Scotland, the UK and Brexit – At a Constitutional Crossroads

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Introduction

Since 2014, the constitutional future of the United Kingdom (UK) has been in a state of almost permanent flux. In the space of two years, the Scottish electorate has twice gone to the polls to vote on referenda on hugely significant constitutional issues. On 18 September 2014, a record number of voters (circa 85%) voted in an independence referendum in which 55% of the electorate voted 'no' to the question 'Should Scotland be an independent country?' Almost two years later, the Scots were at the polls again, this time for a state-wide referendum on the UK's continued membership of the European Union (EU). In this referendum, 62% of voters in Scotland voted to remain in the EU. However, the Scottish vote to remain was trumped by the overall UK-wide result in which just under 52% of the electorate chose to leave the EU.

No sooner had the UK Government fired the starting gun on its lengthy and complicated negotiations to secure the UK's exit from the EU than the Scottish Government called for a second referendum on Scottish independence. In Wales, Labour and Plaid Cymru worked together to produce a co-authored White Paper calling for continued membership of the European Single Market, while Sinn Fein's strong performance in the March 2016 Stormont elections, increased calls for a border poll on Irish reunification. Added to this already complicated mix, the snap General Election in June 2017, called to strengthen Prime Minister Theresa May's hand in the Brexit negotiations, resulted in the loss of the Conservative Party's majority and a controversial confidence and supply arrangement between the Conservatives and the Democratic Unionist Party's ten MPs (Tonge 2017). In Scotland, the SNP remained the largest party, but lost 21 seats, 12 of which were won by the Conservatives. As a result, Scottish First Minister Nicola Sturgeon agreed to delay plans for a second independence referendum, but continued in her pursuit to increase and guarantee the participation of the devolved nations in withdrawal negotiations.

Conflicting and at times diametrically opposing visions for the constitutional future of Scotland and the UK and their relationship with Europe have hitherto characterised the debate since the

vote on 23 June 2016. As this politically charged terrain continues to evolve, both Scotland and the UK find themselves at a constitutional crossroads: The secession of Scotland is not inevitable, but there is nothing guaranteed about the future integrity of the UK. The Brexit vote, namely the differing results from the four nations, has reignited debates about the constitutional future of the UK. Hence, in this chapter we argue that the UK's departure from the EU will not only alter the relationship the UK has with its European neighbours, but will also have far-reaching ramifications for the UK's relationship with its home nations. In leaving one union, the future of the other remains in the balance.

This chapter proceeds in three steps. First, we explore the development of devolution in the UK paying particular attention to the Scottish settlement, the rise of the Scottish National Party (SNP), and the 2014 independence referendum. Subsequently, we analyse the results of the 2016 Brexit vote and detail the reactions of both the UK Government and its Scottish counterpart. Thirdly, we examine the emerging constitutional crisis in the UK vis-à-vis Scotland. The Scottish Government may have delayed its plans for a second independence referendum, but it is becoming increasingly clear that the UK's withdrawal from the EU will have far-reaching implications for the constitutional architecture of the UK.

From Evolution to Revolution? - Devolution in Scotland

The (re)establishment of the Scottish Parliament in 1999, the centrepiece policy of a raft of constitutional reforms implemented under Tony Blair's New Labour government, introduced a number of interesting dynamics and puzzles into the constitutional debate in the UK. In the words of Bogdanor (2001: 1), devolution amounted to 'the most radical constitutional change this country has seen since the Great Reform Act of 1832.' With a parliament established in Scotland and assemblies created in Wales, Northern Ireland and London, Westminster, the mother of parliamentary democracy, was no longer alone in her own state. The devolved arrangements instituted from 1999 were not created anew and in fact built upon previous 'administrative devolution' (Mitchell 2003), including a Department of State for Scotland (1885), a Department of State for Wales (1964) and varying degrees of legislative and executive autonomy for Northern Ireland for a large part of the twentieth century. The UK, therefore, despite claims to the contrary, has never conformed to the textbook definition of a pure unitary state. Instead, it has been defined as a 'Union-state' (Rokkan and Urwin 1982) and a 'State of Unions' (Mitchell 2009) in which each peripheral territory has a distinct relationship with the centre, rooted in their varying political traditions and identity. Unlike other plurinational states, the UK has historically been comfortable with recognising the distinctiveness of the four nations it comprises. As Keating (2015b: 177) notes, '[t]here has never been a Jacobin project of the sort practised in France and (less successfully) in Spain to assimilate the peripheral nations into a single identity.'

