"The Art of Falling Apart?": Constitutional Conundrums Surrounding a Potential Brexit

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CSF - SSSUP Working Paper Series 2/2015

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"THE ART OF FALLING APART?": CONSTITUTIONAL CONUNDRUMS SURRONDING A POTENTIAL BREXIT

Allan F.Tatham*

Abstract

This paper concentrates on the "Brexit" scenario and proceeds to look at some of the constitutional issues that may negatively impact on the continuance of the UK as a union in the event of a vote to leave the EU. Having briefly considered the impact of devolution might have on the legitimacy of the results in such a scenario (Section II), the main focus will then turn to how a Brexit has the potential to undo the UK Constitution (Section III) by analysing its impact not only on the three smaller constituent nations but also the Crown Dependencies and Gibraltar. The Conclusion (Section IV) hopes to provide some sobering thoughts on the continuing viability of the United Kingdom were a Brexit to be confirmed.

Keywords: European Union, Brexit, UK, UK Constitution, Referendum

I. Introduction

The Prime Minister, David Cameron, while the head of the Conservative-Liberal Democrat coalition government, announced that a referendum would be held on UK membership of the EU, in what became known as the Bloomberg speech, delivered on 23 January 2013.[1] Such referendum was intended to follow on from proposed negotiations with EU partners to secure a reformed Union, taking into account matters which the UK considered necessary in its national interests. While progress on this referendum was slow during the coalition's time in power (2010-2015), the Conservative overall majority victory at the May 2015 British general elections guaranteed the holding of such a vote as set out in its election manifesto.[2] This pledge has been given force in the

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[1] For a copy of this speech, see https://www.gov.uk/government/speeches/eu-speech-at-bloomberg. Accessed 5 January 2016.

[2] *Conservative Party Manifesto 2015*, at 72: https://www.conservatives.com/manifesto. Accessed 10 December 2015.

European Union Referendum Act 2015 which mandates that a referendum must be held before 31 December 2017[3] but does not preclude it from being held earlier (at the time of writing, it remained unclear as to when the referendum would be held, with the date dependent on the outcome of the forthcoming negotiations in the European Council).[4]

It is not the purpose of this work to discuss reasons for the referendum set against the background of the rise and rise of Euroscepticism in the UK Conservative Party,[5] or the content of the negotiations with the Union, or even the provisions of the European Union Referendum Act. Neither will it set out the many arguments that can be made as to why the United Kingdom ("UK") should or should not remain within the European Union. Indeed, such arguments have been well rehearsed over the years and are likely to be further honed again by both sides of the EU membership referendum campaign that in reality began in earnest in autumn 2015,[6] even while the bill for the referendum was still proceeding through its legislative stages in the UK Parliament.

Rather, this work seeks to identify briefly some of the constitutional complexities of a vote to leave the EU. In fact, the consequences of such a vote – the so-called "Brexit" scenario – carries with it serious constitutional consequences for the UK as a whole as well as for the constituent parts of the UK (which comprises the four nations of England, Wales, Scotland and Northern Ireland). Such consequences should not be underestimated: as Douglas-Scott has already warned in a recently-published paper since "the UK survived one of the most serious threats to its constitutional existence – a very closely run Scottish referendum on independence ... the risk of further such constitutional instability should be taken seriously."[7] It also has important implications for the three

[3] European Referendum Act 2015, c. 36, section 1(3)(a): http://www.legislation.gov.uk/ukpga/2015/36/pdfs/ukpga_20150036_en.pdf. Accessed 4 January 2016. For all UK statutes, access and search: http://www.legislation.gov.uk .

[4] According to an interview with David Cameron on the BBC in early January 2016, he indicated that he was hopeful of a deal on the UK's outstanding issues at the February 2016 European Council meeting, with the consequent in-out referendum to be held in the summer of 2016. If no agreement were to be reached then, the referendum would consequently take place later. See "EU referendum: David Cameron 'hopeful' of February deal," *BBC News website*, 10 January 2016: http://www.bbc.co.uk/news/uk-politics-eu-referendum-35275297. Accessed 10 January 2016.

[5] C. Fontana & C. Parsons, "'One Woman's Prejudice': Did Margaret Thatcher Cause Britain's Anti-Europeanism?" (2015) 53(1) *Journal of Common Market Studies* 89–105; and M.I. Vail, "Between One-Nation Toryism and Neoliberalism: The Dilemmas of British Conservatism and Britain's Evolving Place in Europe" (2015) 53(1) *Journal of Common Market Studies* 106-122. For UK Labour Party recent views on Europe and their relationship with earlier perspectives, see P. Schnapper, "The Labour Party and Europe from Brown to Miliband: Back to the Future?" (2015) 53(1) *Journal of Common Market Studies* 157–173.

[6] For various opinions and news items, see, e.g., *The Guardian website* (http://www.theguardian.com/politics/eu-referendum) or the *euractiv.com website* (http://www.euractiv.com/sections/uk-europe).

[7] S. Douglas-Scott, "A UK exit from the EU: the end of the United Kingdom or a new constitutional dawn?" (2015) *Oxford Legal Studies Research Paper No. 25/2015,* at 1: http://www.ssrn.com/link/oxford-legal-studies.html. Accessed 20 November 2015. Professor Sionaidh Douglas-Scott is Professor of European and Human Rights Law, University of Oxford and has presented and written extensively on this issue. Her perspectives have certainly influenced my own approach, particularly her discussion of the issue of sovereignty between the UK and Scotland that is duly acknowledged and referenced hereunder.

