate good character (Sandel, 2009).

"Any polis which is truly so called, and is not merely one in name, must devote itself to the end of encouraging goodness. Otherwise, a political association sinks into a mere alliance...

Otherwise, too, law becomes a mere covenant... "a guarantor of men's rights against one another" - instead of being, as it should be, a rule of life such as will make the members of a polis good and just" – (Aristotle, *The Politics, Book III, chapter XII*)

To make his point clearer, Aristotle tackles what he takes to be the two major claimants to political authority: oligarchs and democrats, both of which have clear parallels to our modern times. The oligarchs are not legitimate because a political community isn't solely about the promoting economic prosperity. And for their part, democrats (or rather, majoritarians) are similarly illegitimate since the political isn't only about giving the majority its way either. Both groups miss the crucial point Aristotle makes, being that the highest end of political association is the cultivation of the virtue of citizens – to make them further deserving of the benefits a society brings. For him, politics is about encouraging the collective development of distinctive human capacities and virtues. To acquire practical judgement and to deliberate about the

common good. To reach the telos of human existence, if you will. Aristotle does acknowledge the usefulness of other forms of association, such as trade agreements and defensive pacts, but he insists that these kinds of associations don't amount to the true purpose of politics because their ends are ultimately limited. They do not ultimately serve to further the true purpose of collectively achieving the so-called "good life" (Sandel, 2009).

If this is how Aristotle would define the purpose and end of politics then we can start to understand how he would wish to distribute political authority. Aristotle reasons from the telos he assigns to political authority that the legitimate way of distributing it is to those who contribute most to an association of this character. To those who are greatest in civic excellence. Therefore, those deserving of the highest offices, authority, and honours should go to those who are best at identifying the common good and most effective in seeing it through (Stanford Encyclopedia of Philosophy, 2015).

5. Brexit and its Judicial Compatibility with Devolution

Now that we understand the inner workings of the United Kingdom's devolutionary structure we can seek to apply it to the Westminster Parliament's enactment of Article 50 of the European Union in order to see if they are mutually compatible from a purely constitutional standpoint. But first, let us take a look at what exactly what lead to the 2016 Brexit referendum, at what entailed, and what it currently appears to be lacking politically.

5.1. The 2016 Referendum

The 2016 United Kingdom European Union membership referendum, popularly referred to as the Brexit referendum (a portmanteau of the words 'British' and 'Exit'), firmly placed what was arguably one of the UK's most persistent and divisive foreign policy topics into the hands of the British people. Or did it? Numerous arguments and counter-arguments arise from both sides regarding the inherent input- and output democratic legitimacy of the Brexit referendum campaign.

There had been calls for a referendum on whether the United Kingdom should be part of the European Community ever since its inclusion back in 1973 (BBC, 2015). In spite of persisting as a highly contested issue, the matter regarding European membership seemed at first as if it had been quelled after the original 'Brexit' referendum of 1975 had resulted in an overwhelming vote to remain as part of the EEC (the precursor of the modern European Union). Yet it resurfaced numerous times, reaching a boiling point among Eurosceptics following the

Maastricht and Lisbon treaties of 1992 and 2008, each of which called for further centralization of European authority (Kirby, 2020). In response to these treaties, the Anti-Federalist League, a cross-party organization in opposition to the newly formed European Union, was formed. It would later be renamed the U.K. Independence Party (UKIP) in 1993 when its founder, Alan Sked, ran under its banner for the position of MP. Slowly but steadily the party gained traction over the years, entering mainstream politics and acquiring the status of a major party within the Westminster Parliament by 2014 under the leadership of Nigel Farage (Merrick, 2017). UKIP's supporters were not simply conjured up from thin air, but were seeping away from the other political parties as their popularity grew, most notably from the Conservative Party. Due to Westminster reliance on a first-past-the-post (FPTP) electoral system, the rise of UKIP caused what is known as 'the Spoiler Effect' for the ideologically right-wing parties (Bogdanor, 2019). This is when political parties of a similar ideology lose their constituent majorities due to the votes being split into two or more separate parties, allowing for an opposing party winning despite possessing less votes than the aforementioned parties combined.

In a desperate response to this phenomenon, Conservative Party leader and Prime Minister David Cameron made an effort to appease the UKIP voters by promising them that he would hold a referendum regarding the UK's membership of the EU were the Conservatives to secure a parliamentary majority in the 2015 general election. Rather unexpectedly, the Conservative Party won the election, and following a number of failed renegotiations with the EU, the referendum was declared to be held on the 23rd of June, 2016 (BBC, 2015). An extensive campaign for both Remain and Leave ensues, with Cameron declaring that normal rules of collective ministerial responsibility will not apply until an agreement on a deal with the rest of Europe is reached. And so, MPs were free to campaign on either side of the debate. The British people go to the polls to answer the following question: "Should the United Kingdom remain a member of the European Union or leave the European Union?"

The referendum was finally passed in favour of leaving the European Union with close majority of 51.9% against 48.1% in favour of remaining, with a total voter turnout of 72.2%. In total, 37,4% of the total electorate voted to leave the European Union. Looking at the geography of the vote, the 'Leave' vote reached a majority in both Wales and England with 52.5% and 53,4% respectively, with the notable exception of Greater London being in support of 'Remain' with a 59.9% majority. In contrast, Northern Ireland and Scotland had both been in favour of remaining within the EU with a 55.8% and 62% majority respectively (The Electoral Commission, 2019).

Cameron, despite having called for the referendum, was in fact against leaving the EU and subsequently resigned as Prime Minister the day following the referendum results. This has been widely considered by pundits to have been an opportunistic political move by Cameron in an attempt to secure his seat as Prime Minister by gambling against his own state interests, costing the nation billions of pounds in campaign funding and negotiation costs, gridlocking Westminster for years to come, and arguably hammering the final nail into the coffin containing any hope for British political unity (Stewart, Mason, & Syal, 2016). Unexpectedly, London Mayor Boris Johnson, who had been a leading figure for the ‘Leave’ campaign, declined to be nominated as the new Prime Minister, resulting in Home Secretary Theresa May taking on the role as the highest ranking scapegoat in the recent history of the UK, some three weeks later. Despite the referendum being specified by the high court as being merely consultative, and with the precise aim of either a ‘Hard’- or ‘Soft’ Brexit never having been made clear to the electorate, the newly arranged Conservative Executive put into motion their intention to leave the EU without a deal of any sorts as early as possible (Grayling, 2016).

