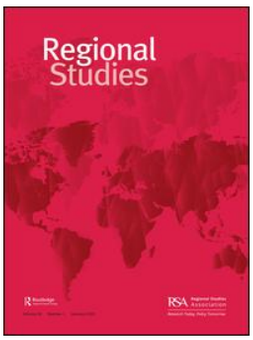

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Crisis, what crisis? Conceptualizing crisis, UK pluri-constitutionalism and Brexit politics

Daniel Wincott[a], Gregory Davies[b] and Alan Wager[c]

ABSTRACT

Has Brexit triggered a constitutional crisis? Crisis is one of a family of concepts, including tipping points, catastrophic equilibrium and failure, identifying it as a decisive moment for overcoming contradictions and ambiguities. Across multiple UK levels – the whole state, constituent nations and different legal jurisdictions – even in 'normal times' the constitution has been marked by both a dominant 'Anglo-British imaginary' and territorial ambiguities. Drawn into political debate, these ambiguities became sources of basic constitutional instability during Theresa May's premiership. Although May avoided full-blown constitutional crisis, one may yet come. Equally, she did oversee basic constitutional change, not necessarily in the form of crisis.

KEYWORDS

Brexit; crisis; UK constitution; pluri-constitutionalism; Anglo-British imaginary; devolution

JEL H70, H77, K1

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INTRODUCTION

Nearly everyone seems to agree the UK's referendum of 23 June 2016 on European Union (EU) membership engendered a crisis. When Theresa May became Prime Minister three weeks after the referendum, UK politics was in a state of flux. The UK had voted to leave – May voiced her 'Brexit means Brexit' mantra repeatedly – but little else was clear about the way that its political institutions would be shaped by the fallout from that decision. When May left Downing Street three years later, all three broad outcomes – leaving with or without an agreement, and remaining in the EU – were still possible. In that sense, the three years of her leadership may be seen as an interregnum where very little of consequence changed. Throughout this period of government, there were few moments when the institutions of the UK state were not depicted as being in crisis. Crisis talk about UK's political system manifested itself in discussion of parliamentary gridlock, questions about inter-institutional logjams and the fraught interaction between a minority government and a divided Parliament. Yet, what exactly was in crisis – or even the meaning of the term – was far from clear. Indeed, some political actors, commentators and analysts rejected the notion that Brexit had precipitated a crisis. Instead, some regarded the constitution as operating effectively through this period. The Speaker of the House of Commons, John Bercow, asked if the Withdrawal Agreement deadlock was 'a constitutional crisis'. 'No,' he answered, 'I would like to call it a political challenge' (Domenech & García, 2019).

Territorial politics has featured prominently in UK debate since the referendum. The result and processes it set in train beg fundamental questions about the nature of the UK. These include the existential matter of the continued survival of the UK state with its current territorial boundaries. Making sense of these big questions is hampered, we believe, by two major factors. First, the UK's constitutional arrangements are at once unusual and not well understood – particularly as they concern territory and legal jurisdiction. Second, challenges to these arrangements are often framed in a language of crisis – in both public debate and academic analysis. Partly because of the ways it compounds misunderstandings of the territorial constitution, we argue that this framing often further hampers our understanding of the key challenges.

Beyond 'material' (Arato, 2012) conceptions of a constitution, some theorists identify its 'mystical' significance

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(Davies & Wincott, 2020), treating constitutions as a vessel for an imagined community (Anderson, 1983); a constitutional 'imaginary' (Kahn, 2010). The UK's constitutional arrangements are unusual; it may even be their defining feature (on the UK as an exceptional unexceptional state, see Murray & Wincott, 2020). The absence of a written – or, more precisely, a codified – constitution, its vaulted flexibility, evolutionary capacity for gradual accommodation of and adaptation to new circumstances, and the distinctive concept of parliamentary sovereignty are key features of this constitutional imaginary. The fact that the UK is made up of three territorial legal jurisdictions – Northern Ireland (NI), Scotland, and England and Wales – is not nearly as widely recognized or understood; nor are the ramifications of these jurisdictional realities. Legally speaking, there is no hierarchy of authority across these jurisdictions: each is (equally) authoritative within its territory. The place of territory in how the UK's constitutional arrangements are imagined is much less clear.

The context for our analysis is some large, fundamental issues about the territorial character of the UK state. Here, we aim to make a modest contribution to addressing these big issues through particular contributions of three kinds: in turn historical, empirical and conceptual. The first sets the backdrop for our main empirical analysis. It provides a historical sketch of the UK's diverse constitutional traditions. This brief account shows that the ambiguities now attached to devolution (Sandford & Gormley-Heenan, 2020; Wincott, 2018) are a long-term feature of the UK's territorial constitution.

Our main empirical analyses focuses on May's period as Prime Minster. It explores the responses of the UK government (UKG), Scottish Government (SG), Welsh Government (WG) and the Northern Ireland Executive (NIE) to Brexit. Perhaps controversially, we conceive of these entities as the UK's four central governments. More specifically, our analysis addresses the following research questions: How did these four governments invoke, deploy or imagine the constitution in their responses to Brexit? Were they similar? If not, how did they differ? Here, our empirical analysis has conceptual implications: How are the UK's constitutional arrangements imagined within its politics and society?