Crown Dependencies which are linked to the UK but neither form part of it nor of the EU, as well as the British Overseas Territory of Gibraltar which however does form part of the Union (and whose citizens will be entitled to vote in the forthcoming referendum[8]).

And yet, despite the dominance of the Brexit situation in the minds of politicians, the media and probably the public at large, it will be equally necessary to have already prepared the constitutional way ahead the morning after a vote in favour of continuing EU membership – the so-called "Bremain" scenario. This approach is based on the firm understanding that the decentralizing forces unleashed by the New Labour Government in the late 1990s is increasingly impacting on the relationship not only between Westminster and Whitehall on the one hand and the executives and assemblies of the three devolved-power nations of Scotland, Wales and Northern Ireland on the other, but also between the former and the regions of England. There appears to be an emerging consensus that further devolution to the English regions,[9] already in place in London and now championed by the current Conservative British Government in respect, *inter alia*, of the "Northern Power-House,"[10] has the potential of a clearer (though necessarily asymmetrical) federalization in the United Kingdom, designed to stave off any future Scottish exit. How the English, whose identity has been largely subsumed into the British one for several hundred years and have thereby provided (to a certain extent) the cement holding the UK together,[11] will view such developments will remain an open question and the serious constitutional issues involved in the "Bremain" scenario will need to be more fully considered in another paper.

This work, therefore, concentrates on the "Brexit" scenario and proceeds to look at some of the constitutional issues that may negatively impact on the continuance of the UK as a union in the

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[8] European Union Referendum Act 2015, c. 36, Preamble and section 2(1)(c) and (2).

[9] E. Cox & C. Jeffrey, *The Future of England – the Local Dimension*, Briefing, IPPR North, Manchester, April 2014: http://www.ippr.org/files/publications/pdf/England-local-dimension_Apr2014.pdf?noredirect=1; E. Cox, G. Henderson & L. Raikes, *Decentralisation decade: A plan for economic prosperity, public service transformation and democratic renewal in England*, IPPR North, Manchester, September 2014: http://www.ippr.org/files/publications/pdf/decentralisation-decade_Sep2014.pdf?noredirect=1; E. Cox & L. Raikes, *The State of the North: Setting a Baseline for the Devolution Decade*, Report, IPPR North, Manchester, November 2014: http://www.ippr.org/files/publications/pdf/State-of-the-North_Nov2014.pdf?noredirect=1; and J. Purvis & A. Blick, *A Parliament for Reform 2015-2020*, Legacy paper, All-Party Parliamentary Group for Reform, Decentralisation and Devolution in the United Kingdom, London, March 2015, at 2-4: http://www.local.gov.uk/documents/10180/6917361/L15-79+APPG+for+reform+Devolution/891e0442-8692-4153-bf35-f12e61207508. All accessed 16 November 2015.

[10] This is a proposal to boost economic growth in the North of England, promoted by the Conservative-Liberal Democrat coalition Government (2010-2015) and latterly by the Conservative Government (since the 2015 general election). It focuses on the core cities of Liverpool, Manchester, Leeds, Sheffield and Newcastle and aims to rebalance the UK economy away from London and the South East. This vision extends into other spheres and will clearly impact on the recalibration of political power throughout England: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/427339/the-northern-powerhouse-tagged.pdf. Accessed 20 December 2015.

[11] M. Kenny, "The Return of 'Englishness' in British Political Culture – The End of the Unions?" (2015) 53(1) *Journal of Common Market Studies* 35-51.

event of a vote to leave the EU. Having briefly considered the impact of devolution might have on the legitimacy of the results in such a scenario (Section II), the main focus will then turn to how a Brexit has the potential to undo the UK Constitution (Section III) by analysing its impact not only on the three smaller constituent nations but also the Crown Dependencies and Gibraltar. The Conclusion (Section IV) hopes to provide some sobering thoughts on the continuing viability of the United Kingdom were a Brexit to be confirmed.

II. The impact of devolution on the legitimacy of the EU referendum

The Conservative plan for a popular vote on continuing membership needs to be considered against the broader background of comparatively recent constitutional developments in the UK. Here two linked but different processes are impacting on "traditional" – by which I mean those expounded by Dicey – British views of unitary conceptions of sovereignty, viz., the devolution of power downwards within the UK and the sharing of power with other Member States in the EU.[12]

These developments amount in effect to a crisis of political identity for all concerned, in which the resolution of the EU issue actually depends on providing a solution to that of the UK itself.[13] This crisis has produced much academic discussion on the topical constitutional unsettlement being experienced in the UK.[14]

Perhaps as a reflection of this constitutional unsettlement, the circumstances surrounding the legitimacy of the referendum vote have been impacted on by the devolution settlement. Readers will no doubt be aware that the UK – in a typical British way – held its first referendum on then EEC membership in 1975, two years after initial accession.[15] Some commentators have even argued the similarity of circumstances surrounding that first popular vote with respect to the present one.[16] The Labour Party, under the leadership of Harold Wilson, was riven with deep divisions over the