5.2. Scotland and its Rights within the United Kingdom

A Scottish person might tell you that it was a Scottish king, James VII, who inherited the English throne and not the other way around. That Scotland and England joined *together*, in the Acts of Union to create the United Kingdom of Great Britain. That the Parliament of Great Britain was arbitrarily placed in London, rather than in Edinburgh. He might boast that the British Empire wouldn’t have amounted to anything without Scottish scientific, medical, and entrepreneurial innovations. That Scotland is historically an equal partner to England within what evolved to become the United Kingdom. While it is hard to argue against these claims – why doesn’t it feel as though Scotland is a true equal to England today?

Scotland is without a doubt the most devolved nation of the United Kingdom. They possess a Parliament – not an Assembly, containing the highest number of devolved Parliament seats representing the second-most populous nation within the Union. They have substantial rights to taxation, proudly enforce a number of their own laws with their independent Scottish police force, and operate their own branch of the National Health Service (Scottish Parliament, 2018). Coupled with this exceptionally devolved structure, and unlike in Wales or even England for that matter, is the distinct and tangible Scottish national identity. It’s as loud and proud as with any independent nation you’d find outside of the United Kingdom, and this is a necessary element to keep in mind when comparing Scotland’s devolved status to those of Wales and

Northern Ireland. Nationalism within Scotland has been ever present and has frequently resurfaced over the years. Recently however, it has become greatly exacerbated within the tumultuous climate following the Brexit referendum results. The reason for this surge in Scottish nationalism as well as the most apparent incompatibility that Scotland's devolved structure has with Brexit is the fact that it so *overwhelmingly* voted Remain in the 2016 referendum by a near two-thirds majority (62%) in total, and being the only nation in which every single constituency had majority Remain votes (The Electoral Commission, 2019). This speaks to an undeniable affinity that Scotland has had with the European Union, having benefitted greatly from its membership. A fact which became quite apparent back in 2014, when the Scottish National Party (SNP) administration for the Scottish Parliament sought to implement the core policy-matter of their party manifesto; A referendum regarding Scotland's full independence (Bogdanor, 2019).

Talks of independence were never unprecedented in Scotland, but they had never before been put to the ballot until the 18th of September 2014. The dream was short-lived, however, as the referendum resulted in a majority (55%) of Scots voting to remain within the United Kingdom. While the very fact that an independence referendum was held so recently in Scotland is quite telling of the current Scottish mindset in regards to the United Kingdom, it is the reason why it failed which is most relevant to the matter at hand. Among the most pressing of issues felt during the time regarded Scotland's relationship with the European Union. The Scottish public were extremely worried about having to reapply for membership and of what the notion of temporarily becoming a non-EU nation would bring. Faced with these problems, the Scots elected to stay within the United Kingdom, largely under the assumption that it would continue to benefit from the EU (Mooney, 2015). However, as we saw in 2016, the United Kingdom decided to leave the European Union anyway – doing away with one of Scotland's primary incentives to remain within the Kingdom.

The viability Scottish independence is a Pandora's Box of social and economic uncertainties best left untouched in this paper. What is to be taken away from this twist of fate, however, is that Scottish voting behaviour in the Brexit referendum, along with Scotland's subsequent outcries in light of its results, is highly indicative of its devolved semi-sovereign political structure being largely incompatible with what Scots experience as having its interests be undermined in a manner inconsistent with its position in the Kingdom. This begs further questions; Should there be a difference between a devolved *nation* within a union or a devolved *region* under a supreme parliament? And which is Scotland both practically and ideally?

Analysing this problem from a purely constitutional viewpoint it would appear that Scotland, in spite of its unique standing, is practically speaking the latter – a devolved region with effectively no judicial rights or powers of any substance. As mentioned during the clarification of devolution; Due to the reservations made by the Sewel Convention, Westminster retains the right to be able to legislate on any matter within the Union regardless of whether they are devolved or not, during what would be classified *by* Westminster as being “abnormal circumstances” (Bogdanor, 2001). The precise definition of these circumstances are ill-defined and thus free to be interpreted in any manner by the Westminster administration. Brexit itself has rather understandably been classified as an “abnormal circumstance” and thus any complaints Scotland makes regarding its results, regardless of how politically sound they may be, ultimately have no *justiciable* grounds of legitimacy.

The idea that Westminster can fully decide when to make exceptions on its own laws, legislate amendments to them, and reinforce them in a constitutional court at any given occasion without any effective checks-and-balances between the executive, legislative, and judicial branches of its government is democratically dubious at best. In light of the asymmetric power-structure of the United Kingdom with English seats making up 82% the entire parliament, this effectively makes England the Union’s *de facto* judge, jury, and executioner on any and all policy matters, both devolved or reserved, as they can always guarantee and impose a majority (O’Neill, 2019). This apparent structure had led Scotland’s First Minister, Nicola Sturgeon, to claim England hijacking Scotland’s interests and forcing it out of the European Union in the manner they did to be “democratically unacceptable” (Cooper, 2016). There is quite a lot to analyse from this statement, as it contains multiple implications on the state of the British constitution. Is devolution and/or Brexit simply illegitimate in the face of it from a politically philosophical standpoint? Hopefully there will be something to take away from all of this for the betterment of the United Kingdom as a whole.

5.3. The Conjoined England & Wales

Far on the other end of the Brexit debate you will find the neighbours England and Wales. They are best analysed together, not only due to their similar voting behaviour in the Brexit referendum, but because they have become so inextricably linked together throughout the course of their mutual history as a kingdom predating the Union itself.

Before assimilating into the English kingdom back in the 13th century, Wales had existed as a conglomerate of petty Celtic king- and chiefdoms; Successfully deterring both Anglo-Saxon

and later Norman invaders from their impregnable mountain strongholds. This relative isolation had retained the distinctly Celtic Welsh culture and once king Edward I of England finally did conquer and assimilate Wales back in 1283, local affairs were largely left in the hands of Welsh lords (Welsh, 2011). What this means is that while Wales has become much further intertwined with England than its devolved counterparts both politically and economically, it has managed to retain a great deal of its distinct cultural and linguistic identity. To put it through a simple analogy; Wales remains the mystical back garden of the United Kingdom. Home to nation defining legends like King Arthur of Camelot. As such, the Welsh pride themselves greatly on their cultural distinctiveness.

