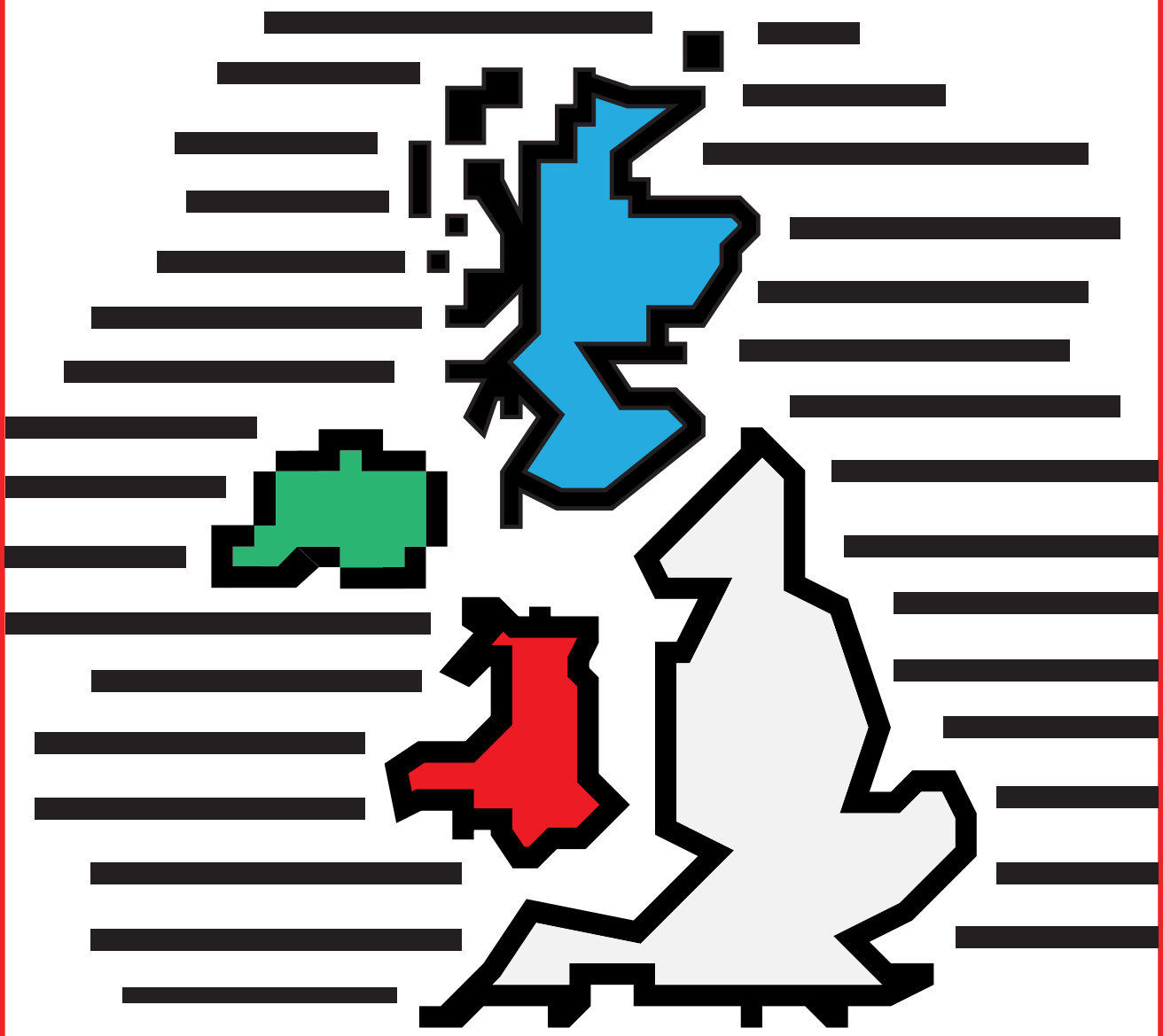


Brexit and Devolution: A New UK Settlement or the Break-Up of Britain?



by David Gow

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INTRODUCTION

The United Kingdom has no written (codified) constitution. Its political structure has evolved through a series of significant events, often marked by legal documents, from Magna Carta¹ in 1215 via the Bill of Rights of 1689², the Act of Union between England and Scotland of 1707, the Great Reform Act of 1832 abolishing 60 “rotten boroughs” and the Fourth Reform Act of 1918 giving women the right to vote through to the 1972 European Communities Act and the 1998 Acts devolving powers to Scotland, Northern Ireland and Wales.