To answer these research questions we reconstruct the constitutional claims made by, or implicit in, the early statements made in the name of each of the four central governments. In some instances these governmental positions reflect the stance of a single political party in power (the UKG before the 2017 election and the SG). In some places and times other parties demand attention, variously due to the UKG's confidence and supply agreement with the Democratic Unionist Party (DUP) after the 2017 election, cooperation between Labour and Plaid Cymru over Brexit in Wales and the collapse of devolved government (DG) in NI. We are interested in both the patterns of similarity and the difference in how the territorial constitution is envisioned in each nation or jurisdiction and in the internal in/consistency of the position of each government (or political leaders in each place). We distil their distinctly different, often mutually inconsistent and sometimes self-contradictory constitutional visions. These visions emerged quickly after the 2016 referendum and have, NI excepted, remained fairly consistent. Brexit processes, we find, have brought longstanding constitutional ambiguities, ambivalences and abeyances to the surface. They have unveiled pluri-constitutional facets of the UK state.

The paper then takes a conceptual turn. While May was Prime Minister the language of crisis was deployed widely in and about the processes of Brexit. Set against the backdrop of a constitutional imaginary of evolutionary flexibility, this language is striking, even jarring. Are there, then, reasons to believe that Brexit engendered a crisis in the UK's territorial constitution? If so when did (or will?) that crisis occur? Or are there more helpful ways of conceptualizing the challenges to the territorial constitution posed by Brexit? How might we conceptualize the ways these historical legal understandings became manifest through Brexit? To do so, we draw on, and seek to develop, a strand of the social science and political economy literature on the nature and dynamics of institutional change and continuity. Hay (1999) elaborated a fruitful conception of crisis as a moment of decisive intervention, within a four-category typology that relates political intervention to structural contradictions. We seek to build on this theory, offering a new distinction between *deliberate ambiguity* (ambiguity acknowledged/accepted by relevant actors, but 'fudged' for wider consumption) and *constitutive ambiguity* (when key actors seem not to recognize/acknowledge ambiguity). Deploying a wider palate of crisis concepts, our analysis suggests that the UK did not face a full crisis of its territorial constitution, at least while May was Prime Minister.

In other words, we ask how much light promiscuous use of the term 'crisis' has shed on Brexit processes and their political and constitutional implications. For all the talk of crisis it was May's inability to bring Brexit to a head that seems particularly striking. That inability suggests a sense of widespread chaos, with key actors seemingly unable to act decisively to resolve the situation one way or another. Whether this translates into a crisis is a different matter. The term 'crisis' is often used to label a disorganized or chaotic condition, one pregnant with risks and dangers where certainties and guiding principles are questioned (Arendt, 1977). Yet, if it is to mean anything beyond the cut and thrust of politics and the functioning of political institutions under stress and strain, crisis must mean the triggering of decisive transformation from what has gone before. Of course, we do not mean to downplay the depth of the challenges Brexit has posed (and poses) for the UK. Equally, though, the 'crisis' terminology that has littered popular and academic discourse around Brexit is of limited analytical use. Our understanding of the impact and significance of May's government requires a wider palate of crisis-related concepts than has been used, typically, in Brexit analysis.

Making sense of May's pursuit of Brexit and its implications also requires a wider understanding of the UK's territorial constitution that extends beyond the machinations of Westminster and Whitehall. Our focus is on the UK as

an (increasingly strained) union marked by pluri-national identities and four different territorial nations/jurisdictions. Here we cannot devote much attention to subnational regions, even though some parts of England have subnational institutions – particularly in the form of metropolitan assemblies and mayors in some major English cities – that are often discussed in the language of devolution. Suffice it to say that the constitution is imagined in ways that make it hard to entrench the power and autonomy of these institutions, at least at its metropolitan centre in Whitehall and Westminster. Devolution to England's major city-regions has the same asymmetric and ad hoc qualities shown by national devolution in Britain and jurisdictional devolution to NI.

Our focus on national/jurisdictional devolution requires that we set the Brexit moment in a longer temporal perspective, attending to the variegated constitutional histories that have constituted the UK state (Wincott, 2018). Significant territorial constitutional issues were brought to the surface during May's premiership, partly because majorities in Scotland and NI voted to remain in the EU (Keating, 2019). Of course, London, too, contained a remain voting majority, as did most English conurbations. These patterns do raise interesting question about geographical variation in the vote within England. Although London does have relatively well-entrenched and high-profile devolved institutions and political leadership, its profile of devolution and remain voting has not generated a debate about the break-up of the UK. This difference underscores the distinctive quality of sub-state 'constitutional regions'. For them, Brexit brought questions about the scope and limits of devolution in the UK – which had remained ambiguous – explicitly to the surface of politics.

Of course, questions of consent, competence and cooperation across the UK remain significant for its peoples and governments after Boris Johnson became Prime Minister. If anything, under Johnson a basic centralizing tendency of the Westminster model has become more explicit: the treaty negotiated by Prime Minister Johnson was ratified without the consent of any devolved institution; mechanisms of intergovernmental cooperation are barely operative; and on such issues as the administration of the Shared Prosperity Fund there has been a clear attempt by the UKG to claim areas of competence the DGs regard as their own. Analysing Brexit shows that the UK state's external relations and internal territorial structures are two sides of the same coin. Up to early 2020, Johnson's administration seems to have given greater priority to maximizing its outward-facing authority and autonomy than to sustaining the differentiated structures of the UK's internal union. These challenges run deep – as the apparent inability of the UK political system to grasp them reveals.

