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Brexit and the Territorial Constitution of the United Kingdom

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■ Résumé

Le Brexit et la constitution territoriale du Royaume-Uni

Depuis vingt ans, le Royaume-Uni s'est transformé, passant d'un État unitaire à un État décentralisé et asymétrique. L'Union européenne a fourni un cadre externe facilitant cette réforme. La décision, suite au référendum de juin 2016, de la quitter a des répercussions majeures sur l'ordre constitutionnel interne du Royaume-Uni et sa relation avec la République d'Irlande. Alors que l'Écosse et l'Irlande du Nord ont voté pour leur maintien dans l'UE, tout en exprimant le souhait de demeurer au sein du Royaume-Uni, ces deux choix sont désormais incompatibles. La réattribution des compétences jusqu'alors transférées à l'UE amène à des choix entre le Royaume-Uni et les gouvernements dévolus. Le caractère peu formel et peu écrit de la Constitution britannique a en outre pour résultat qu'il n'y a pas de solutions claires à ces conflits de compétences. Dans un contexte d'incertitude, l'avenir du Royaume-Uni balance entre les scénarios d'une recentralisation, d'une désintégration et d'une recomposition de l'État.

Écosse – Irlande – Royaume-Uni – Union européenne – Constitution – Décentralisation.

■ Summary

Over the last twenty years, the United Kingdom has been transformed from a unitary to an asymmetrically decentralized state, embedded in membership of the European Union. The decision, following the referendum of June 2016, to leave the European Union has major repercussions on the internal constitution of the United Kingdom and its relationship with the Republic of Ireland. Scotland and Northern Ireland voted to remain in the EU but have also expressed a preference for remaining in the United Kingdom; now they cannot have both. Control of competences coming back from the EU is contested between the UK and devolved governments. The lack of rules in the largely unwritten constitution means that there are no clear ways of resolving the resulting conflicts. The United Kingdom has become the site of a real-time experiment in constitutional change, in conditions of uncertainty.

European Union – Ireland – Scotland – United Kingdom – Constitution – Devolution.

I. The Constitutional Issue in the United Kingdom

Over the last twenty years, the United Kingdom has undergone a programme of constitutional reform embedded in membership of the European Union (EU). Devolved legislatures and governments have been established in different forms in Scotland, Wales and Northern Ireland. The decision, following the referendum of June 2016, to leave the European Union has major repercussions on the internal constitution of the United Kingdom (UK) and its relationship with the Republic of Ireland. Scotland and Northern Ireland voted to remain in the EU but have also expressed a preference for remaining in the United Kingdom; now they cannot have both. Control of competences coming back from the EU is contested between the UK and devolved governments. The lack of rules in the largely unwritten constitution means that there are no clear ways of resolving the resulting conflicts. The United Kingdom has become the site of a real-time experiment in constitutional change, in conditions of uncertainty.

II. The United Kingdom as a Plurinational Union

The United Kingdom is often seen as a unitary nation-state. The “Westminster model” presents as a flexible order reliant on convention rather than a written, codified constitution but resting ultimately on the principle of parliamentary sovereignty. Seen from the periphery rather than Westminster however, it is a plurinational union consisting of England, Scotland, Wales and Northern Ireland, each of which has its own constitutional traditions and institutions.¹ It has been held together by the doctrine and practice of unionism, a British idea which is distinct from French and other continental conceptions of unity. A distinguishing element is the recognition of national diversity in symbolic realms, including calling the component parts “nations”; recognition of cultural traditions; international sporting recognition; flags and heraldry. There are four different religious settlements, in violation of the Westphalian principle.

A second element is economic union, with a single market and set of regulations. A third is the welfare state, which developed on a UK-wide basis and was used to underpin shared social citizenship and sharing of risks and resources. The same political parties operated across the whole of Great Britain (that is England, Scotland and Wales). Finally, administrative devolution in the form of the Scottish, Welsh and Northern Ireland Offices allowed some flexibility in the application of policy in the smaller nations.

The elements of symbolic recognition and administrative differentiation were not matched by concessions of political authority. On the contrary, the fact that central politicians accepted that Scotland, Ireland and Wales were nations made them the more reluctant to concede autonomy since they feared that such autonomous

1. Colin KIDD, *Union and Unionisms*, Cambridge: Cambridge University Press, 2008; Iain McLEAN and Alistair McMILLAN, *State of the Union. Unionism and the Alternatives in the United Kingdom since 1707*, Oxford: Oxford University Press, 2005; Neil MACCORMICK, *Questioning Sovereignty. Law, State and Nation in the European Commonwealth*, Oxford: Oxford University Press, 1999; Michael KEATING, *Plurinational Democracy. Stateless Nations in a Post-Sovereignty Era*, Oxford: Oxford University Press, 2001.

institutions would inevitably make claims to sovereignty. Home Rule, or autonomous territorial government, was on the political agenda since the mid-nineteenth century but was only ever put into effect in Northern Ireland between 1922 and 1972.

During the late twentieth century, this system of territorial management came under increasing strain and in 1999 the new Labour Government adopted a policy of devolution, with autonomous assemblies and governments for Scotland, Wales and Northern Ireland, confirmed by referendums in the respective territories.