Devolution has fundamentally changed the nature of politics in the UK and has engineered the development of distinct subnational political systems. In Scotland, the SNP, once a fringe political party, has been in government since 2007, winning just one seat more than the Scottish Labour Party and ending eight years of a Labour-Liberal Democrat Coalition (1999-2003; 2003-2007). Shortly after being elected, the nationalist government published a White Paper on constitutional change, *Choosing Scotland's Future – A National Conversation* in which it outlined three 'realistic choices' for the constitutional future of Scotland: Maintaining

devolution with the possibility of further powers; redesigning the devolved settlement to include new powers (including fiscal levers) and the nationalist government's preferred option: independence (Scottish Government 2007: vii-viii). In response, the pro-Union political parties – Labour, Conservatives and Liberal Democrats – participated in the Commission on Scottish Devolution (Calman Commission), 'an independently chaired commission to review devolution in Scotland'. The Calman Commission reported in June 2009 and proposed a number of extensions to the Scottish Parliament's powers, including the transfer of (limited) fiscal powers to the legislature (Commission on Scottish Devolution 2009). Many of the proposals of Calman – power to raise or lower income tax by ten pence, responsibility for stamp duty and landfill revenues and increased responsibility over borrowing powers – translated into the Scotland Act 2012 (Loughlin and Viney 2015: 81).

Prior to the implementation of the Scotland Act 2012, the Scottish electorate went to the polls to elect the fourth set of Members of the Scottish Parliament (MSPs). The SNP was swept to power in a landslide victory, securing 69 of the 129 seats, 45% of the vote and thus became the first party to ever form a majority government in the Scottish Parliament. This was no mean feat considering the Mixed-Member Proportional system was designed to make majorities unlikely (although, as the SNP demonstrated, not impossible). The clear electoral mandate given to the SNP substantiated its position in securing a referendum on independence, a key pledge in the party's 2011 manifesto. On the 15 October 2012, the then Prime Minister David Cameron and First Minister Alex Salmond signed The Edinburgh Agreement, in which legislative competence to hold a referendum (a reserved matter in the UK) was passed to the Scottish Parliament so that a fair, legal and decisive referendum could be held. The referendum was to be conducted in line with the principles detailed in the *Political Parties, Elections and Referendums Act 2000* as well as legislation passed by the Scottish Parliament (*The Scottish Independence Referendum (Franchise) Act 2013* and the *Scottish Independence Referendum Act 2013)* which extended the franchise to 16 and 17 year olds.

The ensuing referendum campaign began with the establishment of two umbrella organisations (Better Together and Yes Scotland) and focused on a myriad of issues including economic policy, defence, currency and membership of the EU. The latter issue was one of the most prominent topics in the campaign (Muro and Vlaskamp 2016). The SNP, in line with their pro-European stance (Anderson and Keil 2016), advocated continued membership of the EU. The Scottish Government's White Paper *Scotland's Future* posited that while an independent Scotland would have to seek membership of the UK, 'a smooth transition' could take place given Scotland (as part of the UK) had been a member of the EU and its predecessors for more than 40 years (Scottish Government 2013: 220). Pro-unionist politicians, on the other hand, drew upon the lack of clarity on the issue as 'an obstacle to independence' (Keating 2015a: 203). This was bolstered by claims from European Commission President José Manuel Barroso who claimed it would be 'extremely difficult, if not impossible' for Scotland to smoothly accede to the EU (BBC News 2014). The pro-unionists, unsurprisingly, seized upon such comments and underlined the complexities of the accession process. They claimed that given the lack of guarantees on EU membership, the safest route for pro-European Scots who wished to remain in the EU was to vote 'no' to independence. Ruth Davidson, the Scottish Conservative leader, amidst criticism that this position was untenable owing to Conservative plans to hold an in-out referendum on future UK membership, claimed '[i]t's disingenuous … to say No means out and Yes means in, when actually the opposite is true. No means we stay

in' (Davidson 2014). The results of the Brexit referendum, however, have proved Davidson wrong. Despite its support for continued membership of the EU, Scotland, alongside the other constituent nations of the UK, will leave the EU. And therein lies the rub.

Brexit: Results and Reaction

On 23 June 2016, 43 years after joining what was then the European Community, the UK electorate, belying the predictions of polls and politicians, voted to end its membership of the EU. The differing results from England, Wales, Northern Ireland and Scotland (see Figure One) in which the latter two voted to remain, while the former two voted to leave, underline the political divisions that have become evident in the UK since the introduction of devolution. Since 2007, Scotland has three times elected a nationalist government, most recently in 2016 when the SNP lost its majority, winning two seats short of the required 65, but increased its share of the vote and became the first party ever to win over one million votes on the first ballot (Anderson 2016). Paradoxically, support for the SNP increased following its defeat in the independence referendum, with party membership growing to over 100,000 and bolstering its support in the 2015 General Election. In the 2015 UK election, Labour, once the dominant party in Scotland, was reduced to just one seat. The SNP, on the other hand, increased its share of the vote by 30% and won 56 of Scotland's 59 seats (in 2010 Labour won 41 seats, the SNP only 6). The results of the snap General Election in 2017 saw all three Unionist parties increase their number of seats and the Conservatives, for the first time since 1992, secured a number of seats in the double digits. The SNP, remains the third biggest party in Westminster andno longer resides on the fringe of British politics and is at the centre of the British and Scottish political systems. The constitutional future of Scotland, despite the 2014 referendum, is far from settled. Brexit has propelled the issue of Scottish independence back onto the political agenda.

