

WILL BREXIT LEAD TO THE DISINTEGRATION OF THE UNITED KINGDOM?

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The Scots voted to stay in the United Kingdom when they voted against independence by a majority of 55% against 45% in the 2014 referendum. This result was clear enough to secure the consent of the losers, but it was also close enough to ensure that the debate on Scotland's constitutional future would continue. Less than two years later, the United Kingdom voted by a majority of 52% to 48% to leave the European Union. The slim majority for Leave in the UK as a whole masked significant territorial differences. A majority in all regions of England, with the exception of London, voted to leave the EU. In Scotland, by contrast, the population as a whole supported remaining in the EU by 62% to 38%, with Remain majorities in every Scottish region.

Scotland was not the only constituent territory of the UK to oppose Brexit. Northern Ireland voted 56% in favour of Remain. Survey evidence revealed considerable division between the two communities in Northern Ireland, with an estimated 85% of Catholics, and 88% of those identifying with the nationalist (as opposed to the unionist) community, voting Remain, while the Protestant/unionist community recorded majority Leave votes.¹ The fall-out from Brexit is adding to the complex and fraught relationships between the political parties that have prevented the restoration of devolved government in Northern Ireland since January 2017.

Although it rarely featured as an issue in the 2016 referendum debate outside of Northern Ireland, the Irish border has come to dominate the Brexit process. Both the EU and the UK expressed their joint commitment to retaining an open border on the island of Ireland after Brexit. The Irish Government illustrated the potential of small member states to shape the EU agenda by ensuring that this commitment was at the heart of the EU mandate in Brexit negotiations. The combined commitment to maintain an open border was given legal weight in the Joint report from the negotiators on progress during phase 1 of Brexit negotiations, and was translated in the draft Withdrawal Agreement as the

AUNQUE FUERA DE IRLANDA DEL NORTE APENAS SE PLANTEÓ COMO UN PROBLEMA EN EL DEBATE DEL REFERÉNDUM DE 2016, LA CUESTIÓN DE LA FRONTERA IRLANDESA HA PASADO A DOMINAR EL PROCESO DEL BREXIT. LA UNIÓN EUROPEA Y EL REINO UNIDO EXPRESARON SU COMPROMISO CONJUNTO PARA EL MANTENIMIENTO DE UNA FRONTERA ABIERTA EN LA ISLA DE IRLANDA DESPUÉS DEL BREXIT

Protocol on Ireland/Northern Ireland ('the backstop'), to be introduced at the end of the transition period unless and until an agreement on the future relationship provides the same protections. The issue of the backstop has, ostensibly at least, been one of the main barriers to the Withdrawal Agreement securing the necessary consent of the UK Parliament, albeit for many different reasons. For many advocates of Brexit, it risks shackling the UK to the EU, and especially to the EU Customs Union, indefinitely, inhibiting the UK Government's ability to negotiate its own trade deals. For the Democratic Unionist Party -the largest unionist party in Northern Ireland, upon whose parliamentary support Theresa May's minority government depends- the backstop risks loosening the political, economic and cultural ties that bind Northern Ireland to the rest of the UK. In addition to both of these objections, the Political Declaration accompanying the Withdrawal Agreement gives very little insight into the nature of the future UK-EU relationship. The Prime Minister may have hoped that the ambiguity built into the Political Declaration could avoid alienating any of the competing factions within her own party and the parliament more broadly, but it seems that by ruling little in and little out, it has left all sides seeing more of their fears than their hopes for the future relationship.

The United Kingdom is today at an important crossroads, not only in its position as a European country, but also in its constitutional and national conception of itself. The United Kingdom remains a rare case of a sovereign state which recognizes itself as plurinational. Membership of the EU helped to mollify national differences. Devolution was introduced to Scotland, Wales and Northern Ireland in 1999 within the context of EU membership. EU laws and regulations may have helped to contain institutional divergences, as well as providing a supranational, post-sovereign framework within which multiple territorial identities could coexist.

Brexit risks destabilizing the delicate balance between political autonomy and national unity brought about by devolution. It has undermined the status of the Good Friday Agreement which brought peace to Northern Ireland; the prospect of a border poll on Irish reunification is in vogue today as never before, even if there is not yet evidence of popular demand. It has also raised questions about Scotland's constitutional future, reigniting the campaign for Scottish independence.

