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Scotland, the UK and Brexit - At a Constitutional Crossroads: What Next for Scotland?

Introduction

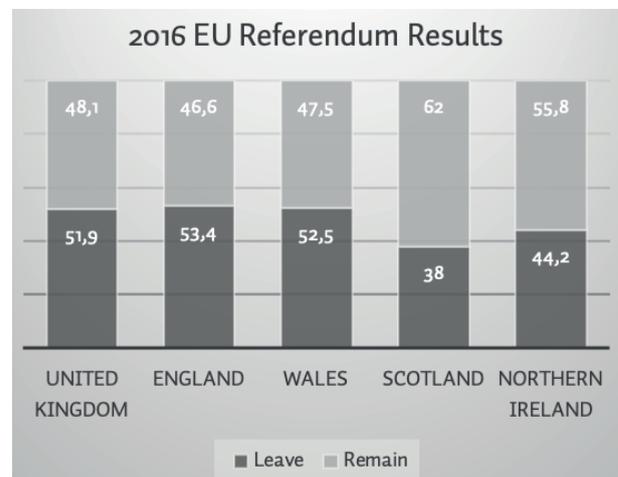
Since 2014, the constitutional future of the United Kingdom (UK) has been in a state of almost permanent flux. In the space of two years, the Scottish electorate went twice to the polls to vote on referenda on hugely significant constitutional issues. On 18 September 2014, a record number of voters (circa 85%) voted in an independence referendum in which 55% of the electorate voted 'no' to the question 'Should Scotland be an independent country?' Almost two years later, the Scots were at the polls again, this time for a state-wide referendum on the UK's continued membership of the European Union (EU). In this referendum, 62% of voters in Scotland voted to remain in the EU. However, the Scottish vote to remain was trumped by the overall UK-wide result in which just under 52% of the electorate chose to leave the EU. As has been pointed out elsewhere, 'Brexit was made in England'.¹

No sooner had the UK Government fired the starting gun on its lengthy and complicated negotiations to secure the UK's exit from the EU than the Scottish Government called for a second referendum on Scottish independence. In Wales, Labour and Plaid Cymru worked together to produce a co-authored White Paper calling for continued membership of the European Single Market, while Sinn Fein's strong performance in the March 2016 Stormont elections and the 2020 Irish elections has increased focus on a border poll on Irish reunification. Added to these conflicting and at times diametrically opposing visions for the constitutional future of Scotland and the UK, both countries find themselves at a constitutional crossroads: In leaving one union, the future of the other remains in the balance.

The purpose of this paper is to provide an overview of the constitutional debate in the UK vis-à-vis Scotland and the future of the UK union. We take stock of this debate in the post-referendum period, and look at what next for Scotland in the light of the Scottish government's push for a second independence referendum.

Brexit: Results and Reaction

On 23 June 2016, 43 years after joining what was then the European Community, the UK electorate, belying the predictions of polls and politicians, voted to end its membership of the EU. The differing results from England, Wales, Northern Ireland and Scotland (see Figure One) in which the latter two voted to remain, while the former two voted to leave, underline the political divisions that have become evident in the UK since the introduction of devolution. Since 2007, Scotland has three times elected a nationalist government, most recently in 2016 when the SNP lost its majority, winning two seats short of the required 65, but increased its share of the vote and became the first party ever to win over one million votes on the first ballot.² Since 2015, SNP support in UK general elections has fluctuated. In 2015, just one year after the independence referendum defeat, the SNP secured all but 3 seats across Scotland, with an all-time high of 56 (of 59) seats. In the 2017 snap election, the SNP remained the largest party across Scotland, but lost 21 seats, including 12 to the pro-union Conservative party. However, in the December 2019 general election, the SNP regained some of the lost seats (winning 48 seats) and cemented once again its status as the biggest party in Scotland, and the third biggest party in the UK Parliament.



