

From Empire to Little England

A Review of Sionaidh Douglas-Scott: *Brexit, Union And Disunion: The Evolution of British Constitutional Unsettlement*. Cambridge University Press, 2023, ISBN: 9781108795340 (PB). 523 pages. £34.99.

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Brexit, Union and Disunion is a comprehensive examination of constitutional laws and conventions that, in various degrees over a 300 hundred year period, have provided the framework within which Britain has ceased control over huge tracts of territory and has determined the fates of large and diverse human populations. From this, Douglas-Scott contemplates the very real prospect that such constitutional norms will soon have relevance to England only - the largest of the four nations of which the United Kingdom (UK) is currently composed. The immediate cause of the now 'destabilised' UK (499) is the highly conflictual near four-year period during which the UK withdrew from the European Union (EU) - a period customarily referred to as 'Brexit'. However, the main purpose of the book is to tease out the connections between the Brexit process and other constitutional struggles which the UK has encountered during its 'history of belonging to, or managing, larger territorial organisations' (332). According to Douglas-Scott, histories of struggles over 'transfers of power - whether the case of Irish independence, or in Britain's constitutional relationships with its former colonies - [are] too quickly forgotten' (418). Not least of these forgotten lessons is that which tells us that 'concentrating power in the centre, refusing greater self government for some of its nations or territories' (379) has repeatedly led to break-up or dissolution; demonstrated not least by the 'American revolution...in 1776...the first break up of Britain' (183).

Unsurprisingly, the event of Brexit has brought about renewed interest in how Britain's imperial past continues to dictate its present and future possibilities (see for example Dorling and Tomlinson 2019; Koegler et al. 2020; Tuitt 2020), but few publications are as ambitious in their depth and range as is Douglas-Scott's engrossing legal history. *Brexit, Union and Disunion* sheds light on the causes of Brexit in a way that few other texts have been able to achieve. The book will be of interest to academics, practitioners and policy makers concerned with the longer-term implications of Brexit. However, unlike others that focus on the impact of Brexit on the European Union itself (see for example Martill and Staiger 2018), as the title to this review indicates, Douglas-Scott sees Brexit as the last 'act of disunion' (6) of a polity that 'by the 1890s, ...included about a quarter or worldwide territory and one-fifth of the world's population' (211).

Divided into two parts and ten substantive chapters, the book provides compelling examples of how an '(unsubstantiated) claim for a unified English Westminster/governmental sovereignty to the exclusion of other parties' (313) has been Britain's dominant response to attempts at self-determination by its governed territories and peoples. According to Douglas-Scott, this claim has manifested itself in various negative ways. For example, after the 1707 Act of Union, 'the older Scottish tradition of popular sovereignty [was] overtaken by English conceptions of Parliamentary sovereignty' (48). Indeed, Douglas-Scott attributes both America's successful independence war and Britain's exit from the EU to the same fundamental cause: 'Britain's [insistence] on asserting a sovereignty it could not clearly justify or explain' (140). Moving to contemporary times, Douglas-Scott notes that despite Devolution being effected in Scotland, Northern Ireland and Wales by various Acts of Parliament in 1998 (50), both Northern Ireland and Scotland were effectively 'driven out of the EU against [their] will' (66 & 133) because of Britain's constitutional arrangements which treats EU negotiations as 'reserved' matters, thereby according the smaller nations of the UK 'few legal rights in the EU withdrawal process' (66).

Thus, the reader is encouraged to draw parallels between the ways in which the strategic interests of Scotland and Northern Ireland were marginalised during the Brexit negotiations by the dominant Westminster Parliament and earlier assertions of English parliamentary sovereignty affecting other territories which made up Britain's former Empire - including North America (chapter three: 140-183) and India (chapter four: 184-253). As Douglas-Scott writes, at various momentous points in history 'Britain has encountered challenges to the very constitutional identity. Past acts of union and disunion...all provide precedents' (4) of sovereign assertions - backed by both physical and symbolic violence - which led to the eventual break-up of Britain's Empire. Whilst the claim to 'unlimited' sovereignty now takes more muted forms (and is more widely disputed), its continuance will inevitably lead to the dissolution of the UK. In Douglas-Scott's words 'Brexit has revealed many flaws in Britain's aged constitution... without some sort of new constitutional settlement, both the constitution, and the union itself are at risk' (20).

