THE UNITED KINGDOM'S EVOLVING CONSTITUTION

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SUMARIO

1. The Union

The United Kingdom poses something of a constitutional conundrum. It is an established European state with a continuous constitutional tradition, but it lacks a written, codified constitution. Instead, it relies on ordinary laws to regulate the conduct of politics and government, together with constitutional conventions. Conventions are shared understandings about the conduct of government and the relationships among institutions, which are considered politically but not legally binding and are not subject to judicial control. They are not fixed for all time but evolve along with changing understandings, such as the expansion of democracy and the reduction of the monarchy to a symbolic role. When understandings break down, as they did over the powers of the hereditary House of Lords in the early twentieth century, there is a constitutional crisis, after which the rules are usually clarified and codified. In that case, the Parliament Act, agreed by both houses, stipulated that the Lords would have only a suspensory veto over legislation and none over finance. If there is a fixed principle, providing ultimate certainty, it is that of the sovereignty of the Monarch in Parliament. As the monarch has retreated to a ceremonial role, this effectively means Parliament, with the House of Commons having the final word.

This principle of parliamentary sovereignty and supremacy, which might be called the 'Westminster doctrine', is associated with the English jurist Albert Venn Dicey in the late nineteenth and early twentieth centuries. According to it, Parliament can do anything except bind its own successors.[1] It could not, however, alienate this sovereignty by transferring it to other legislatures.[2] In recent years,

[1] A. V. Dicey, 1961.
[2] A. V. Dicey, 2012.

however, challenges including membership of the European Union and devolution, have raised questions about what parliamentary sovereignty means in the modern world.

This is not, in fact, a new question The 'Westminster' doctrine of sovereignty is based on the notion that Parliament is the direct descendant of the English Parliament as it existed before the union with Scotland in 1707 and with Ireland in 1801. The Scottish union, Dicey insisted, did not leave any residual sovereignty to Scotland.[3] Many Scottish jurists, on the other hand, have pointed out that the union of 1707 abolished both English and Scottish Parliaments, creating a new Parliament of the United Kingdom of Great Britain.[4] This could not assume full sovereignty, because the Scottish Parliament had not established such wide prerogatives. The English doctrine of sovereignty was the outcome of conflicts in the seventeenth century, the outcome of which was that monarchical and parliamentary claims to sovereignty were merged into the institution of monarch-in-Parliament, leaving no room for alternative sources of authority. In Scotland, neither the monarchy nor the parliament had been strong enough to achieve this; in particular the established Church of Scotland, unlike the Church of England, remained independent of the state. so, the issue of sovereignty was unresolved, as recognized by Lord Cooper's orbiter dictum in the famous case of *MacCormick vs Lord Advocate* in 1953.[5]

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[3] A. V. Dicey, R. Rait, 1920.

[4] N. MacCormick, 1999. I. McLean, A. McMillan, 2005. C. Kidd, 2008. M. Keating, 2009.

[5] The case was MacCormick vs. Lord Advocate. MacCormick had challenged the right of the Queen to use the title Elizabeth II in Scotland. The Court dismissed the case on the grounds that the matter came under the royal prerogative. Lord President Cooper commented: The principle of the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constitutional law. It derives its origin from Coke and Blackstone, and was widely popularised during the nineteenth century by Bagehot and Dicey, the latter having stated the doctrine in its classic form in his *Law of the Constitution*. Considering that the Union legislation extinguished the Parliaments of Scotland and England and replaced them by a new Parliament, I have difficulty in seeing why it should have been supposed that the new Parliament of Great Britain must inherit all the peculiar characteristics of the English Parliament but none of the Scottish Parliament, as if all that happened in 1707 was that Scottish representatives were admitted to the Parliament of England. That is not what was done. Further, the Treaty and the associated legislation, by which the Parliament of Great Britain was brought into being as the successor of the separate Parliaments of Scotland and England, contain some clauses which expressly reserve to the Parliament of Great Britain powers of subsequent modification, and other clauses which either contain no such power or emphatically exclude subsequent alteration by declarations that the provision shall be fundamental and unalterable in all time coming, or declarations of a like effect. I have never been able to understand how it is possible to reconcile with elementary canons of construction the adoption by the English constitutional theorists of the same

This is not merely a Scottish nationalist interpretation but is present in Scottish unionist thought. Scottish unionism is not based on the idea of the United Kingdom as a unitary nation-state. On the contrary, it accepts that Scotland is a nation, which retained many of its own institutions after 1707, notably the legal system, the ecclesiastical settlement, local government and its education system. There has never been a single education ministry for the United Kingdom, even before devolution. In this vision, the union is the result of a historic pact. Even Irish unionism incorporates ideas of a historic bargain and, in Northern Ireland, has been informed by the Covenant tradition in which loyalty is contingent; hence the historic co-existence of a strident 'Britishness' with willingness to break with the UK should unionists feel betrayed.