THE PLURINATIONAL NATURE OF THE UK

The United Kingdom is a plurinational state composed of England, Scotland, Wales and Northern Ireland. These separate nations and territories developed alongside the British nation, with no concerted effort by the state during the democratic period to repress distinct sub-state national identities. The Good Friday Agreement explicitly recognises the 'birthright' of people in Northern Ireland to define themselves, and be recognised, as British or Irish, or both. The UK does not have a strictly written and codified constitution that officially recognizes its plurinational character. Nevertheless, successive governments have demonstrated a pragmatism which, despite some notable historical exceptions, has allowed for the preservation and flourishing of plurinational identities in the management of territorial differences.

Scotland in particular has always enjoyed the status of a nation, and retained legal and institutional distinctiveness after its political Union with England in 1707. Union was achieved through elite negotiation and accommodation, not colonial conquest. Implicitly, at least, there was a sense that the Union could one day be dissolved. Even Margaret Thatcher, a bitter opponent of political devolution during her premiership, in the face of growing demands for Scottish self-government, noted in her memoirs: *"As a nation, they have an undoubted right to self-determination; thus far they have exercised that right by joining and remaining in the Union. Should they determine on independence no English party or politician would stand in their way."*²

Since 1999, the recognition of the constituent nations and territories of the UK has been institutionally recognised by the devolution of power in Scotland and Wales, and its restoration in Northern Ireland. These changes were made through referendums in Scotland and Wales in 1997, and in Northern Ireland in 1998 as part of the peace process and the Good Friday Agreement, with variations in the degree and form of devolution in each case. England, on the other hand, does not have a

separate parliament. Therefore, the UK Government acts simultaneously as the government of the UK as a whole and the government of England. This gives rise to a very asymmetrical political system. The UK continues to be marked by strong centralization in some areas (eg most taxation, macroeconomic policy, defence, immigration, the constitution and external relations) and widespread decentralization in others (eg education, health, agriculture and the environment) for the smaller nations and territories. There is no codified constitution and little coherence to the structure as a whole. It is held together by a system which is based on more or less tacit understandings and conventions and a body of separate constitutional laws, reinforced by the continued dominance of the UK government and the doctrine of Westminster parliamentary sovereignty.

THE SCOTTISH INDEPENDENCE REFERENDUM

The recognition of national identities in the United Kingdom, alongside a majoritarian political culture, helps to explain why the UK Government immediately recognized the right of the Scottish Government to hold a referendum on independence when the Scottish National Party was re-elected with a parliamentary majority in 2011. David Cameron, then Prime Minister, said that his government would not put any legal or political obstacles in the way of an independence referendum, while reaffirming his commitment to campaign with heart and soul to keep Scotland in the Union. In the eighteen months that followed, the two governments negotiated a temporary transfer of power (in the “Edinburgh Agreement”) to allow the Scottish Government to pass legislation facilitating a referendum on Scottish independence. That agreement committed both governments to respect the outcome of the referendum whatever it would be, and to negotiate a transition to independence in the event of a Yes vote. The degree of accommodation suggested by this episode is startling by international comparisons, though it should also be considered alongside the near certainty felt by the UK Government at the time that the independence option would be soundly defeated.

The transfer of power was concluded with only minimal conditions attached, including the supervision of the referendum by the Electoral Commission (the elections regulator) and the stipulation that only one question be asked, with only two possible answers. The Scottish Government secured some concessions too: the mandate was broadened to include 16 and 17 year olds, and they retained control over the process for legislating for the referendum, including the question, subject only to the oversight of the Electoral Commission. The Agreement also committed the two governments

to respect the results of the referendum; a simple majority would be enough to negotiate independence.

However, that the UK Government helped to authorize the independence referendum in 2014 does not mean they would do so again. Indeed, when the Scottish First Minister asked for a new ‘section 30 order’, the device used to transfer the necessary power from Westminster to the Scottish Parliament to enable it to hold a new independence referendum, her request was denied. The Prime Minister’s carefully worded rejection -“*now is not the time*”- was translated into a much firmer ‘No’ in the heat of the subsequent election campaign, with evident electoral benefits for the Scottish Conservatives. Indeed, firm opposition to a new independence referendum, coupled with a popular and skillful leader, has been central to the Scottish Conservatives’ transformation from the electoral wilderness to the official opposition in the Scottish Parliament. Nonetheless, the SNP remains the largest party in Scotland by some distance, and it too has gained electorally from the fact that the constitutional question is the dominant lens in Scottish politics through which most other issues are perceived and contested. This polarization of politics around the constitutional divide is a familiar picture in other European countries too.