That being said, a slim majority of the Welsh (52,5%) did vote to leave the European Union during the Brexit referendum (The Electoral Commission, 2019). If, for the time being, we are to look aside from the complications which arise by such a slim majority enacting a drastic policy and rather directly onto the compatibility said policy has with the devolved Welsh state from a purely constitutional viewpoint, it would appear there is nothing discernible to be found. The Welsh voted for Brexit and they receive Brexit. The Wales Assembly has worked closely with a number of EU institutions for the purpose of Welsh linguistic development, but seeing as how the Welsh language is already fully guaranteed by Welsh devolution it would seem unlikely that it would be too drastically affected (United Kingdom Civil Service, 2020). As for their beloved culture, it's arguably more likely that leaving the European Union would have a positive effect on its preservation, seeing as Wales would be leaving a continental-wide federal bloc to isolate with its more immediate neighbours. Lastly, Wales is considerably less devolved than both Scotland and Northern Ireland, and as such is much more compatible with having policy directly implemented onto them from Westminster as this is the already case with the majority of their governance.

Similar to Wales, England voted Leave in the referendum (53,4%) with a slim, albeit slightly greater majority (The Electoral Commission, 2019). England is by far the largest entity within the United Kingdom, possessing some 85% of its population. As a result, even such a slim percentage majority in England is enough to tip the entire British scale in favour of Brexit. There are many things to consider when analysing the demographics of the English vote – as there seems to be a clear disparity between the prosperous and pro-European South-East region, primarily that of London, versus the largely neglected and anti-European remainder of England (Short, 2016). This is telling of some level of asymmetry within England itself and is worth going into in a separate paper to perhaps fully understand the underlying faults of English

Euroscepticism. London is one of the EU's largest financial hubs and did vote majority Remain (59,9%), being the only one of England's nine official regions to do so (The Electoral Commission, 2019). London itself is semi-devolved, possessing its own London Assembly, and there were a considerable objections made by Londoners in wake of the referendum results. Some so ludicrous as to even call for an independent EU London city-state (Baxter, 2016). Ignoring the impossibility of such a suggestion, it does reflect both the Londoner mindset and London's dependency on economic ties with the European Union. Aside from this minor inconsistency, England does not seem to possess any constitutional incompatibilities with having enacted Brexit, given that they did in fact vote for it and that the Brexit movement had both originated and gained its traction there.

It could be argued that economics alone are not sufficient to fight for nor against the referendum's legitimacy as the Brexit movement had primarily been an issue regarding British sovereignty in the face of being absorbed into a greater European bloc. This is not without its sense of irony as England is arguably the only truly sovereign nation within the United Kingdom. All things considered, the idea of analysing the compatibility that legislation passed in Westminster has with England is completely redundant, as England already possesses a vast majority of the seats in parliament. This, along with the relative lack of checks-and-balances, as well as the precautions made by the Sewel Convention, effectively give England the ability to "legitimately" legislate on anything. In the words of Scottish legal philosopher Neil McCormick, "parliamentary sovereignty is an exclusively English doctrine" (McCormick, 1999). For England to be in any way incompatible with any policy enacted by Westminster it would have to be subject to some form of a codified constitution restricting the parliament's legislative authority. But it simply isn't (Bogdanor, 2019).

5.4. Northern Ireland and the Good Friday Agreement

As with Scotland, the most apparent incompatibility that the devolved environment of Northern Ireland has with Brexit is the fact that they had voted to Remain in the referendum. However, when considering the exceptional nature of Northern Irish devolution there is a lot more to be observed about that outcome than just its flat vote statistic. The provisions agreed upon in the first strand of the Good Friday Agreement of 1998, the historic treaty on which Northern Ireland's devolved style of government is based on, detail the necessity for cross-community support on all matters affecting the entirety of the province (The Belfast Agreement, 1998). According to a survey carried out by the Northern Ireland Assembly into the demographics of

the Brexit vote, a two-thirds majority (66%) of those who identified themselves as unionist voted to leave the EU as opposed to an astounding majority of self-identified nationalists who voted to remain (85%) (Garry, 2017).

This is indicative of the important fact that the peace-process is still ongoing and that the idea of Northern Irish solidarity has unfortunately not yet come to fruition. The importance and fragility of the peace process cannot be overstated because regardless of what people might forget about history; causing it to revert back to the state of affairs prior to the Agreement is tantamount to instigating an oppressive civil conflict (Humphreys, 2018). As mentioned previously, the first strand of the Good Friday Agreement mandates cross-community support for all decision-making affecting Northern Ireland as a whole. Given that the referendum results did not garner such support in Northern Ireland, the fact that it had not been addressed is not only damaging to the power-sharing arrangement guaranteed by devolution but is in violation of the first strand of the Agreement.

The Good Friday Agreement is repeatedly brought up in this paper out of necessity as it is the foundation for Northern Irish devolution, by which all devolved measures and operations are instructed (Bogdanor, 2001). A number of those who have spearheaded the Brexit initiative have erroneously claimed that it will have no effect on the stipulations of the Good Friday Agreement on the basis that the EU is hardly ever mentioned within the compact. This is because no one foresaw the UK leaving the EU during the signing of the Agreement, and so no such precautions were implemented. Without the unity and legislative compatibility provided for by the EU, it is highly unlikely that the Agreement would have been as effective as it turned out to be, let alone be signed at all. As a result, the Good Friday Agreement, along with all of its resulting institutions – including the Northern Ireland Assembly, is wholly dependent on the EU to withhold its integrity (Laffan & O'Mahony, 2008). This has justifiably caused great concern regarding the implementation of the Agreement, most notably regarding the peace process and the interests of those border communities and businesses who have become dependent on an open, transparent border between Ireland's regions (Phinnemore & Hayward, 2017).

Membership of both the Republic of Ireland and Northern Ireland to the European Union has played an integral role in the operation of the border for a number of reasons. Cross-border operations require most of all bilateral co-operation and intergovernmental legislative compatibility, a platform which the EU readily provided for. Additionally, EU membership

had established ease of business between the two regions, largely in thanks to their access to the, at-the-time, shared Customs Union and Common Market. This resulted in the abolishment of all customs checks within Ireland and an increased flow of all export- and import transactions across the island, leading to the inextricable intertwining of Ireland's economies (Humphreys, 2018). Lastly, the Schengen Agreement of 1985 had guaranteed a seamless movement of both Irish and British nationals across the Irish border. Coupled with the Free Movement of People's Acts, this resulted in businesses being able to hire from an island wide labour pool, with numerous people crossing over the border as part of their daily commute, finding employment in what would become a single, near indistinguishable Irish economy. Any semblance a border, the primary fuel of Northern Irish sectarian conflict, had all but vanished – barring the change between metrics in speed limit signs (Phinnemore & Hayward, 2017). With the UK's declared intention of leaving the European Union they have ostensibly turned their back on this achievement, as withdrawing from these guarantees will effectively split Ireland once more.