Devolution came to Scotland, Wales and Northern Ireland in different ways and is highly asymmetrical. Scotland has a parliament with legislative competence over all matters not expressly reserved to the centre. Wales initially had only administrative devolution over a specified list of fields but is gradually moving towards the Scottish model. Northern Ireland has an assembly with powers similar to the Scottish Parliament but this is embedded in institutions designed to overcome the historic divisions between nationalists (mainly Catholics) and unionists (mainly Protestants) and between the two parts of Ireland. It has a power-sharing Executive representing both the nationalist and unionist communities. It also has a complex set of institutions linking Northern Ireland both to Great Britain and to the Republic of Ireland. There is recognition of both communities, those who wish to unite with the rest of Ireland and those who want to remain in the UK.

The process of devolution has been piecemeal and gradual, with three successive acts both in Scotland and Wales between 1998 and 2017. There is no overall plan and there are numerous lacunae and abeyances. The Westminster Parliament has devolved power to the nations but insists that the principle of parliamentary sovereignty is unabridged; powers are only lent out and can be rescinded or overridden. This unitary conception of sovereignty clashes with a distinct Scottish tradition of shared and divided sovereignty.² The conflicting interpretations go back to the Union of 1707. For England, it created a unitary state based on the English Parliament. For Scotland, it was a pact negotiated between two nations, which can be renegotiated in the future.

The post-1999 settlement can be seen as quasi-federal but differs from federalism in several respects. One is the lack of entrenchment. Another is the lack of provision for England, which comes under the direct authority of Westminster and the UK Government. As a consequence, the system lacks a clear “centre”. The UK Government is defined by subtraction, covering England for all matters and the other three nations in respect to the reserved competences. Whitehall departments are variously, UK-wide, English, or combine English and UK responsibilities in complex ways.

In the absence of constitutional guarantees, the UK has accepted a convention (the Sewel Convention) that Westminster will not “normally” legislate in devolved matters without the agreement of the relevant devolved legislatures. This was later enacted legislatively in the Scotland Act 2016 and the Wales Act 2017. The paradox of the UK constitution, however, means that these are ordinary laws with no special status, meaning that Westminster can over-ride them at will. Hitherto, it has avoided

2. Neil MACCORMICK, *Questioning Sovereignty. Law, State and Nation in the European Commonwealth*, op. cit.

doing this, preferring to negotiate politically but there is no legal redress should it do so. An extension of the Sewel Convention has been that Westminster will not change devolved powers without the consent of the devolved legislatures. The Northern Ireland settlement involves the government of the Republic of Ireland and elements were incorporated into an international agreement deposited at the United Nations, but it is an open question how far this really entrenches the institutions.

There is no agreed doctrine of the right of self-determination of the UK nations. In 1922, the UK allowed the greater part of Ireland to secede but only on condition that it remained within the British Empire (later Commonwealth) with the British monarch as head of state. In 1949, Ireland declared itself a republic and left the Commonwealth without opposition from the United Kingdom. At the same time the UK Parliament guaranteed that Northern Ireland would remain within the United Kingdom as long as it wished to do so. Under the settlement of 1998, there is provision for Northern Ireland to join the Republic of Ireland after a referendum.

The position of Scotland is less clear. Successive UK prime ministers have declared that, if the people of Scotland wished to become independent, they could not be prevented.³ This, however, is not recognized anywhere in law and the Scotland Act stipulates clearly that the union of the kingdoms of England and Scotland is a matter reserved to Westminster. In 2011, the Scottish National Party (SNP) won an absolute majority of seats in the Scottish Parliament and declared its intention to hold a referendum on independence. The UK Government of the time judged it prudent to agree, calculating that the proposal would be defeated heavily. The result was the Edinburgh Agreement, under which the UK agreed to bring forward a statutory order under Section 30 of the Scotland Act, which allows it to transfer competences to the Scottish Parliament. This gave the Scottish Parliament permission to hold an independence referendum but only before the end of 2014. The UK government further stipulated that there should only be one question, so excluding a “third way” option of more devolution. The outcome was an agreed question, and agreed procedure and a commitment to accept the result. Legally, this remained an *ad hoc* measure, without changing the constitution. Politically, it set an important precedent. The independence side lost by 45 to 55%, but Scottish independence was henceforth established as a realistic option.

Two visions of the nature of the state thus co-exist. In England, there is a unitary vision, focused on a unitary and sovereign parliament. In the other nations, there is a multilevel vision, based on divided authority and diffused sovereignty. The politicians have preferred to allow these visions to co-exist rather than attempting to resolve them or find a deeper common foundation for political authority.

III. Devolution and Europe

Devolution has been developed entirely during UK membership of the European Union and is deeply affected by it. Under the devolution statutes, the devolved

3. Margaret THATCHER, *The Downing Street Years*, London: HarperCollins, 1993; John MAJOR, “Forward by the Prime Minister”, in SECRETARY OF STATE FOR SCOTLAND, *Scotland and the Union*, Edinburgh: HMSO, 1993.

bodies are bound to respect EU law, as well as the European Convention on Human Rights (ECHR) and the courts can disallow any laws that breach these. Indeed most of the jurisprudence on devolved powers has concerned EU and ECHR provisions rather than the domestic boundary between reserved and devolved matters. At a minimum, Brexit will require the removal of the provisions to follow EU law from the devolution statutes.

