

# Scotland, the UK and Brexit



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A Guide to the Future

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## CHAPTER NINETEEN

## Brexit, the SNP and independence

*Marco G. Biagi*

HOW TO DEAL with the UK voting for the EU's exit door? Strategists bent over laptop screens polishing drafts of the SNP's 2016 election manifesto in the party's campaign centre must have been just as sceptical as everyone else that what they were writing about Europe would ever need to be invoked. They knew they had to provide circumstances under which a new independence referendum would be held, to give the party faithful a reason to slog doorstep-to-doorstep for the party's re-election as the Scottish government. Just a year and a half after an epoch-defining vote on sovereignty caution was always going to be the watchword, and even as late as the early spring of 2016 Brexit seemed improbable.

The eventual wording put before the electorate was a masterwork of caveats. Capable of being read minimally as simply supporting Holyrood being *allowed* to hold a referendum, it balanced a clear reiteration of support for independence while freeing any re-elected SNP government from a commitment to call a vote speedily:

*We believe that the Scottish Parliament should have the right to hold another referendum if there is clear and sustained evidence that independence has become the preferred option of a majority of the Scottish people – or if there is a significant and material change in the circumstances that prevailed in 2014, such as Scotland being taken out of the EU against our will. (SNP, 2016)*

The specific, unequivocal mention of the EU as a circumstance that could trigger a second referendum provided a clear democratic mandate should the Scottish government choose to hold one. Subtly it also almost compelled them. By choosing Brexit as an example – the *sole* example – of a possible 'material change' the party set up as the default expectation that if Brexit were to happen it would indeed trigger a new referendum. After making such an explicit manifesto commitment a subsequent decision not to call an independence referendum would need almost as much explaining as actually calling one. Yet at no point since the EU referendum did Nicola Sturgeon even come close to holding back.

### *Scotland after the Brexit vote*

By the morning after the Brexit vote the implicit caution of that manifesto text was nowhere to be seen. The political tension of those hours is easily forgotten. Friday 24 June 2016 was a day of high stakes: a Prime Minister resigned in Downing Street and the Governor of the Bank of England urgently handed the economy a £250bn injection. Into this the First Minister of Scotland called a new independence referendum ‘highly likely’, announcing the initiation of legislation to that end. Since then, in every interview, speech and public statement by Scottish government representations the option has been played up rather than down.

While the threat of a referendum would always have been the Scottish government’s strongest bargaining chip to secure a voice in the Brexit process, the possibility of empty bluff was never open to them. From the moment of her ascension to leadership in the wake of the 2014 referendum defeat, Nicola Sturgeon has been perched atop a hugely politically-charged membership that was burgeoning to over 100,000. Many members and most voters had come to the SNP from other parties and could just as easily drift away again if momentum shifted.

For a significant minority, the question within a matter of months became not whether there should be another referendum but why there had not been another referendum already. The SNP depends on its rank-and-file more than other parties, principally for finance and communications, and mechanisms exist for the membership to dispense with a leader who is not delivering. A political culture that values openness, accessibility and iconoclasm means strong expectations that leaders will be responsive to ordinary members. Institutional memories abound of the consequences of the perceived softening on independence in the early 2000s for party unity and consequent electability. Strategists knew that backing down from a new referendum that had been talked up would be costly in ways that are wholly unpredictable, and would present almost as much risk to the SNP’s dominant position as would taking independence back to the electorate.

Ever since the Brexit vote there has been a growing sense in the wider movement that this is an opportune moment. Nationalist administrations run a famously tight ship when it comes to message discipline, but the standard bearers of the former regime have been forthright. Both former First Minister Alex Salmond and his former chief-of-staff Geoff Aberdein took to the newspapers and TV studios to argue that a new independence referendum is now winnable. Based on her actions since the Brexit vote the current First Minister agreed as throughout the winter of 2016–17 she very visibly marched the independence

movement's troops to the top of the hill before finally passing the point of no return on the eve of the SNP conference.

Circumstances were conceivable where those troops could have been quietly marched down again. If support for independence – or willingness to entertain a second independence referendum – had plummeted, enough members of the independence movement might have shown caution to tip the balance back. An exit would also have been provided if the UK government had delivered a significant devolution of additional powers. Perhaps it still could. The Scottish government's repeated sincere offers to take a referendum off the table if the Scotland Act were revisited to accommodate the new post-Brexit situation have however been repeatedly rebuffed by the UK government. For supporters of independence moreover, Whitehall's relationship with Holyrood through the Brexit process has only highlighted the fundamental imbalance of esteem that has always provided fuel and justification to their cause.

A first call for the Brexit vote to require support in a majority of the UK jurisdictions as well as a majority of the UK's voters was after all rejected out-of-hand. A common condition for constitutional change in genuine federations, it was alien to the political culture of a UK that still, in London at least, sees itself as one country rather than four. Yet had that requirement been included, English voters would undoubtedly have reacted with the same frustration and fury at being held in the EU against their will as Scotland's leaders reacted at being pulled out.

