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Brexit as constitutional “shock” and its threat to the devolution settlement: reform or bust

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Abstract

The devolution settlement was not designed to withstand such a major shock as Brexit and, furthermore, Brexit has demonstrated key weaknesses in the devolution design (an argument that is even more fundamental for Northern Ireland). This would point to a logical conclusion: to rectify these problems either the devolution design needs to be fundamentally redrawn post- Brexit allowing a distinct Scottish voice to be heard and given force or independence as a solution.

The UK's decision to leave the EU as a result of the referendum of 23 June 2016 created a profound shock to the UK constitutional order. So much is obvious. This article examines its impact on the devolution settlement. It argues that the devolution settlement was not designed to withstand a shock of this magnitude and the referendum has demonstrated just how fragile that settlement is.¹ The referendum has also highlighted a seeming inability on the part of the UK Government to accept the logic of devolution despite the rhetoric of its statements on equality of esteem amongst the nations that make up the UK.

It is useful to recap the basic principles underlying the devolution settlement in relation to the UK's membership of the EU. Its design was based on the understanding that the UK was responsible for its international obligations as a Member State of the EU; hence relations with the EU were reserved matters. However, acting within the framework of EU law is central to the settlement in that devolved administrations are required to honour the obligations of EU law; hence the Scotland Act provides that an act of the Scottish Parliament is not law if it contravenes an EU obligation. The Scottish Parliament and Scottish Ministers have powers to implement EU obligations of the UK in devolved matters.² The devolved administrations have been involved in the development of a "UK line" on EU policy via the Joint Ministerial Committee and from time to time Scottish Ministers formed part of the ministerial team at the Council of Ministers where items of particular interest to Scotland, such as fisheries, were under discussion.

Within this constitutional design no consideration was given to the possibility that the UK might leave the EU. This is not surprising. The Labour Government under Tony Blair, which delivered devolution, was relatively pro-EU, even if historically the Labour Party has been divided "on Europe". It was the same government that ended the UK opt-out of the Social Chapter. And while bespoke opt-outs and arrangements have been concluded in relation to parts of the EU *acquis* (for instance the euro and the area of freedom, security and justice), opting out of the EU in its entirety was not seriously contemplated by the front bench of successive UK governments (until David Cameron). Indeed, as we have seen, EU law and its respect was designed into the devolution settlement, and thus embedded further into the then new constitutional landscape of the UK.

What is more surprising, from the point of view of anyone with any understanding of the importance of devolution to the nations of the UK, is that when the possibility of opting out of the EU became a reality in the UK³ little consideration appears to have been given to the impact of a decision to leave.

The Scottish Government attempted to raise this issue in the debate preceding the legislation to initiate the referendum. In her speech to the European Policy Centre in June 2015, the Scottish First Minister proposed three ways in which the proposed legislation might be improved; the first two based on the experience in Scotland of the referendum on Scottish independence. First, the voting age. In the Scottish referendum 16 and 17 year olds were allowed to vote on the premise that it was their future that was under discussion. The First Minister suggested that similarly these young people should vote on their future in the EU. The second proposal was in relation to citizenship provisions. European Union citizens living in Scotland at the time of the referendum were given a vote. The First Minister suggested that the same should apply. Both these suggestions were rejected by the UK Government—had they been accepted it is likely that the outcome of the referendum would have been quite different.

It is however the third suggestion from the Scottish Government that might have addressed the weakness of the devolution settlement identified above—the failure to plan for a fundamental shock to the devolution settlement itself. The First Minister proposed a "double majority" provision whereby the UK could only leave the EU if each nation voted to leave. Such a provision would

respect the rights of the devolved administrations and respect the constitutional order created by devolution—the fact that each of the nations of the UK should have a say when potential shocks are under consideration.⁴

This proposed approach was rejected. The referendum provisions ignored the fact of devolution entirely. The UK was treated as a single entity. A simple majority was sufficient. No one nation could hold back the others. In practice given the relative sizes of the electorate—Scotland, Wales or Northern Ireland could not outvote England. Had the UK Government accepted this proposal then again the outcome would have been very different, given the results in both Scotland and Northern Ireland.⁵

As it transpired, it is not an exaggeration to say that the 2016 referendum has triggered a constitutional crisis in the devolution settlement. Quite simply, within the current constitutional settlement, the devolved administrations have no constitutional or legal means to ensure that the democratic will of the people they represent can be respected. There is nothing in the Scotland Act to assist and, as can be seen in subsequent attempts to protect Scottish interests, the existing political and legal institutions are insufficient to provide a framework for the resolution of such a shock.