[12] P. Gillespie, "The Complexity of British-Irish Interdependence" (2014) 29(1) *Irish Political Studies* 37, at 51.
[13] E. Meehan, "The changing British–Irish relationship: the sovereignty dimension" (2014) 29(1) *Irish Political Studies* 58–75.
[14] N. Walker, "Our constitutional unsettlement" [2014] *Public Law* 529-548.
[15] A.F. Tatham, *Enlargement of the European Union*, Kluwer Law International, Alphen aan den Rijn (2009), at 22-25.
[16] See, e.g., M. Elliott, "Seven lessons from Britain's 1975 EEC referendum," *Daily Telegraph website*, 5 June 2015: http://www.telegraph.co.uk/news/newstopics/eureferendum/11652504/Seven-lessons-from-Britains-1975-EEC-referendum.html. Accessed 10 June 2015; J. Langdon, "EU referendum: Parallels with 1975," *BBC News website*, 10 June 2015: http://www.bbc.co.uk/news/uk-politics-33045935. Accessed 11 June 2015; and R. Roberts, "Back to the future? Britain's 1975 referendum on Europe," *New Statesman website*, 23 January 2015: http://www.newstatesman.com/politics/2015/01/back-future-britain-s-1975-referendum-europe. Accessed 20 April 2015. See further the analysis of E. Mourlon-Druol, "The UK's EU Vote: The 1975 Precedent and Today's Negotiations," *Bruegel Policy Contribution*, Issue 2015/08, June 2015: http://bruegel.org/wp-content/uploads/imported/publications/pc_2015_08-.pdf. Accessed 6 January 2016.

EEC and thus promised in its election manifesto to renegotiate the terms of British entry, putting the results to the test in a referendum.[17]

Once in power, the Labour Government conducted its renegotiations[18] – which to many represented mere window dressing – and put the results to a referendum of the British people. This referendum was regarded as a one for the whole of the United Kingdom[19] to be voted on by one person one vote, irrespective of where they lived. In order to save the integrity of the Labour Government, collective cabinet responsibility was suspended during the referendum campaign with cabinet ministers on either side of the debate.[20]

Fast forward to today and the environment has changed in certain aspects. Granted, David Cameron – following Wilson's example – recently stated in the House of Commons that, during the referendum campaign, members of his Government would likewise be free to argue in favour or against leaving the Union.[21] Moreover, the referendum itself and the topic of the referendum (UK membership of the EU) are not matters that have been devolved to the three smaller constituent nations of the UK but rather they are "reserved" areas in which Westminster retains the power to legislate for the whole of the United Kingdom.[22] Nevertheless this has not stopped the Scottish First Minister in particular from trying to recapitalize on the "success" of the Scottish Nationalist Party

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[17] D. Lasok, "Some legal aspects of fundamental renegotiations" (1976) 1 *European Law Review* 375, republished (2015) 40 *European Law Review* 3-14.

[18] On the context and content of the negotiations which led to the 1975 referendum, see J. Pinder, "Renegotiation: Britain's Costly Lesson?" (1975) 51(2) *International Affairs* 153-165.

[19] In fact it was the first UK-wide referendum to be held. The first major referendum to be held in any part of the United Kingdom was the 1973 Northern Ireland sovereignty referendum called to determine whether it should remain in the UK or join the Republic of Ireland to form a united Ireland.

[20] In a statement on 23 January 1975 (HC Deb 23 January 1975 c1746), the Prime Minister, Harold Wilson, announced that a referendum would be held before the end of June 1975, once the outcome of the renegotiation with the EEC was known and the Labour Government had made its recommendation. He stated:

> "The circumstances of this referendum are unique, and the issue to be decided is one on which strong views have long been held which cross party lines. The Cabinet has, therefore, decided that, if when the time comes there are members of the Government, including members of the Cabinet, who do not feel able to accept and support the Government's recommendation; whatever it may be, they will, once the recommendation has been announced, be free to support and speak in favour of a different conclusion in the referendum campaign."

Wilson subsequently set out the guidelines for the agreement to differ, as approved by the Cabinet (HC Deb 7 April 1975 c351W).

[21] "EU Referendum: Ministers will be able to campaign for either side, *BBC News website*, 5 January 2016: http://www.bbc.co.uk/news/uk-politics-eu-referendum-35230959. Accessed 7 January 2016.

[22] The approach taken depends on the constituent nation: under the Scotland Act 1998 (as amended by the Scotland Act 2012, c. 11) Schedule 5, paragraph 7, all matters that are reserved are listed and anything beyond them comes under the jurisdiction of the Scottish Parliament. The converse is true in respect of Wales with the result that the devolved matters are specifically listed in the Government of Wales Act 1998, c. 38 (as amended by the Government of Wales Act 2006); anything not so listed is considered as reserved for the UK Parliament. Northern Ireland provides a further variation: under the Northern Ireland Act 1998 (as amended by the Northern Ireland Act 2006), Schedule 2 provides a list of excepted matters and Schedule 3 a list of reserved matters. Any competence which is not listed in either of these two schedules is consequently a "transferred" or devolved competence.

(SNP), stemming from its increase in popularity following the Scottish independence referendum of September 2014[23] and using the EU referendum vote as a possible way of providing the grounds for another independence vote. In this respect, the issue of a "double-lock threshold" has been raised by heads of the devolved executives of Scotland and of Wales who stated: "Any decision to leave the EU, taken against the wishes of the people of Wales or Scotland, would be unacceptable and steps must be taken to ensure this does not happen."[24]

What is a "double-lock threshold"? In some federal countries, there is a requirement for certain referendums to secure a majority in the population as a whole and in a majority of the states. For example, in Australia,[25] referendums to approve changes to the federal constitution must achieve a majority of voters as a whole (in Australia, voting is compulsory), and a majority in a majority of states. In fact, if one state is particularly affected by the proposed change, then there must also be a majority in that state.[26]

For its part, the SNP pledged they would "seek to amend the legislation [on the EU referendum] to ensure that no constituent part of the UK can be taken out of the EU against its will."[27] The party proposed that the UK should remain in the EU, unless *each* constituent part of the UK (England, Scotland, Wales and Northern Ireland) voted to leave.[28] This does appear to be a rather perverse version of the double-lock, one which would bind the UK to staying in the Union even if only one constituent nation voted to stay in – in other words, it would give just one nation a veto over Brexit!