The second concession that was seriously debated, where the Scottish parliament was given the power to retain full EU membership unilaterally, was less credible. Nicknamed 'reverse Greenland' after that jurisdiction's unique position outwith the EU while still a part of the state of Denmark, it would have required Scotland to assume functions associated with being an independent state in order to discharge treaty obligations, such as international representation even up to participation in mutual defence, that were never realistic.

The more credible Scottish government position of December 2016 however evolved from this; that the Scottish parliament should gain sufficient powers to be able to retain membership of the Single Market unilaterally, as opposed to full membership of the European Union. Such an arrangement would require devolution of powers over immigration, business regulation, health and safety and employment law. Precedents exist in other federal states around the world for each of these to be governed by component parts, rather than the central government, but while the UK government has strategically avoided ruling out this proposal, they have also displayed no obvious enthusiasm and made no concrete commitments. Instead the leader of the Scottish

Conservatives has predicted on a public platform that Brexit will lead to a turf war over whether Westminster seeks to reclaim powers over agriculture. Those powers were devolved to Scotland at a time when that responsibility, in practice, largely meant administering a public policy that originated in Europe. David Cameron's description, in the dying days of the independence referendum, that the UK is a 'family of nations' may have been an expedient soundbite at the time but now more than ever seems a flattering and inaccurate description of how differing interests within these islands are accommodated.

Much else has changed since 2014, and the actual process of Brexit itself is actually far from the most important. When Theresa May stated 'Brexit means Brexit' she presumably meant that the one certainty was that Brexit means the UK will no longer be a member of the EU – no more, no less. That change is very abstract – a narrow definition of Brexit – and alone would be insufficient to shift Scotland's politics radically. The Scottish Social Attitudes Surveys have consistently, over years, found little widespread evidence of a gut attachment to European identity. In-depth focus groups conducted by IPPR Scotland and IPSOS-Mori ahead of the Brexit referendum concurred. Scotland's EU membership is not, in and of itself, of definitive importance to more than a small number of citizens – certainly much fewer than intrinsically value a sense of attachment to the UK, its identity, traditions and flag. A new independence referendum that came to be a choice between pure emotional attachment to the EU or the UK would be a disaster for the Yes side.

To see Brexit in such narrow terms, however, is to overlook the wider impact of all that has now been bundled with it. This is now a political divide about much more than whether the words 'European Union' adorn passports, just as Scottish independence means much more than whether 'United Kingdom' is on them.

This 'wider Brexit' is what has fundamentally altered the political landscape.

The future of Britain now looms with doubt and even menace. In the independence referendum the No campaign, by contrast, made doubt the cornerstone of their efforts to weaken the independence cause. Introducing 'Project Fear' into the political lexicon, they ruthlessly associated Yes with uncertainty and risk and framed No as stability and security. The Yes campaign spent many months fruitlessly trying to contest that territory, portraying independence as steady-as-she-goes. As late as February 2013 billionaire Jim McColl was describing the prospect as 'a management buyout' in a well-heralded endorsement in *Scotland on Sunday*. By the end of that year the independence case had evolved into a White Paper offering social democracy with distinctly Nordic overtones but without the tax increases. Often fronted by Nicola Sturgeon as the Scottish government's official 'Yes Minister', they sought to win votes through inspiration



and conviction. The new Scotland offered by the Yes side won the support of 45 per cent of those who voted: short of victory but tantalisingly close.

### *A changed environment*

The relative strength of these arguments has now changed utterly. The UK government is now unable to offer answers about the future. Even worse, if they followed Yes Scotland's example and instead put forward an authentic pledge of change, the worldview they would be tied to offering would be that of a Conservative-dominated little Britain. Nothing could be more guaranteed to repel rather than inspire Scotland's voters, who have been rejecting Conservative visions at the polls for over fifty years.

In 2014 the No side sought to make voters fear that they would lose their pensions with independence, never mind that the UK's pensions were already the third lowest relative to wages in the industrialised world (House of Commons Library, 2015). Today independence supporters can more easily convince that it is staying with the UK that invites the loss of employment rights as EU-wide minimums no longer compel UK governments to at least basic safeguards. They will be able to talk up the threats to public services posed by the free trade deals that the UK will have to negotiate with strong-willed countries like the United States. Even the core economic debate will take on a new tenor when the UK government has in Brexit a flagship policy most mainstream economists have publicly denounced as self-destructive. A second No campaign will have to explain to undecided voters the likely sight of office buildings in London being emptied of financial services companies 10,000 employees at a time, as they relocate to Paris, Frankfurt and Dublin, turning a 2014 spectre used against independence on its head. It is an unenviable position.

The vision of a fairer Scotland put forward by those who argued for independence could meanwhile remain broadly the same. Some aspects of policy, like currency and how to bring expenditure and revenue into greater balance through economic growth, need to be updated. To the SNP, however, the contrast that epitomised the late stages of the 2014 independence campaign – for example the 'Kirsty' broadcast that presented the two potential futures of a child born on referendum day – has only been vindicated since. To this can be added the collapse of the UK Labour Party as a force that could credibly win power in Westminster and the growing alignment in Scotland of unionism with Conservatism. The prospect of voting No in expectation of the UK being restored to its old self by an incoming Labour government, as many did in 2014, is now implausible.