Figure One: 2016 EU Referendum Results
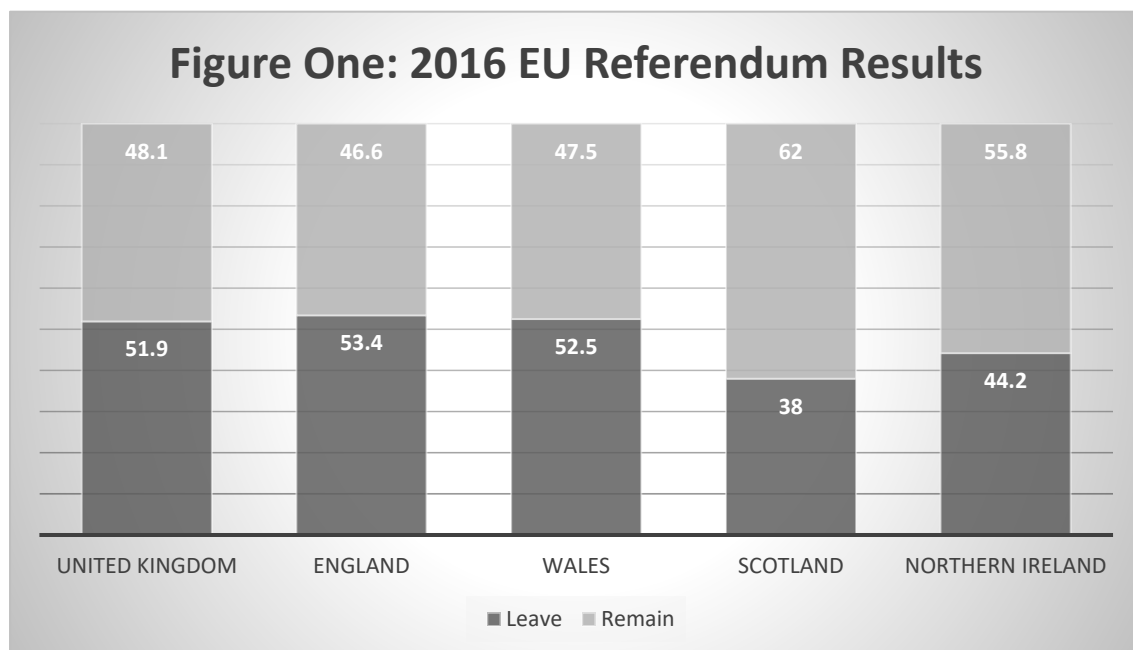
In her first speech after becoming Prime Minister in July 2016, Theresa May sought to emphasise the importance of the Union and 'precious bond' between the devolved nations of the UK (May 2016). Subsequently, in her Lancaster House Brexit Speech, the Prime Minister argued that 'the devolved administrations should be fully engaged in this process' and that she looked forward to achieving 'a Brexit that works for the whole of the United Kingdom' (May 2017). The establishment of a Joint Ministerial Committee (JMC) on EU negotiations was lauded by the Prime Minister as lucid proof of her commitment to ensuring the devolved administrations were involved in preparing for the UK's departure from the EU. The devolved administrations, however, and in particular, the Scottish Government, have consistently complained that irrespective of JMC meetings, their views and concerns are superseded by the priorities of the UK Government (BBC News 2017b).

Given that all 32 regions in Scotland voted to remain in the EU, Scottish First Minister Nicola Sturgeon found it 'democratically unacceptable' that Scotland was to be 'taken out of the EU against our will' (Sturgeon 2016). Consequently, the First Minister set up a Standing Council in Europe to provide the Scottish Government with expert advice on maintaining Scotland's relationship with the EU. While Nicola Sturgeon was clear in her continued commitment to independence, she insisted that her government would explore a range of options to uphold Scotland's relationship with the EU. In December 2016, the Scottish Government published *Scotland's Place in Europe,* a paper which set out a number of options for Scotland's future: the UK retaining single market membership, bespoke arrangements for Scotland and further devolution of powers to the Scottish Parliament (Scottish Government 2016). Theresa May avowed to examine the Scottish Government's proposals, but her subsequent decision to pursue a 'hard Brexit', that is, removing the UK from membership of the European Single Market, undermined and clashed with the proposals put forward by the Scottish Government. Resultantly, and unsurprisingly, the SNP became much more vociferous in calling for a second independence referendum.