This alternative tradition sees the UK as a plurinational union of nations lacking in a unitary people or *demos*. Rather, citizens in the non-English nations have a choice of identities and can hold more than one at the same time. Nor does the UK have a single purpose or *telos*, but is interpreted differently across and within its component parts. Rather than being a single thing, shared across the polity, the union is a family resemblance concept, without shared normative foundations. The UK never had a problem in recognizing that Scotland, Ireland and Wales are nations. To the bewilderment of outsiders, they have their own team in international football and rugby tournaments – but not in the Olympic Games. Scotland and Northern Ireland have their own banknotes, issued by private banks, but in Pounds Sterling. There were dedicated ministers in the UK Government dealing with Scottish, Welsh and (after 1973) Northern Ireland, with their own departments, administering central government policy, with some local modifications.

The one thing unionism could not accept was the existence of parliamentary institutions in the component nations, arguing that, precisely because these were nations, such institutions would inevitably assume sovereignty rights themselves. As Colls[6] puts it, unionists never allowed the wires of nationality and statehood to be crossed. So Conservative prime ministers like Margaret Thatcher[7] and John Major[8] could even accept that (in theory) Scotland could separate if its people so desired but, as long as it was in the union, it could not have an autonomous parliament. In the years leading up to the First World War, Conservative politicians

attitude to these markedly different types of provisions. He added, however, that neither the English nor the Scottish courts were competent to enforce this provision.

[6] R. Colls, 2002.

[7] M. Thatcher, 1993.

[8] J. Major, 1993.

were even prepared to countenance armed rebellion to prevent the then Liberal government from giving Home Rule (autonomy) to Ireland. The ambivalence of unionist doctrine and practice, far from a weakness, has historically proven to be its strength as unionism has made different appeals across the component nations. Unionism thus stands out in Europe as a state ideology that is not inimical to the recognition of national pluralism.

In the event, most of Ireland broke away after the First World War and eventually became an independent republic. Six counties in Northern Ireland, where Protestant unionists were strongest. remained part of the United Kingdom, with an autonomous parliament for which they had not asked. In the early 1970s that settlement broke down, ushering thirty years of conflict.

II. The millenium settlement

Periodically during the twentieth century there was agitation for an autonomous Scottish parliament[9] and, to a lesser degree for devolution to Wales.[10] Every opinion poll and every election in which it was an issue showed a popular majority for Scottish Home Rule, or devolution as it came to be called. UK Governments resisted, fearing for the union and, in the case of Labour Governments, for the unity of the working class and the welfare state at a time when Scotland might not have been able to afford its own welfare settlement. This changed from the 1970s when the Scottish National Party (SNP) began to pose an electoral threat to both Conservatives and Labour. After a failed effort in the late 1970s, devolution legislation was introduced by the incoming Labour Government in 1997-8. As a result of the peace process and the Good Friday Agreement of 1998, devolution was also restored in Northern Ireland. All three settlements were agreed by referendum in the respective territories.

This was part of a set of constitutional changes at the turn of the millennium, which included the establishment of the Supreme Court and the incorporation into UK law of the European Convention for the Protection of Human rights (ECHR). The three territorial settlements were initially quite different. Scotland has a legislative Parliament, with a 'reserved powers' model in which its competences cover all matters not expressly reserved to the central parliament (Westminster). The main excluded competences initially included monetary policy; taxation; social security; defence; and foreign affairs. Competences are mostly

[9] J. Mitchell, 1996.
[10] K. Morgan, 1980.

exclusive and there are very few framework laws or limitations on competence within devolved fields. A Scottish Government (formerly Scottish Executive) has the executive power, taking over from the old Scottish Office, a UK department formerly charged with administering Scottish matters. There is a National Assembly for Wales, which initially had powers over defined fields only and secondary but not primary legislative competence. There was initially no separate executive. Successive devolution statutes have now brought Wales more or less in line with the Scottish model. Both the Scottish Parliament and the National Assembly for Wales are elected by proportional representation, with mixed system of constituency members and party lists. There is provision in both Scotland and Wales for more powers to be transferred (technically, unreserved) by statutory instrument.

Northern Ireland has an Assembly elected by proportional representation (single transferable vote), also with a reserved powers model. This gives a set of competences somewhat wider than for the Scottish Parliament, as social security is not reserved, although in practice it is highly constrained by UK policies. In addition to reserved powers, which can be transferred in time, there are excepted powers which cannot be transferred under the existing settlement. There is a Northern Ireland Executive in which there is obligatory power sharing between nationalists and unionists. In addition, there is a complex set of institutions to satisfy the conflicting demands of unionists, who want to remain in the UK, and nationalists, who want to unify with the Republic of Ireland. The nationalists get 'north-south' bodies and the unionists get 'east-west' ones, including a British-Irish Council, which includes the UK and Irish governments and the governments of Scotland, Wales, the Isle of Man and the Channel Islands. The essentials of the Good Friday Agreement are included in a UK-Ireland treaty deposited at the United Nations, which means that essential elements of the settlement have a supranational guarantee and that the Republic of Ireland continues to play a role in the constitutional settlement for Northern Ireland. There is a provision that a referendum can be held in Northern Ireland on reunifying with the Republic if the UK Government judges that there is sufficient support.