Among those left voters there is also an enduring group of genuine progressives who are instinctively suspicious of any political movement that carries the name of 'nationalist'. For them the social democratic promises of the Scottish government and the support of the Scottish Green Party for independence in 2014 were insufficient to allay their fears of a dark side to nationalism, even as the Yes campaign offered nuclear disarmament, a living wage, extended childcare and protection of a public NHS. These are also though, precisely the people most likely to feel a heartfelt sense of European identity, along with the immigrants from the EU who also voted against independence by two-to-one.

Together these groups have now experienced not just Brexit but also the sight of Scottish (and Welsh) nationalists repeatedly taking up the causes of Europe and immigration. In contrast the Labour Party continues to self-consciously equivocate on both issues and the UK government increasingly looks outright like the exclusionary nativist movement they fear. Realisation of the consequences of the SNP's progressive *bona fides* being reinforced has led to ever more severe attacks from Labour, culminating in London Mayor Sadiq Khan's infamous Scottish Labour conference speech in Perth alleging that Scottish nationalists were not racists per se, but somehow also that nationalism was no different to racism. Set against the backdrop of the Scottish government's internationalist response to Brexit, such accusations only further question the credibility of the accuser.

After all of this, supporters of independence could be forgiven for surprise at polls seemingly still lodged roughly where they were on that auspicious day in September 2014. Since Brexit it seems that the cause of independence has lost as many supporters as it has gained. Why? A section of the population open to appeals to independence has always been simultaneously sceptical of appeals to Europeanism. Nigel Farage enjoys poking fun at the SNP by alleging that the party wants to win power from London only to hand it over to Brussels. Such a worldview is simplistic. The UK is not the EU. To even resemble the EU, the UK would need to have veto powers for the Scottish, Welsh and Northern Irish governments over all UK-wide legislation, a Cabinet made up of nominees from those governments and devolution of powers over tax, welfare, defence, employment rights, foreign affairs, broadcasting and currency. The UK affords less flexibility in these policy areas than even the USA affords to its states, let alone the European Union. Yet despite all of this this, some voters do see equivalence.

Those optimistic about a new independence referendum base their strategy on a simple calculation: that these voters can be won back to Yes as easily as they drifted away. This is not far-fetched. After all, the Yes campaign these

voters supported in 2014 was one resolutely in favour of a Scotland in the EU. Winning these voters back, while not alienating new converts, would be a challenge for a renewed independence campaign; but holding on to these voters while not alienating more of the 62 per cent of Scots who voted remain would be a challenge for a renewed anti-independence campaign too.

This strategy is based on a belief that rather than a growth in support, what has grown is an openness to the appeals that a new independence campaign would put forward. Respondents in polls are notoriously terrible at predicting how they will vote in the future. Five polls in the run-up to the Brexit vote saw Scots responding that in the event of the UK voting to leave the EU against Scotland's will they would vote for independence – in one case 54 per cent to 39 per cent. Such polls shaped the Scottish EU referendum debate, despite the precedent of the three Yes Scotland-commissioned polls in 2014 that showed clear leads for independence in the event of the Conservatives being re-elected as the UK government. Both events happened and in neither case did the promised support for independence materialise in any real way. With the injection of former No voters, Brexit, has at the very least, enlarged the proportion of people who have been in recent times supportive of independence. Deeper research than a simple opinion poll would be needed to predict how they will react to a campaign.

As Scottish government ministers increasingly invoke the rhetoric of 'hard Britain' or 'Tory Brexit' it is clear they see the wider implications of Brexit as part of a message that will resonate with this population. They may well be right. A larger audience in the country is receptive to their arguments than in 2014 and progressive arguments now carry greater credibility. The UK government is mired in economic uncertainty and the face of union is now unreservedly Conservative. No referendum result is ever certain, but in post-Brexit UK, Scottish nationalists have reason to feel that circumstances have changed such that if they present their pro-European, social democratic vision of independence to the people once more they can be justified in hoping for a different result.

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CHAPTER TWENTY

Scotland, Britain, Europe: where now? A  
Conservative perspective

*Adam Tomkins*

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CARDS ON THE table: on 23 June 2016 I voted for the United Kingdom to remain a member state of the European Union. Not with anything like the same enthusiasm as I had voted on 18 September 2014 for Scotland to remain part of the United Kingdom. My vote in 2014 was a matter of deep conviction; my vote in June 2016 was calculation rather than anything else. I am no cheerleader for the European Union. It is undemocratic, intolerant of critical voices, bullying and, since Maastricht in the early 1990s, it has taken on far too much and has lost sight of its core purpose. Maastricht was a double error. Its expansion of economic union to embrace a single currency was a mistake (and the United Kingdom was entirely correct to stay out of the Eurozone). And the expansion of the EU's role beyond the core task of economic integration, into fields of political union, was a grievous error. None the less, I thought Britain should remain a member state so that we could argue from within for a radical change of European direction.