Supreme Court—R. (on the application of Miller) v Secretary of State for Exiting the European Union⁶

The Supreme Court's decision in *Miller* adds weight to the argument that the devolution settlement cannot bear the weight of constitutional shocks. The court was essentially asked to examine the role of the Sewel convention, now given statutory form by s.28(8) of the Scotland Act. This provision provides that

"it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament".

Given that the decision to leave the EU directly impinges on a considerable part of the work of the Scottish Parliament and Scottish Government on issues ranging from agriculture and fisheries, environmental protection to higher education and research, the argument was led that the UK Parliament required the consent of the Scottish Parliament before it could trigger art.50 TEU.

The Supreme Court analysed the wording of the provision to hold that it effectively restates a constitutional convention but does not translate it into a legally binding obligation. It entrenches the constitutional convention as a feature of the relevant devolution settlement but goes no further. The court then reiterated the well understood constitutional maxim that it is not in the remit of the courts to police constitutional conventions since these are political agreements and not law. It therefore did not reach a conclusive decision on whether consent was required as a matter of convention but it decided unanimously, that the UK Government was not legally obliged to consult the Scottish Parliament or obtain their consent before triggering art.50 TEU.

In its judgment the Supreme Court was effectively stating that s.28(8) could not be interpreted as if it were a "double majority" provision. The Scottish Parliament could not block the UK Parliament by refusing its consent despite the fact that leaving the EU had the potential to impact its devolved powers in very fundamental ways. In other words devolution does not matter.

The question therefore which must follow from this is what is the point of devolution in times of major constitutional changes? Clearly the devolved administrations cannot protect the devolution settlement through legal means against this kind of shock. In this context, the Scottish Parliament might as well not exist and 20 years of experience of devolution does not weigh into the constitutional and institutional balance in the UK. It is as if time has gone back to pre-devolution times in constitutional law terms.

Many might argue that this has always been the case, that sovereignty of the UK Parliament was not affected by either membership of the EU or by devolution. But to rehearse old arguments, from a Scottish constitutional perspective, sovereignty lies with the people and now the Scottish Parliament is the medium by which the Scottish people express their views. There is now a recognisable Scottish constitutional law which has been eroded by the vote to leave. From the perspective of north of the border, devolution *does* matter. That is why, post the first independence referendum, the Scotland Act was amended to ensure the continued existence of the Scottish Parliament against constitutional shocks such as UK legislation seeking to abolish Scottish constitutional arrangements.⁷ The decision of the Supreme Court, of course, does not abolish the Scottish Parliament but it has, in effect, drained some of its life-blood.

Joint Ministerial Committee (EU Negotiations)

If the Sewel convention is a political agreement rather than a legally binding obligation then that would suggest that there is a political mechanism whereby the consent of the Scottish Parliament can be given to proposals that might fundamentally impact on its powers. At the very least there must be an opportunity for the devolved administrations to voice their concerns and to make their position clear.

The Joint Ministerial Committee (EU Negotiations) (JMC(EN)), a newly created format of the Joint Ministerial Committee, is the only forum currently envisaged to carry out this function.⁸ The Joint Ministerial Committee, has never been a particularly successful forum for the exchange of views between the UK and the devolved administrations.⁹ By its nature there is a permanent imbalance in the structure with a UK minister always in the chair and with the agenda largely set by UK ministers. Given these weaknesses it is surprising that the UK Government has not proposed any alternative political structures for discussions as fundamental as those involved in Brexit.