A common thread of this process is the slow, gradual and often reluctant cession of power from the centre, whether absolute monarch or elected government, to the people and its representatives. However, sovereignty is not of the popular variety common in mainland Europe but “the Queen in Parliament.” And, in recent years, the power relations among the three arms of the UK state – executive, legislature and judiciary – have shifted in favour of the ruling cabinet despite popular referendums and devolution.

The government in power is, arguably, less constrained in the exercise of its authority by the 650 MPs than by the Supreme Court and other judges. The current 782 unelected peers in the House of Lords may, as in the series of votes amending the EU Withdrawal Bill in April and May 2018, challenge the government and House of Commons. But, ultimately, they cannot frustrate their will under a convention³ that the Lords cannot oppose a measure set out as an election manifesto pledge by the governing party.

Equally, the devolved parliaments and governments have limited scope for challenging the executive, as we shall see below. Devolution is not federalism. It is about enabling self-government in the three nations/regions. But, under this British form of subsidiarity, the UK Parliament is sovereign in law and the UK government retains “reserved” powers over such vital policy areas as the constitution, defence and security, foreign affairs, macro-economics, immigration and trade. Further, the three devolved legislatures have differing powers over their own policy areas. These reflect, in Scotland, the push for independence; in Wales, the absence of a separate legal system; and, in Northern Ireland, the special peace settlement (Good Friday Agreement) between the unionist and nationalist communities. There is no English devolution as such. This political patchwork provides the context for the unfolding impact of Brexit upon devolution.

BREXIT AFTER TWO DECADES OF DEVOLUTION

The likelihood that the United Kingdom will leave the European Union formally in late March 2019 after the pro-Brexit vote of 23 June 2016 has put the 20-year-old devolution settlement between the British government (Westminster) and Scotland, Wales and Northern Ireland under severe strain. Scotland and Northern Ireland voted decisively but for different reasons to Remain while Wales voted to Leave in the Brexit referendum. England, without any devolved government, voted substantially to Leave. Indeed, for the three smaller nations that, with her, make up the UK the Brexit vote was essentially and primarily an inchoate expression of Englishness rather than a sustained effort to “take back control.”

¹ See here <https://www.bl.uk/magna-carta/articles/magna-carta-an-introduction>

² Establishing frequent parliaments, free elections, parliamentary privilege <https://www.parliament.uk/about/living-heritage/evolutionofparliament/parliamentaryauthority/revolution/collections1/collections-glorious-revolution/billofrights/>

³ The Salisbury Convention adopted during the 1945-1951 Labour government See: <https://www.parliament.uk/site-information/glossary/salisbury-doctrine/>

The referendum result, indeed, reflected substantial differences of identity within the so-called unitary UK state and, what's more, underlined significant political clashes among its constituent parts. These have been heightened in the absence of any agreed strategy for dealing with the EU-27 post-Brexit, with a protracted and continuing dispute between the Scottish and Welsh governments and Westminster over the repatriation of powers from Brussels and their subsequent devolution to Edinburgh, Cardiff and Belfast. Political and identity differences are set to deepen in the months and years ahead.

The Brexit vote and pending EU withdrawal have exposed further fissures in the UK's unwritten constitution and political structures. The UK is, unlike Germany, not a federation/federal union though increasingly politicians and policy experts talk about the desirability or, indeed, feasibility of federalism. Its political system has been rightly described as increasingly messy, informal, strained, and fragmented within an ever-looser union.

Decentralisation or devolution of policy-making/power in the UK has always been a reactive, sometimes panicky response to events and developments such as the rise of the Scottish National Party rather than a concerted process subject to an agreed master-plan. The three devolved governments, accordingly, have different degrees of power. Brexit has already intensified those differences while the Conservative government's clumsy and insensitive handling of it will make matters worse. Unless the political class puts aside such differences and works upon and to an agreed redistribution of powers within the UK, including for England and its regions, the present unitary state is almost certain to collapse.

This paper examines how this may come about. It describes the recent history of the UK's current political structure, including the devolution settlement; it discusses Brexit's actual and likely impact upon power-sharing in the UK against a background of the referendum's emphasis on "taking back control" and national sovereignty; and it puts forward various outcomes for the post-Brexit structure of the UK, with a set of conclusions.