British Prime Minister David Cameron, following his first post-election meeting with First Minister Sturgeon, categorically refused such a threshold for each constituent part of the UK, referring to the reserved nature of foreign policy:

> "We put forward in our manifesto the clearest possible pledge of an in-out referendum

[23] For discussions on the context of this referendum and the implications of possible Scottish independence, see S. Tierney, "Legal Issues Surrounding the Referendum on Independence for Scotland" (2013) 9 *European Constitutional Law Review* 359–390; and A. Tomkins, "Scotland's choice, Britain's future" (2014) 130 *Law Quarterly Review* 215-234.
[24] Joint Statement of the First Minister of Scotland, Ms. Nicola Sturgeon (SNP), and the First Minister of Wales, Mr. Carwyn Jones (Labour), 3 June 2015: http://news.scotland.gov.uk/News/First-Ministers-of-Scotland-and-Wales-meet-1988.aspx. Accessed 10 June 2015.
[25] Commonwealth of Australia Constitution Act 1900 (as amended), s. 128. For a general discussion on the provision, see T. Blackshield & G. Williams, *Australian Constitutional Law and Theory: Commentary and Materials,* 5th ed., Federation Press, Leichhardt (Sydney) (2010), at 1340–1369. For the text of the Australian Constitution, see http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Constitution. Accessed 17 December 2015.
[26] Ibid. This condition is known as the "triple majority."
[27] *Stronger for Scotland*, SNP Election manifesto (for 2015 UK General Election), at 9: https://bramcotetoday.files.wordpress.com/2015/04/snp-manifesto-2015.pdf. Accessed 25 November 2015.
[28] Ibid., at 17-18.

> by the end of 2017. That has now been backed in a UK General Election and I believe I have a mandate for that. They didn't give Orkney and Shetland an opt out, or the Borders an opt out [during the Scottish independence referendum], so this is a UK pledge, it will be delivered for the UK."[29]

No amendment for a double-lock or even any threshold has been included in the European Referendum Act 2015 and so the necessary majority will be customary 50% plus one of those voting throughout the UK in the referendum. Nevertheless, it is likely that the SNP and others will continue to question the legitimacy of a vote whereby the English-based electorate (England makes up some 85% of the total population of the UK) can decide on the UK leaving the Union while the electorates based in the three other constituent nations and in Gibraltar vote to stay.[30].

III. Brexit: undoing the Constitution?

Given the state of unconstitutional settlement pervading the British scene, a Brexit would entail serious consequences for the continuing viability of the UK, imposing intolerable strains on the devolution settlements of the late 1990s, the calling into question of the presence of Scotland in the UK, and the unbalancing of the Northern Ireland peace accords and related treaties, legislation and institutions. In addition, the UK's relationship with its Crown Dependencies and the British Overseas Territory of Gibraltar would require a clear recalibration.

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[29] M. Brown, "David Cameron: Scotland will NOT have a veto if Britain votes to leave the EU," *Daily Express website*, 16 May 2015: http://www.express.co.uk/news/uk/577617/David-Cameron-Scotland-European-Union-EU-referendum-Nicola-Sturgeon. Accessed 25 November 2015.

[30] On the issue of the problems linked to special majorities and legitimacy of referendum results, it may be useful to consider the words of the 1996 Report by the independent Commission on the Conduct of Referendums chaired by Sir Patrick Nairne. It noted:

> "95. The main difficulty in specifying a threshold lies in determining what figure is sufficient to confer legitimacy e.g. 60%, 65% or 75% and whether the threshold should relate to the total registered electorate or those who choose to vote. Requiring a proportion of the total registered population to vote 'Yes' creates further problems because the register can be so inaccurate. Some of the electorate may believe that abstention is equal to a 'No' vote. Thus the establishment of a threshold may be confusing for voters and produce results which do not reflect their intentions. A turnout threshold may make extraneous factors, such as the weather on polling day, more important."

Sir Patrick Nairne (chmn.), *Report of the Commission on the Conduct of Referendums*, Electoral Reform Society and the Constitution Unit, 21 November 1996, at 42: https://www.ucl.ac.uk/spp/publications/unit-publications/7.pdf. Accessed 6 January 2015.

1. Impact on the UK devolution settlement in general

A Brexit would quite evidently undermine the devolution settlement of the late 1990s and undoubtedly provoke a profound constitutional crisis.

The severity of a potential crisis stems in part from the fact that EU law is incorporated directly into the devolution statutes in Scotland,[31] Wales,[32] and Northern Ireland.[33] Consequently, although the Westminster Parliament might repeal the European Communities Act 1972 and European Union Act 2011, these repeals would not terminate the domestic incorporation of EU law in the devolved nations. It would still be necessary to have the agreement of each of the three devolved legislatures to amend the relevant parts of their own foundational devolution legislation at the same time.[34]

And such agreement from the devolved legislatures would be absolutely essential since, although the UK Parliament can still amend the three devolution Acts, the British Government has stated, under what is called the Sewel Convention[35] and now encapsulated in the main intergovernmental agreement,[36] that it would not normally pass a law on a devolved matter without the consent of the devolved legislature in question, neither would it seek to amend the powers of the devolved legislatures or of the devolved executives without their prior consent. All such amendments require a Legislative Consent Motion, under the terms of the Sewel Convention, to be passed either by the Scottish Parliament, the Welsh Assembly or the Northern Ireland Assembly, in which the relevant

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[31] Section 29(2)(d) of the Scotland Act 1998, c. 46, provides that Acts of the Scottish Parliament that are incompatible with EU law are "not law."