More generally, EU membership allowed a more extensive devolution settlement than would otherwise be possible, since the EU provides a policy framework and rules in matters such as agricultural support, environmental policy and industrial development and state aid, making up for the lack of UK-wide provisions. The EU helps to secure the UK's own single market and ensure fair competition within its borders.

At a deeper level, Europe provides an important discursive framework in which ideas of shared and divided sovereignty or “post-sovereignty”⁴ can flourish. The EU is a distinct polity in which the issue of sovereignty has never been resolved but is, rather, suspended. It has no clear constitutional end point or *telos*, but rather is in continual evolution. Its legitimacy does not rest upon a unitary people or *demos*, but rather recognizes national pluralism and the balance of national and supranational authority. It does not abolish borders among states but rather recognizes them and at the same time diminishes their importance and opens them up. In these respects, it presents a “goodness of fit” with the United Kingdom as we have described it above.

The point is illustrated in the case of the Northern Ireland settlement. This is an agreement within Northern Ireland and also between the sovereign states of the United Kingdom and the Republic of Ireland. Citizens are allowed to define themselves as British, Irish or both and practical expression is given to this in citizenship provisions. There are cross-border institutions covering issues such as agriculture and tourism and the border (as an intra-EU border) is free of check-points⁵ and customs controls. There are joint north-south (Northern Ireland-Republic of Ireland) and east-west (UK-Ireland) bodies and a British-Irish Council representing the two sovereign states, Northern Ireland, Scotland and Wales, and the Isle of Man and the Channel Islands. While little of this stems directly from the EU, European ideas of open borders and divided sovereignty provide an essential background. This complex set of arrangements is the first constitutional settlement since the division of Ireland in 1922 to command support across the two communities, although the balance remains fragile.

The European dimension is also important in Scotland. Scottish nationalists since the 1980s have favoured independence in Europe, which would avoid the problem of a hard border with England and provide common policies and institutions. Those favouring more autonomy for Scotland short of independence have looked to visions of Europe of the Regions as offering a “third way” although the

4. Neil MACCORMICK, *Questioning Sovereignty. Law, State and Nation in the European Commonwealth*, op. cit.; Michael KEATING, *Plurinational Democracy. Stateless Nations in a Post-Sovereignty Era*, op. cit.

5. Neither the UK nor Ireland is in the Schengen zone but there is a Common Travel Area between them.

Europe of the Regions movement has declined in recent years. Surveys in Scotland have consistently shown that, unlike in England, there is little support for the proposition that all sovereignty and all power should be concentrated in one place. On the contrary, people are easy with the idea of multiple levels of government, in balance with each other.⁶

In spite of the legal uncertainties of the devolution settlement, the United Kingdom appeared to be evolving in a federalizing direction, if not becoming a federation. The prerogatives of the devolved institutions had not been challenged frequently and they had gained legitimacy in their own constituencies. Yet tensions remained. There was an unresolved issue of Scottish independence. The Northern Ireland institutions commanded more support than any previous regime but were precarious and left historic grievances open. There was a growing English question,⁷ fuelled by concerns about funding and the “West Lothian Question”. This concerned the fact that Scottish, Welsh and Northern Irish Members of Parliament (MPs) at Westminster could vote on laws affecting purely English matters while English MPs had no say in the same matters in the devolved territories. It has partly been addressed by a provision, known as English Votes for English Laws (EVEL), that bills concerning only England must be approved by a committee comprising all MPs from England, as well as the whole House of Commons.

IV. Brexit and Devolution

Since the devolution settlement is so embedded in EU membership, Brexit seriously destabilizes it. This is accentuated by the fact that, while both England and Wales voted Leave by 53%, Scotland voted Remain by 62%. In Northern Ireland, Remain won by 55% but among Catholics it was 85% while among Protestants Leave won by 60%.⁸ In Scotland, all the parties represented in the Scottish Parliament favoured Remain, with only a few dissenters. In Northern Ireland, the Democratic Unionist Party, the largest, favoured Leave, following its historic suspicion of all things European. Sinn Féin, the largest nationalist party, is historically Eurosceptic but favoured Remain because it feared that Brexit would “repartition” Ireland by introducing a hard EU border between the two states. In Wales, Labour, Plaid Cymru (Welsh nationalists) and the Liberal Democrats supported Remain but, despite commanding majority electoral support between them failed to deliver a Remain vote. Welsh Conservatives were divided and the National Assembly for Wales contains a strong UKIP (United Kingdom Independence Party) element.

6. Robert LIÑEIRA, Ailsa HENDERSON and Liam DELANEY, “Voters’ Response to the Campaign”, in Michael KEATING (ed.), *Debating Scotland. Issues of Independence and Union in the 2014 Referendum*, Oxford: Oxford University Press, 2017.

7. Michael KENNY, *The Politics of English Nationhood*, Oxford: Oxford University Press, 2014.

8. John GARRY, “The EU Referendum Vote in Northern Ireland: Implications for our Understanding of Citizens’ Political Views and Behavior”, *Knowledge Exchange Seminar Series*, Belfast, 2017.