Brexit also deeply impacts the operations of the second strand of the GFA, which pertains to the institutions and policies which implement co-operation and compatibility between the Republic and the province of Northern Ireland. Most affected are the operations of the North/South Ministerial Council, the foremost executive and legislative governmental institution of Ireland as a whole. As mentioned previously, the Northern Ireland Assembly had been purposefully made so interdependent on the Ministerial Council that everyday operations would cease to be viable for either without the other (The Belfast Agreement, 1998). Currently, it remains unclear as to how the Ministerial Council will be able to resume operations without the constitutional guarantees of the European Union, the Customs Union, and Free Movement of Peoples, and by extension, it becomes equally unclear as to how this will impact its dependent Northern Irish Assembly. In this regard, it can be considered that Brexit in its current form is a direct violation of the Good Friday Agreement's second strand.

Taking a look at the third strand of the Agreement, which regards intergovernmental co-operation between Ireland and the UK, there is yet another violation to be found. It stipulates that decision-making made by either government must be unanimously accepted if it has a substantial impact on both countries. In spite of this, the Irish government had not been consulted with in any capacity prior to the British government's enactment of Article 50 of the European Union, and all subsequent pleas made by the Irish government to address the issue pertaining to the Irish border fell on deaf ears (Humphreys, 2018). Unlike in Scotland, in which

any incompatibility Scottish devolution has with Brexit technically has no *justiciable* grounds of illegitimacy, the Good Friday Agreement was a treaty the United Kingdom had signed with a fully sovereign nation, that being the Republic of Ireland. The Sewel Convention providing Westminster with the ultimate authority to go against quite literally any legislation set forward regarding devolution simply doesn't apply when dealing with a completely separate nation. There aren't any ways around it. The Republic of Ireland partook in the Agreement because its sovereign interests, as well as the interests of its own nationals living within Northern Ireland, were at stake. Breaching the first two strands of the Agreement deeply impacts Irish nationals on both sides of the border, while the violation of the third strand is a direct offense to the nature of the Agreement being an international treaty. No sort of constitution, regardless of how convoluted it may be in regards to the authority of its own parliament, can justify a violation of a peace treaty with a foreign nation nor the infringement upon the rights of shared nationals living within its territory. According to the standards by which international affairs have been conducted for the past few centuries, the methods employed by the UK in leaving the EU in light of the compact it had signed with the Republic of Ireland is in direct violation of the third, and last strand of the Good Friday Agreement.

6. Grounds of Illegitimacy

Given that democratic processes, such as the 2016 Referendum, are instituted for the sole purpose of deciding matters which people disagree about, their legitimacy rests on there being a fair process towards decision-making so that the result will be acceptable to even the “losers” of the decision in question. While Brexit is technically speaking not judicially illegitimate in a devolved United Kingdom (with the exception of Northern Ireland), a number of constitutional questions have risen upon its analysis. Does a constitution fully legitimise the methods by which Brexit was enacted? Is a majority of less than two percent sufficient to impose a such a divisive policy? Does such a result call for some form of compromise or near unanimous consent? What purpose should devolution *ideally* serve in the face of it? In order to answer these questions, let us refer back to our established philosophical understanding of political legitimacy and apply it to the situation at hand.

6.1 The Input Legitimacy of Brexit

We have previously analysed what is referred to as *Output* legitimacy, which assures formal rights to citizens and defines the capacity by which those in power are permitted to act. In other

words, the impact and compatibility which Brexit has on the established legislative landscape of the United Kingdom and of the rights of those who are subject to it. In order to get the full picture we are obliged to analyse Brexit from the lens of its *Input* legitimacy, which assures citizen's ability and opportunity to rationally participate in political decision making with the information they are provided as well as ensuring that the interests of the entire population are fairly represented.

Fortunately, the matter of Brexit's input legitimacy has been extensively researched by one Sandra Kröger from the political department of the University of Exeter. Her article addresses questions which consider not only who was presented with a vote but also whether they could make a reasonable choice in light of both the Leave and Remain campaigns (Kröger, 2018). It does so by assessing the democratic legitimacy of the Brexit referendum through the following criteria:

1. By reviewing the defined franchise of the vote
2. By analysing the presence of clarity in the referendum question
3. By assessing the amount and quality of information during the campaigns

The franchise for the Brexit vote had been defined in the EU Referendum Act of 2015, which for the sake of simplicity was based on the general election franchise, with an exception made for members of the House of Lords to weigh in on the vote, along with electors in Gibraltar. This means that the electorate was limited to UK citizens over the age of 18, excluding a significant portion of those most strongly affected by the referendum – those being the youngest generation (Uberoi & Johnston, 2020).

Adding to this, some 2.15 million adult EU citizens living within the United Kingdom were denied suffrage. The reason being for not extending the franchise appropriately to include those most affected was because the House of Commons Briefing had explicitly stated to all MPs that the referendum would not *need* to be implemented and would thus not be binding on the government. In other words, the 2016 Referendum was specified to be purely consultative. Another, yet equally damning reason for not extending the franchise was because the Conservative Party had allowed its Brexit faction to define it in order to exclude those who favoured the Remain vote. The reason for allowing this is that the Conservative government never realistically expected Leave to win. As a result; not all relevant parties could see their views and interests represented (Kröger, 2018).

Second point to address is the presence of clarity. The referendum question read as follows:

“Should the UK remain a member of the EU or leave the EU?”

The issue with this question is that Remain or Leave were never exclusively *one* option. Both include a number of alternatives, which in the case of Leave includes scenarios such as leaving the EU yet remaining in the European Free Trade Association (EFTA), for example. When reviewing the different options it becomes clear that a majority for any given Leave scenario doesn't exist. This lack of clarity as to what Brexit itself would entail deprived the public of crucial information of what the consequences of the referendum were, thereby rendering a meaningful vote difficult – if not impossible. The vagueness of the Leave option cast a wide net, catching a conglomerate of incompatible voters (Kröger, 2018).