Laws of the devolved nations can be appealed to any court on grounds that they go beyond devolved competence. This can happen at the time of enactment, if the law officers of the UK or devolved governments refer them. It can also happen if a devolution issue arises in the course of any court proceeding. The final court of appeal in such constitutional matters is the UK Supreme Court. Devolved laws are also subject to the law of the European Union and the European Convention on Human Rights (ECHR) and can be struck down for

non-compliance with either. In practice, there has been very little constitutional jurisprudence as devolved governments have taken care to ensure that their laws are compliant and the division of competences is reasonably clear. The UK Government has never referred a Scottish law to the Supreme Court before the recent Brexit arguments, and has done so in the case of Wales very rarely. More laws have been appealed on grounds of non-compliance with EU law or ECHR, mostly in the course of court proceedings, although few of these appeals have been successful. The most prolonged case involved the Scottish Parliament's legislation to impose a minimum price for alcohol, opposed by producer interests. This went through the entire Scottish legal system and up to the Court of Justice of the European Union, which referred it back to the Scottish courts and eventually the law was upheld. Generally, the UK courts have been reluctant to get involved in constitutional matters and have deferred to Parliament or declared matters to be political rather than juridical and this has extended to devolution. The Supreme Court, although set up as part of the constitutional reform movement around the same time as devolution, has not therefore become a constitutional court and tends to avoid abstract constitutional reasoning, keeping closely to the facts in individual cases.

The system overall might be considered to be a form of asymmetrical federalism, with one important proviso. The Westminster Parliament still considers itself sovereign and supreme and clauses in the devolution statutes reaffirm that. Westminster is free to legislate in devolved matters and is not subject to the Supreme Court in any way. In theory, it could even legislate to abolish the devolved institutions in Scotland and Wales, although in the case of Northern Ireland this might be considered to be breaching its international agreements and so in violation of international, if not domestic, law.

In the absence of a legal limitation on the power of the centre, a constitutional convention was agreed, named after Lord Sewel, the UK minister responsible at the time. This provides that Westminster will not 'normally' legislate in devolved matters. Later this was extended to include changing the powers of the devolved bodies. Following the Scottish independence referendum of 2014 the UK parties promised to entrench the devolved bodies and put the Sewel Convention in statutory form. It was then included in the Scotland Act of 2016 and the Wales Act of 2017. Yet this did not make its status any clearer as it did not alter the power of Westminster and there was no independent body to determine what 'normally' means. The Supreme Court, in a case involving withdrawal from the EU, pronounced that this is a 'political' matter outside its purview.

The other respect in which the constitution is not yet federal concerns England and the state centre. England comprises 85 per cent of United Kingdom population and a similar proportion of MPs in the Westminster Parliament. There have been calls for federalism across the United Kingdom or what used to be called Home Rule All Round (the Spanish might call it *café para todos*). There is, however, little demand for that in England, where the focus has been more on local and metropolitan government and not legislative autonomy. An English Parliament would find it difficult to co-exist with Westminster if the latter lost most of its domestic competences and resources. English people are not generally opposed to devolution for the smaller nations. There is more resentment over the fact that Scottish, Welsh and Northern Irish MPs at Westminster can vote on matters for England, which are devolved in their own nations. This issue has been called the West Lothian Question after the late Scottish Labour MP who asked why he should be allowed to vote on English matters like education and health, while neither he nor English MPs could vote on those matters as they concerned his own constituency (West Lothian). This has partly been addressed by a provision (English Votes for English Laws or EVEL) requiring that parliamentary bills affecting only England should be considered first by a committee of English MPs for approval, before going before the House of Commons. This provides a negative veto but does not allow English MPs to bring in their own legislation.

Initially, the devolved governments had almost no fiscal autonomy. Instead, they were financed under the Barnett Formula,[11] which predates devolution and was used to calculate the expenditure of the Scottish, Welsh and Northern Ireland Offices. This is a non-statutory formula controlled by the UK Treasury, which gives the devolved governments the same funding in each spending round as they received in the previous one, adjusted by the same per capita increase or decrease in spending on the corresponding matters in England. This provides a block grant, which the devolved governments are then free to spend at their discretion. Although it was originally seen as a temporary expedient, the Barnett Formula has been in operation since the late 1970s, because the various parties have been unable to agree on a replacement. It is not an equalization formula and gives a larger per capital share of expenditure to Scotland than to England or Wales. As it happens, Scotland also contributed a larger share of UK taxation because of North Sea Oil but there was no formal link to that. Welsh politicians have consistently

[11] M. Keating, 2010.

complained that the Barnett Formula discriminates against them and English politicians have periodically called for its abolition.

III. Stability

Devolution represents a major change in the constitutional balance of the United Kingdom. Previously, it recognized its internal nations in symbols and various institutions, but insisted that ultimate authority was indivisible. Now that symbolic recognition is combined with a concession of legislative and executive power. The issue of sovereignty, which had previously been seen as a purely intellectual question, now took on greater importance. Yet nothing was done to redefine the overall nature of the constitution. Government at the centre carried on largely as though nothing had changed. England and the United Kingdom were still constitutionally merged and there is no separate state government, as in Spain or in federal systems.