Referendums, however, are not opinion polls whose verdicts we can celebrate or ignore as the case befits. They are formal, binding, decision-making devices. They represent not advice to government, but instructions to government. Had Scotland voted 'Yes' in 2014 the United Kingdom would not have been free to ignore or to seek to overturn the result. Likewise in 2016: having asked the people for their decision we are now duty bound to give effect to it. The UK is leaving the EU not because the Tories have willed it – both the current Prime Minister and her immediate predecessor campaigned and voted to remain, as did Sir John Major – but because parliament decided in the European Union Referendum Act 2015 to ask the people whether we should leave or remain, and the people gave their answer, calmly and clearly, just as the Scottish people gave their answer on the independence question in 2014.

That some parts of the UK voted to remain and others to leave is immaterial to the result, just as it was immaterial to the result in 2014 that Glasgow and Dundee voted ‘Yes’. No local authority had a veto over the result of Scottish independence referendum; and no part of the UK has a veto over the result of the EU referendum. Scotland was not the only place where a majority of voters wanted the UK to remain a member state. London, Manchester, Leeds, Liverpool, Newcastle, Bristol and Northern Ireland all voted remain.

### *EEA membership?*

Sadly – if predictably – however, the Scottish government has yet to accept this. At the end of 2016 the Scottish government published a paper, *Scotland’s Place in Europe* (Scottish Government 2016), which made three arguments. Each is worthy of analysis. The first argument was that the whole of the United Kingdom should seek to become a member of the European Economic Area (EEA). This option, sometimes referred to as the softest of soft Brexits, would mean that the UK, whilst it would leave the institutions of the European Union (no more British MEPs, no more British members of the European Commission, and no more British judges at the Court of Justice), would remain a ‘member’ of the single market. Legally, there is no such thing as ‘membership’ of the single market. One can have *access to* a market; one can *participate in* a market; but markets do not have members. Clubs have members, and on 23 June we elected to relinquish our membership of the EU club. Membership of the single market has been adopted, however, as shorthand for membership of the EEA.

It is not the policy of the United Kingdom government to pursue EEA membership for the UK. Theresa May is right to have rejected this option. We all know that the most powerful slogan of the leave campaign was ‘take back control’. EEA membership means full participation in all four fundamental freedoms of the European single market (free movement of goods, services, workers and capital) – so EEA membership would not enable the UK to take back control of its borders. EEA members must comply with the entirety of the Court of Justice’s case law on the single market, including its case law on the supremacy of European law – so EEA members cannot take back control of their national legislation. For EEA members the sovereignty of national legislation is conditioned by, and subject to, the supremacy of European law. And, finally, EEA members must make a substantial financial contribution to the EU institutions, so there is no taking back control of national finances, either.

It could be argued that EEA membership is compatible with the referendum result, in that the referendum question was about EU membership, not about

the EEA. But such an argument would be a triumph of form over substance. People voted to take back control, and EEA membership does not deliver on that democratic mandate.

### *A differentiated deal for Scotland?*

The second argument put in the Scottish government's paper was that even if the UK as a whole was not going to become a member of the EEA, Scotland should join the EEA in its own right. This would see a 'differentiated' deal for Scotland, on the one hand, and the rest of the UK, on the other. This option was put forward by the Scottish government in order to maintain and protect Scotland's place in the single market. In its view, a differentiated deal such as this would reflect the differentiated result of the 23 June referendum (in which Scots voted 62:38 to remain, whilst the UK as a whole voted 52:48 to leave).

My party – the Scottish Conservative and Unionist Party – spent two months carefully considering this option. In February 2017 we published a paper, *Scotland's Trading Future* (Scottish Conservatives, 2017), in which we explained why we cannot accept it. On analysis, the option suffers from two basic flaws. First, it is undeliverable. Only states may accede to the EEA Treaty and Scotland is not a state. There is no precedent for a sub-state region or territory (I am using the language that European law uses) to join the EEA (nor indeed the EU) in its own right. Member states are exactly that: states. Scotland is not a state because in the 2014 independence referendum a majority of 55:45 rejected the Scottish National Party's proposal that Scotland should leave the United Kingdom to become an independent state. It was precisely Scottish statehood that was rejected in 2014. Subsequent opinion polls very clearly show that Scots do not want to be asked that question again.

Secondly, and more importantly, a differentiated deal along the lines proposed by the Scottish government would be contrary to Scotland's economic interests. Scotland trades four times as much with the rest of the UK as it does with the whole of the European Union. Since 2002 the value of Scottish trade with the rest of the UK has grown by 74 per cent (from £28.6 billion to £49.8 billion) whereas in the same period Scottish trade with the EU has grown by less than 8 per cent (from £11.4 billion to £12.3 billion) (Scottish Conservatives, 2017: 12). This is far from the only measure of the comparative importance to Scotland of the British domestic market compared with the European single market. Consider, for example, Scottish jobs. There are currently 2,790 enterprises registered in Scotland with ownership in the rest of the UK, employing more than 340,000 Scots (17.7 per cent of the Scottish workforce). This compares

with just 1,000 EU enterprises operating in Scotland, employing 127,000 people (6.6 per cent of the Scottish workforce).