The last point of analysis considers the presence and quality of information. Among the preconditions of a fair and democratic campaign is that the competing sides are limited to the same amount of funding, and thus the Brexit campaigners were subject to such a regulatory framework. These regulations place a spending limit of £7 million. In July 2018, the Election Commission had confirmed that the Leave campaign had broken electoral law by overspending by at least £626,000 which had been funneled into its youth arm, BeLeave. This branch of the campaign spent its over-allowance on online advertising which targeted people based on their individual psychological profiles (Kröger, 2018). These profiles had been assorted through data collected from Facebook completely without knowledge or consent of the electorate. This scandal, exposed in 2018, revealed members of the Leave campaign having consorted with Cambridge Analytica, a political consultancy firm which had designed quiz games for the sole purpose of stealing and funneling the electorate's personal data into the hands of political campaign strategisers. This in turn, would be utilized for the purpose of “psychological political warfare”. This firm's data collection, spearheaded by former chief executive for the Trump presidential campaign Steve Bannon, played a vital role in many of the political upheavals of 2016 (Cadwalladr, 2018).

As for the actual quality of information it is widely regarded that both campaign were plagued by misinformation, and in some cases even flat-out lies. The most prominent of these was the infamous “Boris Brexit Bus” which mislead the public into not only believing that the UK suffered a one-sided weekly expenditure of £350 million to the EU but also that this money would be instead redirected to fund the National Health Service (NHS). It has since become clear that it is not going to happen. Such misinformation was not at all exclusive to the Leave vote however; the Remain campaign repeatedly utilized unverified numbers to forecast an

economic breakdown in the case of Brexit (Kröger, 2018). This is not to say that misinformation doesn't occur during regular elections. But the main difference is that an in/out referendum such as Brexit is completely a one-off event with no subsequent opportunity to hold leading figures accountable. So in a way, there was even *less* incentive to act in the truthful way.

Alluding back to the philosophy of Kant; did misinformation and campaign fraud treat voters simply as a means or an end in and of itself? One could reason that fraud and the spread of misinformation could never be considered a legitimate means toward any given end as the thought of excusing such behavior is tantamount to allowing everyone to commit fraud. It doesn't respect the public as being the goal of politics if for any purpose they must be misled. But what even was the motive of Brexit? For if the ends are to justify the means then their utility must outweigh the costs of having mistreated the public. The issue is that David Cameron, party leader of the Conservative Party, committed to the Brexit referendum, not because there had been a careful analysis of what such a referendum would involve, but rather in order to appease the UKIP voters and to stand a chance of his party winning the upcoming general election. Therefore, whatever argument Cameron and his Party would make concerning the benefits of Brexit become legitimately redundant as they would stem first and foremost from personal gain – making Brexit a motive of inclination rather than one for its own sake. Lastly, why did a referendum explicitly specified by the House of Commons Briefing to be a solely consultative suddenly become binding on the government? Given that its intended purpose dictated the way it had been structured it cannot be assumed that the altered interpretation of its result be democratically legitimate (Grayling, 2016). If, for example, the referendum had been structured around the idea it would become binding then it would have possessed a reason to have its franchise expanded. Something which would have undoubtedly tipped the majority in favour of Remain. This brings us to the next potential grounds of illegitimacy.

6.2 The Majority Question

Typically, when a proposal for an irreversible and drastic change to the political, social, and economic status of society is put to the ballot, two things are instituted to guarantee its democratic legitimacy: A degree of compromise to secure the consent of the minorities, and thus the whole of society, alongside a requirement of a *qualified majority* in order to prevent a small majority from eroding the fundamental rights of a large minority (Holden R. , 2014).

For the time being, let us analyse the latter – that being the requirement of a qualified majority. Seeing as how the Brexit referendum became solely hinged on which future the majority of UK citizens preferred for their nation it becomes worth considering what exactly amounts to a majority. The obvious answer seems to be anything above 50%. But even if the entirety of an appropriately franchised electorate participated in a referendum, would it be just to impose the will of the 50,1% onto the 49,9%? Such an imposition is impossible to justify as it would result in the most extreme form of what Stuart Mill referred to as the “Tyranny of the Majority”, an inherently undemocratic situation in which the slight majority might be better off in the short-term but the society as a whole would suffer in the long-term through the erosion of minority rights (Sandel, 2009). This is the case for most majority rule without compromise, but its severity increases the slighter the majority becomes. As a precaution in an attempt to minimize such effects, most democracies implement a requirement in binding referenda for a qualified majority (aka. supermajority) which can typically range from a benchmark of three-fifths to a two-thirds majority. This in effect helps to define a majority worth considering, and pairs well with the fact that the electorate never fully participates in any given polling. Meaning, that if there is a relatively low voter turnout but it results in a majority greater than two-thirds then the chances of that majority being a mere statistical anomaly are considerably less than if it had crawled slightly over half (Holden R. , 2014).

This brings us to the Brexit referendum, which was passed into motion with a majority of only 51.9% and a 72,21% voter turnout (The Electoral Commission, 2019). This means the Leave vote only represented some 37% of the total electorate, and as such the true scope of the majority desire becomes impossible to legitimately act upon. What is the precedent for such a slim majority passing a policy of such great and long-term impact, especially considering the relatively meagre voter turnout? The United Kingdom is no stranger to referenda and has come across this issue in the past. During the 1979 Scottish devolution referendum, which had been the United Kingdom’s very first devolutionary proposal, a majority of about 51.6% of Scots had voted for the establishment of a Scottish national assembly. However, there had been an abysmally low voter turnout of about 63.7%, meaning that the result only represented some 32,9% of the total Scottish electorate. As such, the referendum was repealed as it failed to gain the necessary level of approval of 40% required by an amendment (The Edinburgh Newsroom, 2019). This is not to say that this was an unjust interpretation – quite the contrary. The question is why was Brexit not bound by the same regulatory framework? It neither required any degree of a qualified majority nor was it subject to the required electoral approval of 40%. This is

indicative of the fact that there simply is no parliament-proof constitutional regulation on referenda in place to guarantee their legitimacy in difficult cases such as this.

The final point to address to the majority question regards the lack of referenda clarity, as was discussed in the previous sub-chapter. The referenda question had been utterly unclear as to the exact path the United Kingdom would embark upon when leaving the European Union, leaving voters to each vote for their own assumption (Kröger, 2018). As such, it simply isn't mathematically realistic to expect that of the slim majority of 51,9% who had voted for Brexit, that enough of them had specifically wished for a "No-Deal" style Brexit to still comprise a majority. Does this mean that the government's interpretation of the results as a fully binding "Hard" Brexit lead to a "Tyranny of the *Minority*"? The utter ridiculousness of this notion must have Mill rolling in his grave, but nevertheless it has become clear that the will of the minority of an already dubious majority is being imposed on the rest of the United Kingdom for no explicitly stated reasons. How would this make a referendum, that which is designed for the sole purpose of deciding matters on which people disagree on, legitimate in any shape or form? This is especially curious considering that a "majority" seems to have been the ultimate deciding factor in the referendum once it suddenly became binding. What is the inherent utility of such an interpretation? Why was the most extreme form of Brexit implemented without any discourse between not only the 48.1% "minority", but also among those who had voted for Brexit?