Rather than being resolved, these difficult issues have been put into abeyance. The English can continue to believe that the United Kingdom is a unitary state, with power lent to the devolved nations in the same way it is lent to municipal government, without affecting the sovereignty of Westminster. Scots can believe that their Parliament is the product of their own sovereign decision in the referendum that approved devolution in 1997, where some 75 per cent of voters endorsed it. There is still no written constitution and the unwritten constitution still rests up multiple foundations, which are not always consistent.

Critics long argued that, because of these contradictions, devolution would be a 'slippery slope' leading to break-up of the United Kingdom. Conscious of this risk, successive UK Governments campaigns have to give the union firmer ideological grounding in 'Britishness' or 'British values'. Unionism on the political right has stressed themes of unity and shared history. On the left, unionism has founded itself in the welfare state and the pooling of resources.[12] Both Conservative and Labour governments have used the theme of 'British values' to face what they seen as the challenge of multiculturalism arising from immigration. Yet these efforts to give union a core meaning and common foundation have merely served to highlight divisions and even to undermine the union itself since there is no agreement across the United Kingdom that these are peculiarly British. They have also allowed Scottish, Irish and Welsh nationalists to use exactly the same values to underpin their own sovereignty claims. These are 'civic' nationalisms

[12] This case is expressed in G. Brown, 2014.

not representing differences in social, economic or political values, but rather arguments about the national and territorial framework which these values will be given effect.[13] Britishness campaigns have therefore had little resonance.

Instead, devolution has matured incrementally without much of a core doctrine. After the Scottish National Party (SNP) won successive elections in the Scottish Parliament in 2007, 2011 and following the independence referendum of 2014, the UK parties conceded more powers, including taxation and elements of welfare. These were enacted in the Scotland Acts of 2012 and 2016. Now the Scottish Parliament receives the whole of income tax on earned income and controls the rates; it is assigned half the product of Value Added Tax (VAT). Its responsibilities extend to most domestic policy with the exception of most welfare payments, business taxation and the setting of VAT rates.

Wales has generally followed Scotland, extending its legislative power and competences under a series of governments led by the Labour Party, alone or in coalition with the Liberal Democrats or Plaid Cymru (the nationalists). New Wales Acts were enacted in 2006, 2014 and 2017. It now has a reserved powers model like Scotland, the main differences being that it does not control criminal law or policing and that its tax and welfare powers are more limited. Unlike Scotland, Wales has required referendums to extend its independence. The reason is purely political, as there has been more opposition within Wales to extending devolution. There is particular concern about extending tax powers, given Wales' weak fiscal base. Northern Ireland follows its own path without reference to Scotland or Wales, according to local political dynamics and in cooperation with the Republic of Ireland. The main point of instability has concerned the power-sharing arrangements within Northern Ireland, which have broken down on several occasions, forcing the UK Government to resume control. Surveys of public opinion have generally shown that the devolved arrangements are the favoured option for citizens, as opposed to separation or a rule from London.

The greatest challenge to the union came from 2011, when the SNP won an absolute majority in the Scottish Parliament, promising a referendum on independence. There were some who argued that this would be within the Parliament's competence as long as the question was merely consultative rather than binding. Others insisted that it would not be legal. Others again argued that, while the Scotland Act clearly reserved the matter of the union of Scotland with England to Westminster, there was an implicit right of self-determination for Scotland

[13] M. Keating, 2001.

and that no UK Government had ever actually tried to deny it. In the event, the issue was resolved in a very British manner. The UK Government agreed to allow a referendum on Scottish independence but only once and it would have to be held before the end of 2014. This would not affect Westminster's continuing supremacy. The Scottish Government, while not conceding that it did not have a right to call a referendum itself, agreed to this procedure. So the issue of principle was avoided but this was nevertheless a significant constitutional moment and a precedent. The reasons for the UK taking this view were practical. It judged that to refuse a referendum would merely increase support for the nationalists in Scotland, while allowing it would give them an easy victory, given that support for independence was around a third of the electorate.

The result of the referendum in September 2014 was closer than expected: 45 per cent for Yes and 55 per cent for No. While this appears to show a divided society, the reality is more complex.[14] During the campaign, the Yes side presented an attenuated version of independence, which observers called 'independence-lite'. Scotland would remain in the European Union, avoiding a hard economic border with the remaining United Kingdom. It would keep the British monarch, as do several independent countries of the Commonwealth. It would continue to use the Pound Sterling as its currency. SNP leader Alex Salmond declared that Scotland was presently in six unions – political; currency; European; security; social; and monarchical. After independence, it would leave the political union but remain in the others. For their part, the No campaign promised more devolution and even federalism; this was dubbed 'devolution max'. Surveys show that, while there was a shift of opinion during the campaign from No to Yes, the underlying attitudes of most voters changed a lot less, concentrating on a middle ground corresponding to 'independence-lite' or 'devolution-max'.[15] The change was in the way they thought they could best reach this destination. It is this that explains why, following the referendum, the two sides came together to negotiate a compromise involving added powers for the Scottish Parliament, including the tax powers and legislative entrenchment of the Sewel Convention that we have already discussed.