The author will focus on Scotland and Wales, especially the former, rather than Northern Ireland because the power-sharing executive and assembly in the latter remain suspended, with no sign of their being restored since suspension in January 2017. Inevitably, too, some of the analysis and conclusions may end up being overtaken by events as the Brexit process itself is far from settled.

UK POWER STRUCTURE

"The establishment of the (Scottish) Parliament (on 1 July 1999) was indeed a historic watershed, even if ultimate sovereignty was retained by Westminster. The nature of the Union of England and Scotland framed in 1707 had now changed irrevocably,"⁴ wrote Tom Devine, Scotland's leading historian. In fact, the historic caesura in relations has not proved to be as decisive as this comment would suggest. As Prof Michael Keating, director of the Centre on Constitutional Change, has suggested, Scotland does indeed have another view of the UK constitution, both legally and politically. "From this perspective, the UK is an asymmetrical, pluri-national union without a single demos (people) or shared telos (end-point or purpose); the union is continuously negotiated and subject to multiple interpretations across its component parts."⁵ The three smaller nations/regions in the UK have won different degrees of devolution in terms of policy-making and, arguably, power over the past 20 years. But their devolved

⁴ Independence or Union. Scotland's Past and Scotland's Present. T.M.Devine, Allen Lane, 2016 P205

⁵ The UK in a Changing Europe, 13 March 2018, <http://ukandeu.ac.uk/brexit-shaking-up-the-scottish-constitutional-settlement/>

parliaments and assemblies do not enjoy sovereignty or command and control. That resides at Westminster and will continue to do so up to and beyond Brexit.

This is made plain by constitutional experts such as Dr Mark Elliott, Reader in Public Law at Cambridge University: "Authority has not been transferred from London to Belfast, Cardiff and Edinburgh. Rather, it has merely... been shared on a non-exclusive basis. Devolved legislatures enjoy law-making autonomy, free from Westminster's interference, not because Westminster cannot unilaterally intervene in devolved affairs, but because it does not."⁶ Westminster retains the right to abolish the devolved assemblies if it so wishes. This was reaffirmed by the UK Supreme Court in its ruling on the Article 50 case brought by Gina Miller and on the applicability of the Sewel Convention (under which Westminster does not 'normally' legislate on devolved matters without Holyrood's consent). Henry McLeish, a former Scottish First Minister, put it well: "The 1997 White Paper and three Scotland Acts have given Scotland power over certain policies but no significant power over politics, governance and the constitution, where all roads still lead to Westminster. Power devolved is not power shared."⁷

This underlines the very partial and evolving nature of the devolution process⁸. The UK remains a very centralised state and this inbuilt tendency to concentrate power in Westminster and Whitehall reached an apogee under Margaret Thatcher as prime minister between 1979 and 1990. It continued under prolonged Conservative rule until 1997 when Labour returned to government under Tony Blair. Blair was committed to legislating for devolved assemblies in Scotland and Wales – following an attempt to introduce deliberative bodies in 1978 that failed to win approval in referenda, narrowly in Scotland and overwhelmingly (4-1) in Wales. Thatcher had enraged Scottish public opinion by piloting the hated "poll tax" north of the border as "alien" to Scotland's proclaimed egalitarian culture⁹. This may have heightened a sense of separate Scottish politics and identity but the main beneficiaries were Labour, not the SNP. And Labour, in the words of George Robertson, then shadow secretary of state for Scotland, sought to kill off Scottish nationalism via devolution "stone dead."¹⁰ From the mid-1970s onwards Scottish Labour's embrace of devolution was by and large tactical, not principled: it was to "do down the Nats" and cement its hegemony in Scotland. Similarly, though under considerably less pressure, Welsh Labour sought to head off any advance by the nationalists of Plaid Cymru with its own but much less extensive devolution proposals.