To date, it appears that the JMC(EN) has been spectacularly unsuccessful in providing a forum for genuine discussion and for taking the Brexit debate forward within the UK in a meaningful way for the devolved institutions. At least that is the Scottish perspective. Mike Russell, the Scottish Minister responsible for Brexit negotiations, stated in the Scottish Parliament on the 7 February 2017 that the JMC(EN) had not been involved in drawing up the "hard Brexit" plan announced by the Prime Minister in her Lancaster House speech on 19 January 2017. He also stated that the devolved administrations were not party to UK Government thinking. This might be mere braggadocio except that the most telling of his statements in relation to the work of the JMC(EN) during that speech was that a meeting was due the following day and the members of the JMC(EN) from the devolved administrations had not at that point received an agenda or any papers. Moreover, the Scottish Government had asked that the terms of the art.50 TEU notification letter be discussed at the JMC(EN) meeting in January 2017 but the terms were not discussed.

Once again, this points to the conclusion that the intergovernmental machinery of the devolution arrangements is not suited to dealing with a major upheaval. It may be partly that the UK ministers involved in Brexit are themselves inexperienced in both EU matters and in devolution. Certainly neither David Davis nor Liam Fox had held ministerial positions in the post-devolution world. It may also be partly that the reorganisation of departments to meet the challenges posed by the Brexit negotiations meant that key civil servants who might have been experienced and have understanding of devolution had been switched to other roles. It may also be the case that the UK Government had, despite its public-facing rhetoric set itself against allowing a full debate in the JMC(EN) since its own position had not been formed or that it had taken the view that Brexit was a matter for the UK Government.¹⁰ For whatever reasons, to date, the JMC(EN) has not proved to be an arena in which free and frank discussion can take place in formulating a UK position which takes into consideration the position of the devolved administrations, and particularly Scotland and Northern Ireland, which, following the outcome of the referendum in those nations, are seeking a differentiated approach. It has to be concluded, therefore, that hierarchy still overshadows devolution and the structures don't exist to protect it in the face of this constitutional shock.

Scottish Government's position

The results of the referendum of 23 June showed a clear divergence of views between the electorates of England¹¹ and Wales on the one hand and Scotland and Northern Ireland on the other. The results in Scotland showed a very substantial majority in favour of the UK remaining in the EU. Thus the results of the Brexit vote created not just a constitutional shock in the relationship between the UK and the EU but also within the UK itself. The SNP Government in Scotland had warned of the potential consequences of such a pattern of voting by suggesting a possible second independence referendum in such a scenario.

The reaction of the Scottish Government was to set out its position in two papers, which should be read together. The first, *Scotland a European Nation*, set out the rationale for Scotland's approach to membership of the EU in terms of its political, historical and cultural orientations. The intended audience for this paper appears to have been EU Member States and sets out an argument for due process in the Brexit negotiations. It argues that Scotland has a special relationship in Europe and has a right to be heard.

Published in December 2016, the Scottish Government white paper, *Scotland's Place in Europe*, in contrast sets out a series of positions for discussion within the UK and seeks to influence the internal UK debate taking into consideration the view of the Scottish electorate. It does not explicitly set out an option for an independent Scotland and its relations with the EU although that is, of course, an underlying threat.¹² Instead

"in good faith and a spirit of compromise [it seeks] to identify a solution that might enable Scotland's voice to be heard, and mitigate the risks that Brexit poses to [Scotland's] interests within the UK".¹³

It offers first an undifferentiated approach, the whole of the UK should stay within the single market and the customs union, and moves to arguing, in the absence of an agreement on that position, for a differentiated approach which would allow Scotland to remain within the single market whilst England and Wales exit. The white paper argues that whatever outcome is reached (short of a second independence referendum) that Scotland's interests within the UK demand "a fundamental review of the devolution settlement" arising as a result of "the removal of the protections provided

by EU law for the devolved institutions and the rights of citizens".¹⁴ It argues that Brexit should not diminish the devolution settlement and should, in some respects, enhance devolution.¹⁵

The timing of the white paper was important. The Scottish Government intended to influence the UK debate particularly as the UK Government had taken the position that it would not disclose its negotiating position and was arguing that even the Westminster Parliament should not be involved in defining the UK position. By contrast, the Scottish Government placed its white paper before the Scottish Parliament and gained support for it from all but the Conservative MSPs.