IV. Brexit and the Union

The other great constitutional change affecting the United Kingdom has been membership of the European Union, with which it has long had a difficult rela-

[14] M. Keating, N. McEwen, 2017.

[15] R. Liñeira, A. Henderson, L. Delaney, 2017.

tionship. For believers in the Westminster constitution, there was a fundamental problem in accepting supranational authority and supremacy of European law. In practice, they have accepted European jurisdiction while asserting that Parliament is only doing this voluntarily. There is a similar attitude to the European Convention for the Protection of Human Rights (ECHR) under the Council of Europe. For many years, the United Kingdom had refused to incorporate this directly into UK law, so that complainants had to go directly to Strasbourg, whose rulings were seen as advisory. The first exception came in the devolution statutes of 1998, which bound the devolved bodies to the ECHR and allowed any court to strike down devolved laws that did not conform to it. As part of the millennium settlement, the Labour Government introduced the Human Rights Act (1998), incorporating the convention into UK law and so applying to England and, in respect of reserved competences, Scotland, Northern Ireland and Wales. The difference is that courts cannot strike down UK statutes but can only advise Parliament, which can then amend the law by emergency procedure. Thus parliamentary supremacy is preserved.

While European integration might appear to be in conflict with the Westminster view of the constitution, this is much less so in the peripheral nations. There are longstanding arguments about whether the European Union is an intergovernmental body, a federation in the making, or a new form of polity. It is best understood as a plurinational polity, with no defined constitutional status, no unitary *demos*, no fixed *telos* or end point and a refusal to address the issue of sovereignty explicitly. In this it bears a close resemblance to the UK constitution viewed from a Scottish, rather than the Westminster perspective. There is what scholars of European integration describe as a 'good fit'. Indeed, the EU has provided an important external support system for the devolution process, allowing it proceed in spite of its incompleteness and all the abeyances.

In the first place, Europe provides a discursive space for ideas of shared and divided sovereignty, multiple *demoi* and constitutional pluralism, which characterize the UK's evolving constitution. Stateless nationalist movements across Europe have embraced the European project because of its ambiguity on sovereignty, viewing it as a post-sovereign polity, in which different conceptions of nationality and law can be rehearsed. Post-sovereignty does not mean that sovereignty has disappeared, but rather that it is transformed into something less encompassing. Multiple sovereignty claims can co-exist and be negotiated and compromised. In many cases, this links into older traditions in those places, where membership of the state has been understood as a form of pact; they

include Catalonia and the Basque Country. Plaid Cymru and the SDLP have long been committed to post-sovereign ideas. While the SNP is in favour of independence within Europe, its actual proposals are more in the post-sovereign field as 2014 showed.

Second, the EU provides for market integration and regulation at the European level, allowing for a more expansive devolution settlement within the UK than would otherwise have been possible. A range of matters, including agriculture and fisheries, the environment and regional assistance policies, are wholly devolved, coordinated only at the European level. The European Single Market has allowed an open border between the two parts of Ireland and the removal of all physical controls. It has permitted all-Ireland markets to emerge in agriculture and energy and encouraged cross-border cooperation. The Europeanization of Ireland has coincided with the 'post-nationalist' turn in the Republic and an increasing recognition of the shared historical experiences of both islands.

Third, the EU, together with the European Convention on Human Rights (in the Council of Europe) provides a rights regime that is detached from national citizenship and national identity. When up to 40 per cent of Scots do not regard themselves as British, the idea of rights or values being available on condition of being British is not going to work. This is much more so in Northern Ireland. European rights, however are another matter so that the entrenchment of both EU and ECHR rights in the devolution statutes is critical, as is the ability of the courts to strike down laws that violate either.

Brexit has an inescapable impact on devolution as this common framework for the United Kingdom is removed. The various nations are being pulled in different directions in response to their different attitudes to Europe. Some of these effects will be long-term but one immediate effect is that Brexit requires yet another amendment to the devolution statutes, at least to remove the clauses binding the devolved legislatures and governments to abide by EU law need.

v. Brexit scenarios

The politics of Brexit has been shaped by the different referendum results across the United Kingdom. While England and Wales voted to leave by around 52 per cent, Scotland voted 62 per cent to remain. Northern Ireland voted to remain by 56 per cent but there was a big difference between the two communities. Nationalist voters supported Remain by over 80 per cent, while Unionists showed a majority for leave. Within England, London voted Remain.

Percentage vote in EU Referendum 2016

	Remain	*Leave*
UK	48	52
England	47	53
Wales	47	53
Scotland	62	38
Northern Ireland	55	45
London	60	40

Surveys have shown that many of the same factors worked across all four nations but in Scotland and Wales the leadership of the nationalist parties delivered majorities for Remain among social groups that, in England and Wales, voted Leave. The Scottish National Party (SNP) has long seen the EU as an important external support system for an independent Scotland. The moderately nationalist Northern Ireland Social Democratic and Labour Party (SDLP) is historically pro-Europe. The militantly nationalist Sinn Féin, now the larger nationalist party, is historically Eurosceptic but supported Remain on the grounds that it did not want to 'repartition Ireland' by erecting a hard EU border. The hard-line Democratic Unionist Party (DUP) supported Leave, while the more moderate Ulster Unionist Party (a much-diminished for these days) was for Remain but now supports leaving.