THE CONSTITUTIONAL CONTEXT: PLURAL CONSTITUTIONAL HISTORIES

Advocates of a UK political and constitutional 'tradition' have long argued adaptability and flexibility are its key strengths (Birch, 1964; Greenleaf, 1983). Even so, a powerful orthodoxy treats the sovereignty of the Crown-in-Parliament as the UK's basic constitutional rule, parsed as 'Parliamentary sovereignty'. A. V. Dicey, its Victorian archpriest, defined this 'sovereignty' as Westminster's 'right to make or unmake any law whatever; and further, that no person or body is recognised by the law … as having a right to override or set aside the legislation of Parliament' (Dicey, 1915, p. 38). In the 2016 Miller judgment, the High Court of England and Wales (re)asserted as 'common ground' that the Dicey formulation from the 1880s was 'still the leading account'. Subsequently the Supreme Court relied on the same principle, but accorded Dicey less prominence. The collapse of empire, the independence and partition of Ireland, changed roles for the monarch, the House of Lords and House of Commons, as well as the shifting balance between the political executive and legislature notwithstanding, the High Court's formulation seemed to suggest that this constitutional principle had enjoyed continuous and unbroken authority since the 1880s.

Even within England, the idea that orthodox Diceyan parliamentary sovereignty held sway continuously after the 1880s is questionable. Jennings' (1933) sustained radical critique based on the rule of law limitations on parliamentary sovereignty is well known, although his radical alternative arguably serves now to strengthen the orthodox historiography. A standard intellectual history of English constitutional law scholarship could point to H. W. R. Wade's article 'The basis of legal sovereignty' (1955) as a powerful reassertion of the orthodoxy. A more systematic review of academic constitutional texts between the 1930s and 1955 tells a different story. It suggests an anti-Dicey consensus across radical and more conventional legal scholars, now it seems largely forgotten. Of course, Dicey's own text was available throughout this period. A new edition was published in 1959, introduced by a sympathetic preface written by E. C. S. Wade (his 1939 introduction had been highly critical in tone). Dicey never wholly lost his influence, but if it flowed at some times, it also ebbed at others. Major constitutional textbooks endorsed Dicey's view of parliamentary sovereignty explicitly and directly only from the 1970s.

Viewed from a territorial and historical perspective, the UK's constitution looks different. The UK state was built on the unions of 1706/7 (England and Scotland) and 1800/1, which created the United Kingdom of Great Britain and Ireland. The coexistence of three major territorial legal systems is a legacy of this history: Scotland and NI have always maintained separate jurisdictions. In contrast, English law applied in Wales after the Laws in Wales Acts of 1535/6 and 1542/3. Though Welsh was generally spoken in Wales, the 1535/6 statute made English the only language of legal administration. There is though 'evidence that Welsh was … widely employed' in the courts (Watkin, 2007, p. 145). Following the 1542-3 Act, English law was administered in Wales through the distinct Courts of Great Session. They were abolished in 1830 as part of wider reforms of the English legal system, heralding

full integration of the administration of justice in Wales with that of England.

Even so, scholars have identified persisting and re-emergent Welsh distinctiveness rooted in the language and, to a lesser extent, the law. By necessity, but without official recognition, the Welsh language played a continuing role in the courts. Demand continued for Welsh-speaking judges after 1830. Thomas (2000, p. 116) noted, the 'beginning of acceptance of the distinct identity of Wales within the unitary legal system because of the Welsh language' from the mid-19th century. The Report of the Royal Commission on the Constitution (1973, p. 110) also noted the socio-political centrality of the language: 'for a good many people in Wales, the distinctive Welsh culture and language has come to assume the degree of importance which is attached to the idea of Scottish sovereignty in the minds of people in Scotland'. Sporadically, from the late 19th century a body of Wales-only laws was enacted. Carter (1970, p. 49) observed a growing 'constitutional and public recognition of Wales as a country different from and separate from England, in marked contrast to the position of Wales in the early nineteenth century'.

The Anglo-Scottish Union included terms meant to stand 'in all times', including protections for the Church of Scotland, the Scottish education system and Scots Law. These civic institutions remain distinctive to this day. Dicey viewed the Union Parliament at Westminster as having subsumed its predecessors in England and Scotland, while operating basically on the same terms as the English Parliament. His account of parliamentary sovereignty pivoted on the fact that Westminster had overridden some seemingly permanent terms of the Anglo-Scottish Union. Some Scots lawyers have disagreed. For example, in 1953, John MacCormick and Ian Hamilton contested the right of Queen Elizabeth to use the reginal number II in Scotland, where she is the first monarch of that name. The case was appealed to the Inner House of the Court of Session. While it was lost, Lord President Cooper famously said that 'the principle of unlimited sovereignty of Parliament is a distinctively English principle and has no counterpart in Scottish constitutional law' and the UK Parliament 'could not' repeal certain 'fundamental and essential' conditions of the Union. Other aspects of the UK's constitution could take on a different complexion when viewed from a Scots Law perspective. For example, J. D. B. Mitchell viewed the constitution as 'neither federal nor strictly unitary' (Mitchell, 1968, p. 4).