In one sense these actions could be seen as political manoeuvres. But at a fundamental level, the actions of the Scottish Government do reflect what the devolution settlement was intended to be about. Differentiated policies and policy making are at the essence of devolution. The Scottish institutions are accountable to the Scottish electorate. The major difference being, of course, that the Brexit referendum was not solely about devolved powers, although it impacted them, the decision to leave the EU was far more fundamental in terms of the UK constitution and the Scotland Act reserved matters relating to the EU to Westminster. The Brexit vote therefore unsettled the existing constitutional balance without offering any kind of view of the future direction of travel for devolution in the same way that it did not offer any future direction of travel for the UK as a whole.

To date, although the UK Government has stated that it will consider the Scottish Government proposals set out in the white paper it has not responded in any formal sense. Its own white paper does recognise a need for a differentiated approach for Northern Ireland but is silent on a differentiated approach for Scotland. Should the UK Government not divert from this course before it triggers the art.50 TEU exit process (promised by the end of March 2017), the First Minister of Scotland has made clear the argument that "Indyref 2" would not simply be legitimate, it would be necessary to give the Scottish people a say in their own future direction.¹⁶ In doing so she asserts that:

"The Brexit process has emboldened a now powerful Westminster faction, which perhaps never fully embraced devolution, and which now sees an opportunity to rein in the Scottish Parliament."¹⁷

Conclusion

This article has argued that the devolution settlement is not sufficiently robust to withstand the kind of shock not just of the result of the referendum to leave the EU but of the extensive disparity in voting patterns north and south of the border. The absence of any mechanism in the European Union Referendum Act 2015 setting out the terms of the referendum which would take into consideration potential differing views amongst the nations of the UK and in the absence of any consideration by the UK Government of the implications of such widespread disparities ahead of the vote has meant that the existing institutional and constitutional framework has to be used to resolve differences. Brexit has the potential to impact enormously on the devolution settlement. Ahead of the referendum there was no planning for its impact on devolution.

It is clear that the devolved administrations have no legal right to hinder the UK's exit from the EU but neither do they have the right to try to secure a differentiated position in relation to the EU from within the UK. They have no legal mechanism to ensure that the terms of negotiations respect the devolution settlement.¹⁸ Section 28(8) of the Scotland Act cannot be used as a break to require the consent of the Scottish Parliament.

At the same time, the JMC(EN) is insufficiently robust to provide for a proper mechanism whereby the devolved administrations can ensure not just that they are heard but that they are listened to. The JMC(EN) is not a regional senate. It is an intergovernmental talking shop where the preponderance of power lies firmly with the Westminster Government.

Major reform of the UK's constitutional landscape must be seriously considered (in an appropriate forum) if the UK is going to survive in its current form. Brexit will fundamentally affect the UK's constitution. It has exposed and exacerbated the fragility of the devolution settlement. It is not the purpose of this paper to detail the appropriate constitutional reforms but these must go beyond a revised division of competences between Westminster and Holyrood (for instance further devolution of powers in spheres such as energy and employment and immigration and international capacity). They must include a revised architecture to ensure less London-based hierarchy, more mutual understanding of the settlement and the divergent interests represented within it and more mutual respect between the relevant institutions: Devolution must effect a more inclusive and co-operative politics within *and* between devolved administrations and the UK administrations if it is to remain a central organising tenet with the four nation UK. Constitutional reforms must also include a revised division of constitutional authority to enable decisions to reflect the views of the electorates or their elected representatives in the respective nations of the UK. It is too late for that particular discussion in relation to Brexit but there may be further significant constitutional shocks to come. The Prime Minister has in the past suggested withdrawal from the European Convention on Human Rights —another piece of central legal architecture built in to the devolution legislation and indeed into EU membership—and while "on ice", this could quite feasibly re-emerge as a UK Government priority in the medium term. Under current constitutional arrangements Scotland, and (perhaps more significantly) Northern Ireland may be forced out of the protection offered by the Convention.

As things stand, the UK Government seems intent on taking control of Brexit (its meaning, scope and consequences for the UK), and in the process apparently misunderstanding and undermining 20 years of UK constitutional reform.