The UK Government’s refusal to negotiate a transfer of power to facilitate a new referendum on independence underlines the fragility of the right to self-determination in the UK. Authority over all matters relating to the Union and the constitutional status of the United Kingdom and its constituent territories belongs to the UK parliament. Although it is difficult to imagine any UK Government demonstrating the degree of intransigence of the Spanish authorities, or the will to criminalise a

EL RECONOCIMIENTO DE IDENTIDADES NACIONALES EN EL REINO UNIDO, JUNTO CON UNA CULTURA POLÍTICA MAYORITARIA, PERMITEN EXPLICAR POR QUÉ EL GOBIERNO DEL REINO UNIDO RECONOCIÓ INMEDIATAMENTE EL DERECHO DEL GOBIERNO ESCOCÉS DE CELEBRAR UN REFERÉNDUM DE INDEPENDENCIA CUANDO EL PARTIDO NACIONAL ESCOCÉS FUE REELEGIDO CON MAYORÍA PARLAMENTARIA EN 2011

campaign for independence, the UK Government still has veto power over a future constitutional referendum. For its part, the SNP Government has made clear its desire to proceed to a new referendum through negotiated agreement, similar to the Edinburgh 2012 Agreement, rather than to act unilaterally.

SCOTLAND: BETWEEN TWO UNIONS

The SNP has long envisaged its self-government ambitions for Scotland as being realised within a broader transnational and supranational framework. Historically, that framework was the British Empire then the Commonwealth. Since the late 1980s, the SNP has firmly tied its project of independence to the project of European integration. Contrary to the more dominant political point of view in the rest of the UK, and more specifically the dominant view within England, Europe is not perceived as an “other” threatening Scottish identity or self-determination, but as part of the solution to support a transition to independence. This is not simply borne of pragmatism. For the SNP, like many of its European counterparts, national independence and European interdependence go hand in hand.

The SNP’s support for the EU has never been more evident than in the context of Brexit. The SNP Government has continued to declare its desire for the UK to remain within the EU. They accepted the referendum result in the UK while insisting that the result in Scotland should be respected too. In a series of documents entitled *Scotland’s Place in Europe*, the Scottish Government championed the UK as a whole remaining within the EU Single Market and the Customs Union. Failing that, they suggested a ‘compromise’ which would somehow allow Scotland to remain part of the Single Market, perhaps via the EEA and EFTA, even if the rest of the UK negotiated a looser relationship.

These proposals would likely have met with resistance among the EU 27 had they made it that far, but they never did. Despite her apparent support for the UK remaining in the EU prior to the referendum, the UK Prime Minister has emphasized the UK-wide nature of the vote. In her speech at the 2016 Conservative Party Conference, her first as party leader and Prime Minister, Theresa May insisted: *‘Because we voted in the referendum as one United Kingdom, we will negotiate as one United Kingdom, and we will leave the European Union as one United Kingdom. There is no opt-out from Brexit.’* Her letter to Donald Tusk, triggering the Article 50 process, described the Brexit referendum as *‘a vote to restore, as we see it, our national self-determination’*. Embracing Brexit as a UK

nationalist project despite the territorial diversity in preferences expressed in the referendum underlines the limitations of the recognition of the plurinational character of the UK.

The SNP is expected to kick-start a new independence process once the terms of Brexit are known. It’s not clear, though, that Brexit offers new opportunities for Scottish nationalists. The continued commitment of a clear majority of Scots to EU membership has not, thus far, translated into an upswing in support for Scotland to negotiate its own independent membership of the EU. Further, the dominance of the Brexit issue since 2016 has crowded out other policy issues. Coming so soon after the 2014 referendum, which itself was the culmination of an intensive two-year campaign, it may have contributed to constitutional fatigue among those voters who are not already committed to the independence cause.

Brexit does, however, add to the considerable challenges confronting independence advocates. The Brexit process has demonstrated that negotiating to leave a Union is a difficult and complex task, wherein the balance of power lies primarily with the larger partner. It has also complicated independence, especially if Brexit entails the UK leaving the EU Customs Union and maintaining only a loose relationship with the EU Single Market. Such an eventuality, while far from certain despite the Prime Minister’s ‘red lines’, could mean that the border between Scotland and England becomes a new external frontier for the EU. EU membership has been central to the independence vision since the late 1980s, and Brexit is the catalyst for returning to the independence issue so soon after it was determined in 2014. Fears that it could lead to a ‘hard border’ between Scotland and England are unlikely to reassure those not yet fully committed to the independence project.