The 1998 Scotland Act won 74.3 per cent backing while 63.5 per cent of Scots also endorsed tax-raising powers for the proposed Scottish parliament in the 11 September referendum. A bare majority of Welsh voters (50.3 per cent or 6721 electors out of 1.1 million) voted to establish a Senedd in Cardiff. The last two decades have witnessed two dominant trends, again most notably in Scotland: the gradual extension of the devolved powers and the cementation of very distinct political systems and cultures in the four constituent parts of the UK. Here it is not just a question of elections to Holyrood (seat of the Scottish Parliament) Cardiff (home of the Welsh Parliament) and Stormont (seat of the Northern Ireland Assembly) being held under proportional representation rather than Westminster's first-past-the-post system. The electoral system chosen was designed to ensure that, for example, the Scottish Government be composed of a coalition of parties in an effort to promote consensus. But it is now in the hands of the SNP for a third term. Its policy orientations, and interestingly, those of Welsh

⁶ In LSE Constitution 8 January 2014 <http://blogs.lse.ac.uk/constitutionuk/2014/01/08/devolution-federalism-and-a-new-constitution-for-the-uk/>

⁷ The National, 4 April 2017, http://www.thenational.scot/news/15200687:Henry_McLeish__The_trouble_with_UK_federalism_would_be_overcoming_the_absolute_sovereignty_of_Westminster/

⁸ See UK Government guidance <https://www.gov.uk/guidance/devolution-of-powers-to-scotland-wales-and-northern-ireland>

⁹ Devine op cit. P180-181

¹⁰ See here: https://en.wikipedia.org/wiki/George_Robertson,_Baron_Robertson_of_Port_Ellen

Labour are the opposite to those of, first, David Cameron and, now, Theresa May and the Conservatives in Westminster. The Scottish Government seeks to enact anti-austerity policies and promote income redistribution as well as to encourage immigration and is avowedly social democratic. In contrast, the Conservatives are wedded to neo-liberal economic policies, favour privatisation and endorse workfare. Critically, the SNP is for staying in the EU single market and customs union while the UK cabinet is increasingly drawn towards a hard Brexit outside both institutions. These divergences prompted Akash Paun and Robyn Munro of the Institute for Government to argue: “Such jagged edges seem likely to increase in the Scottish case as a result of the Smith Commission agreement (for instance around management of the welfare and tax systems).”¹¹

The Smith Commission was set up after the 2014 Scottish referendum that rejected independence. Its report and the subsequent Scotland Act of 2016 have significantly extended the Scottish Government’s powers, including over some taxes and social security benefits. The latest Scottish budget has, indeed, enshrined a 1 per cent rise in income tax bands to help pursue the SNP’s anti-poverty programme while the government now has control over half the VAT raised in Scotland. This is a far cry from the original settlement that “reserved” powers over foreign policy, defence, macro-economic policy, social security, abortion and broadcasting for Westminster. The UK continues to hold sway over corporation, capital gains and other taxes. Similarly, the Welsh Parliament that initially held only deliberative powers has now the ability to make its own laws – except in those “reserved” areas of policy outlined above – and this has expanded following the Silk Commission (2012-2014)¹² under the Wales Bill of 2017. Northern Ireland can, given its proximity to the low-tax Irish Republic, set its own rate of corporation tax (theoretically). Devolution now amounts to more than the power to ban smoking in public places or impose levies on plastic bags. It even goes beyond such key decisions as whether to charge tuition fees in higher education institutions or part-privatise the National Health Service (as in England). It has become the process through which the UK’s constituent parts challenge and clash with each other politically and ideologically rather than work together for the collective good. It contains the seeds of destruction for the UK’s political order.

And nowhere is that more obvious than the bitter constitutional conflict over Brexit and EU law as we shall consider in the next section. The devolved parliaments are, like Westminster, bound by EU law (and *acquis*) with, for example, the 1998 Scotland Act laying down that the Scottish Parliament is forbidden from legislating contrary to it. (As the Scotch Whisky Association argued in its abortive case against minimum alcohol pricing that was introduced finally on May 1 2018.) The Scottish Government and Members of the Scottish Parliament (MSPs) are also bound by the European Convention on Human Rights and subscribe to the provisions of the EU Charter of Fundamental Rights. What’s more, Brexit has radically altered the subsidiarity context within which devolution sits” as an Institute for Government report puts it, “The devolution settlements agreed in the late 1990s were predicated on the UK’s membership of the EU.”¹³ First, it has removed the competence of devolved ministers to implement EU law. Second and, more critically, it will or should return the bulk of policy responsibilities now residing in Brussels to Westminster with very few going to the devolved assemblies. If Scotland, Wales and Northern Ireland are no longer part of the EU, they will lose or could lose significant control over their own affairs by handing it back, involuntarily or otherwise, to the centralised UK state.