[32] Section 108(6) Government of Wales Act 2006, c. 32, states that any act of the Welsh Assembly incompatible with EU law, falls outside its competence.

[33] Section 24 of the Northern Ireland Act 1998, c. 47, prohibits any legislation contrary to EU law.

[34] The European Communities Act 1972, c. 68, and the European Union Act 2011, c. 12, together with the three statutes providing for devolution are all considered as "constitutional statutes" within the terms expressed in the High Court of England and Wales by Laws LJ in *Thoburn v. Sunderland City Council* ([2002] EWHC 195 (Admin); [2003] QB 151) and recently affirmed by two members of the UK Supreme Court in *R. (HS2 Action Alliance Ltd) v. Secretary of State for Transport* ([2014] UKSC 3; [2014] 1 WLR 324). For comment, see P.P. Craig, "Case Comment - Constitutionalising constitutional law: HS2" [2014] *Public Law* 373-392; and M. Elliott, "Constitutional Legislation, European Union Law and the Nature of the United Kingdom's Contemporary Constitution" (2014) 10(3) *European Constitutional Law Review* 379-392.

[35] The Sewel Convention is named after Lord Sewel, who was the Scotland Office Minister in the House of Lords responsible for the conduct through that House of the bill that later became the Scotland Act 1998. During the second reading debate, he said: "[A]s happened in Northern Ireland earlier in the century, we would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish parliament." See HL Debates, volume no. 592, part no. 191, 21 July 1998, column 791.

[36] The *Memorandum of Understanding* between the UK Government and the devolved executives (drawn up in 1999, latest version 2013) gives a broad statement of principles for relations between the executive authorities in the UK, Scotland, Wales and Northern Ireland:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/316157/MoU_between_the_UK_and_the_Devolved_Administrations.pdf. Paragraph 14 sets out the Sewel Convention. The *Memorandum* itself is not intended to be legally binding but it does represent a political undertaking. For some further detail, see P. Bowers, *Concordats and Devolution Guidance Notes*, SN/PC/3767, *House of Commons Library Research Briefings*, 7 October 2005: file:///C:/Documents%20and%20Settings/00070313/Mis%20documentos/Downloads/SN03767%20.pdf. Both accessed on 4 January 2016.

devolved legislature agrees that the UK Parliament may pass legislation on a devolved issue over which the devolved body has regular legislative authority.

However, the devolved legislatures might be reluctant to grant assent, especially as one feature of "The Vow" – that the leaders of the Conservative, Liberal Democrat and Labour parties in Westminster made to the Scottish electorate on the eve of the Scottish independence referendum to further encourage a vote to remain in the UK[37] – was a commitment to entrench the Scottish Parliament's powers, thus giving legal force to the Sewel Convention.

The consequences of a Brexit would therefore require the agreement of the three devolved legislatures: this may be especially difficult to obtain if the electorate in one devolved nation had voted by a clear majority to remain in the UK. Such is the scenario faced by Scotland which will be discussed below.

2. Scotland and Wales: Conflicting notions of sovereignty within the UK

Traditional, revised and new notions of sovereignty within the UK are driving change in the way in which constitutionalists and politicians perceive the slowly emerging resettlement of the British constitution. In many ways, it is the continuing place of Scotland in the UK and in the EU that provides the most serious challenge to the future viability of a British state.[38] But this should not obscure the ongoing re-interpretation of traditional notions of British sovereignty according to the Diceyan viewpoint or the slowly emerging roots of a new sovereignty for Wales.

The traditional understanding of parliamentary sovereignty was famously enunciated by Dicey at the end of the 19th century when he stated:

> "Parliament means, in the mouth of a lawyer (though the word has often a different

[37] Essentially, The Vow promised the devolution of more powers from the United Kingdom Parliament to the Scottish one in the event of a vote against independence: D. Clegg, "David Cameron, Ed Miliband and Nick Clegg sign joint historic promise which guarantees more devolved powers for Scotland and protection of NHS if we vote No," *Daily Record website*, 15 and 16 September 2014: http://www.dailyrecord.co.uk/news/politics/david-cameron-ed-miliband-nick-4265992. In fulfilment of this commitment, the Smith Commission was announced by Prime Minister David Cameron on 19 September 2014 in the wake of the "No" vote in the Scottish independence referendum. The Smith Commission Report was published on 27 November 2014 (https://www.smith-commission.scot/wp-content/uploads/2014/11/The_Smith_Commission_Report-1.pdf) and its recommendations are to be put into effect by the Scotland Bill 2015-2016 which bill is currently passing through its UK parliamentary stages (*Scotland in the United Kingdom: An enduring settlement*, Cm 8990: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/397079/Scotland_EnduringSettlement_acc.pdf). All accessed on 6 January 2016. A short analysis is contained in Alan Page, "The Smith Commission and further powers for the Scottish Parliament" (2015) 19(2) *Edinburgh Law Review* 234-239.

[38] On this matter, see Douglas-Scott, note 7 above, at 7-9.