The Constitutional Crossroads: From Compromise to Crisis?

The results of the Brexit vote have exposed the deep political divisions in the UK, primarily in relation to territorial politics and constitutional visions. The Scottish Government, despite remaining committed to independence, sought to fashion a compromise solution in which the national interests and democratic wishes of the Scottish electorate could be protected. Its strategy paper, *Scotland's Place in Europe*, was billed as such a compromise, one which laid out several options which would either ensure continued membership of the Single Market for the UK as a whole, or Scotland alone. This was further illuminated by Nicola Sturgeon's announcement that she would take calls for a second independence referendum off the table in return for a 'soft Brexit', that is membership of the European Single Market (BBC News 2017a). The announcement, therefore, that leaving the single market was the preferred option of the UK Government, merely emboldened the SNP's position on a second independence referendum. Notwithstanding this, the Supreme Court's ruling that the devolved administrations did not need to be legally consulted before the triggering of Article 50 reignited

debates regarding the constitutional and legal status of the devolved parliaments. Consequently, Nicola Sturgeon argued that the Sewel Convention - the agreement that the UK Parliament will not legislate on devolved matters without the consent of the devolved legislature in question – was 'not worth the paper [it was] written on' (Sturgeon 2017a).

In the absence of a UK-wide strategy for Brexit or any progress on securing a bespoke arrangement for Scotland, the Scottish First Minister announced on 13 March 2017 that she would seek the permission of the Scottish and British Parliaments to hold a second independence referendum (Sturgeon 2017b). On the 28 March 2017, the Scottish Parliament voted by a margin of 69 to 59 to give the First Minister approval to seek a Section 30 Order from Westminster for a second independence referendum.[1] Prior to this vote, Theresa May vehemently criticised the SNP's 'tunnel vision' on the issue of independence and accused the Scottish Government of 'playing politics with the future of our country' (Stone 2017). The Prime Minister, however, did not rule out the possibility of holding another referendum and merely stated that 'now is not the time' for a second vote (BBC News 2017c). A second independence referendum, therefore, seems inevitable, but the results of the 2017 General Election resulted in the shelving of such a vote, at least until after the conclusion of Brexit negotiations and the UK's official withdrawal from the EU. .

The result of this ongoing quagmire in British politics is a deepening constitutional crisis. The Scottish Government may have delayed its plans for a second independence vote, but it seems likely that such a vote will take place in the near future, yet when this is held, or indeed, what the final result will be is far from clear. Moreover, the lack of clarity vis-à-vis the repatriation of powers from Brussels to the UK has further intensified the debate regarding Scotland's place within the Union. The UK Government has argued consistently that the Scottish Parliament will become more powers as a result of EU withdrawal, but the absence of guarantees over which powers will be devolved has increased conflict between the Scottish and UK Governments, including accusations that the UK Government are undermining the original devolution settlement. As Anderson and Gallagher (2018: 37) note, the UK Government may well 'be tempted to arrogate to itself the powers currently exercised by Brussels', but caution against such a move since 'this would breach the constitutional conventions regarding the devolution agreements' and further jeopardise the already fragile Union. It is becoming increasingly clear, therefore, that the UK's departure from the EU will not only have significant ramifications for its future relationship with its European neighbours, but moreover will substantially affect the future constitutional design of the UK itself.

Conclusion

Devolution to Scotland, Wales and Northern Ireland has fundamentally changed the constitutional landscape of the UK. Since 1997, successive British governments have taken an ad-hoc, piecemeal approach to constitutional and territorial politics in the UK and while it remains clear that such tinkering has transformed the UK's constitutional architecture, its impact on the Union remains contested. Devolution has not led to the disintegration of the UK,

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[1] Constitutional matters are a reserved power for Westminster. A Section 30 Order, therefore, as was granted to hold the 2014 independence referendum, would temporary transfer legal authority from Westminster to the Scottish Parliament to enact legislation for a second referendum to be held.

but devolutionary politics, particularly the rise of the SNP and the increasing prominence of the constitutional question, has meant that British politics is far from business as usual. In the late 1990s, very few would have predicted a Scottish referendum on independence, nor serious discussions vis-à-vis the re-unification of Ireland. Yet, the differing results of the Brexit vote in England, Wales, Scotland and Northern Ireland not only underline the distinct political cultures that continue to evolve in each of these nations, but furthermore illuminate the development of very different and at times diametrically opposing political and constitutional visions. The final outcome of the Brexit negotiations has yet to be established and academic analyses, this chapter included, may already be dated before the negotiations conclude. ,It is, however, becoming increasingly evident that the UK's decision to leave the EU will have far-reaching implications for the future constitutional terrain of the UK. It seems that the tectonic plates of British politics are shifting and the UK's once strong and stable constitutional edifice may be beginning to crack.

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