¹¹ In *Governing in an ever looser Union*, Institute for Government (2016), <https://www.instituteforgovernment.org.uk/sites/default/files/publications/Governing%20in%20an%20ever%20looser%20union%20-%20final.pdf>

¹² See National Archives 5 June 2014 <http://webarchive.nationalarchives.gov.uk/20140605075122/http://commissionon-devolutioninwales.independent.gov.uk/>

¹³ Jack, Owen, Paun, Kellam *Devolution after Brexit* IfG London 2018

TAKING BACK CONTROL?

A key and winning formula of the Vote Leave campaign was the notion that outside the EU the UK could regain its sovereignty – “take back control” – over policy areas such as free movement of labour, immigration and trade. But the post-referendum political process suggests that not only is that harder than Leave protagonists said at the time but that Brexit has been seized upon by the Conservative government – often with the connivance of Labour – to extend and buttress executive power. Parliamentary sovereignty is a shibboleth in Britain. In 2018 it is only because the May government is a minority administration, held in place by the support of the Northern Irish Democratic Unionist Party, that it pays even obeisance to that convention.

The UK Cabinet has been forced, very reluctantly, to allow votes on key aspects of legislation implementing Brexit in the run-up to March 2019. What concerns us here is that it has paid little more than lip-service to the 20-year-old devolution settlement. For instance, the joint ministerial committee (JMC) at which the four nations’ political leaders are meant to confer *inter alia* upon the modalities of leaving the EU did not meet at summit level for almost a year. Devolved government ministers have been side-lined, their letters gone unanswered. The Cabinet also promised to amend its EU Withdrawal Bill (Clause 11 regarding devolution or EU law as it affects “unreserved” policy matters such as justice and home affairs, agriculture, fisheries, environment) but failed to do so. This, in turn, prompted the SNP-run Scottish and Labour-run Welsh governments to issue, instead, Continuity Bills designed “to preserve devolved competences from appropriation by Westminster in direct challenge to the EU Withdrawal Bill (EUWB), thereby moving the UK a step closer to a major constitutional clash. Unless changes are made to the EUWB, devolved consent will be withheld and devolved Continuity Bills may be adopted,” as Sionaidh Douglas-Scott, Anniversary Chair in Law, Queen Mary University of London, explained at the time.¹⁴

This *démarche* was unusual to say the least. First, in the Scottish case, it was ruled *ultra vires* (beyond its powers) by the Parliament’s presiding officer. Second, the Scottish Government has sought via this tactic to add to its powers. Third, and most critically and dramatically, it exposed the huge gulf that had opened up between Westminster/the UK and Edinburgh/Cardiff. Essentially, neither side trusted the other to share the restored sovereignty due to flow back from Brussels. Nicola Sturgeon and Carwyn Jones, Scottish and Welsh first ministers, denounced a “naked power grab, an attack on the founding principles of devolution...”¹⁵ May insisted that the UK government sincerely intended handing even more powers to Edinburgh and Cardiff once Brexit was complete. Inevitably, the UK government went to the Supreme Court to try and stop the Scottish and Welsh bills – approved by the respective parliaments – from going ahead.

In essence, this constitutional wrangle over whether the “consent” of the devolved governments is required for changes to the legislation for which they are responsible is proxy for a struggle for post-Brexit power. The UK government is determined to retain the seamless unity of the UK’s single market and to prevent policy and legislative divergences among the nations/regions of the country from becoming overwhelming by establishing “common frameworks.” These four categories of (returning) EU powers were set out in a framework analysis:

¹⁴ Prospect magazine, 6 March 2018, <https://www.prospectmagazine.co.uk/politics/does-brexit-risk-destabilising-the-devolution-settlement>

¹⁵ Joint statement of 13 July 2017: <https://news.gov.scot/news/eu-withdrawal-bill>

- “(a) policy areas where powers can be released to devolved authorities outright;
- (b) policy areas where “non-legislative common frameworks” may be required;
- (c) policy areas where “legislative common frameworks” may be required;
- (d) policy areas it believes are reserved but which are subject to ongoing discussion with devolved authorities”

Westminster also wishes to exercise sole authority over the negotiation and conclusion of trade agreements. This crucial if it is to reach agreements with, say, the United States that would allow the infamous chlorinated chickens to enter duty-free against the will of the Scots or with Australia and New Zealand over agricultural products to the detriment of local sheep farmers. To do so, it wishes to control “retained” EU laws and prevent them being modified by Holyrood, Cardiff and Stormont even though these are within their devolved portfolio of powers. As Graham Cowie explained in a briefing paper for the House of Commons Library¹⁶, the Scottish and Welsh governments had four main objections to the so-called EUWB:

- ‘(a) it imposes a new restriction on devolved competence “not to modify” retained EU law;
- (b) it allows UK Ministers to modify the devolution statutes using delegated powers without devolved consent;
- (c) it allows UK Ministers to change the law in devolved areas using delegated powers without devolved consent; and
- (d) it requires certain delegated powers of devolved Ministers only to be used with the consent of UK Ministers.’