Source: Own elaboration, based on data from The Electoral Commission.³

In her first speech after becoming Prime Minister in July 2016, Theresa May sought to emphasise the importance of the Union and ‘precious bond’ between the devolved nations of the UK.⁴ Her successor, Boris Johnson (who came to power in July 2019), has adopted a similar rhetoric.⁵ What we have seen from both May and Johnson is a discourse focused on inclusive politics and a Brexit-deal that would be good for the whole UK, while in practice this rhetoric has not been met with the same political actions. Instead, institutions such as the Joint Ministerial Committee (JMC) on EU negotiations, established to coordinate a joint Brexit response between the UK government and the devolved administrations, have been wholly dominated by the UK government’s uncompromising Brexit vision. The devolved administrations, and in particular the Scottish government, consistently complained that irrespective of JMC meetings, their views and concerns are superseded by the priorities and Brexit-stance of the UK government.⁶

The inability of the UK Parliament to find a way forward on Brexit once Theresa May’s government lost its majority in June 2017 was a further indication of the deep divisions over Brexit within UK politics. The SNP has predominantly voted against plans to move forward with Brexit, instead supporting and putting forward proposals on a second Brexit referendum, as well as the suspension of Article 50. The election of Boris Johnson as the new leader of the Conservative Party, and as Prime Minister in July 2019 is a direct result of this impasse. Yet, a clear route out of the Brexit quagmire with cross-party support in Parliament did not ensue. Instead, Johnson’s polarising style resulted in the defection of several Conservative MPs and a further escalation of these deep divisions. The debate over Brexit was only resolved when new elections took place in December 2019, in which Johnson won an overwhelming majority, thereby somewhat marginalising opposition from others within Parliament and the devolved administrations. As a result, the UK left the EU on the 31st of January 2020. Consequently, and unsurprisingly, the Scottish government became much more vociferous in calling for a second independence referendum.

The Constitutional Crossroads: What Next for Scotland?

The results of the Brexit vote have exposed the deep political divisions in the UK, primarily in relation to territorial politics and constitutional visions. The

Scottish Government, despite remaining committed to independence, sought to fashion a compromise solution in which the national interests and democratic wishes of the Scottish electorate could be protected. Its strategy paper, *Scotland’s Place in Europe*, published in 2016, was billed as such a compromise, one which laid out several options which would either ensure continued membership of the Single Market for the UK as a whole, or Scotland alone.⁷ This was further illuminated by Scottish First Minister Nicola Sturgeon’s announcement that she would take calls for a second independence referendum off the table in return for a ‘soft Brexit’, that is membership of the European Single Market.⁸ The announcement, therefore, that leaving the Single Market was the preferred option of the UK Government, merely emboldened the SNP’s position on a second independence referendum. Notwithstanding this, the Supreme Court’s ruling that the devolved administrations did not need to be legally consulted before the triggering of Article 50 reignited debates regarding the constitutional and legal status of the devolved parliaments.

In the absence of a UK-wide strategy for Brexit or any progress on securing a bespoke arrangement for Scotland, the Scottish government has continued to pursue calls for a second independence referendum.⁹ Despite support in the Scottish Parliament to hold another referendum (69 MSPs from 129), both Theresa May and Boris Johnson have rebuffed calls for another independence poll. As the Constitution is a reserved power for the Westminster Parliament, it is not considered within the competence jurisdiction of the Scottish Parliament to hold a referendum on independence, albeit this issue has not yet been decisively settled. The Scottish Government has called for this power to be devolved, but hitherto this has fallen on deaf ears. This leaves the Scottish Government with several (limited) options on how to move forward in the debate on independence.

First, Nicola Sturgeon can continue the dialogue with Westminster and hope that opinion shifts within the Johnson government on a second independence referendum. Currently there is no indication that this might occur, but in 2021 voters will elect a new Scottish Parliament, and an overwhelming victory for the SNP is likely to be used to put additional pressure on the UK government to agree a second independence referendum. The advantage of this option is that it remains within legal means. It is the preferred option of Sturgeon and is designed to acquiesce the demands of even the

most impatient pro-independence supporters. There are, however, several caveats to this position. While the SNP is on course to secure a fourth electoral victory in the 2021 election, it is unlikely to repeat its 2011 feat which cemented the decision of David Cameron to negotiate on a referendum. The Scottish Parliament's mixed member proportional system is designed to prevent one party majorities, making an absolute majority for the SNP alone a difficult but not impossible task. Combining the numbers of SNP parliamentarians with those of the Scottish Greens (the only other party in the legislature that supports independence) may result in a pro-independence majority of MSPs, but this is not guaranteed to lead to a change of opinion in the UK government.