And here's the rub: whether we like it or not, a differentiated deal for Scotland, in which Scotland was in the EEA and the rest of the UK was not, would inevitably see growing divergence either side of the border. The nature of the border would change, as controls appeared along it. And the nature of trade in goods and services between Scotland and the rest of the UK would likewise change, becoming more complex and more expensive as the regulatory regimes developed along their own, different, paths.

Prime Minister Theresa May has made it clear that her 'guiding principle must be to ensure that, as we leave the European Union, no new barriers to living and doing work within our own Union are created'. As the Prime Minister made plain, that means, among other matters 'maintaining the necessary common standards and frameworks for our own domestic market' (May, 2017).

This does not mean that there can be no Scotland-specific elements to Britain's Brexit deal. For example, were universities in England and Wales not to want continued participation in the EU's schemes of research collaboration and research grants there is no reason in principle why Scottish universities could not do so, if that is what they wanted. (I should add: I do not think this likely. I think it likely that all UK universities will want to continue to participate in these schemes, and there is no reason in principle why that should not be the case even after Brexit.)

It is striking that, for a nationalist document, *Scotland's Place in Europe* fails to identify any Scotland-only interests that require a bespoke solution, different from that for the rest of the United Kingdom. This is striking, but not surprising. After all, the interests of farmers in Perthshire are surely the same as farmers in Yorkshire; the interests of manufacturers in Lanarkshire and Dundee are surely the same as those in Tyneside and South Wales; and the interests of the financial services sector in Edinburgh are the same as those of the City of London.

It may very well be that Britain's Brexit deal can be sensibly differentiated sector to sector. But no case has been made for a Brexit deal that is differentiated nation to nation.

### *Enhanced devolution?*

The final argument made by the Scottish government in its paper is that Brexit should deliver a fresh round of devolved powers to the Scottish parliament.

I have no doubt that it will do so. It seems inevitable that some of the powers to be repatriated from Brussels to the United Kingdom will pass to the devolved legislatures in Scotland, Wales and Northern Ireland. But I am equally in no doubt that this will occur at nothing like the scale proposed by the Scottish government.

In Scotland we are now seeing Devolution 3.0. We are on our third Scotland Act, the 2016 legislation implementing into law the conclusions and recommendations of the all-party Smith Commission, which met in the immediate aftermath of the 2014 independence referendum (full disclosure: I was a member of the Smith Commission). Opinion polls record no desire on the part of Scots to see the devolution question opened up yet again. The priority must surely be to get on with the job of implementing the Smith powers, some of which (particularly as regards social security) will in any event not be operational until 2020 or 2021, the slowness of the pace being set by the Scottish Ministers, not by the United Kingdom government.

What the Scottish government argued for in *Scotland's Place in Europe* is actually a copy-and-paste job of what it had argued for going into the Smith Commission: namely, the devolution to Holyrood of more or less all powers except those pertaining to defence, national security, and monetary policy. It asserts the need to devolve employment law, equalities law, health and safety law, consumer protection, import and export controls, immigration law, competition law, company law, energy regulation, financial services, telecommunications and postal services. This is not devolution designed to strengthen the United Kingdom's domestic market: it is devolution designed to destroy it, to undermine its integrity and to break it apart. This is a vision of devolution that was rejected by the Smith Commission in 2014 and it will be rejected again as Brexit unfolds.

There are perhaps three main areas regulated by the European Union that would most obviously fall within devolved competence in Scotland. These are agriculture, fisheries and environmental regulation. One might add a fourth policy area: VAT. The Smith Commission agreed that a proportion of VAT receipts in Scotland be assigned to the Scottish government. VAT could not be devolved, the Smith Commission was advised, because it is contrary to EU law for a member state to set more than one rate of VAT. Brexit may liberate us from that rule, meaning that a proportion of VAT could be devolved to the Scottish parliament, rather than merely assigned. To date, this matter has not featured prominently in Scottish political debate since the EU referendum. Perhaps the Scottish Ministers are in no great rush to take control of sales or consumer taxes?



In recent months there has been more consideration given to agriculture, fisheries and the environment than there has to VAT. Early assumptions that these fields would be devolved in full and that this would be automatic given the nature of the Scotland Acts have been challenged since the turn of the year, however. The position of the United Kingdom government is that no power currently exercised by Holyrood (or, presumably, by Cardiff Bay or Stormont) will be re-reserved. There is nothing currently done by Holyrood that will be removed from its powers. But is it in the British national interest to have two (or three) regulatory regimes for fisheries policy and four for agriculture? It is surely a question worth asking, even if it risks a political row.

There is also the question of understanding just how broad an array of powers is covered by the Common Agriculture Policy (CAP). It includes regulation of the quality, grading, weight, sizing, packaging, wrapping, storage, transport, presentation, origin and labelling of agricultural products. By no means all of these matters are really about agriculture. Some are concerned with consumer protection or product safety. These fields are generally reserved to Westminster under the Scotland Act 1998, although there are exceptions for food products. Again, the question does need to be asked: is it in Britain's interests to have different rules on labelling, packaging, transport and storage in each of England, Wales, Scotland and Northern Ireland, or would it be more coherent, given the integrity of the UK's domestic market, to have a single, UK-wide regulatory regime for these matters?