This leaves a set of clashing mandates. The British parties decided that the referendum was binding on them. The governing Conservative Party even argued that a parliamentary vote was not necessary to start the process of withdrawal, so abandoning the principle of parliamentary sovereignty in favour of a notion of popular sovereignty residing in a unitary *demos*. The argument that the verdict of 'the British people' must be respected does not convince nationalists in Scotland or Northern Ireland who insist that, whether we are talking about parliamentary or popular sovereignty, the United Kingdom is a plurinational union. Within Northern Ireland itself, there are not the concurrent majorities that have been required over the years to bind both communities into constitutional reforms. The prospects for the future can usefully be considered under three headings: disintegration; recentralization; and reconfiguration.

1. *Disintegration*

In the immediate aftermath of the referendum, Sinn Féin called for a poll on Irish reunification. The SNP declared that a second independence referendum was

likely, a position that was hardened in 2017 when Article 50 was triggered. Yet there are enormous difficulties in the idea of the UK falling apart on clear lines.

Surveys in recent years have shown that there is no majority in Northern Ireland for reunification, even among Catholics, as long as the alternative of power-sharing under the Good Friday Agreement is available. The *Northern Ireland Life and Times Survey* of 2016 found only fourteen per cent of the population in favour of unification, with 54 per cent favouring power-sharing devolution. Thirty five per cent of Catholics would vote for unification. Twenty eight per cent of Catholics and five per cent of Protestants said that Brexit made them more supportive of Irish unity, which suggests that it was not decisive.[16] Nor is there much enthusiasm in the Republic for taking on the North. Brexit may create a hard border between the two parts of Ireland but Irish unification after Brexit would create a similar hard border between Northern Ireland and Great Britain, so that the border would merely be moved.

In Scotland, the 62 per cent vote for Remain did not, as widely expected, translate into increased support for independence. In fact, the electorate has never made the link between independence and Europe on which the SNP independence project is based.17 Surveys over the years have shown more pro-Europeanism (or at least less Eurocepticism) across all parties in Scotland but particularly among Labour voters; SNP voters are divided in much the same way as Scots as a whole. In the EU referendum, something like a third of SNP voters and of Yes (to independence) electors voted Leave. The British Election Study has examined the relationship between voting at the two referendums. This produces a matrix with four boxes, none of which contains more than a third of the electorate.

Support for EU and independence in Scotland

	Yes independence	*No independence*	*Total*
Remain EU	27	34	61
Leave EU	17	21	37
Total	44	55	

Chris Prosser and Ed Fieldhouse, *A tale of two referendums – the 2017 election* in Scotland, British Election Study, http://www.britishelectionstudy.com/bes-findings/a-tale-of-two-referendums-the-2017-election-in-scotland/#.We0CaDb907M.

[16] http://www.ark.ac.uk/nilt/2016/Political_Attitudes/NIRELND2.html

[17] M. Keating, 2009.

This leaves the SNP highly cross-pressured (as are the other parties) and at the snap General Election of 2017 it lost a lot of its support, particularly among Leave voters. As a result, the SNP leadership parked the idea of a second independence referendum, although the policy has not been abandoned. Yet there is no clear mandate in Scotland for any combination of independence, union and Europe.

Brexit has also undermined the logic of the independence-in-Europe strategy of 2014, which was that, with both Scotland and the rest of the UK (rUK) inside the EU, there would be no hard border and free trade and movement of people would continue. With Scotland in the EU and rUK outside, the same problem would arise on the England-Scotland border as in Ireland. Some elements within the SNP have since argued that an independent Scotland could join the European Economic Area (EEA), which would keep it within the European Single Market and allow for free movement of people with Europe. As it would be outside the EU customs union, it could also potentially negotiate a free trade agreement with rUK. In the meantime, the SNP moved to support the emerging soft Brexit coalition alongside the Liberal Democrats, Greens and elements of the Labour and Conservative parties. While a soft Brexit might reduce the Scottish grievance about being dragged out of the EU, it would make independence easier, by keeping open trading links with rUK as well as the EU/EEA.

So the UK cannot disintegrate on clear territorial lines following Brexit in a way that would leave people more satisfied than now. Moving the borders would not resolve the issue of aligning the two unions and allowing most citizens of Scotland and Northern Ireland to realize their preference for staying in both unions.

2. *Recentralization*

The central promise of Brexit was to 'bring back control', whether to the British people or the Westminster Parliament. Such appeals may have had particular resonance in England and we know that support for leaving the EU correlates strongly with English identity; there is no comparable correlation in Scotland or Wales. One scenario is therefore that the United Kingdom reconstitutes itself as a unitary nation-state bound by the sovereignty of Westminster. This would go against evolving understandings of the UK as a quasi-federation in which the devolved institutions are an entrenched part of the constitution. Signs of this evolution had been the failure of the UK to challenge devolved competences (except on a couple of occasions in Wales); the reluctance to test the limits of devolution in the courts; pledges given by the No side during the Scottish independence referendum campaign; and the devolution acts of 2016 and 2017 for Scotland

and Wales respectively, putting the Sewel Convention into statutory (albeit not legally-binding) form.