Similar arguments have been made from NI. In the 1920s, NI began with a full set of devolved political and legal institutions. As a small jurisdiction, NI has not generated much scholarly commentary. Even so, a key text *Constitutional Law in Northern Ireland* (Calvert, 1968) was published shortly before the political system collapsed. It provides unique historical insight into the NI legal system. Calvert observed: what 'has hitherto been presented to us as "British constitutional law" may be merely a masquerade for the English view of United Kingdom constitutional law' (p. 2). Drawing on the Scottish experience, Calvert hinted at the UK's general 'union' character (beyond its particular unions). He argued, there:

> appears to be a markedly Scottish view of the British constitution, with a perfectly respectable pedigree, for what happened in 1707 was not a subjugation but a union. … It can be no more be readily assumed that there is not also an Irish law of the British constitution. During a long period of its history, Ireland was subjected to the political domination of England, but its legal institutions were never completely submerged. … [A]s part of the United Kingdom, the history and character of its constitutional structure differ from those of other parts.
>
> (Calvert, 1968, pp. 2–3)

In the late 1990s the Labour government adopted a policy of devolution, supporting autonomous legislative bodies for Wales, Scotland and NI confirmed through referendums. Even then, innovation and evolution happened in a remarkably asymmetrical way. Scotland's parliament operated under the assumption it had powers over all areas not specifically reserved by Westminster. In Wales, the National Assembly's powers were much more restricted, though areas of devolved power have evolved and expanded over the last two decades. Consociational institutions and practices reflect an attempt to square competing claims to identity and sovereignty in NI. Even in England, new decentralization of powers for some cities and regions begs questions about where power can, and should, lie between citizen and state. However, these discussions skirted basic questions about parliamentary sovereignty. Above all, rather than simplifying them and resolving their ambiguities, the pace, demand and shape of devolution across the UK reflected the complex and variegated history of its constitutional narratives and traditions.

Across the UK, we find significant, if often hidden, evidence of longstanding territorial differences of legal structure and constitutional interpretation. While aspects of this constitutional plurality are sometimes glimpsed, 'pluri-constitutionalism' has not been central to mainstream constitutional analysis. Few, if any, constitutional analysts routinely encompass perspectives from all four UK nations/jurisdictions. If push were to come to shove, pluri-constitutionalism might suggest a basically disunited UK state; in practice, though, it has remained cloaked in ambiguity. Our next question is whether territorially divergent readings have survived Brexit, and how far they have permeated the processes of withdrawal from the EU.

THE PLURINATIONAL CONSTITUTIONAL POLITICS OF BREXIT

The UKG: multilevel polity, but unified people

May's first statement as Prime Minister in July 2016 contained a powerfully expressed commitment to the UK Union: 'the precious, precious bond between England, Scotland, Wales and Northern Ireland' and 'that word "unionist" is very important to me' (UK Government,

2016a). Digging deeper uncovers complexity – and a hint of ignorance or ambiguity: the Prime Minister acknowledged that 'not everybody knows … the full title of my party is the Conservative and Unionist Party'. May deployed the concepts of both the 'union' and the 'nation' at two levels – sub-state and state-wide – at once. She celebrated the 'union between the nations of the United Kingdom', but also endorsed the union as one 'between all of our citizens, every one of us, whoever we are and wherever we're from' which she called 'just as important'. In addition, she praised former Prime Minister David Cameron for having led a 'one-nation government', presenting the UK polity here in singular terms, made up of unit-citizens. Her approach reflected multilevel UK nationhoods, but did so in a fragmented mirror. It re-presented territorial ambiguity rather than recognizing or resolving it.

At the Conservative Party conference three months later, May (2016) expanded on her unionist theme. She both reiterated her vision of the union as made up of four nations and restated her conception of the UK an aggregation of equal unit citizens in a single shared polity. While expressing a commitment to consult/work with the DGs, May stated that EU exit negotiations were the 'job' and the 'responsibility of the Government and no one else'. She went on to explain: 'we will negotiate as one United Kingdom, and we will leave the European Union as one United Kingdom'. May's reason for this singular position – 'Because we voted in the referendum as one United Kingdom' – is instructive. She did not rely primarily on the UK's member state status or a deeper historic argument for UKG authority. Instead, she pointed to the referendum itself – particularly its UK-wide basis – as the source of her authority.

Before a Joint Ministerial Committee (JMC) meeting on 24 October, May described a 'great Union' brought together by far 'more than mere geography' (UK Government, 2016b). No JMC meetings – the main UK forum of the devolved and UKGs – had been held for nearly two years. The meeting, held before the UKG had triggered the Article 50 leaving process, brought Nicola Sturgeon, Carwyn Jones, Arlene Foster and Martin McGuinness to Downing Street. May called for 'the start of a new grown up relationship between the devolved administrations and the UK government'. The First Ministers and Deputy First Minister were invited 'to take up a key role in helping to build a new industrial strategy for the whole of the UK'. While apparently offering new scope for DGs to shape UK policy around Brexit, there was something patronizing about the Prime Minister's language. When she called for a 'new grown up relationship', was May criticizing the DGs or (also) suggesting that the UKG's prior devolution policy was itself immature? Characteristically, the UK level was described as a 'government', while the DGs were referred to throughout as 'administrations'. This language reflects and reinforces an asymmetrical power distribution and constitutional hierarchy; its use weakened May's claims to collegiate, genuine cooperation (McEwen, 2018).