Second, there are some dissenting calls from within the SNP to consider a 'wildcat' Catalonia-style unilateral referendum.¹⁰ Supporters of this position believe the Scottish Parliament, notwithstanding the refusal of the UK government to transfer the necessary legal power to do so, should legislate on a second independence referendum to end the current stalemate on the issue. Such a bold move, however, has been firmly rejected by the Scottish First Minister.¹¹ This, it seems, is a wise move considering the ongoing impasse in Catalan-Spanish relations¹² and the sobering reality that an 'illegal' referendum would almost certainly result in a unionist boycott (as was the case in Catalonia) and therefore do very little to attract voters who voted 'no' in 2014. Preference is for a legal and fair referendum as was agreed for 2014, but voices are growing in favour of a more unilateral approach.

Third, albeit somewhat linked with the above, is the option of a legal showdown in the Courts.¹³ Intriguingly, and contrary to most other multilevel states, litigation on constitutional matters has been an almost completely absent feature of UK territorial politics. In fact, it was not until the Brexit debate that the Courts came to play an important role in constitutional debates. A court battle between the UK and Scottish governments has been described by Sturgeon as a measure of last resort, not least because the 'outcome would be uncertain', but has not been ruled out as a future strategy in order to challenge the UK government's intransigent position.¹⁴ Those in favour of unilateral legislation for a second independence referendum somewhat align with this position, believing that the legislation would be challenged in the Courts and thus would facilitate movement on the issue.¹⁵ A court

battle may have some political mileage for the SNP among its supporters but is unlikely to result in the legal victory the SNP desires.

Finally, there is also the possibility of the SNP losing support in the 2021 election, in which case its quest for a second referendum would be undermined. As discussed above, the 2017 general election highlighted that the polarisation of voters around constitutional issues has not proved beneficial for the SNP. There is currently no substantial increase in support for independence recognisable across opinion polls in recent months, and a further focus on this issue might lead to voters turning their backs on the SNP. Current polling shows, however, that the SNP remains significantly ahead of other parties, in some surveys with a 20-point lead, suggesting the party is on course for a fourth electoral victory in the 2021 election.¹⁶ As was the case with the SNP's previous electoral victories, this does not mean the case for independence will have been won; the party still needs to win over previous 'no' voters to secure an affirmative referendum result. A vote for the SNP does not translate to a vote for independence.

The result of this ongoing quagmire in British politics is a deepening constitutional crisis. While the Scottish Government's call for a second referendum remains unheeded it seems to be a question of when rather than if another independence referendum takes place. Yet, even though it may seem likely that such a vote will take place, when this is held, or indeed, what the result will be, is far from clear.

Conclusion

Devolution to Scotland, Wales and Northern Ireland has fundamentally changed the constitutional landscape of the UK. Since 1997, successive British governments have taken an ad-hoc, piecemeal approach to constitutional and territorial politics in the UK and while it remains clear that such tinkering has transformed the UK's constitutional architecture, its impact on the Union remains contested. Devolution has not led to the disintegration of the UK, but the rise of the SNP and the increasing prominence of the constitutional question, has meant that British politics is far from business as usual. The differing results of the Brexit vote in England, Wales, Scotland and Northern Ireland underline the distinct political cultures that continue to evolve in each of these nations, and furthermore illuminate the development of very different and at times

diametrically opposing political and constitutional visions. It is not yet clear what the final impact of EU withdrawal will be on the UK, and in particular on Scotland. While it is a truism that the secession of Scotland is not inevitable, there is nothing guaranteed about the future constitutional integrity of the UK. The tectonic plates of British politics are once again shifting, and the UK's once strong and stable constitutional edifice is beginning to crack.

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