6.3 Loser's Consent

The legitimacy of referenda, as it pertains to its purpose of deciding matters which people disagree on, rests on it being acceptable to even the "losers". The term "losers" doesn't feel appropriate, however, because in referendums there ideally shouldn't be "winners" either. A society doesn't simply comprise of two teams seeking to undermine each other. It comprises of countless individuals and shares with them an inextricable mutual interest. Everyone seeks what they think is best, not only for themselves but for their community. People might disagree on what that might be but they nevertheless share the same essential goal. They can thereby rest assured to some degree, given that everyone has their interests considered, that whatever unfolds progresses society as a whole (Anderson, Blais, Bowler, & Listhaug, 2005).

Unfortunately, this does not adequately reflect contemporary political discourse, as can be seen in the methods by which the Brexit referendum results had not only been interpreted but subsequently implemented. Division is natural to politics. If there were none, politics would

become redundant as everyone would simply do as everyone would agree. But the severity of the division fostered by the referendum has been inherently self-destructive. In an age old union of nations, a shameful lack of effort has been made to reconcile its different preferences on a matter possessing generation-lasting consequences – be it between the different votes or even amongst those who voted in unison to leave yet under different assumptions. Once the results came in, the government rushed to interpret it as a call for the most extreme form of Brexit, defending it in the face of all objections as being the “will of the people” (Holden & Shirbon, 2016). The result began to revolve around undermining the preferred values of the “losers”. And it seemed fair – because they “lost” and as such they must have been “wrong”. As previously mentioned, there was no clearly discernible majority approval for such a conclusion. Even if there were, it would’ve resulted in a slight majority imposing its values onto a minority of 48,1% in the name of the “will of the people”, or rather “the will of every *other* person”.

John Stuart Mill argues against the Tyranny of the Majority on the basis that its disregard for individual liberty and the erosion of the minority’s right and opportunity to dissent against the prevailing values is harmful to society in the long-term (Sandel, 2009). This form of tyranny doesn’t consider – it imposes. It concludes on behalf of others and rejects the chance for discourse, so that one might never know what would’ve been the best course for everyone. This in turn deprives a society of the vitality which prompts social improvements. For the many are always “right” and the few remain “wrong”. But what if it isn’t a mere minority that is suffering imposed values, but whole nations? Here we must consider the inherent utility of rejecting “Loser’s Consent”. In the case of Brexit, an unreliable and slight majority will have their utility maximised as they will have received *roughly* whatever they wished for, that being marginally increased autonomy – while an equally slight minority will have their interests ignored as well as opposing values (for many, those which are incompatible with their livelihood) imposed upon them. Scotland, a nation overwhelmingly in favour of remaining begins to suffer a crisis of sovereignty. Northern Ireland, a province in the midst of a fragile peace-process, has its communities pitted against one another. It is for the reader to decide which outweighs the other, but one thing is absolutely clear: Placing the interests of all into consideration in an attempt to reach even a limited form of a unanimous consent, such as having its interpretation up for a parliamentary debate, would have minimized these negatives.

Division is natural in politics. We commonly perceive our endless attempts at its resolution to be the essential point of democracy. To figure out what most people want and deliver it to them – for it would be more just than to let fewer decide. But one might wonder what Aristotle would

think if he'd witnessed the 2016 referendum. What would he *say*? Of our eagerness to undermine each other; of the use of technicality to slide past due process; of short-term personal gain driving generation-lasting decisions? He would undoubtedly recognize it as democratic, but rather of the sort he warned us about. The reality of the referendum is misaligned with the actual purpose, the *telos* of politics. For Aristotle, politics is meant to provide us with the opportunity to collectively recognize and amend the faults of society, both in order to, and for the sake of, cultivating a good citizen. A citizen worthy of the benefits such a nurturing society would provide. It should encourage the collective development of the distinctive human capacities and virtues – those of our ability to deliberate about the common good and implement practical judgement in our venture towards it. In other words; Politics is there for us to realize the *telos* of our humanity (Sandel, 2009). Carrying forward a decision lacking judgemental practicality made by a minority of a slight and dubious majority without deliberation with society at large is not only incompatible with the inherent purpose of politics but it also betrays our innate goal as human beings.

7. Conclusion

As stated previously, the inherent purpose of referenda is to resolve matters which people disagree on in order to conclude on a course of action acceptable by even the “losers”. Any attempt to reach a conclusion on such matters without involving all those affected, properly specifying the nature of the proposal, or garnering close to unanimous consent, becomes devoid of its original purpose and thus incapable of delivering a meaningful and democratic result.

In the case of the Brexit referendum, the electoral franchise was inadequately inclusive and the referenda question lacked clarity – causing a disparity in voter expectations. This was because the referendum was supposed to be solely consultative, according to the Supreme Court, and a proper handling of it in light of its suddenly binding status would've undoubtedly changed its outcome. The referendum utterly lacked any binding regulatory framework, such as that of a qualified majority or even the minimal electoral support of 40% as was required of Scotland's 1979 devolution referendum. This, along with the disparity in voter expectations, resulted in no clear majority for any given Brexit scenario; Allowing for an indefinite portion of a dubious majority imposing its will, in the form of a policy of immense and irreversible impact, onto the rest. In light of the fact that “loser's consent” was wholly ignored in the wake of the referendum results in favour of the most extreme form of Brexit, this warrants the odd but accurate description of a “tyranny of the minority” during which the devolved rights of Scotland and

Northern Ireland were subverted. The complete lack of discourse and compromise towards Scottish consent, as well as Westminster's imposition of Eurosceptic values onto Scotland in light of its exceptionally devolved position within the UK and dependency on the EU deeply impacts upon the democratic legitimacy of Brexit. As for Northern Ireland; In order to preserve peace until such a time that the communities of Northern Ireland would consolidate, the province was required by devolution to exist in a sort of limbo in-between two separate yet equally sovereign nations. The Brexit referendum did not only prematurely offer the Northern Irish a decision they were unprepared to make in solidarity, thus effectively back-peddalling the aforementioned peace process, but it also strained the long-held, yet undeniably complicated relationship between the Republic of Ireland and the United Kingdom.

