

Brexit, the UK and Scotland: the story so far:
A constitutional drama in four acts.

The European Union (EU) referendum result has led to the unfolding of a domestic constitutional drama in the United Kingdom, which on its current trajectory could lead to its break-up. Written just prior to the anticipated trigger of the Article 50 TEU process to leave the European Union, this chapter maps that trajectory by considering the roles of the key institutional actors in the drama so far.

Setting the scene

Within the framework of the current devolution settlement, the UK's withdrawal from the EU ('Brexit') will mean that Scotland also leaves, despite 62% of the Scottish electorate voting to 'remain'. In legal terms, the UK as a state recognised under international law is the signatory to the European Treaties. Withdrawal of that state includes its constituent parts. However while relations with the EU were designed into the devolution settlement as 'reserved' to Westminster, the 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 contravened an EU obligation; the Scottish Parliament and Scottish ministers have powers to implement EU obligations of the UK in devolved matters (Scotland Act 1998 s.53 and s.57) and the devolved administrations have been involved in the development of the UK's EU policy via the Joint Ministerial Committee (an intergovernmental talking shop set up within the Devolution settlement and which means in various subject matter formats). In short, EU law is embedded within Scotland's devolved constitutional landscape and a UK withdrawal from the EU will have direct and significant impacts on the devolution settlement as currently designed – something that was not apparently planned for.

This sets the scene for a constitutional drama which has been slowly unfolding since 24 June 2016.

Act 1

Enter – the Scottish Government

The referendum result has prompted calls from Scotland's First Minister to 'take all possible steps and explore all options to give effect to how people in Scotland voted.' The Scottish Government is keen to retain a strong relationship with the EU based on five key tests set out by the First Minister in a speech in July which will serve as a benchmark to assess the extent to which any Brexit solutions preserve key interests viewed to be related to Scotland's relationship with the EU: democracy; economic prosperity; social protection; solidarity; and influence. Short of a second independence referendum which, if successful, would allow Scotland to become an EU Member State in its own right, consideration, as promised, has been given to whether Scotland could remain in the EU without seeking independence. The

Scottish Government's position has been laid out in two papers. The first, *Scotland a European Nation*, sets out the rationale for Scotland's approach to membership of the EU in terms of its political, historical and cultural orientations. It sets out an argument for due process in the Brexit negotiations and the other EU Member States appear to be its intended audience. In essence, it argues that Scotland has a special relationship in Europe and has a right to be heard. The second paper, *Scotland's Place in Europe*, was published on 20 December 2016 and was intended for a UK audience. At the outset, the paper reiterates the Scottish Government's wish for the whole of the UK to remain an EU Member State although it recognises that the referendum result does not permit such an outcome. In order to mitigate the impact of Brexit on Scotland, the paper therefore advocates for the UK's membership of the European Economic Area (EEA) Agreement and the Customs Union. In the event that such an option is not feasible, the paper takes a two-track and differentiated approach to mitigating the impact of Brexit. First, it argues in favour of Scotland remaining within the European Single Market through membership of the European Free Trade Area (EFTA). However, if that also proves not to be possible and Scotland finds it is no longer a member of the European Single Market, then the policy proposals argue in favour of devolution of the necessary powers to allow the Scottish Parliament to legislate on areas which are of primary concern. This includes "repatriated" powers (ie those previously within the EU's competence) which are not currently within areas of devolved competence, for example employment and health and safety laws, as well as any other powers necessary to secure a differentiated relationship with Europe.

Although legally feasible, implementation of the plan set out in *Scotland's Place in Europe* would require a high level of political will and legal creativity at both the UK and the EU level. There are existing examples of the EU's considerable flexibility where it has accommodated differential territorial application of EU law within a Member State or associated territories. However, the Prime Minister has not so far shown any signs of willingness to permit Scotland to negotiate a differentiated position as part of the Brexit negotiations.