Table 1
Percentage Vote, European Referendum, 2016

	Remain	Leave
United Kingdom	48	52
England	47	53
Wales	47	53
Northern Ireland	56	44
Scotland	62	38

Brexit immediately raises the issue of how the devolved governments will be affected, whether they will gain or lose competences and how they can influence the negotiations. It poses a particular problem in Northern Ireland, where the border between the United Kingdom and the Irish Republic will become an EU border and undermine efforts to open the border as part of the settlement. It puts the Republic of Ireland in additional difficulty because, although it has diverted its trade away from the Great Britain towards Europe since joining the EU, it still relies on UK markets for much of its export trade. Much of its trade with the EU 27 also passes through British ports.

Broadly, there are three scenarios for the constitutional future of the UK after Brexit: recentralization; disintegration; or reconfiguration.

V. Recentralization

The central promise of the Leave campaign was to “take back control”, by reasserting national sovereignty. Sometimes this was expressed as a desire to bring back power to the UK Parliament and people, in a unitary nation state. This finds an echo in an emerging English nationalism, most often found on the populist right. There is a strong association between feeling English (as opposed to British) and supporting Brexit.⁹ In Scotland and Northern Ireland, on the other hand, feeling Scottish or Irish has no such effect, as these identities are more compatible with European sentiment. This English unitary and centralist conception is completely at odds with the Scottish and Northern Ireland constitutional settlements. The UK Government has stated that: “The result – by 52% to 48% – was a clear instruction from the people of the United Kingdom to leave the EU”.¹⁰ The very concept of such a UK-wide demos is widely rejected in Scotland and Northern Ireland. Nationalists there claim their own mandate, which is for Remain. The case of Wales is more complicated, as Wales voted Leave but there is also opposition there to turning the

9. Charlie JEFFERY, Richard WYN JONES, Ailsa HENDERSON, Roger SCULLY and Guy LODGE, *Taking England Seriously: The New English Politics. The Future of England Survey*, Edinburgh: Centre on Constitutional Change, 2014.

10. DEPARTMENT FOR EXITING THE EUROPEAN UNION (DEXEU), *Legislating for the United Kingdom's withdrawal from the European Union*, Cm 9446, London: DEXEU, 2017, p. 10.

UK back into a unitary state.

There are also concrete issues about the Brexit process and control of powers. The position of the UK Government was that triggering Article 50 of the Lisbon Treaty, giving the EU notice of its intention to leave, did not require parliamentary approval at all but, as “foreign policy”, could be done under prerogative powers. The matter was pursued by a private citizen, all the way to the Supreme Court. The Scottish Government and nationalists in Northern Ireland then joined the action, claiming that it would also require the approval of their legislatures as Brexit entailed changing their devolution settlements (by removing the application of EU law), thereby triggering the Sewel Convention. The UK Supreme Court¹¹ ruled that the UK Government did indeed need parliamentary approval but not that of the devolved legislatures. Rather than ruling on the narrow ground that EU relations were a reserved matter and thus not subject to the Sewel Convention, the Court added that Sewel was a mere “political” convention having no binding force in any circumstances. At a stroke it thus emptied the efforts in 2016 and 2017 to entrench it, and undermined a pillar of the devolution settlement. This question will recur with the enabling legislation for Brexit.

Another centralizing move concerns the competences currently shared between the devolved legislatures and the EU. Agriculture, fisheries, environment, regional economic development and, in Scotland and Northern Ireland, large parts of Justice and Home Affairs competence are not reserved to Westminster. This means that, unless the devolution statutes themselves are amended, these competences will after Brexit revert directly to Scotland, Wales and Northern Ireland. Only in respect of England, will they come back to Westminster.

Repatriation will not, however, be clear cut. Regulation and support for agriculture and fisheries will be devolved, but not trade. Whatever trade deals the UK signs with the UK or others will include rules on agricultural support, as would falling back on World Trade Organization rules. Without the EU framework, there may need to be UK rules on agricultural support and state aides to ensure fair competition and a UK-wide single market. Environmental policies have external effects that need to be managed in common.

The UK Government¹² has sought to reassure opinion in the devolved territories that the settlement will not be undermined by Brexit. It has promised that no “decisions” currently taken by the devolved governments will be brought back to Westminster;¹³ indeed they might gain powers.¹⁴ Yet all sides have conceded that there might need to be at least some common action in order to deal with common issues, externalities and fair competition in agriculture and environmental regulation. The UK Government it has also indicated that there will UK-wide frameworks

11. UK SUPREME COURT, *Judgment on the Application of Miller and Another (Respondents) v Secretary of State for Exiting the European Union (Appellant)*, London: UK Supreme Court, 2017.

12. UK GOVERNMENT, *The United Kingdom's Exit from and New Partnership with the European Union*, London: UK Government, 2017.