And, of course, the UK government said the repatriated powers would almost entirely be transferred in due course to the devolved governments, enhancing their competences. But Scottish ministers simply do not trust them in this regard. They recognise that shared frameworks may well be necessary but insist they should be negotiated, not imposed. Eventually, the Scots were left isolated when the Welsh Government reached a settlement of this contentious issue by agreeing to accept so-called sunset clauses that would enable the UK cabinet to retain these powers until five years after Brexit takes place.¹⁷ Peers endorsed the UK Government’s stance on May 2 2018. The SNP, backed by Scottish Labour, the Liberal Democrats and Greens at Holyrood, held out, with the matter due to be decided (at the time of writing) by the Supreme Court.

At the same time, the Scottish Government has clearly indicated that not only would it like Scotland to remain within the EU single market and customs union but also that it would ideally take on the power to determine, say, immigration policy given that Scottish interests are for more migrant labour rather than less. The UK government sees this as “creeping devolution” and rejects it out of hand, seeing it as straying into “reserved” areas such as foreign affairs. In fact, as Prof Alan Page, Professor of Public Law at Dundee University, told the Scottish Parliament’s European and External Relations Committee in a briefing paper¹⁸: “most existing EU competences are reserved to the UK Parliament. If we ask why that should be the case, the answer is to be found in the fact that the devolution settlement, like the European Union, is based on a ‘single market’ in goods, persons, services and capital. There is therefore a considerable degree of overlap between EU competences and reserved matters. The UK Parliament would thus acquire the majority of the policy responsibilities that would fall to the

¹⁶ Legislative consent and Brexit: devolved governments’ objections to the EUW Bill House of Commons Library 15 April 2018 <https://commonslibrary.parliament.uk/parliament-and-elections/devolution/legislative-consent-and-brexit-devolved-governments-objections-to-the-euw-bill/>

¹⁷ See here: <https://www.walesonline.co.uk/news/politics/welsh-government-agrees-uks-revised-14571337>

¹⁸ Page The implications of EU withdrawal for the devolution settlement http://www.parliament.scot/S5_European/General%20Documents/The_implications_of_EU_withdrawal_for_the_devolution_settlement.pdf

UK following withdrawal from the EU, including those in respect of the free movement of goods, persons, services and capital, and the negotiation and conclusion of trade agreements with non-EU countries.” Prof Page opined that some agreed “adjustments” might have to be made to the devolution settlement to prevent policy and legislative divergences emerging. But he also went on to warn: “The situation could thus arise in which the UK legislated extensively in areas devolved to Scotland without seeking the consent of the Scottish Parliament as there would be no requirement of its consent in relation to subordinate legislation altering the effects of EU law in the devolved areas. In my view, this represents a significant potential gap in the framework of Scottish parliamentary control over UK law making in the devolved areas, which the Scottish Parliament should be alert to the need to close should UK Ministers be given the power to revise EU law in the devolved areas.”

This unresolved dispute illustrates graphically how Brexit has already caused severe stress within the UK’s unitary state and has the potential to cause a constitutional crisis. If the Sewel convention – written into the Scotland Act of 2016 – is over-ridden and/or has little more than symbolic value in demanding the consent of the devolved legislatures for any changes in areas under their “sovereignty” then withdrawing from the EU will indeed amount to an executive power grab. In the next section we examine the possible outcomes and, crucially, the question whether the UK can remain intact or is likely to break apart.