> sense in conversation) The King, the House of Lords, and the House of Commons: these three bodies acting together may be aptly described as the 'King in Parliament', and constitute Parliament.
>
> The principle of Parliamentary sovereignty means neither more nor less than this, namely that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever: and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament."[39]

It has been contended that, although the Acts of Union 1707 which created a new British parliament from the previously existing and separate parliaments of Scotland and England, "in essence it was just an extension of the English parliament."[40] In fact, it is arguable whether the concept of parliamentary supremacy arose from the Acts of Union or was a doctrine that evolved thereafter.[41] While some academics have sought to evolve a new understanding of parliamentary sovereignty, Lord Bingham, speaking in the House of Lords over a decade ago, upheld the traditional view of the doctrine of parliamentary sovereignty as understood in England and in the UK generally when he stated: "The bedrock of the British Constitution is … the Supremacy of the Crown in Parliament."[42]

However, this understanding of sovereignty carries little weight north of the border. Such difference in understanding partly underscored the debate surrounding the Scottish independence referendum of September 2014, the constitutional underpinnings of which may be said to have evolved from the approach taken in the Scottish Constitutional Convention that laid the foundations for devolution under the Scotland Act 1998. Academics, lawyers, judges and politicians across the political spectrum that, following the 1707 Act of Union (passed by the then existent Scottish parliament), the English doctrine of parliamentary sovereignty did not and still does not apply in Scotland. Rather they maintain the continuation of a peculiarly Scottish tradition of popular sovereignty, dating from the 1320 Declaration of Arbroath on Scottish independence.[43] Made in the form of a letter in Latin and submitted to Pope John XXII, it was intended to confirm Scotland's status as an independent, sovereign state. It stated in rhetorical terms, *inter alia*, that the independence of Scotland was the prerogative of the Scottish people, rather than the King of Scots. Some

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[39] A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 6th ed., Macmillan and Company, London (1902), at 37-38.
[40] T. Harris, *Revolution: The Great Crisis of the British Monarchy 1685–1720,* Allen Lane, London (2006), at 498.
[41] J. Alder, *Constitutional and Administrative Law*, 7th ed., Palgrave Macmillan, Basingstoke (2009), at 167.
[42] *R. (Jackson) v. Attorney General* [2005] UKHL 56 [9].
[43] See generally, E.J. Cowan, *For Freedom Alone: The Declaration of Arbroath, 1320*, Birlinn Ltd., Edinburgh (2014).

commentators[44] have consequently interpreted this last point as an early expression of “popular sovereignty,” in other words that government is contractual and that kings can be chosen by the community rather than by God alone.

In support of such contentions, it is possible to refer to the famous *dicta* of Scottish judges. For example, the Lord President (Lord Cooper) in *MacCormick v. Lord Advocate*[45] stated:

> “The principle of the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constitutional law. It derives its origin from Coke and Blackstone, and was widely popularised during the nineteenth century by Bagehot and Dicey, the latter having stated the doctrine in its classic form in his Law of the Constitution. Considering that the Union legislation extinguished the Parliaments of Scotland and England and replaced them by a new Parliament, I have difficulty in seeing why it should have been supposed that the new Parliament of Great Britain must inherit all the peculiar characteristics of the English Parliament but none of the Scottish Parliament, as if all that happened in 1707 was that Scottish representatives were admitted to the Parliament of England. That is not what was done.”[46]

He further observed that UK legislation contrary to the Act of Union would not necessarily be regarded as constitutionally valid. Moreover, Lord Keith in *Gibson v. Lord Advocate*[47] was circumspect as to how Scottish courts might deal with a UK Act, which would substantially alter or negate the essential provisions of the 1707 Act, such as the abolition of the Court of Session or the Church of Scotland or the substitution of English law for Scots law.

A broad national political consensus on the doctrine of Scottish popular sovereignty, accepted even by those advocating to remain in the UK, can be seen in the draft Constitution for an independent Scotland, published in 2014, which stated that “the fundamental principle” that “the people are sovereign…resonates throughout Scotland’s history and will be the foundation stone for Scotland as an independent country.”[48]

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[44] For example, I. McLean & A. McMillan, *State of the Union: Unionism and the Alternatives in the United Kingdom Since 1707*, Oxford University Press, Oxford (2005), at 247.

[45] 1953 SC 396. For a detailed discussion of this case, see N. MacCormick, “Does the United Kingdom have a Constitution? Reflections on MacCormick v. Lord Advocate” (1978) 29(1-2) *Northern Ireland Legal Quarterly* 1-20.

[46] 1953 SC 396, at 411.

[47] 1975 SC 136, at 144.

[48] N. Sturgeon, “Foreword,” in Scottish Government, *The Scottish Independence Bill: A Consultation on an Interim Constitution for Scotland*, The Scottish Government, Edinburgh (2014), at 4:

In Scotland, then, this "historic" doctrine of popular sovereignty could provide the foundation of its own right to determine whether or not it exits the EU. The point is not merely theoretical: the SNP leader and First Minister for Scotland Nicola Sturgeon has already indicated that, while in principle the SNP does not intend to pursue the holding of another independence referendum at the present time, were there to be a material change in circumstances, this would be sufficient to justify a second referendum on Scottish independence. Such a material change, she has maintained, would occur in a situation in which Scotland voted against leaving the EU while the rest of the UK voted in favour.[49]

For Wales, the issue of its nascent sovereignty and the theory underpinning it – however premature this consideration might be – cannot be appealed to through historical arguments and the existence of consent, implicit or otherwise, for the formation of the Union between England and Wales in the sixteenth century: the Acts of Union (1536-1542) were thus a statutory confirmation of the English Crown's conquest of Wales in 1283.[50] Instead, according to Jones,[51] it would be an autochthonous development, a response to devolution, which recognizes that the form of government in and of Wales is a matter of popular sovereignty. Hadfield supports his point:

> "devolution marks a clear movement from the formal doctrine of parliamentary sovereignty standing alone (which ultimately concerns nothing other than the status in law of an Act of Parliament) to its combination with a process … whereby the holding of a referendum on any fundamental change to devolution (itself based on the 'will of the people') is not a matter of concession ... but a nascent right. Devolution is not simply a gift from the Westminster Parliament but a reflection of an autochthonous movement which continues to develop."[52]

In this respect, it would be possible to argue that – even in a Bremain situation – the opportunity has arisen for a revamp of the English/UK understanding of sovereignty, with its emphasis on Parliament, towards a popular idiom more in line with 21st century constitutional developments.