BREXIT AND DEVOLUTION

EU exit is also presenting new challenges for the UK’s system of devolution. Despite intensive intergovernmental meetings, the views of the devolved governments have had little influence in shaping the UK Government’s Brexit preferences. The UK Government has argued that, by bringing powers back from Brussels, Brexit will enhance significantly the powers of the Scottish Parliament. However, the Scottish Government has accused its UK counterpart of using Brexit to carry out a raid on the powers of the devolved institutions.

These competing perspectives emerged during the passage of the EU (Withdrawal) legislation. Both the Scottish Government and the

Welsh Government objected to the restrictions it placed on the devolved institutions' authority to amend repatriated competences ('retained EU law') in areas like fishing, agriculture and the environment that fall within their remit. Working together, the two governments used 'soft power' to force changes to the legislation. However, the Act still gives the UK Government the legal authority to introduce regulations that would 'freeze' devolved powers to allow for the development of UK common frameworks. Despite the UK Government's assurances to seek agreement, the legislation lends it the authority to proceed without it, even in the face of an explicit refusal of consent. This represented, in the words of Michael Russell, then Minister for UK Negotiations on Scotland's Place in Europe, an '*unprecedented, unequal and unacceptable new legislative constraint*' on the powers of the Scottish Parliament. By a clear majority, excluding only the Conservatives, the Scottish Parliament refused consent for the Withdrawal legislation. The legislation was passed regardless.

The Scottish Parliament's alternative 'continuity' legislation was referred by the UK Government to the Supreme Court. That legislation was designed to prepare for the eventuality of Brexit, but retained authority within Scotland for what would happen thereafter. Among other things, the legislation committed the Scottish Parliament to retaining EU legal principles and to 'keep pace' with EU law. The Supreme Court ruled that the bill was largely within the powers of the Scottish Parliament at the time that it was passed, but much of it was rendered beyond its powers by the protected status given subsequently to the EU (Withdrawal) Act. The entire episode has undermined one of the founding principles of devolution: that the UK parliament will not normally legislate in areas of devolved competence or change devolved powers without the consent of the devolved institutions.

There is no doubt that Brexit is placing strains on the relationship between the Scottish and UK Governments. But beneath the public spats, there is a lot of cooperation. So far, the UK Government has not used its regulatory powers to 'freeze' devolved powers, and it does not anticipate doing so in the foreseeable future. Civil servants from each of the UK's administrations have been working intensively to agree where new UK common frameworks might be needed to replace EU frameworks, and how these might be governed. These negotiations are founded on agreed principles, including ensuring 'the functioning of the UK internal market' and respect for the devolution settlements and democratic accountability of the devolved legislatures. However, these principles might be difficult to reconcile once

proposals move from discussions among politically neutral civil servants to critical decisions between competing government ministers.

Whatever form it eventually takes, Brexit adds new complexities to the UK's system of multi-level government. Rather than conceiving it (wrongly, in my view) as a system which creates clear distinctions between the powers of each level of government, Brexit creates more overlaps and interconnections, opening up space for shared powers. Each of the administrations is engaged in a joint review of the principles and processes of intergovernmental relations, which many commentators, my colleagues and I included, have regarded as not fit for purpose in a post-Brexit landscape. But if reforms are to be effective, rebuild trust and be regarded as legitimate by all governments, collaboration and mutual consent will need to go hand in hand.

CONCLUDING REMARKS

When the UK eventually gets to the endpoint in its negotiations with the EU, wherever and whenever that might be, that will not be the end of its constitutional journey. From the tensions in Northern Ireland and the challenges of the Irish border, to renewed demands for Scottish independence, Brexit has generated new existential threats to the UK which risk national unity. It has exposed the territorial fragmentation in UK politics that has long been evident to those who cared to look for it, and brought new challenges in managing and responding to territorial diversity. Whether and how the UK Government responds to these challenges remains far from clear. There are other problems on the Brexit horizon, and other divisions not yet healed, not least the division between Leavers and Remainers laid bare by the Brexit referendum itself.

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ENDNOTE

1. Garry, John, *The EU referendum Vote in Northern Ireland: Implications for our understanding of citizens' political views and behaviour*, http://www.niassembly.gov.uk/globalassets/documents/raise/knowledge_exchange/briefing_papers/series6/garry121016.pdf

2. Thatcher, M. 1993. *The Downing Street Years*. London: Harper Press, p624.