Perhaps the answer is both. This leads me on to my final point. For more than 15 years we have acted as if a power is either devolved or it's reserved. If it is devolved, it is for these ministers accountable to this parliament; and if it is reserved it is for those ministers accountable to that parliament. The reality, particularly since the Smith Commission Agreement and even more so after Brexit, is more complicated than that. Of course there are devolved powers, and of course there are reserved powers. But there are also shared powers – areas where both the UK and Scottish governments have concurrent and overlapping responsibility. Social security is a good example. Universal Credit is a reserved benefit, but the Scottish Ministers have powers to make adjustments to its operation in Scotland. Likewise, child benefit is reserved, but Holyrood has the power to top it up (i.e. to make additional payments to recipients) if MSPs consider it to have been set at too low a rate.

The repatriation to the UK of powers over agriculture, fisheries and the environment presents an opportunity for the further development of ideas and practices of, and institutional apparatus for, shared rule. Could the UK

establish a UK department of fisheries but base it in north-east Scotland rather than in landlocked Whitehall? Or think about it this way: the European Commission typically governs via directives, setting out broad principles of convergence but leaving to the member states the choice of form and methods of delivery. This is not a mechanism we have used in devolved Britain: it is not as if the UK sets broad principles and devolved administrations implement them in a manner best suited to local needs. But could such a system – innovative and novel as it would be in the UK context – not be the future of agriculture in Britain? These are the sorts of questions we are likely to be looking at in Scotland as Brexit unfolds.

### *Conclusion*

Scottish political debate since 23 June 2016 has proceeded as if there is a gulf of difference of view and direction between the Scottish and UK governments. This has no doubted suited the party political aspirations of the SNP. But it really does not have to be like this. When you read the published views of the two governments and analyse them dispassionately, they have much more in common with one another than divides them. For example, the Scottish government wants continued ‘membership’ of the single market; the UK government wants the ‘freest possible trade in goods and services between Britain and the EU’ and ‘the greatest possible access to’ the European single market through a ‘new, comprehensive, bold and ambitious free trade agreement’ (May, 2017). These positions are really not that far apart.

Similarly, Scottish Ministers have said that EU nationals resident in the UK should have their rights protected. The Prime Minister has said that she wants to ‘guarantee the rights of EU citizens who are already living in Britain... as early as we can’. But such a guarantee needs to be reciprocal, and it is the EU holding this up, not the British government. Again, Scottish Ministers have said that workers’ rights, currently protected under European law, should be fully protected after Brexit. The UK government evidently agrees – in the Prime Minister’s words: ‘as we translate the body of European law into our domestic regulations, we will ensure that workers’ rights are fully protected and maintained’ (May, 2017).

In the end, Brexit could mean one of two things. It could see Britain turning in on itself, becoming more isolated, as protectionist walls are thrown up. Or it could mean the very opposite. It could mean that Britain recaptures something of its historic role as one of the world’s great global trading nations, as one of the world’s leading advocates of free trade and of the promise of economic

freedom and prosperity it offers. The Scottish Conservatives are firmly in the latter camp. We are unionists, not nationalists – advocates of growing the economy through increased international trade, not of separating ourselves from our nearest trading partners. But this is a vision of Brexit that will need to be fought for – it cannot be taken for granted.

Across the western world, liberal internationalism is in retreat and nationalist protectionism is on the rise, in Trump's America, in Le Pen's France and elsewhere. The argument for free trade is not yet won. Those of us who believe in it must be ready, forcefully and confidently, to make its case.

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<http://www.gov.scot/Resource/0051/00512073.pdf>

## CHAPTER TWENTY-ONE

## A better post-Brexit path for Scotland

*Douglas Alexander*

THE YEAR 2016 was one during which many old certainties, both in the UK and the US, died. A combination of economic anger, cultural anxiety, and political alienation upended the two most stable democracies on earth as a wave of populism swept the UK out of Europe and carried Donald Trump into the White House. Months on from these momentous decisions there are still many more questions than answers about their consequences and impacts, while Brexit continues to dominate British politics and will do so for years to come.

In December 2016, the Scottish government published its response to the Brexit vote in a document entitled ‘Scotland’s Place in Europe’ (Scottish Government, 2016a), and the next month the Prime Minister set out the UK government negotiating objectives for exiting the European Union, and thereafter published a White Paper on February 2nd 2017 (HM Government, 2017). These documents help explain a central tragedy of our politics today: In the insightful words of Alex Massie (2016), ‘the middle ground of Scottish politics is pro-union and pro-EU but neither of our governments can accept or accommodate the whole of that reality’.