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http://www.gov.scot/Resource/0045/00452762.pdf. Accessed 5 January 2015. This point is emphasized in clause 2 ("Sovereignty of the people") and clause 3 ("Nature of the people's sovereignty") of the Bill: ibid., at 11-12.

[49] See, e.g., N. Sturgeon, "First Minister Speech to European Policy Centre," 2 June 2015, Brussels: http://news.scotland.gov.uk/Speeches-Briefings/First-Minister-speech-to-European-Policy-Centre-1977.aspx. Accessed 20 July 2015.

[50] No agreement lay behind the acquisition, through conquest, of Wales by the English Crown. P. Roberts, "Tudor Wales, national identity and the British inheritance," in B. Bradshaw (ed.), *British Consciousness and Identity: The Making of Britain, 1522–1707*, Cambridge University Press, Cambridge (1998), at 10, writes of Wales's "Act of Union" that "the imperial sovereignty it envisaged had not entirely lost its associations with suzerainty." See, further, T.G. Watkin, *The Legal History of Wales*, University of Wales Press, Cardiff (2007), chapter 7.

[51] T.H. Jones, "Wales, Devolution and Sovereignty" (2012) 33(2) *Statute Law Review* 151, at 153.

[52] B. Hadfield, "Devolution: A National Conversation?" in J. Jowell and D. Oliver (eds.), *The Changing Constitution*, 7th ed., Oxford University Press, Oxford (2011), chapter 8, 233.

3. Ireland and the Northern Ireland peace process

The impact on the island of Ireland of a UK exit from the EU would be serious and would undermine the very basis of the Northern Irish peace process, bringing into question the viability of devolved government there with all its attendant consequences.[53] In view of the vital importance that Ireland (i.e., the Republic of Ireland as opposed to the island itself) attaches to continued UK membership in the EU, the Joint Committee on EU Affairs in the Irish *Oireachtas* (Parliament) published a short report on this matter in summer 2015,[54] in view of the cross-border implications, and the Irish *Taoiseach* has called on the UK to stay in the EU.[55]

Although Ireland separated from the UK many years ago, it is nonetheless enjoys a rather unique relationship to the UK than other current Member States of the EU. Section 2(1) of the Ireland Act 1949[56] declared that, even though Ireland (when it became a republic) was no longer a British dominion, it would not be treated as a "foreign country" for the purposes of British law. The result of this provision was to allow Irish citizens resident in the UK to be treated like citizens of Commonwealth countries similarly resident thereby, e.g., allowing them to retain the right to vote in British .national elections. This long-standing constitutional position with the UK would evidently need to be reconsidered in the light of a possible Brexit.

Of the various concerns for Ireland if the UK were to leave the EU, is that it might result in an external border of the EU would run through the island of Ireland: such situation would be quite unprecedented for the island as a whole, at least in recent times. Except for a period during and in the years after the Second World War, neither Ireland nor the UK has placed restrictions on travel between each other for citizens resident in each other's states since Irish independence. Together with the Crown Dependencies of the Channel Islands and the Isle of Man, they form the Common Travel Area (CTA).[57] The CTA is not founded on any formal agreement between Ireland and the United Kingdom or provided for in any legislation: rather, it is an informal arrangement between the states.

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[53] See these and other issues addressed in D. Phinnemore (ed.) *et al.*, "To Remain or Leave? Northern Ireland and the EU Referendum," *EU Debate NI Research Paper*, Centre for Democracy and Peace Building, Belfast, November 2015: http://eudebateni.org/wp-content/uploads/2015/11/To-Remain-or-Leave-Northern-Ireland-and-the-EU-Referendum.pdf. Accessed 4 January 2016.

[54] Joint Committee on European Union Affairs, Houses of the *Oireachtas*, *UK/EU Future Relationship: Implications for Ireland*, June 2015: http://www.oireachtas.ie/parliament/media/committees/euaffairs/23-6-15-Report-UK-EU-Future-Relations.pdf. Accessed 15 September 2015.

[55] L. Hand, "Taoiseach: It is in Ireland's interest that UK remains 'central part of the EU,'" *The Irish Independent website*, 18 June 2015: http://www.independent.ie/irish-news/politics/taoiseach-it-is-in-irelands-interest-that-uk-remains-central-part-of-the-eu-31312772.html. Accessed 5 December 2015.

[56] Ireland Act 1949, c. 41, 12 13 and 14 Geo. 6: this British Act of Parliament was passed to deal with the consequences of the (Irish) Republic of Ireland Act 1948 (No. 22 of 1948).

[57] B. Ryan, "The Common Travel Area between Britain and Ireland" (2001) 64(6) *Modern Law Review* 855-874.

When the Schengen Area Agreement was incorporated into the EU through the 1997 Treaty of Amsterdam, the first formal recognition of the CTA was made by an annexed Protocol[58] that exempted Ireland and the UK from their obligations to join Schengen.

Originally initiated in 1923 on Irish independence, the CTA was reconfirmed in a revised version in 1952. In 2011, the first public agreement between the British and Irish governments[59] concerning the maintenance of the Common Travel Area was published under which they agreed reciprocal visa arrangements; measures to increase the security of the external Common Travel Area border; and to share immigration data between the two countries' immigration authorities. In effect, the CTA means that there are no passport controls in operation for Irish and UK citizens travelling between the two countries (as well as the Crown Dependencies).