13. Theresa MAY, *A Global Britain*, Speech by Prime Minister Rt Hon Theresa May MP, Lancaster House 17th January 2017.

14. UK GOVERNMENT, *The United Kingdom's Exit from and New Partnership with the European Union*, *op. cit.*

in those matters to replace the EU frameworks. As the UK government currently has no competence in these fields, that would require an amendment to the devolution statutes in order to take back the powers. The UK Government's¹⁵ interpretation is that, currently, the devolved governments "are responsible for implementing the common policy frameworks set by the EU" rather than making policy. Taking back the powers would thus not reduce their ability to take decisions. Moreover, "when the UK leaves the EU, the powers which the EU currently exercises in relation to the common frameworks will return to the UK".¹⁶

This interpretation is strongly disputed by all the devolved administrations. They argue, with some justification, that after Brexit the current frameworks will cease to exist as they are the product of EU law and there is no provision for them in UK law. The Scottish Government has accepted a need for some (negotiated) "cross-border frameworks"¹⁷ but otherwise emphasized its scope for autonomous policy-making. The Welsh Government¹⁸ is not opposed to UK-wide frameworks but insists that these should be negotiated on a basis of equality among the four nations rather than imposed from above. The Northern Ireland parties show a rare unity in resisting losing competences, with the added complication that joint participation in European policies with the Republic of Ireland has been a key element in their constitutional settlement, notably in relation to agriculture, tourism and economic development.

The EU Withdrawal Bill proposes that all the relevant powers will come under the heading of "retained EU law" and come back to Westminster. In due course, some of them could be "released" back to the devolved legislatures. The Scottish and Welsh governments objected that this was a major recentralization and that indicated that they could not give legislative consent under the Sewel Convention. At the time of writing, this was subject to a constitutional stand-off between the two levels. In law, the UK Government could proceed without consent but that would represent a step back from the federalizing understandings of devolution incorporated into the most recent Scotland (2016) and Wales (2017) Acts.

Another potential for recentralization concerns the funding of these competences. In principle, the devolved administrations currently receive a block grant from the central government, under the Barnett Formula. This gives each devolved body the same budget as in the previous spending round, raised or lowered according to the population-adjusted change in the corresponding allocations for England. This is supplemented by devolved taxation in Scotland (and in future to some extent in Wales and Northern Ireland). Barnett does not include European agriculture and research money.¹⁹ Currently, all three devolved territories gain more than England

15. ID., *Legislating for the United Kingdom's withdrawal from the European Union*, 2017.

16. *Ibid.*

17. Michael RUSSELL, *Letter from Michael Russell (Scottish Minister for Brexit negotiations) to Joan McAlpine (Convenor of Scottish Parliament European Committee)*, 4 May, 2017, Edinburgh: Scottish Parliament, 2017.

18. WELSH GOVERNMENT, *Securing Wales' Future*, Cardiff: Welsh Government, 2017; ID., *Brexit and Devolution*, Cardiff: Welsh Government, 2017.

19. The allocation of Cohesion and Structural funds is highly obscure and controversial.

in agricultural funding. Overall, Wales and Northern Ireland are net beneficiaries from EU funding, while Scotland is a net contributor.

Table 2
EU funding: CAP (Common Agricultural Policy), Structural Funds and Research
(in percentage)

	UK CAP receipts	Structural Funds 2014-2020	UK funding from EU research area	UK population
England	63	63.8		84
Scotland	18	8.2	10.4	8.2
Wales	9	22.2		4.7
Northern Ireland	10	5.6		2.7

Source: Alan GREER, *The European Referendum, Agriculture, Food and Rural Policy Issues*, Royal Society of Edinburgh, 2016; SPERI, "UK Regions and European Structural and Investment Funds", *British Political Economy*, 24, University of Sheffield, 2016.

There are several options for distributing these repatriated funds. There could be a UK-wide formula, which would imply a UK-wide policy framework and criteria. This could imply a recentralization unless, as argued by the Welsh Government, policy were to be made by negotiation among the various governments. Funding could be distributed on a historic basis, which would entrench the advantage of the devolved governments, given their larger spending on agriculture. This would provoke objections in England. There could be a distribution on a per capita basis, which would not take account of needs and which would favour England. Finally the money could be put into the block grant and adjusted according to the Barnett Formula, which would imply transferring existing funds and adjusting thereafter on a per capita basis.

VI. Disintegration

The second scenario is disintegration as the UK falls apart, with some parts remaining in the EU and others not. Immediately after the vote, the Scottish First Minister declared that another Scottish independence referendum was likely in order to keep Scotland in the EU. In March 2017 the Scottish Parliament, with a pro-independence majority consisting of the Scottish National Party (SNP) and Greens, passed a resolution supporting another referendum. The reasoning was that in 2014 the unionist side had threatened that an independent Scotland would not be allowed into the EU so that the only way to ensure continuing EU membership was to vote against independence.²⁰ The pro-independence side argued that the real danger

20. Michael KEATING, "The European Question", in ID. (ed.), *Debating Scotland. Issues of Independence and Union in the 2014 Referendum*, Oxford: Oxford University Press, 2017.

was that Scotland could be dragged out the EU against its will by an English majority; this is exactly what happened. In their manifesto for the 2016 Scottish elections the SNP indicated that they would not hold another referendum unless there was a material change of circumstances such as Scotland being taken out of Europe against its will. The unionist response was that the 2014 referendum result was still binding.