These issues are not merely dry constitutional arrangements or interesting theoretical political constructs, and I do not claim academic detachment from them. For me, these issues run deep and indeed touch on deep senses of affinity and belonging. All of politics begins and ends with relationships; with our neighbour, our family, our community, with those who lead us and make decisions for us. Constitutional politics involves much more than a ledger of accounts: it speaks to who we are, how we see ourselves, and how we relate to others. It is about a common journey, a shared story and who we choose to share that journey with.

It would be easy in these circumstances to simply despair at the posturing and prejudice we have too often seen on both sides of the border in recent months:

for some, a retreat into cynicism and an embrace of old certainties seems the only appropriate response. Yet that would be a wholly inadequate, indeed cowardly, reaction in the face of the seismic developments in politics nationally and globally witnessed this past year. Nationalism, populism, and xenophobia are all on the march today. They have found voices once more, as almost always, in the context of economic uncertainty. Accordingly, this chapter is written not in denial of the re-emergence of these forces – or of the risk that politicians North and South of the border may well choose a path of division and grievance – but in defiance of that bleak choice. It suggests a politics, rooted in a commitment to solidarity and a recognition of our interdependence, demands a different and better path for Scotland: a path where, while retaining the strengths of the British partnership, we can in Scotland make different choices, including over relationships with Europe.

This chapter is written from a Scottish perspective and accordingly starts by considering the Scottish government's White Paper before considering the UK government's subsequent proposals. In acknowledging the political and economic backdrop to today's Brexit debate, the chapter concludes with policy proposals aimed at maintaining both British and European relationships for Scotland.

### *Scottish options*

The Scottish government's Brexit proposals set out three options: one is staying inside the UK which itself stays part of the European Economic Area and the European Customs Union (Scottish Government, 2016a: vi). Another is for Scotland to stay inside the European Economic Area and the European Customs Union under specific arrangements, while the rest of the UK is outside them (Scottish Government, 2016a: p.vi). The other option is for Scotland to become a member of the EU as an independent country (Scottish Government, 2016a: vi). In contrast, the UK government's Brexit proposals assert that the UK will withdraw from the single market and seek a new customs arrangement and a free trade agreement with the EU (HM Government, 2017: 35).

The UK government (2017) addresses the issue of trade across the UK by highlighting that, 'Scotland's exports to the rest of the UK are estimated to be four times greater than those to the EU27. So, our guiding principle will be to ensure that – as we leave the EU – no new barriers to living and doing business within our own Union are created' (HM Government, 2017: 19). The gap between the two governments' sets of proposals are self-evident, but both governments make the same mistake in assuming the outcome of the Brexit negotiations can be dictated by a British Prime Minister. That is simply not the case.

There are politics, let us acknowledge, on both sides of the Channel, and one of the many ironies of a campaign run under the slogan ‘Take Back Control’ is that it has ensured the United Kingdom is not in control of the terms of the deal that will ultimately be struck with Europe. We don’t get ‘sovereignty’ over the decision-making process, nor over the outcome of the negotiations. Indeed, the operation and the timetable of the Section 50 process is specifically designed to put the leaving country on the back foot. The politics of the Brexit negotiations must also be understood in the context of leaders across the continent determined to avoid an outcome that strengthens populism or encourages contagion. In 2017 we will see crucial elections in the Netherlands, in France and in Germany (alongside Theresa May’s decision to call a snap UK election in June). In each of these contests populist, nationalist and xenophobic candidates will be challenging the mainstream governing parties.

While many of us in Scotland who supported ‘remain’ would be attracted to the option of the UK remaining part of the EEA and within the EU Custom’s Union, the UK government’s determination to end ‘free movement’ effectively takes this option off the table. Similarly, the option of Scotland remaining in the EEA and EU Customs Union, with the rest of the UK on the outside, has been explicitly rejected by the UK government. Indeed, even Charles Grant (2016) the Director of the Centre for European Reform and a member of the First Minister’s Standing Council on Europe, has suggested that ‘legally, politically, technically, it’s extremely difficult for Scotland to stay in the single market if the UK as a whole does not, the basic point being that there would have to be one set of business regulations applying to England and another set applying to Scotland’. So, if these two options identified by the Scottish government are off the table, what of the alternative: Independence in Europe, described by the First Minister as ‘the best option’ (Scottish Government, 2016a: vi).

If the tumultuous weeks and months following the vote on 23 June 2016 have taught us anything, it should be to ask the difficult economic questions before deciding to disdain experts and simply walk away from our neighbours. There is little serious disagreement that one of the reasons the Nationalists lost the 2014 referendum was their failure to provide credible answers to reasonable economic questions; whether on the reliability of the oil price, the currency of a post-independence Scotland or the significant financial advantage Scotland gains from the operation of the Barnett Formula. So here are just a few relevant facts: The Scottish government’s official blueprint for independence in 2014 asserted that the oil price would not fall below \$113 a barrel (Scottish Government, 2014: 510); however, in 2017 oil prices are around \$53 a barrel (Bloomberg Markets, 2017). The collapse in global oil

prices has seen a 97 per cent fall in North Sea oil incomes between 2015 and 2016 (Scottish Government, 2016b: 21) while Scotland's estimated oil revenues fell from £1.8 billion to £60 million in the same period (Scottish Government, 2016b: 23).