The first test of this was the issue of the triggering of Article 50, giving notice of intention to leave the EU. The UK Government initially proposed to do this under the Royal Prerogative, on the grounds that it was a matter of foreign affairs. A private citizen, Gina Miller, took the matter to law and the case went all the way to the Supreme Court, which ruled that parliamentary approval was necessary. The Scottish Government joined the case to argue that, because Brexit impinged on devolved matters, the consent of the devolved legislatures should also be sought. The Court did not agree with this but, instead of deciding the matter on narrow grounds such as that the issue was indeed a matter of foreign relations and therefore reserved it went further. It stated that the Sewel Convention was not legally binding in any circumstances.[18] This in itself was no surprise as most people realized that the Convention was not justiciable. Where the Court attracted more criticism is for stating in an orbiter dictum that the Sewel Convention was a mere 'political' understanding. This appeared to downplay the role of conventions in the UK constitution as a whole, although arguably they are its very foundation. This contrasts with the practice of the Supreme Court of Canada, which has been more prepared to engage in constitutional reasoning and to take conventions into account. Faced with such an opportunity, the UK Supreme Court chose to pass the issue back to the politicians, leaving the Westminster Parliament as master of the game.

A second challenge arose in relation to those competences that are shared between the EU and the devolved legislatures, notably in agriculture, fisheries, environment and justice and home affairs. In many of these fields, there is no UK legislation or policy, so that coherence across the United Kingdom is ensured only by EU regulation. The UK Government argued that, after Brexit, common UK frameworks would be needed to ensure the operation of the UK internal market, allow it to negotiate trade agreements with the EU and third countries, and deal with externalities. It further insisted that, as these matters are covered by EU laws, the devolved bodies were merely implementing EU policy rather than making policies themselves. So these competences could be repatriated to Westminster without the bodies level losing powers, as they would exercise the same amount of discretion at the implementation end. The EU Withdrawal Bill therefore pro-

[18] The Supreme Court, Hilary Term [2017] UKSC 5. *On appeals from: [2016] EWHC 2768 (Admin) and [2016] NIQB 85. EWHC 2768 (Admin) and [2016] NIQB 85JUDGMENT R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant).*

posed that all 'retained EU law' including that in devolved spheres, would revert to Westminster. UK ministers could then decide which powers to 'release' back to the devolved level. The Scottish and Welsh governments strongly disputed this interpretation, insisting that the competences belonged to them under the constitutional settlement and refusing to give legislative consent to the Withdrawal Bill.

After some months of negotiation in the newly-established Joint Ministerial Committee (European Negotiations) it was agreed that some UK-wide frameworks would be needed to deal with matters affecting the UK internal market, trade, international obligations and common resources. The UK Government also accepted that the relevant parts of the EU Withdrawal Bill would be subject to legislative consent from the devolved legislatures. It gradually conceded on the principle of blanket reservation of powers, instead working on lists of competences that could be released immediately. Then it reversed the principle altogether, conceding that all the relevant competences would return to the devolved bodies unless they were specifically reserved, thus restoring the original 'reserved powers' model of devolution. Finally it offered a 'sunset clause' whereby all powers would revert to the devolved level after seven years. In the meantime, legislative frameworks would be negotiated alongside non-legislative frameworks through memoranda of understanding or concordats. Legislative frameworks, alongside the temporary reservation of powers, would be subject to the legislative consent procedure. This compromise was enough to satisfy the Welsh Government. The Scottish Government did not agree, arguing that the legislative consent provision was insufficient, as the UK Parliament could still proceed on its own. Indeed, in the UK Government's new proposal (in an amendment to the EU Withdrawal Bill), it was stipulated that a reservation order would proceed if the devolved legislatures accepted it; if they rejected it; or if they did not pronounce on it. This did not introduce a new legal principle, but it did make explicit that the Sewel Convention on legislative consent amounts to no more than consultation and has no binding effect.

3. *Reconfiguration*

The third possibility is a reconfiguration in which the different parts of the United Kingdom would have different relationships with European institutions. The Scottish Government's main policy statement, *Scotland's Place in Europe,*[19] issued in December 2016, set out a range of possibilities. The first preference was

[19] http://www.gov.scot/Publications/2016/12/9234

for the whole UK to remain in the EU, followed by the whole UK remaining in the Single Market and customs union. Failing that, it was proposed that Scotland remain in the Single Market, using a variant of the EEA mechanism. The proposal was complex, involving for example identifying the final destination of goods in order to distinguish those within the Single Market from those circulating only within the UK but the UK Government later suggested something similar for keeping the UK in a customs union while leaving the Single Market. The Scottish Government paper also proposed that Scotland remain open to EU free movement of peoples, reflecting a cross-party consensus in the Scottish Parliament in a favour of migration and mobility. These proposals were ignored by the UK Government, which rejected any territorially differentiated Brexit and were not incorporated into the negotiations with the EU.