1. For the argument that devolution in the UK has always operated on the basis of a "shadow of hierarchy" in comparison to other multi-level states see Wilfried Swenden and Nicola McEwen, "UK devolution in the shadow of hierarchy? Intergovernmental Relations and Party Politics" (2014) 12(4) *Comparative European Politics* 488.
2. See Scotland Act 1998 s.53. United Kingdom Government ministers, however, retain the power to implement EU obligations in devolved areas in Scotland under s.57(1) of the Scotland Act 1998. The Scotland Act 2016 places in law the previously non-statutory "Sewel convention" that the UK Parliament will not normally legislate for devolved matters without the approval of the Scottish Parliament.
3. European Union Referendum Act 2015.
4. This point is made forcibly by Andrew Blick who regards the devolution settlement as an incipient form of federalism requiring the involvement of the devolved institutions in decisions on international relations: "*The EU Referendum, Devolution and the Union*", <http://fedtrust.co.uk/our-work-on-europe/the-eu-referendum-devolution-and-the-union/> [Accessed 2 March 2017].
5. A fourth option might have been in the most recent reform to the Scotland Act to guarantee the permanence of the Scottish Parliament in the Scotland Bill, by entrenching it through the requirement of mutual consent to any changes to the devolution settlement (so one party cannot change the devolution settlement unilaterally). See *Dr Eve Hepburn and Sionaidh Douglas-Scott, "The 'Permanence' Issue: A Question of Symbolism or Power?"* (16 March 2015), http://www.parliament.scot/S4_ScotlandBillCommittee/General%20Documents/Dr_E_Hepburn.pdf [Accessed 2 March 2017].
6. *R. (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2017] 2 W.L.R. 583.
7. The Scotland Act 2016 asserts a guarantee that the devolved government and Parliament in Scotland are permanent, and could be abolished only following approval through a referendum in Scotland.
8. Prime Minister May chaired her first Joint Ministerial Committee (JMC) on 24 October 2016. It was agreed at that plenary meeting to establish a new JMC on EU negotiations and its terms of reference were recorded, <https://www.gov.uk/government/publications/joint-ministerial-committee-communique-24-october-2016> [Accessed 2 March 2017]. The JMC(EN) has so far met on 9 November 2016, 7 December 2016 and 30 January 2016. Discussions have also taken place through the British-Irish Council.
9. Set up under Supplementary Agreement A of the Memorandum of Understanding between the UK Government, Scottish Government, Welsh Government and Northern Ireland Assembly on Devolution, the JMC convenes under several distinct formats.
10. Possibly a telling insight into the Government's behaviour can be gleaned from the speech of the Prime Minister at the Conservative Party Conference: "Because we voted in the referendum as one United Kingdom, we will negotiate as one United Kingdom, and we will leave the European Union as one United Kingdom. There is no opt-out from Brexit. And I will never allow divisive nationalists to undermine the precious Union between the four nations of our United Kingdom."
11. With the exception of London and some other cities.

12. *Scottish Government, Scotland's Place in Europe (Scottish Government, 2016), First Minister's foreword*: "If the real and substantial risks that Brexit poses to Scotland's interests cannot be mitigated within the UK, the option of choosing a better future through independence should be open to the Scottish people."

13. *Scottish Government, Scotland's Place in Europe, First Minister's foreword*.

14. *Scottish Government, Scotland's Place in Europe*, para.4.

15. *Scottish Government, Scotland's Place in Europe*, para.4; and see Alan Page in this volume on steps that might be taken to secure the oversight of the Scottish Parliament in relation to the amendment or repeal of EU derived law in devolved areas: "Brexit, the Repatriation of Competences and the Future of the Union", 2017 *Jur. Rev.* 39.

16. Nicola Sturgeon's speech to the David Hume Institute (28 February 2017).

17. Nicola Sturgeon's speech to the David Hume Institute (28 February 2017).

18. Although see Alan Page in this volume on the future role of the Scottish Parliament in the Brexit saga post the formal triggering of art.50 TEU: "Brexit, the Repatriation of Competences and the Future of the Union", 2017 *Jur. Rev.* 39.