The nature of this process, from its lack of electoral guidelines and norms, its ulterior motives of inclination, to the imposition of a minority's values in the form of an irreversible policy onto a majority, would be in the combined words of Aristotle, Mills, and Kant; democratically illegitimate as well as counterintuitive to not only the inherent purpose of politics but to our role as public citizens. Given these circumstances, it is quite apparent that the referendum itself utterly lacked the democratic legitimacy typically required for referenda to deliver a meaningful result. The fact that enacting it was even legislatively possible reveals obvious shortcoming in the British constitution. Which brings us to our second measure of legitimacy:

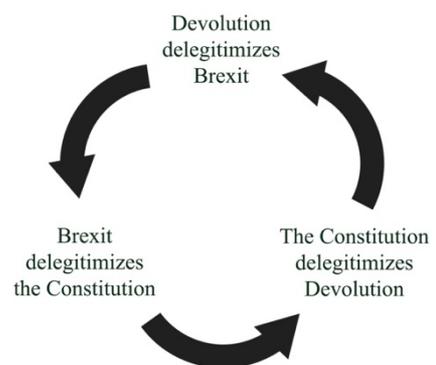
Among those few obscure electoral guidelines the Brexit campaign was actually bound to, one can find a blatant violation in the form of electoral fraud. While both sides of the debate propagated misinformation during their respective campaigns, it was the Leave campaign which exceeded their spending limit. This overspending was funneled into its youth arm, BeLeave, which stole personal data from Facebook via Cambridge Analytica for the express purpose of utilizing psychological tactics to impact the vote. This scandalous violation of personal privacy, uncovered in 2018, is damning enough by itself to completely delegitimize the referendum judicially.

Brexit is also judicially incompatible with Northern Irish devolution, which is uniquely guaranteed by the Good Friday Agreement of 1998. The Brexit policy, along with the methods by which it was executed, directly violate not only the devolved measures taken in Northern Ireland to establish and maintain peace between its grieving communities, but also an *international peace treaty* with a separate, fully sovereign nation; that being the Republic of Ireland. This is unique as no legislation, regardless of its constitutional guarantees, possesses

the legitimate authority to overturn an international treaty made in good faith with a separate nation. This violation exceeds matters simply pertaining to the complexities of devolution, and impacts upon the sovereignty of a wholly independent nation outside of the United Kingdom. As such, the weight and importance of this distinction cannot be overstated.

Regarding the remaining nations of the United Kingdom; Brexit suffers no judicial incompatibility with Scottish and Welsh devolution, regardless of its democratic legitimacy, due to the legal exemptions guaranteed to Westminster by the Sewel Convention. These guarantees dictate that any devolved legislature can be overwritten during what is classified by Westminster as “abnormal circumstances”. This reflects how the British constitution, in effect, delegitimizes devolution as it doesn’t guarantee it but rather retains provisions which make it meaningless in the face of events like Brexit. Additionally, devolution is legitimately incompatible with-, and redundant in light of England’s position within Westminster, as they possess 82% of the seats in parliament. The devolved rights of Scotland and Wales become meaningless when the English can not only impose a majority on any legislature they wish, but additionally decide on when they are allowed to overturn those which are devolved.

A pattern becomes apparent when one attempts to analyse the judicial legitimacy that Brexit possesses in light of the devolutionary structure of the UK. It is evident that devolution impacts upon the judicial legitimacy of Brexit through its violation of the Good Friday Agreement. But so has Brexit impacted the legitimacy of the British constitution, which has failed to provide the legal framework required to make the referendum meaningful,



due to the fact that the constitution is neither codified nor entrenched to make such frameworks binding. The constitution works as the source of all devolution while undermining it by design – as it possesses provisions which make devolved rights practically meaningless in light of events tailored and classified by a non-devolved majority. So we are left with an unending circle of uncertainty in which one won’t definitively find a proper source with which to properly evaluate judicial legitimacy, but rather find each facet undermining the other. Typically, one would refer to an entrenched constitution which would act as the ultimate source of judicial legitimacy. A lack thereof makes discussing what is legitimate when both completely redundant and utterly impossible.

In order to legitimise the legislative authority enacted by Westminster it must be bound to an entrenched set of constitutional rules and guarantees designed to uphold the democratic process and defend it against that which might undermine it. There needs to be a grounded criteria from which judicial legitimacy can be confidently assessed, lest the United Kingdom remains trapped within this circle of unending uncertainty each time it faces forces looking to shake its foundation. As an example regarding the topic at hand, the regulatory framework which referenda are bound to could be entrenched in a codified constitution so to make democratically illegitimate referenda judicially infeasible. The specifics of such a constitution are best left to further studies, but it's necessity is clear.

Bibliography

- Anderson, C. J., Blais, A., Bowler, S., & Listhaug, O. (2005). *Losers' Consent: Elections and Democratic Legitimacy*. Oxford: Oxford University Press.
- Baxter, H. (2016, June 24). *It's time for London to leave the UK and stay in the EU*. Retrieved from independent.co.uk: <https://www.independent.co.uk/voices/brexit-latest-london-independence-time-to-leave-uk-eu-referendum-sadiq-khan-boris-johnson-a7100601.html>
- BBC. (2015, May 21). *Timeline: Campaigns for a European Union referendum*. Retrieved from bbc.com: <https://www.bbc.com/news/uk-politics-15390884>
- Bew, P. (1994). *Ideology and the Irish Question: Ulster Unionism and Irish Nationalism 1912-1916*. Oxford: Oxford University Press.
- Bew, P. (2000). *Northern Ireland Chronology: A Chronology of the Troubles, 1968-99*. Dublin: Gill & MacMillan Ltd.
- Blick, D. (2017). *Devolution in the UK: Historical Perspective*. Retrieved from local.gov.uk: <https://www.local.gov.uk/sites/default/files/documents/devolution-uk-historical--827.pdf>
- Bogdanor, V. (2001). *Devolution in the United Kingdom*. Oxford: Oxford University Press.
- Bogdanor, V. (2019). *Beyond Brexit - Towards a British Constitution*. Oxford: Oxford University Press.
- Cadwalladr, C. (2018, March 18). *'I made Steve Bannon's psychological warfare tool': meet the data war whistleblower*. Retrieved from theguardian.com: <https://www.theguardian.com/news/2018/mar/17/data-war-whistleblower-christopher-wylie-faceook-nix-bannon-trump>
- Campbell, T. (2010). *Justice*. London: Palgrave Macmillan.
- Condor, S. (2010). Devolution and national identity: the rules of English (dis)engagement. *Nations and Nationalism*, 525-543.