Scotland had indeed voted to remain in the United Kingdom. In 2016, it voted by a larger margin to remain in the EU, seeing no inconsistency in the two unions. The Brexit result meant that its will would not prevail and it could not stay in both unions. Independence in Europe, however, does not provide a simple answer. Since the mid-1980s the SNP have argued for independence-in-Europe as a way of softening the impact of secession, avoiding hard borders and providing an external support system for a small independent nation; other European nationalist movements make the same argument. The argument appears logical but it has never convinced the electors of the connection. Surveys show no clear connection between being in favour of Europe and supporting Scottish independence. Indeed the strongest nationalists in Scotland (whether Scottish or British nationalists) tend to be rather Eurosceptic. It is in the middle of both the nationalist-unionist and the Europhile-Eurosceptic axes that the association is strongest.²¹ These are the people who are content with multi-level government and shared sovereignty. In the Brexit referendum, around 30% of SNP voters and independence supporters voted for Leave and, without their support, winning an independence referendum will be difficult. Surveys in the months after the referendum showed no significant increase in support for independence. Some No voters from 2014 had moved towards Yes in a future referendum, but an equal number had moved in the opposite direction.

A further difficulty is that the whole point of independence in Europe was that, with both Scotland and the United Kingdom inside the EU, there would be no hard border between them and no obstacle to trade. With Scotland in the EU and the UK outside, there would be a hard economic border. This is a vital matter, as Scotland does about four times as much trade with the rest of the UK as with the EU²⁷.

There was some debate at the time of the 2014 referendum about whether an independent Scotland would be allowed into the EU. José Manuel Barroso, then President of the European Commission, pronounced that it would be “difficult if not impossible”. There was, however, no legal basis for this and most academic observers agreed that as, under the Edinburgh Agreement, an independent Scotland would be recognized by the United Kingdom, there was no reason for any other state to refuse recognition.²² Given that it was a liberal democracy and market economy already meeting the *acquis communautaire*, there were no grounds for excluding it. The Spanish Foreign Minister even conceded that Spain would follow the UK line²³ and in 2017 his successor made the point explicit.²⁴ The difficulties,

21. ID., *The Independence of Scotland*, Oxford: Oxford University Press, 2009.

22. Michael KEATING, “The European Question”, *op. cit.*

23. *Ibid.*

24. ABC, 02-04-2017.

rather, hinge on the process of accession and whether Scotland would inherit the UK terms of membership. It is unlikely that the EU would simultaneously negotiate Brexit and Scottish accession but, if the latter had not been agreed by the time the UK leaves the EU, Scotland could be left in limbo.

Another possibility is that Scotland could opt for membership of the European Economic Area (EEA). In that case, it would be within the Single Market but able also to negotiate a free trade agreement with the United Kingdom. It would also be outside the Common Fisheries Policy, a contentious point in Scotland. On the other hand, negotiating EEA membership might be no less complex than getting into the EU and it would mean that Scotland, like Norway, would have to accept Single Market policies without having a role in making them.

Finally, the Scottish Government would require the consent of the UK Government in order to repeat the 2014 referendum. The UK Government response was not to rule out an independence referendum in Scotland but to declare that this is not the time. It thus once again side-stepped the issue of principle of whether Scotland has a right to self-determination while retaining control of the issue. The Scottish Government could perhaps organize its own referendum on a question that could be within the law but this would carry little conviction. The unionists could simply boycott the campaign and the vote, thus depriving it of legitimacy. In the event, the fall in support for the SNP at the 2017 UK General Election has removed the prospect of an imminent independence referendum.

The Northern Ireland agreement does contain a provision for a referendum, which can be arranged if the Secretary of State (representing the UK Government) considers that there is majority support for unification with the Republic of Ireland. Following the Brexit vote, Sinn Féin called for such a “border poll”. Surveys, however, show that such a vote would have little chance of success as even among Catholics there has not for several years been a majority in favour of Irish unity, given the alternative of power-sharing within Northern Ireland and the various cross-border institutions. The very call for a poll has merely exacerbated divisions between the two communities, already deepened by Brexit. Irish unification would alienate the unionist community as much as Brexit has alienated the nationalists, destroying the cross-community consensus on which the Northern Ireland settlement is based.

VII. Reconfiguration

The United Kingdom’s flexible and unwritten constitution has allowed it to develop into an asymmetrical, devolved state, with specific settlements for each of its constituent nations. Foundational issues about sovereignty were mostly avoided, while Europe provided a common framework and reference point. Brexit, with its assertion of national sovereignty, makes this more difficult as sovereignty issues are contested within the United Kingdom. Scotland and Northern Ireland have indicated, in various ways, their wish to remain within both the UK and the EU, a status that has become impossible. Immediately after the vote, there was the possibility of a “soft Brexit”, in which the UK would stay in the Single Market and the customs union. Pro-European forces in Scotland, Wales and Northern Ireland were prepared

to joint a pan-UK front to ensure this. The Conservative UK Government,²⁵ however, refused, declaring its intention to leave the Single Market. Labour at Westminster provided little resistance, voting to trigger Article 50, without gaining any concessions.

This leaves the option of differentiation for the devolved territories. There have been efforts to find a new middle ground, both between nationalism and unionism and between remaining in and leaving the EU, by allowing parts of the UK to remain in the EU at least for some purposes. Yet differentiation is more difficult in relation to EU membership than it is within the United Kingdom itself since the EU is based on law and on political compromises that are difficult to unwind.