The Prime Minister's Lancaster House speech became famous for setting out her negotiating 'red lines' (May, 2017). Coming after the SG had published its initial Brexit policy statement, May also offered a vision of the constitution.

> Unlike other European countries, we have no written constitution, but the principle of Parliamentary Sovereignty is the basis of our unwritten constitutional settlement. We have only a recent history of devolved governance – though it has rapidly embedded itself – and we have little history of coalition government.

She repeated the 'precious union' phrase, but suggested that the union was an ongoing process. Shared unity of purpose was its necessary end-point: 'only by coming together as one great union' can we 'make the most of the opportunities ahead'. More explicitly than previously, May defined the union by its 'nations and people' (not, note, peoples). She also stated that 'no decisions currently taken by the devolved administrations will be removed from them'. However, a new 'guiding principle' was introduced: 'no new barriers to living and doing business within our own Union are created'. Moreover, the 'right powers' should be 'returned to Westminster, and the right powers … passed to the devolved administrations of Scotland, Wales and Northern Ireland'. By contrast, many in the DGs viewed competence in devolved fields resting naturally with governments and legislatures at that level. Eurosceptic political economy arguments for Brexit looked for new liberation from governmental strictures, not domestic devolved contestation (Gifford, 2016). For many the idea of 'taking back control' ultimately meant reasserting Westminster's 'Parliamentary sovereignty'. Taken together, these elements made ambiguity and the pretence of mutual constitutional understanding increasingly difficult to sustain.

In February 2017, the UKG published its preliminary Brexit White Paper: *The United Kingdom's Exit from and New Partnership with the European Union* (UK Government, 2017). This document recognized the position of each DG explicitly, noting their views on the future EU relationship. The UKG committed to 'examine' their proposals and 'fully understand their priorities' through 'bilateral discussions' (p. 19). It acknowledged the DGs' various constitutional concerns and emphasized its commitment to the Good Friday Agreement. Mostly, however, the UKG document restated strands of thinking May had already set out, replete with the same tensions and ambiguities.

Again, the 'nation' concept was used at two levels: the UK was both defined by 'the strength of our identity as one nation' and 'the world's most successful multi-nation democracy' (pp. 3, 18). The government's Brexit process management also appeared to pull in different constitutional directions. It suggested a consensual approach to developing the UK's post-Brexit domestic order: UKG–DG collaboration would seek an arrangement of powers that 'works for the whole of the UK and reflects the interests of Scotland, Wales and Northern Ireland' (p. 17). No decisions taken by the DGs before the UK's exit would be removed and further powers would be devolved.

Equally, the document was permeated with unitarist understandings of constitutional aspects of Brexit. Parliamentary sovereignty remained 'a fundamental principle'. Albeit to be exercised 'in close consultation with the devolved administrations', the UKG viewed the EU negotiations as its exclusive responsibility (p. 19). Moreover, the document restated May's 'guiding principle' of maintaining 'our own domestic market', free from internal barriers to trade (p. 19). Little here suggested a willingness to address the competing demands from the DGs directly; their positions had been seen, not fully heard.

Wales: government and opposition

The majority of referendum ballots cast in Wales were for Leave. Perhaps as a consequence, on 23 January the National Assembly's two largest parties published a shared White Paper – *Securing Wales' Future* (Welsh Government, 2017a). Both parties had campaigned for Remain, but then Labour First Minister Carwyn Jones's preface stated that Wales's referendum decision 'must be respected' (p. 4). The document echoed the SG's position on remaining economically close to the EU, although its call for 'continued full and unfettered access to the Single Market' was notably less radical (p. 4). On governance, it called for collaboration and consultation across UKG and DGs in Brexit processes. Constitutionally, it identified Brexit as a fundamental 'change for Wales and the UK as a whole' and renewed its prior call for 'the establishment of a Constitutional Convention to review constitutional arrangements and practice within the UK'. Given the scale of the change involved, it demanded 'new, more federal, structures' for the UK (p. 26).

For Leanne Wood, Plaid Cymru's then leader, the need to remodel UK governance structures was crucial to the party's endorsement of the document. Thus, in Wales, for both government and opposition the UK's EU exit raised fundamental constitutional questions. Six months later, the WG published a detailed follow-up paper, *Brexit and Devolution* (Welsh Government, 2017b). The WG acknowledged the 'traditional model of exclusive Westminster Parliamentary sovereignty', but argued it was 'outmoded and inappropriate to the circumstances of the modern UK' (p. 19). A 'pooled sovereignty' approach should replace it, to recognize 'the special nature of the UK as a union of four countries which combine, through democratic consent, to form the world's most successful multi-national democracy' (p. 19). The WG proposed 'a different relationship among the nations of the Union based on mutual respect and parity of esteem among the administrations' (p. 19).