The Scottish and Welsh governments returned to the issue in their Continuity Bills of 2018. As well pre-empting the EU Withdrawal Bill after the UK Government had refused to amend it to leave out the reservation of retained EU law, these provided for Scottish and Welsh ministers to retain and update EU provisions. So Scotland and Wales would effectively shadow EU policies even after Brexit.

The case of Northern Ireland proved even more difficult. A key item in the Good Friday Agreement (GFA) of 1998 was cross-border cooperation. Although there are not a lot of details about this in the GFA itself, the European Single Market from 1993 allowed for the removal of the remaining physical controls at the border between Northern Ireland and the Republic of Ireland. With the UK leaving the EU and Ireland remaining, a new, hard border would be reinstated. Aware of the sensitivity of the issue, the UK Government insisted that there would be no return to a 'hard border' or 'the borders of the past' but has been short on detail as to how this would be achieved. The Irish Government, for its part, took a decision to play as a loyal member of the EU 27 and use its position there to have the Irish border included as a condition for starting substantive negotiations. In December 2017, an agreement was reached, reiterated in the agreement of March 2018 on transition and the start of negotiation on the future relationship.

This was, however, a fudge that avoided addressing the key question. Three options were stated. First, it was hoped that the future overall agreement between the EU and the UK would avoid the need for a hard border in Ireland. It is difficult to see how this can be achieved unless the UK remains in the Single Market and customs union, which it has said it will not do. Second, if that failed, there would be a technological solution, something the UK has been pursuing all along. Customs formalities and regulatory controls would be done electronically, without

and physical infrastructure at the border. Yet such a virtual border would still be a border as long as there are regulatory differences between the EU and the UK. Such differences are particularly problematic for the agricultural sector, an important matter in north-south trade in Ireland and for border communities. Third, failing other two, there would be regulatory alignment between the two parts of Ireland as far as necessary in order to keep the Good Friday Agreement working. The UK and Irish governments fundamentally disagree on what this entails. On a narrow interpretation, the GFA says relatively little about Europe and the UK has sought to define a narrow list of competences affected. On a broad interpretation, the working out of the GFA, including opening the border and all-Ireland markets and institutions, is deeply dependent on the Single Market. The Irish Government therefore interpreted this as requiring full regulatory alignment. In fact, all three options would require such regulatory alignment. Unless the whole of the UK remained in regulatory alignment, this would require a differentiated Brexit for Northern Ireland, something the UK Government does not accept. Nor does the Democratic Unionist Party, which supports Brexit but opposes a hard border, and provides the UK Government with its parliamentary majority. In fact, the idea of a 'border in the Irish Sea' has little support from any of the parties, as both parts of Ireland depend more on markets in Great Britain than they do on each others' markets.

VI. The future of Union

The United Kingdom was, until 2016, evolving as plurinational union in a characteristically British way. There was an increased understanding that it is not a unitary state. The Sewel Convention, while not binding in law, was observed in practice. The system had survived the challenge of a referendum on independence in Scotland without legal order breaking down. The political agenda in Scotland was moving back to social and economic questions. The divisive issue of sovereignty had been put into suspension in Northern Ireland, although a deep division remained between the two communities. The question of England has not been fully addressed but was not pressing.

Brexit destabilizes these relationships as the component parts of the United Kingdom are pulled differentially out of or into European networks. As usually happens, some voices have called for federalism as a definitive solution to the relationship among the nations. This was always difficult, given the vexed question of England. Now it would not resolve the issues raised by Brexit as such a federation would need to be either in or out of the European Union. The UK's informal

constitution has allowed a great deal of flexibility without getting bogged down in constitutional principles. Provided that the political parties agree, almost anything can be done legally. There is no need to resolve all issues at the same time, but constitutional reform can proceed incrementally, with theory and doctrine following practice. Some observers have always criticized this and argued for a written constitution, order and consistency. Others have argued that such a written document would be at least premature, since the situation is evolving in a flexible way. There have also been calls for a people's convention to agree on a new constitution. Again, that would be premature if not futile as the peoples (plural) of the United Kingdom have different views on the location of authority and sovereignty and on how things should develop.

It is an illusion of many British politicians that Europe can be handled in the same way as the British constitution. Prime Minister David Cameron tried to negotiate a flexible membership of the EU, half in and half out, to be told that the elements of the EU are indivisible. Since the referendum vote, the UK Government continues to believe that it can pick and choose which bits of Europe it will keep. The EU, however, is a legal order, with some flexibility but nothing like as much as the British constitution. It is also a body representing 27 states, which is reluctant to make exceptions that might invite other member states to ask for their own derogations. This rather rigid order in Europe also makes it difficult to accommodate potential associates such as Scotland and Northern Ireland and their aspirations to keep at least some of the features of membership.

It is impossible to predict how matters will work out. A soft Brexit might ease tensions within the United Kingdom by retaining market access via a customs arrangement and regulatory alignment. A hard Brexit, with the UK privileging relationships beyond Europe, whether with the United States or other world regions, could instead increase constitutional tensions within.

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