The book offers a thorough analysis of how the actions of the Westminster Parliament during the EU withdrawal process has left Northern Ireland, the smallest of the UK nations, in a highly fragile political state. For Northern Ireland 'Brexit is arguably of more consequence...than [for] the rest of the UK. [It] is one of the poorest UK regions, but will now no longer benefit from EU funding for Peace programmes...Furthermore, [it] is the only part of the UK to share a land border with another EU member state (Ireland), and this border has enormous symbolic and practical importance' (133). Attempts to address how to proceed with Britain's exit from the EU in a way that acknowledges the positions of both the Republic of Ireland and Northern Ireland have been less than satisfactory. Both the Northern Ireland 'backstop' and the 'Northern Ireland Protocol' fell victim to the vagaries of the Westminster Parliament.

Only as recently as 27 February 2023 was the vexed border question partially resolved. Then ‘the UK government and EU agreed the Windsor framework, which...improve[s] relations between the UK government and EU’ (136) by creating a ‘framework [which] uses a green (Northern Ireland) and red (Ireland/EU) lane system to separate goods moving only from Great Britain to Northern Ireland from those continuing into the EU. Those not destined for the EU will have lighter border controls’ (136). Despite these accommodations, the UK Parliament’s management of Brexit displayed ‘a reckless disregard for borders, internal to the UK, including that most fateful of borders running through the Island of Ireland’ (294). Whilst the situation in Scotland was not nearly so fraught, their interests were quite evidently sidelined. This was all the more galling because many who voted against Scottish independence when the referendum on that question was held in 2014 were assumed to have done so because they thought that ‘the only way Scotland’s EU membership would be assured was by remaining in the UK, and that an independent Scotland’s application for EU membership could take years, with no guarantee of success’ (66). As Douglas-Scott asserts, ‘[n]o mention was made in the UK governments letter triggering article 50 TEU of any particular arrangements for Scotland...[n]or were the contents of the Article 50 notification shared with the Scottish Government prior to its publication...[leaving] little space for Scotland to protect its interest in the withdrawal process’ (67).

Commenting on the American revolution, Douglas-Scott opined that the measures taken by the English Parliament were such as to leave no option than to submit to Parliament’s will or to strive for independence (172). Arguably, the measures Parliament has taken in connection with Brexit, leaves the devolved nations with the same stark choice. Brexit has not only imperilled the UK’s economic interest and threatened the still volatile peace process in Ireland, it has threatened the UK’s position within the international system of human rights which was established under the European Convention on Human Rights (ECHR) in 1950.

As Douglas-Scott writes, ECHR ‘withdrawal becomes easier for the UK after Brexit...[before,] EU membership rendered this impossible, since all EU countries are required to be ECHR members. (268).

Throughout the work. Douglas-Scott argues that a different constitutional arrangement governing its four nations is urgently required - ‘in large part due to the rift caused by Brexit’ (383) - if Britain’s now slim ‘voluntary Union’ (345) is to survive. And yet she doubts that a fitting new arrangement can be found. The best solution would be for ‘the UK...to move to a federal Constitution’ (417), which, depending on the form it takes, might ‘allow greater autonomy to sub-States, for example, in some cases making provision for their treaty making powers’ (417). However, the fact that ‘England comprises 84% of the UK population’ (379) may prove an insurmountable problem to any form of union, since ‘unbalanced unions tend to be weak. This is often so where one territory is much larger than other parts of the union’ (379). Douglas-Scott’s logic is inexorable: the very idea of an ‘impermeable, indivisible and unshareable’ (332) parliamentary sovereignty, which enabled the more brutal manifestations of Britain’s power, is also what will see it emerge all too soon as an isolated ‘little England’.

Postcolonial accounts of Britain’s constitution are few and far between, which fact alone makes Douglas-Scott’s work a welcome addition to the literature. Its postcoloniality lies not simply in its skilful analysis of historical sources, but in its ability to convince the reader that - even now - a more flexible and accommodating set of constitutional arrangements can be imagined into existence.

References

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