BREAK-UP OR NEW SETTLEMENT

The current decade has so far seen three UK general elections (2010, 2015 and 2017) and three devolution-related referenda (Wales on the law-making powers of the National Assembly for Wales in 2011, Scotland on independence in 2014 and the UK on EU membership in 2016). The results, especially the outcome of the last two referenda, have set in train a spate of discussions about the future of the UK and its four nations/regions but no Big Idea commanding significant traction has emerged so far. And even the proposed changes and/or reforms have often flared into life only to be forgotten soon afterwards. Or simply excised derisively from the public debate on grounds of lack of feasibility or even fancifulness.

In 2014, after the Scots voted 55-45 per cent to reject independence in the 18 September referendum, the then UK prime minister, David Cameron, began talking of English devolution. In April 2015 he set out his “Carlisle principles” whereby the rest of the UK would not “lose out” through enhanced Scottish devolution¹⁹ and, six months later, introduced the notion of EVEL (English Votes for English Laws) as a definitive answer to the so-called (and 40-year-old) West Lothian (England) question on why Scots, Welsh and Northern Irish MPs can and do vote in the Commons on matters affecting only England. Nothing has come of these. English devolution amounts to a handful of mayors and/or police commissioners plus the London Assembly, which is a substantial political player, admittedly.

Similarly, in 2014, just prior to the Scottish independence referendum, the Conservative, Labour and Liberal Democrat leaders issued the joint statement known as “The Vow” promising Scotland even greater powers within the UK that SNP politicians and supporters rather arbitrarily built up as home rule (a greater degree of self-government or quasi-independence for one region within the UK) or even federalism (a fully-fledged federal union on German lines with, notably, self-government for England and/or the English regions).²⁰ Cameron then set up the all-party Smith Commission that delivered a series of (extensive but contested)

¹⁹ See The Herald 20 April 2015 http://www.heraldscotland.com/news/13210494.David_Cameron__New__Carlisle__principle_to_ensure_other_parts_of_the_UK_do_not__lose_out__by_Scottish_devolution/

²⁰ See BBC, 1 October 2014 <http://www.bbc.co.uk/news/uk-scotland-29443603>

proposals, including on income tax, for enacting The Vow that were eventually put into the Scotland Act of 2016²¹.

The further powers granted to the Scottish government and parliament did not, however, placate the SNP that had been demanding full fiscal autonomy. Its leader, Nicola Sturgeon, as first minister, gave notice in March 2017 she would call a second referendum on independence – only to put that prospect on hold, virtually indefinitely, when it became obvious that there had been no post-Brexit pro-independence “bounce” in opinion polls. There is now a ferocious debate inside the ruling SNP and its leadership over the wisdom, nay viability, of staging what is known as #indyref2 – this year, next year, 2020, 2021... It goes so far unresolved because questions of identity remain deeply divisive both within Scotland and the same holds true for England as well as both Wales and Northern Ireland. More than a third (37-38 percent) of people who voted SNP in the 2016 Scottish Parliament elections then voted Leave little more than a month later²² while the party lost 21 MPs, including ex-leader Alex Salmond, architect of the independence referendum, in the 2017 general election – around half of them to the pro-unionist Conservatives who won over one in five SNP voters. Sturgeon, an even more cautious political leader now, and her party increasingly look all at sea over both Brexit and independence. Indeed, an irony of the current impasse is that the SNP – that used to see devolution as inimical to the supreme goal of independence – is now its fiercest champion.

Equally, the English population, by far the biggest within the UK (54 million out of 66.5m), remains sharply and deeply divided. Crucially, surveys show that, while “Remainers” feel predominantly British, 85% of those who identified as ‘English, not British’ were Leavers, as were fully two thirds of people who feel ‘More English than British’.²³ Englishness, rather than “taking back control” or “sovereignty,” may well have been the deciding factor in the outcome of the Brexit referendum. Yet the English have no separate political institution – outside Westminster or the monarchy – with which to identify. Efforts to promote a regional identity/assembly in Yorkshire (population 5.3 million or almost the same as Scotland’s 5.4 million) founder, while a 2004 referendum on a North-east of England assembly produced a 2-1 vote against in a 47.8 per cent turnout²⁴. This all suggests that, outside London, the English, notably in the shire counties, have no wish to tamper with the current constitutional settlement. They are also likely to be increasingly indifferent to Northern Ireland opting for a united, 32-county Ireland²⁵ or even Scottish independence (though polls suggest more than 50 per cent oppose it and only 25 per cent back it)²⁶.