Act 2

Enter – The UK Government

The UK Government's reaction to its counterpart's calls from Holyrood to respect the decision of Scottish voters to remain in the EU has been muted. Aptly summarised under the title of the 'May Doctrine' the UK Government is said to be proceeding on the basis of two assumptions: first, that a certain course of action, namely Brexit – however vaguely defined in its specifics – is irresistible. Second, that the UK executive alone has direct responsibility for the implementation, delineation and definition of Brexit (Blick, 2016). This assumption explains the Government's assertion that it alone has the executive power through the royal prerogative to serve a notice intimating the UK's decision to leave the EU under Article 50 of the Treaty on the European Union (TEU) (see Act 3).

The ‘May Doctrine’ is clearly enunciated in Theresa May’s Brexit speech, given on 17 January 2017, in which the Prime Minister set out her plans for a post-Brexit ‘Global Britain’ and made it clear that there would be no accommodation of Scotland’s desire for a differentiated relationship with the EU. Doubts were also cast in this speech over the future remit of the Scottish Parliament. It is often assumed that those powers currently exercised by the EU which fall within devolved competence will be repatriated to the Scottish legislature and that the removal of the requirement in the Scotland Act that the Scottish Parliament cannot legislate contrary to EU law will mean a major enhancement of devolved powers. In her speech, Theresa May instead suggested instead that it would be left to the UK Parliament (with no mention of the devolved administrations) to decide on any future changes to the law. The UK Government’s recently published Brexit White Paper – *The United Kingdom’s exit from and new partnership with the European Union* - also suggests that complete onward devolution to the devolved legislatures and governments of EU competences is not a foregone conclusion.

The official intergovernmental forum to enable the involvement of the devolved administrations in the Brexit process is the Joint Ministerial Committee (EU Negotiations) (JMC(EN)), a newly created format of the Joint Ministerial Committee (JMC). The JMC has never been a particularly successful forum for the exchange of views between the UK and the devolved administrations. The balance of power within the Committee is heavily tilted in favour of the UK Government with a UK Minister always in the chair and with the agenda largely set by UK Ministers. It is hard to see how such a structure could deliver a genuinely inclusive debate that shapes and informs the Brexit roadmap for the UK, taking account of the differing interests and voting patterns of the devolved nations. Indeed, according to the Scottish Government it has not. Speaking in the Scottish Parliament on 7 February 2017, Mike Russell, the Scottish Minister responsible for Brexit negotiations, stated that the JMC(EN) had not been involved in drawing up the ‘hard Brexit’ plan announced by the Prime Minister in her ‘Global Britain’ speech. He also stated that the devolved administrations were not party to UK Government thinking. The last minute issuing of agendas to (at least) the devolved administrations ahead of JMC(EN) meetings and non-discussion of items pertaining to the devolution of power scheduled on the agenda have also been reported. In this context, a commitment in the Brexit White Paper to further ‘bilateral discussions’ between the UK Government and the devolved administrations ‘to fully understand their priorities, which will inform the continuing discussions’ might appear somewhat disingenuous.

Despite much rhetoric to the contrary the UK government’s position on Brexit expounded to date appears to diminish rather than value the devolved constitutional landscape of the UK and the voices of the administrations within that. There is no legal means by which those voices can be taken into account and an already flawed intergovernmental talking shop is not providing a meaningful forum for genuine discussions based on mutual trust and respect. With the stakes so high, this is a sorry situation indeed, and in all likelihood, a constitutional collision course in the making.

Act 3

Enter – The Supreme Court

The Supreme Court has taken the place of the third actor in this constitutional drama. In *R (on the application of Miller and Dos Santos) v Secretary of State for Exiting the European Union* [2017] UKSC 5 the Court was asked whether the UK Government had the power to give formal notice of the UK's withdrawal from the EU (to 'trigger article 50 TEU') without prior parliamentary authorisation through a legislative Act. The outcome of the case in respect of this question is well known. However, the Court was also asked to examine the role of the Sewel Convention, now given statutory form by Section 28(8) of the Scotland Act. This provision provides that the UK Parliament 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 Article 50 TEU.

The Supreme Court analysed the wording of the provision to unanimously hold that it effectively restates a constitutional convention. It does not translate it into a legally binding obligation and thus does not legally enhance the constitutional position of the devolved institutions. 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. The Court then did not reach a conclusive decision on whether consent was required *as a matter of convention* but did decide that the devolved legislatures lack the legal power to block the triggering of Article 50 TEU.