-
- Cooper, C. (2016, June 24). *Brexit: Scotland leaving EU is 'democratically unacceptable', says Nicola Sturgeon*. Retrieved from independent.co.uk: <https://www.independent.co.uk/news/uk/politics/brexit-scotland-leaving-eu-is-democratically-unacceptable-says-nicola-sturgeon-a7100691.html>
- Dardanelli, P. (2005, 21 June). Democratic Deficit or the Europeanisation of Secession? Explaining the Devolution Referendums in Scotland . *Political Studies, Volume 53, Issue 2*, pp. 320-342.
- Garry, J. (2017). *The EU referendum Vote in Northern Ireland: Implications for our understanding of citizens' political views and behaviour*. Belfast: Northern Ireland Assembly.
- Grayling, A. C. (2016, November 3). *Article 50 ruling: the EU referendum was only ever "advisory"*. Retrieved from newstatesman.com: <https://www.newstatesman.com/politics/uk/2016/11/article-50-ruling-eu-referendum-was-only-ever-advisory>
- Hill, F., & Le Corre, P. (2015, May 4). *Blair's bombshell: How Scottish devolution blew up the British general election*. Retrieved from brookings.edu: <https://www.brookings.edu/opinions/blairs-bombshell-how-scottish-devolution-blew-up-the-british-general-election/>
- Holden, M., & Shirbon, E. (2016, December 7). *Brexit referendum not legally binding, Supreme Court told* . Retrieved from reuters.com: <https://www.reuters.com/article/britain-eu-article50/brexit-referendum-not-legally-binding-supreme-court-told-idUSL5N1E237L>
- Holden, R. (2014). *Supermajority Voting Rules*. Sydney: University of New South Wales.
- Humphreys, R. (2018). *Beyond the Border: The Good Friday Agreement and Irish Unity After Brexit*. Newbridge, Co. Kildare: Merrion Press.
- Kirby, J. (2020, January 31). *A short history of the long road to Brexit*. Retrieved from vox.com: <https://www.vox.com/2020/1/31/21083573/brexit-news-boris-johnson-timeline-eu-uk>
- Kröger, S. (2018, December 28). *Assessing the Democratic Legitimacy of the 2016 Brexit Referendum*. Dublin: DCU Brexit Institute.
- Laffan, B., & O'Mahony, J. (2008). *Ireland and the European Union*. London: Macmillan.
- Leeke, M., Sear, C., & Gay, O. (2003, November 17). Introduction to Devolution in the UK. the City of London, Greater London, United Kingdom: House of Commons Library.
- Local Government Association. (2016, June 30). *Combined authorities: a plain English guide*. Retrieved from local.gov.uk: <https://www.local.gov.uk/combined-authorities-plain-english-guide>
- McCormick, N. (1999). *Questioning Sovereignty*. Oxford: Oxford University Press.

-
- McCrudden, C. (2018). *The Belfast-Good Friday Agreement, Brexit, and Rights*. Belfast: the Royal Irish Academy.
- Merrick, R. (2017, September 29). *Ukip: A timeline of the party's turbulent history*. Retrieved from independent.co.uk: <https://www.independent.co.uk/news/uk/politics/ukip-timeline-party-westminster-alan-sked-nigel-farage-conference-key-events-brexit-leadership-a7974606.html>
- Mill, J. S. (1859). *On Liberty*. London: Longman, Roberts & Green.
- Mooney, G. (2015, March 2). *The 2014 Scottish Independence Referendum - Why was there a NO vote?* Retrieved from open.edu: <https://www.open.edu/openlearn/people-politics-law/the-2014-scottish-independence-referendum-why-was-there-no-vote>
- O'Neill, D. (2019, July 2). *Devolution and the problem of English democracy*. Retrieved from theguardian.com: <https://www.theguardian.com/politics/2019/jul/02/devolution-and-the-problem-of-english-democracy>
- Phinnemore, D., & Hayward, K. (2017). *UK Withdrawal ('Brexit') and the Good Friday Agreement*. Brussels: EU Department for Citizen's Rights and Constitutional Affairs.
- Sandel, M. J. (2009). *Justice: What's the Right Thing To Do?* New York: Farrar, Straus and Giroux.
- Scottish Parliament. (2018, June 11). *Devolved Powers*. Retrieved from parliament.scot: <https://www.parliament.scot/images/Parliament%20Publications/DevolvedPowers.pdf>
- Short, J. R. (2016, June 25). *The geography of Brexit: what the vote reveals about the Disunited Kingdom*. Retrieved from theconversation.com: <https://theconversation.com/the-geography-of-brexit-what-the-vote-reveals-about-the-disunited-kingdom-61633>
- Stanford Encyclopedia of Philosophy. (2015, July 29). *Aristotle*. Retrieved from plato.stanford.edu: <https://plato.stanford.edu/entries/aristotle/>
- Stewart, H., Mason, R., & Syal, R. (2016, June 24). *David Cameron resigns after UK votes to leave European Union*. Retrieved from theguardian.com: <https://www.theguardian.com/politics/2016/jun/24/david-cameron-resigns-after-uk-votes-to-leave-european-union>
- The Economist. (2014, September 17). *Let England Shake*. Retrieved from the Economist: <https://www.economist.com/britain/2014/09/27/let-england-shake>
- The Edinburgh Newsroom. (2019, March 1). *Scotland's 1979 devolution plans: 40 years on from the 'Yes' vote that wasn't*. Retrieved from edinburghnews.scotsman.com: <https://www.edinburghnews.scotsman.com/news/scotlands-1979-devolution-plans-40-years-yes-vote-wasnt-94846>
- The Electoral Commission. (2019, September 25). *Results and turnout at the EU referendum*. Retrieved from electoralcommission.org.uk: <https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/elections-and->
-

referendums/past-elections-and-referendums/eu-referendum/results-and-turnout-eu-referendum

The Government of the United Kingdom, The Government of the Republic of Ireland. (1998, April 10). *The Belfast Agreement*. Belfast, Co. Antrim, Northern Ireland.

Uberoi, E., & Johnston, N. (2020). *Voting Age - Commons Research Briefing*. London: House of Commons Library.

United Kingdom Civil Service. (2020). *Introduction to Devolution*. Retrieved from service.gov.uk:
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/770300/IntroductionToDevolution.pdf

Welsh, F. (2011). *The Four Nations: A History of the United Kingdom*. New Haven: Yale University Press.



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