The Scottish Government²⁶ proposed that, if the UK is going to leave the EU, including the Single Market, then Scotland would remain in the Single Market even as England and Wales left. This would give it a status analogous to that of the European Economic Area (EEA); indeed Scotland might formally become part of the EEA. As with the EEA, agriculture and fisheries would be excluded. If the UK were to leave the EU customs union (as it has declared it will), Scotland would also leave, remaining in a customs union with the UK. This would allow it to avoid tariffs and rules of origin on trade in goods between Scotland and the rest of the UK and thus obviate the need for a physical border. There would be full access to the Single Market in services and provision for the free movement of workers between Scotland and the EU-27. All parties in the Scottish Parliament favour free movement and there is a broad consensus in favour of immigration, in contrast to England. Scotland would participate in European social provisions, academic exchange and research and in aspects of EU Justice and Home Affairs policies.

These proposals are legally and technically feasible, although they do pose challenges. Being in a customs union with the UK and a Single Market with the EU could be complex. Retaining a customs union with the UK could remove the need for physical checks on goods traded between Scotland and England. There would, however need to be rules governing the treatment of goods entering the UK from EU countries, depending on whether they were destined for Scotland or for England and Wales (we leave Northern Ireland aside here as it too might have a differentiated settlement). The Scottish Government concedes that there would have to be certification as to the final point of sale of such goods. There would also have to be rules of origin if intermediate goods were passing through England and Wales en route for Scotland.

There would be a virtual border in services to the degree that EU and UK rules diverged after Brexit. This could be avoided by double compliance rules to ensure that Scottish services were compliant with both UK and EU regulations.

Free movement of workers between Scotland and the EU would require controls to ensure that EU workers did not come into Scotland in order to cross the border to work in England. This is not an insuperable problem since a similar mechanism

25. UK GOVERNMENT, *The United Kingdom's Exit from and New Partnership with the European Union*, *op. cit.*

26. SCOTTISH GOVERNMENT, *Scotland's Place in Europe*, Edinburgh: Scottish Government, 2016.

operates in the Schengen area for third-country nationals with the right to work in one member state but not in another. It would be monitored at the place of work rather than at the border. There would also have to be provisions to define a Scottish worker, for the purposes of rights to work in member states of the EEA.

In order for Scotland to remain compliant with Single Market regulations, the Scottish Parliament and Government would require new competences across a wide range of Single Market matters that are currently reserved to Westminster. In the event, the UK Government refused to entertain an territorial differentiation on Brexit.

Northern Ireland presents other issues because of the existence of the land border with the Republic of Ireland, an EU member state. The Democratic Unionist Party (DUP), as a unionist supporter of Brexit, does not want a differentiated settlement. Sinn Féin and the SDLP (Social Democratic and Labour Party, the moderate nationalist party) do. There is a broad commitment, shared by both unionists and nationalists and the British Government, that the border should remain open and the EU itself has recognized the sensitivity of the issue; unlike Scotland, Ireland has a member state to keep its concerns on the agenda. Yet, if the United Kingdom is outside the Single Market and customs union, a hard border is unavoidable. Depending on the nature of the eventual trade deal negotiated with the EU, there may be customs duties. There will certainly be a need to control product standards. Faced with this, the UK Government²⁷ has started to talk of a not returning to the “borders of the past” and of a “seamless frictionless” border. As far as we can tell, this seems to mean that there will not be a physical border, which would provide a visible provocation to nationalists and a target for dissident republicans (who continue to pose a threat). Customs posts could be located away from the border, clearance could be done on-line and vehicles could be checked by number-plate recognition systems. There would, nonetheless, be a border, albeit a virtual one.

There is also a concern about the free movement of people across the border. To some degree, this could be managed by reverting to the old Common Travel Area which, before EU membership, allowed citizens of the UK and the Republic of Ireland free rights to move, work and settle in each state. Such an arrangement could be negotiated bilaterally between the two states without EU involvement, as long as it only involved their own citizens. It would not provide free movement for other EU workers.

VIII. Negotiating Brexit

Following the referendum and the arrival of Theresa May as Prime Minister, the UK Government committed itself to complete withdrawal from the European Union, including the Single Market and the customs union.²⁸ It insisted that its mandate derived directly from the people via referendum and that starting the process did

27. UK GOVERNMENT, *The United Kingdom's Exit from and New Partnership with the European Union*, *op. cit.*; Theresa MAY, *A Global Britain*, *op. cit.*

28. *Ibid.*

not require parliamentary approval. It could, instead, be accomplished under the royal prerogative powers, which are in the hands of ministers. The Supreme Court ruled that Parliament must be consulted, but the Government has continued to minimize its role. It will have a vote on the final agreement but only with the power to accept or reject it, where a rejection will mean no agreement and the UK leaving the EU without a trade agreement, so falling back on World Trade Organization (WTO) rules. In calling an early general election for June 2017, the Prime Minister sought a mandate for Brexit on whatever terms she decides.