The SG: between Europe and independence

Scotland's Place in Europe (2016) – the SG's major statement on Brexit – was published on 20 December, between the October JMC and May's Lancaster House speech. It was based on two, interlinked, foundations. Its political foundation was Scotland's 'Remain' referendum majority. Sturgeon introduced the document with the Scottish Brexit referendum outcome: 'the people of Scotland' had 'voted categorically and decisively to remain within the European Union' (p. v). The 'stark divergence in the democratic will between the different nations demands a reappraisal of how political power in the UK is exercised' (p. v). Sturgeon thus presented the divergent referendum results as political authority for policy and ultimately constitutional divergence, contradicting May's claim of a referendum-based unitary Brexit negotiation mandate. Although contingent on the referendum's political outcome, Sturgeon's position reinforced the idea of progressive civic nationalism as part of a distinct political (and constitutional) Scottish tradition.

The constitutional foundation of *Scotland's Place* appeared much later in the document: 'the sovereign right of the Scottish people … to determine the form of government best suited to their needs' (p. 40). Equally, 'governance and constitutional arrangements of England, Wales and Northern Ireland' were 'matters for the people of those countries' (p. 40). Sturgeon made her 'preferred option of independence' clear, while giving priority to maintaining 'Scotland's current position in the European Single Market' and determination to avoid a 'hard Brexit' (p. vi). In 'good faith and a spirit of compromise' to 'enable Scotland's voice to be heard, and mitigate the risks that Brexit poses to our interests within the UK', Sturgeon sought to 'explore if we can find common ground with the UK Government around a solution that would protect Scotland's place in the European Single Market from within the UK' (pp. v–vi). Thus, for the SG, Scotland's place within the EU's single market should be as high a priority as the UK's internal market. These claims moved the field of external relations and treaty negotiations – traditionally at the core of the UK state's unitary competences – to the heart of the constitutional and political conversation. Juxtaposing the UKG and SG positions reveals 'a union without uniformity' (Rose, 1982, p. 35) and suggests that historic non-standardization across the UK nations had been a sustaining feature of its constitution.

NI: partisan perspectives

In August 2016, Foster and McGuinness sent a joint letter to May. It set out the NIE's initial Brexit priorities (NIE Office, 2016). Their starting point was NI's 'unique' position, due to its land border with another EU state and the 'difficult issues' it had posed 'throughout our history and the peace process'. Challenges arising from it, they argued, should not be allowed to undermine the peace process and political settlement. Like the other DGs, initially the Executive supported close post-Brexit regulatory alignment with the EU. The 'ease with which we currently trade with EU member states' should be retained 'as far as possible'. Also, Stormont ministers should be 'fully involved and represented' within a 'meaningful and inclusive negotiation process'.

Over subsequent months, particularly after the collapse of NIE in late 2016, distinct constitutional visions for NI replaced this initial spirit of pragmatism and compromise. The DUP maintained some emphasis on NI's uniqueness. In 'guiding principles' set out at the party's October conference, Foster (2016) insisted that any UK–EU agreement reflect 'the reality of our geography and of our history' and not 'be used as a basis to reopen settled political agreements'. While still emphasizing intergovernmental

consultation, the DUP argued that 'direct responsibility of the negotiation to leave the EU and our new relationship with it lies with the national government' (DUP, 2017a, p. 4). It also echoed the UKG's emphasis on the UK demos' singularity and unity: for the 2016 referendum, only the UK-wide 2016 outcome mattered. As First Minister Foster argued in late 2016: 'Northern Ireland is a constituent part of the United Kingdom. We were all asked whether we wanted the United Kingdom to remain or to leave, and we all voted' (Northern Ireland Assembly, 2016). Consequently, the 'whole of the United Kingdom' must leave the EU (*Belfast Telegraph*, 2016), without differentiation. Additionally, the DUP shared the UKG's unitarist view of Brexit's domestic legislative consequences. For Foster repeal of the European Communities Act – the legislative interface between domestic and EU law – was 'a matter for the Westminster Parliament, which is sovereign in all these matters' (Northern Ireland Assembly, 2016). Like the UKG, the DUP viewed the union as an ongoing process, potentially enhanced by Brexit. Its 2017 general election manifesto called for '[s]trengthened relationships across the four components parts of the United Kingdom with no internal borders' (DUP, 2017b, p. 18).

Sinn Féin's detailed Brexit policy – *The Case for the North to Achieve Designated Special Status within the EU* (November 2016) – appeared just four months after the referendum. It sought special status for NI whereby 'the whole island of Ireland … remain within the EU together' (Sinn Féin, 2016, p. 1). Subsequently the party argued special status could be achieved 'within current constitutional arrangements' or via an Irish Unity referendum and a united Ireland (Sinn Féin, 2017, p. 3). This Sinn Féin claim relied on NI's remain majority in the referendum. It viewed the people of NI – within the wider Irish polity – as a demos, and expressed a commitment to 'defend the democratic mandate of the people' (Sinn Féin, 2016, p. 1).

More specifically, for Sinn Féin, Brexit was a threat to the 'institutional, constitutional and legal integrity and status' of the Belfast/Good Friday Agreement (B/GFA). In turn that Agreement was the foundation of constitutional authority in NI. It provides that all Irish citizens are entitled to European citizenship, which Brexit threatened to remove. Doing so without the electorate's consent, it argued, would contravene 'fundamentally … the principle of consent' which guarantees no change to the constitutional status of NI (as part of the UK) (p. 1). The party read the B/GFA as a binding international treaty between the UK and Ireland that circumscribes Westminster parliamentary sovereignty within the NI jurisdiction. It therefore argued that any alterations to the European Communities and Northern Ireland Acts arising from Brexit required NI Assembly legislative consent and, in the latter case, the Irish government's agreement as co-guarantor of the B/GFA.