Two observations are offered on this. First, the decision of the Supreme Court highlights once again how fragile the devolved settlement is and powerless the devolved institutions are in the face of something so intrinsically significant to it/them; Brexit. Second, while the Scottish Parliament will not therefore have any involvement in the triggering of Article 50 TEU, it is likely that it will at a later stage of the unfolding Brexit process. For instance the Great Repeal Bill – which will be introduced in the next Queen's speech in order to preserve EU laws in force in the UK post-Brexit – *will* be subject to approval by the Scottish Parliament through a legislative consent motion. In other words the Sewel Convention will apply in that context. Given the different voting patterns and political and constitutional dynamics in Scotland (and Northern Ireland), this may be far more controversial and may certainly contribute to the heightening of tensions within our current constitutional drama.

Act 4

Enter – The UK Parliament

The Supreme Court's decision in Miller has been described as simply putting 'the Brexit ball firmly back in the [UK] parliament's court.' (Elliott, 2017). Only it, through the adoption of a statute – and not the UK Government - can allow Article 50 TEU to be triggered. This raised hopes in some quarters that the two Houses of Parliament would vote down the draft legislation - EU Withdrawal Bill - or at least vote to insert substantive amendments to it, such as to secure Parliament a 'meaningful vote' on the Brexit deal early in the process, effectively giving MPs and peers the chance to send the Government back to seek a better deal. Unwilling to 'frustrate the will of the people', and in a significant nod to *popular*, as opposed to the traditional and embedded notion of *representative* democracy, the House of Commons voted with a majority of more than 300 to give the Prime Minister the power to trigger Article 50 TEU. Perhaps unsurprisingly, all SNP MPs voted against the Bill. More surprising is that the Bill also got through the House unamended. All eyes are now on the House of Lords, with many defiant speeches anticipated (at the time of writing) but ultimately with approval expected, perhaps with several amendments (on 'meaningful' parliamentary approval of the Brexit deal and guaranteeing the rights of non-UK EU citizens living in the UK at the start of the Brexit negotiations.).

Meanwhile, suggestions have been made that the Great Repeal Bill - which legislates for what will happen on the day that the UK leaves the EU - will delegate statutory powers to enable Ministers to make changes, by secondary legislation, to give effect to the outcome of the negotiations with the EU "as they proceed". These so-called 'Henry VIII clauses' cause concern as they would allow the Government to circumvent the full legislative process, which the executive would otherwise need to use in order to enact primary legislation. The role of the devolved administrations in the scrutiny of such legislation is also not clear. On 7 November 2016, during a debate in the House of Commons on exiting the EU and workers' rights, Mark Durkan MP (SDLP, Foyle) raised questions, which have yet to be resolved, concerning both Henry VIII powers and devolution:

The right hon. Gentleman refers to the great repeal Bill, which is in essence the great download and save Bill for day one of Brexit. Who controls the delete key thereafter as far as these rights and key standards are concerned? Is it, as he implies, this House? Would any removal of rights have to be done by primary legislation, or could it be done by ministerial direction? And where is the position of the devolved Administrations in this? These matters are devolved competencies; will they be devolved on day one?

Final Curtain?

Brexit has effected a shock on the UK's constitution, the consequences of which are penetrating deep and wide – including questions about the extent of the royal prerogative and the very hierarchy of law, ultimately answered by the highest court in the land. Another central tenet of the UK constitutional landscape - the devolution settlement - is similarly being tested by Brexit, but appears to lack the legal teeth and the political mechanisms to effectively assert its place (and in the case of Scotland and Northern Ireland, the will of their electorate) within the UK's constitutional landscape. Brexit will effect fundamental changes

to the devolution settlement and given that devolution has embedded itself increasingly into the fabric of the UK constitution over its almost 20 year history, it seems unconscionable that it might be at breaking point – but on the basis of performances given thus far in the drama, it is, at least when viewed from North of the Border.

References

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