There is, therefore, little or no public appetite (yet) for grand schemes such as former prime minister Gordon Brown’s on-off proposals for a federal UK, including an elected senate representing – in the manner of the German Bundesrat – the English regions and the three devolved governments to replace the House of Lords²⁷. “I want to suggest today that there is now an overwhelming case for a UK-wide people’s constitutional convention, mandated with setting a roadmap towards a more federal constitution that empowers all of the nations and regions,” he told the Fabian Society in late 2016.²⁸ This has at least gained some support, with the Welsh Government and Carwyn Jones, first minister, enthusiastically endorsing a new

21 See here: <https://www.parliament.uk/smith-commission-inquiry> and here: <http://www.gov.scot/Topics/constitution/smith-commission>

22 British Election Study and Scottish Social Attitudes surveys cited by John Curtice in: <http://ukandeu.ac.uk/the-politics-of-brexit-in-scotland/>

23 In <http://ukandeu.ac.uk/wp-content/uploads/2018/03/Brexit-and-local-and-devolved-government-.pdf>

24 http://news.bbc.co.uk/1/hi/uk_politics/3984387.stm

25 https://www.huffingtonpost.co.uk/entry/northern-ireland_uk_5a4d0d92e4b0dfode8b06eaf

26 <http://whatscotlandthinks.org/questions/should-scotland-be-an-independent-country-english-welsh-views#line>

27 <https://www.independent.co.uk/news/uk/politics/gordon-brown-speech-third-option-scotland-brexit-nicola-sturgeon-independence-referendum-a7636431.html>

28 <http://gordonandsarahbrown.com/2016/11/gordon-brown-proposes-uk-peoples-constitutional-convention/>

Convention on the Future of the UK.²⁹ Similarly, the Institute for Government has called for “a comprehensive review of the way in which the relationship between the UK and its constituent nations is managed” including an overhaul of the Joint Ministerial Committee (JMC) with an annual plenary meeting.³⁰ A more sceptical attitude to a constitutional convention was expressed in a 2015 report from the Constitution Unit at UCL³¹ but its unionist editor, Robert Hazell, warned of “reckless” developments giving piecemeal devolution: “Their cumulative impact could radically change the nature of the political, economic and social unions which underpin the UK. A new balance may be struck, in a Union with a more coherent territorial constitution. Or without intending it, these changes could render the Union ungovernable, or lead to its break up as a state.”

What are the likelihoods? It is by no means certain that the May government will survive the Article 50 negotiations and emerge with a deal that satisfies not only the entire Conservative Party but also both houses of Parliament and, not least, the three devolved governments. May insists she is determined to preserve and strengthen the UK but the price for doing so will have to be, ideally, an agreed constitutional way forward. More likely is the usual muddling through except that, now, the stakes have been raised considerably higher. If the economic as well as political cost of Brexit proves as exacting and disruptive as commentators suggest – and all the evidence would suggest it will be – then more drastic moves such as Scottish independence, Irish unity and/or the break-up of Britain are on the cards within the next ten years.

CONCLUSION

In June 2016 a small majority of British voters opted to leave the EU as they were persuaded that they would thereby “take back control” and the UK would regain its “sovereignty”. But Brexit is already proving to be highly destabilising politically as well as socially and economically. To provide the country with greater political stability, Westminster and the three devolved governments should conclude a new constitutional settlement for pooling sovereignty within the UK, with fresh powers and competences given to Scotland, Wales and Northern Ireland to control their people’s destinies. Otherwise, it will only undermine the current devolution settlement and assume even greater central powers in the name of national sovereignty. The latter course will almost certainly spell the eventual end of the UK – not immediately but within a few years. ●

²⁹ <https://beta.gov.wales/sites/default/files/2017-06/170615-brexit%20and%20devolution%20%28en%29.pdf>

³⁰ <https://www.instituteforgovernment.org.uk/sites/default/files/publications/IFGJ6070-Devolution-After-Brexit-180413-FINAL-WEB.pdf>

³¹ <https://www.ucl.ac.uk/constitution-unit/publications/tabs/unit-publications/163.pdf/>

About David Gow

David Gow is Editor of Social Europe, Editor of *sceptical.scot* and former German Correspondent and European Business Editor of the *Guardian* newspaper.

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Friedrich-Ebert-Stiftung
44 Charlotte Street
London W1T 2NR
T: +44 (0)207 612 1900
E: info@fes-london.org
www.fes-london.org
[@FES_GB](https://twitter.com/FES_GB)

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Colophon

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