CONCEPTUALIZING 'CRISIS' AND UK PLURI-CONSTITUTIONALISM

In each place analysed here (although in different proportions) current politics – particularly the territorial patterns shown in the Brexit referendum – interacted with inherited constitutional traditions. This analysis of attempts to digest and deliver the referendum vote between July 2016 and July 2019 highlights two key Brexit impacts on UK constitutional arrangements. First, the extent to which Brexit decision-making has led to explicit rhetorical claims to specific, and conflicting, interpretations of the UK constitution. Second, how executive actors have made conflicting political claims to power and authority derived from distinctive constitutional discourses.

The question here is whether 'crisis' is the appropriate terminology to describe what has happened, or whether a more nuanced toolkit exists. Hay (1999) criticized the near ubiquity of crisis-talk and its implicit corralling of disparate experiences. Using crisis as a common term for a range of deeply challenging political phenomena risks conflating them, losing analytical grip and substantive meaning. Elaborating a range of crisis-related concepts can provide greater analytical purchase. Making sense of Brexit – its implications for UK politics and related constitutional arrangements – requires a palate of crisis-related concepts. We treat Hay's analytical categories as stylized and simplifying abstractions (consistent, we think, with Hay's (2019) analysis of abstract 'types' in political economy). Their value is primarily heuristic – prompting questions and helping to make sense of complex political conjunctures – rather than descriptive.

Hay (1999, p. 323) returned to the root meaning of *crisis* and retrieved a specific definition of a decisive intervention that triggers systemic change or transformation. This etymology suggests *crisis* is a moment of agency that resolves a condition of contradiction and, hence, changes a developmental trajectory (see Moran, 1988, on Welfare State crisis). This definition paved the way for an analytically helpful set of distinctions. Hay elaborated three other ways in which contradictions and (non)-interventions could be related. When 'decisive interventions are made unintentionally', Hay (1999, pp. 325–327) labelled them 'tipping points'. The Gramscian concept of 'catastrophic equilibrium' is used to describe situations in which contradictions are widely perceived, 'yet no sense of crisis is mobilised and no decisive intervention is made' (p. 327). Finally, Hay labelled non-intervention with contradictions unperceived as a condition of state 'failure' (p. 325), the inability of a system to reproduce itself together with dysfunctional symptoms such an inability generates (p. 324) (Table 1).

Hay also saw the state as, normally, a dis-unity. It is 'an amorphous complex of agencies with ill-defined boundaries performing a variety of not very distinctive functions' (p. 320; following Schmitter, 1985, p. 33). State unity is 'at best, a *potential*'. It is 'partial and latent', 'a unity that must first be *accomplished*' (Hay, 1999, p. 321). This conception of the state folds back into Hay's understanding of crisis. The latter is the moment when skilled political actors 'reimpose' a 'tendential unity … upon the state' (p. 320) understood as the 'capacity to behave as a singular actor' capable of 'centrally imposed co-ordination' (p. 321). Hay's concepts are not underpinned by categorical distinctions. Contradictions may be more or less clearly perceived,

not only fully grasped or unrecognized. These blurred lines do not detract from the analytic value of the concepts. They *do* mean that we would not expect to find clear 'cases' of any given category.

These notions of state disunity and ambiguity help to make historical sense of the UK's territorial constitution. Rather than being unified and integrated, diversity and difference are hallmarks of the UK's constitutional arrangements. Those arrangements, at least, are marked by sustained ambivalence. Living with these ambiguities may represent the territorial constitution's normal mode. As a result, it is worthwhile taking this framework drawn from state-theoretic political economy, applying it to the constitution and adding to it. New categories for constitutional analysis can draw inspiration from Hay's analysis grounded in political economy. The constitution might continue to operate in spite of unresolved disagreements and conflicting understandings. Holding the state together without the need for unifying interventions might be seen as a sign of success, a *constitutive ambiguity* that is arguably the defining characteristic of the UK territorial constitution. Certainly, the capacity since Brexit for the UK constitution to retain explicit territorial claims to pooled, popular and parliamentary sovereignties could be seen as a remarkable success. It is less remarkable when you think it has survived a wide range of long-term ambiguities, abeyances, lacunae, paradoxes and tensions. It does not seem to fit either the catastrophic equilibrium or failure categories.

Hay's framework points to an important further analytical question: Do state actors understand that they are perpetuating ambiguity as their preferred outcome? Actors may choose to live with, rather than resolve, contradictions they perceive. When skilful political actors face dilemmas of accommodating diversity and managing disunity they may seek to engender *deliberate ambiguity*. Rather than *failure*, un(der)perceived ambiguities may have a 'constructive' or, perhaps better a *constitutive* character. That the UK's union has been (partly) constituted by mutual ignorance may be its (guilty and/or efficient) secret. Again, ambiguities may allow a state to carry on – to endure at times when clarity or a decisive choice between constitutional interpretations would make it unsustainable. This may have been May's intention: while often faulted as a skilled political actor, few doubted her commitment to her particular (Anglo-British) interpretation of the UK's union. Her ambiguity may have been more strategic than accidental. Empirically, it can be difficult to distinguish between a lack of knowledge/understanding of constitutional contradictions and an inability/choice not to address them. Recent history has demonstrated clearly that senior political figures can display ignorance and misunderstanding – recall Karen Bradley's admission of ignorance that 'nationalists don't vote for unionist parties and *vice versa*' (Schofield, 2018). It is, nevertheless, an important distinction to make.