If the Westminster Parliament is largely excluded from the process, it is unlikely that the devolved legislatures will have any influence either. The Prime Minister has called for a “UK approach” to Brexit but this does not extend to joint decision-making. A Joint Ministerial Committee (European Negotiations) (JMC-EN) has been established, bringing together UK and devolved ministers to discuss issues of concern. This follows the precedent of the Joint Ministerial Committee (Europe), which meets regularly to discuss the UK line in EU negotiations where devolved competences are involved. In that case, the devolved ministers can join the UK delegation to the Council of the European Union. It is the UK Government, however, that takes the definitive decision on the line to be followed. The Joint Ministerial Committee (European Negotiations) is weaker still, as it does not take decisions but merely consults the devolved administrations. The devolved administrations have expressed frustration about its working as they have about the other JMC mechanisms.²⁹ The Welsh Government³⁰ has demanded a role in the negotiations, in the room for all matters and at the table for devolved matters. The Scottish Government has also demanded a role but has been more reticent on the details, perhaps because it does not want to commit to the end, namely Brexit.

The result of the 2017 UK General Election has altered many of these calculations. The SNP’s loss of 21 seats left it as still the largest party in Scotland but failed to provide the support needed to retain its demand for another independence referendum. This has now been postponed. Prime Minister Theresa May’s failure to win a majority has weakened her position and allowed supporters of a “soft Brexit” to reopen the question of exactly how the UK will leave the EU. May’s agreement on parliamentary support from the Democratic Unionist Party restricts what she can do in regard to Northern Ireland. The SNP has lost support but it has 35 seats in a parliament without a government majority, providing some leverage. The Scottish Conservatives, who went from one seat to 13, provide another potential for territorial politics to impact on the negotiations. This provides the potential for a broader coalition of forces favouring a soft Brexit. In turn, the softer the form of Brexit finally adopted, the easier it will be to accommodate demands in Scotland, Northern Ireland and Wales (including the single market, migration and the Irish border) without disrupting the internal integrity of the UK itself. On the other hand, a Brexit that left

29. NATIONAL ASSEMBLY FOR WALES, EXTERNAL AFFAIRS AND ADDITIONAL LEGISLATION COMMITTEE, *Implications for Wales of leaving the European Union or Wales of leaving the European Union*, 2017; THE WELSH GOVERNMENT, *Brexit and Devolution*, *op. cit.*

30. *Ibid.*

the UK largely inside the Single Market and the customs union would also make a future Scottish independence prospectus more realistic.

IX. Whither the UK Constitution?

The constitution of the United Kingdom has historically been flexible and capable of adaptation to new needs, based on the concept of parliamentary sovereignty. At the same time, it was managed through constitutional conventions, which limited power and imposed some binding rules. Over recent decades, it has been changed so as to write more of it down and to disperse power away from the centre. Entry into the European Union (as it now is) curtailed absolute parliamentary sovereignty, however much UK politicians resisted this implication. Incorporation of the European Convention on Human Rights (ECHR) into UK law was another radical change. Initially this applied only to the devolved territories, where it is directly applicable. Under the Human Rights Act of 1998, however, it extended to all matters, with the UK courts able to apply it. There was a reservation to the effect that the UK Parliament had to agree before judgments could change UK laws but this did nevertheless represent a modification of parliamentary sovereignty as usually understood. Devolution represented a further curtailment of the power of the centre. It did appear that not only was more of the constitution being written down but that the conventions that underpinned it were evolving.

All of this has now been called into question. Brexit is presented as a return to the sovereign, unitary state. There are voices in the Conservative Party calling for a repeal of the Human Rights Act and even withdrawal from the ECHR. The Supreme Court has indicated that the Sewel Convention is not binding in any way. In describing it as a “political” convention, indeed, the Court implied that it did not even have the status of other conventions which underpin the system. In this atmosphere, claims about the nature of the constitution and its conventions have proliferated. Brexit supporters have insisted that the referendum of 2016 is binding on Parliament, even though it was explicitly advisory. The UK Government interprets the devolution settlement on a hierarchical way, as lending powers down, in contrast to the quasi-federal reading in the devolved territories, who base their status on inherent rights and the devolution referendums. Scottish nationalists claim the right to hold another independence referendum while the UK Government neither agrees nor disagrees, retreating to arguments about the timing.

Constitutional reformers in the United Kingdom have for some time been calling for a written constitution, to be produced by a citizens’ convention. This would seek shared norms of constitutional order, foundational principles, and institutions to delimit power relations among the central institutions and between centre and periphery. Yet the shared norms are just not there. The United Kingdom does not have a unitary *demos*, on which to base authority. There is no shared *telos*, as to where it should go. In these circumstances, a citizens’ convention could only expose fundamental disagreement as to the basis of political authority. We are currently experiencing a period of constitutional debate and change without shared norms, shared legal understandings or even clear procedures to resolve constitutional differences.

Our new research project will examine these moves and arguments over the coming years and the way in which Brexit is changing the UK's own constitution, including its relationship with the Republic of Ireland. The UK is already a unique form of constitutional order, a post-sovereign polity³¹ that does not fit well into the normal models of political order. As it differentiates, not only in relation to its internal constitutional order, but also in the relationship of both the state and its constituent parts to Europe, it becomes even more interesting as an example of rescaling and adaptation to a multiscalar world.

■ L'auteur

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- *Debating Scotland*, Oxford : Oxford University Press, 2017 ;
- *Rescaling the European State*, Oxford : Oxford University Press, 2013.

31. Michael KEATING, *Plurinational Democracy. Stateless Nations in a Post-Sovereignty Era*, *op. cit.*