What then would happen to the Common Travel Area ("CTA") between the two islands if the UK exited the EU? The 2015 Report of the Irish Parliamentary Joint Committee considered that the provisions of the Protocol exempting both states from applying Schengen "appear to imply that if the UK was no longer a member state of the EU, the Protocol would become redundant and by extension, the legal basis in EU law for the CTA would be questionable. This will have implications for both countries, notwithstanding their intentions."[60] In order to maintain the status quo, post-Brexit, it was proposed[61] that a "mini Schengen" arrangement, based on the existing concept, might be the best option for the UK and Ireland to continue the CTA, should the UK opt to leave the EU.

Indeed, the importance of the EU in the evolution of relations between the UK and the Ireland cannot be underestimated.[62] Like the UK, the Republic of Ireland joined the then EEC on 1 January 1973 and this common membership facilitated the development of improved relations between the two States, as they worked together to resolve the conflict in Northern Ireland.

In March 2012 a Joint Statement by *Taoiseach* Enda Kenny and Prime Minister David Cameron set out a programme of work to reinforce the British-Irish relationship over the following ten years. It

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[58] Protocol No. 20 to the TEU and TFEU, Article 2.

[59] *Joint Statement by Mr. Damian Green, Minister of State for Immigration, the United Kingdom's Home Department and Mr. Alan Shatter, Minister for Justice and Equality, Ireland's Department of Justice and Equality regarding Co-operation on Measures to Secure the External Common Travel Area Border*, Dublin, 20 December 2011: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/99045/21197-mea-sec-trav.pdf. Accessed 11 January 2016.

[60] 2015 Report, note 54 above, at 30.

[61] Ibid.

[62] Since Irish independence in the 1920s, relations between the two states had in fact been regulated by a series of bilateral agreements and understandings: e.g., the CTA; the Anglo-Irish Free Trade Area Agreement (M. Fitzgerald, *Protectionism to liberalisation: Ireland and the EEC*, 1957 to 1966, Ashgate, Aldershot (2001), chapter 5, s.v. "The 1965 Anglo-Irish FTA agreement," 237-302); and the pegging of the former Irish *punt* to UK sterling until 30 March 1979 (J. Kelly, "The Irish Pound: From Origins to EMU," *Quarterly Bulletin: Spring 2003*, Irish Central Bank, Dublin, at 98: http://www.centralbank.ie/paycurr/notescoin/history/documents/spring8.pdf. Accessed 12 January 2016).

emphasized the importance of the two countries' shared common membership of the EU for almost forty years and described them as "partners in the European Union and firm supporters of the Single Market" who would "work together to encourage an outward-facing EU, which promotes growth and jobs."[63] It has been suggested that a "British withdrawal, however unlikely, would be a source of enormous instability and turbulence for Ireland,"[64] and it is possible that the political arrangements established by the Belfast (Good Friday) Agreement would not be entirely protected from this instability.

The Agreement[65] is an international treaty and includes many provisions concerning EU law, and the status of the UK and Ireland as EU member states is woven into the fabric of the Agreement: it provides for the establishment of a Northern Ireland Executive and Northern Ireland Assembly, as well as enshrining "North-South" and "East-West" co-operation. In addition, it has effected constitutional changes and established cross-border bodies.[66] Both the Northern Ireland Assembly and the Executive have been pro-actively working to develop "European engagement" and the Northern Ireland Assembly has increasingly sought to engage with European issues.[67]

It is quite apparent that a Brexit could easily lead to an unravelling of the Belfast Agreement and undo much of what has been achieved in the last two decades in UK-Irish relations, undermining the institutions established in order to provide for the foundations of the dynamic relationship between all parties concerned.

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[63] D. Cameron & E. Kenny, "British Irish relations – the next decade," *Joint Statement by the Prime Minister, David Cameron and the Taoiseach, Enda Kenny*, Dublin, 12 March 2012: http://taoiseach.gov.ie/eng/News/Archives/2012/Taoiseach's_Press_Releases_2012/Joint_Statement_by_the_Prime_Minister,_David_Cameron_and_the_Taoiseach,_Enda_Kenny.html. Accessed 14 January 2016.

[64] D. O'Ceallaigh & J. Kilcourse, *Towards an Irish Foreign Policy for Britain*, Institute of International and European Affairs, Dublin, 26 October 2012, at 12: http://www.iiea.com/publications/towards-an-irish-foreign-policy-for-britain. Accessed 14 January 2016.

[65] For a copy of the Belfast (or Good Friday) Agreement of 10 April 1998, see: https://www.gov.uk/government/publications/the-belfast-agreement. Accessed 20 December 2015. For an analysis, see e.g., A. Reynolds, "A Constitutional Pied Piper: The Northern Irish Good Friday Agreement" (1999–2000) 114(4) *Political Science Quarterly* 613-637.

[66] The institutions created between Northern Ireland and the Republic of Ireland are the North/South Ministerial Council, the North/South Inter-Parliamentary Association and the North/South Consultative Forum; while the institutions created between the islands of Ireland and Great Britain (as well the Crown Dependencies) are the British-Irish Intergovernmental Conference, the British-Irish Council and an expanded British-Irish Interparliamentary Body.

[67] For example, Committee for the Office of the First Minister and Deputy First Minister, *European Issues: Committee Report*, Northern Ireland Assembly, Belfast, 23 June 2010: http://www.niassembly.gov.uk/globalassets/documents/official-reports/ofmdfm/2009-2010/100623_europeanissues_report.pdf. Accessed 25 July 2015.