Table 1. Contradictions and decisive interventions.

	Moments of decisive intervention	Moments of indecisive or non-intervention
Contradictions subjectively perceived	Crisis	Catastrophic equilibrium
Contradictions unacknowledged	Tipping point	Failure

Source: Hay (1999, p. 325).

CONCLUSIONS

We contend that promiscuous use of 'crisis' stretches the concept out of analytical shape, and argue that Hay's (1999) typology of crisis-related concepts provides a more precise and larger palette of concepts for interrogation of Brexit's constitutional implications. These categories and distinctions help to disentangle continuity and change when analysing constitutional implications of Brexit. Hay's own concepts of *crisis*, *tipping point*, *catastrophic equilibrium* and *failure* offer something distinctive for analysis of Brexit processes littered with misunderstandings and marked by logjams. A conception of state unity as only ever partially achieved, and the wide palate of crisis-related concepts – the framework's two key elements – are *heuristically* useful.

At least if crisis is conceptualized as a moment of decisive and transformative intervention, by the summer of 2019 the UK had not experienced a (full) constitutional crisis. Equally, though, set among varieties of ambiguity deeply embedded in the UK's territorial constitution, the sceptical view can appear complacent. From this perspective, Brexit processes have included moments of decision that have altered the balance of UK constitutional arrangements. As they took place, none of these moments broke the Brexit blockage – some may even have contributed to the sense of logjam. Through this process pre-existing constitutional differences have become explicit. Brexit has brought these differences – including those previously encapsulated or dormant – onto the political foreground simultaneously. All four governments have been exposed to the full range of conflicting constitutional understandings and Brexit preferences. Our analysis shows the UKG's constitutional self-perception pivoted on parliamentary sovereignty, whereas the SG stressed the sovereignty of the Scottish people. Lacking these constitutional foundations, the WG nevertheless criticized parliamentary sovereignty and demanded new UK constitutional structures. Especially after DG collapsed, different political readings of its distinctive post-1998 settlement have largely defined Brexit politics in NI. Sandford and Gormley-Heenan (2020) describe 'Schrodinger's devolution' – the territorial constitution seen simultaneously as unchanged and fundamentally altered. Our analysis underscores these ambiguities. By making the distinct constitutional claims explicit, Brexit has caused them to become significantly more difficult to sustain.

Looking back, May's premiership lacked a single, decisive intervention. Instead the UK passed through a

series of distinct moments. Generally, these moments have enhanced centralizing, unitarist Anglo-British unionism. Their full consequences, however, had not yet become manifest. The choice largely to exclude devolved actors from Brexit's external aspect – the Article 50 negotiations – reinforced established UK state-centred practice of interstate relations. Major moments in the UK's internal Brexit processes under May include the Miller rulings and the EU(W)A 2018. The former (re)asserted Diceyan parliamentary sovereignty as UK constitutional orthodoxy. Despite adjustments from the initial hypercentralism displayed by the first bill, the latter culminated in Westminster passing the legislation while the Scottish Parliament withheld consent. These moments have changed the balance of the UK constitution, perhaps decisively. In retrospect, they may appear as a tipping point, triggered by actors not fully aware of the contradictory forces they released. As a result, Brexit may precipitate a dramatic moment of constitutional change. It could, for example: trigger new pan-UK reflection on, and considered rebalancing of, the UK constitution; prompt English nationalism into structured political action; or provoke separation of, say, Scotland or NI from the UK (Murray & Wincott, 2020).

Alternatively, the UK could continue to muddle through, with key decisions chipping away but not undermining definitively the ambiguities running through UK constitutional arrangements. The continuing instability of the UK constitution under May's successor demonstrates that no fundamental epochal change took place under her administration. As Johnson took office, the UK might yet have managed to muddle through, maintaining constitutive ambiguities in its territorial arrangements – or even allowing them to redevelop. Second, Johnson might seek to renegotiate the bases of the UK's constitutive unions. Third, his emphatic electoral victory in 2019 furnished him all at once with significant political resources and major challenges. His Anglo-British nationalist narrative appeal, reaching across class divides, notably in northern England, to 'get Brexit done' may create a context in which he seeks to impose new terms for the UK's territorial constitution. Finally, policies pursued by his government might instead (deliberately or inadvertently) provoke reactions in some or all of the UK nations and jurisdictions that could lead to the break-up of the UK territorial state. The eventual consequences of Brexit, taken together, may be a pattern of change that none of Cameron, May or Johnson – or, in institutional terms, the UKG generally – ever intended nor desired. Such a pattern could end up looking rather like a constitutional tipping point. At first glance, our approach to crisis analysis might appear to downplay Brexit's potential constitutional consequences. On closer inspection, though, the analysis points in a different direction – it suggests that the constitutional consequences of Brexit may yet prove profound.

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