The First Minister has stated that 'losing our place in the Single Market would be potentially devastating to our long-term prosperity' (Sturgeon, 2016a). However, while Scotland does indeed export goods and services to continental Europe totalling around £12 billion (Scottish Government, 2017: 1), the inconvenient truth for the nationalists is that, as Scots, we sell £49.8 billion of goods and services to the rest of the UK (Scottish Government, 2017: 19). It simply doesn't make sense to leave the UK without fully considering the impact of leaving the UK single market. If leaving the EU single market, where we export £12 billion of products and services, would be devastating for Scotland, how does leaving the UK single market where we export £48 billion make things better? If it is important for Scotland's companies to be able to trade freely with the European Single Market, then geography, history, and economic integration make it even more essential for Scotland's companies to be able to trade freely within the British Single Market.

And what of currency? In circumstances where the UK has left the EU, the choices for an independent Scotland become even more fraught with difficulty; joining the Euro with our interest rate decisions made in Frankfurt, or seeking to stay with Sterling with our interest rate decisions made in London (a foreign capital post-independence), or establishing a new Scottish currency with no reserve or any kind of petro-economy to underpin it when the currency speculators come calling, are all equally unappealing. Additionally, let us recognise the public expenditure backdrop to these decisions: Scotland spent £14.3 billion (Scottish Government, 2016b, p.46) more than it raised in taxes in 2015/16 (or 9.1 per cent of GDP (Scottish Government, 2016b: 27)) – with these figures including a share of North Sea Oil revenue. EU rules mean that joining the European Union would require Scotland to cut this deficit down to 3 per cent of GDP (Treaty on the European Union, 1992), with all the cuts to public services and public expenditure this obligation would entail. Far from ending austerity, this would extend and deepen austerity.

### *The limits of nationalism north and south of the border*

We have just witnessed one form of nationalism take us out of Europe with little thought for the consequences, so we should be wary of another form of nationalism repeating a similar mistake in Scotland. Little wonder a majority of

Scots are not demanding another independence referendum at this time and the opinion polls fail to show significantly increased support for independence since the Brexit vote last June (What Scotland Thinks, 2017). Yet, almost 100,000 supporters have joined the SNP following the Scottish independence referendum (House of Commons Library, 2016) – which helps explain why the First Minister continues to assert that for her, independence ‘ultimately transcends the issues of Brexit, of oil, of national wealth and balance sheets and of passing political fads and trends’ (Sturgeon, 2016b). It seems evident therefore that for the First Minister and her Party, the real issue is not so much the terms of the deal, but the level of the polls.

My honest worry is that the SNP now risks replicating David Cameron’s fatal error – starting off trying to solve a party problem and ending up creating a far bigger country problem. Constantly threatening an independence referendum in the face of the economic evidence and without offering answers to reasonable questions doesn’t enhance the First Minister’s credibility for the discussions ahead – it diminishes it. Today we need more new thinking, and less of just the same old threats. Why would we choose to add greater insecurity and uncertainty to the insecurity and uncertainty already created by Brexit? Why would we choose an approach that guarantees division and rancour rather than an approach that could build consensus by consent?

The reality is that millions of Scots today feel squeezed between nationalist narratives north and south of the border and identify with neither. These narratives fail to recognise the grave risks posed by both governments’ respective positions and they miss the opportunity that can still be seized to find a better path forward: a path towards a constitutional settlement that I believe could command broad support from both sides of the 2014 debate, and indeed on both sides of the border. So where, within the bounds of the possible can a way forward be found that would command this widespread support in Scotland?

### *A new British settlement*

Rather than overestimating the capacity of the British government to dictate the terms of its new relationship with Europe, it is better to simultaneously look at internal arrangements within the UK – where the British government undoubtedly does have the capacity to deliver a new settlement. On these matters the former Prime Minister Gordon Brown, in a speech in August 2016 (Brown, 2016), started to chart a way forward. Then, in October, Professor Jim Gallagher produced a timely and influential paper (Gallagher, 2017) that sets out a number of these proposals in more detail.



Following the publication of the UK government's negotiation objectives there had been much speculation in recent weeks about the merits of the UK agreeing a Canadian-style free trade arrangement with the EU. This interest reflects the fact that the Canadian agreement (CETA) is the most recent and the most comprehensive trade agreement negotiated by the EU. I Chaired the UK government Cabinet Committee on Trade Policy back in 2009 when discussions between the European Commission and the Canadian government were first initiated. CETA took 7 years to negotiate, is 1,600 pages long, and does not cover services (Kassam, 2016) that make up 79 per cent of UK GDP (Office of National Statistics, 2016). It therefore seems highly unlikely that such a comprehensive free trade agreement (necessarily including services) could be negotiated within the two-year timetable anticipated by the Section 50 procedure. There is merit therefore, in the Scottish government focusing its immediate efforts on the terms of the 'bridging agreement' that will likely emerge as the legal framework governing relations between the UK and the EU, while work continues on a final and more comprehensive agreement. Such an agreement, which we might call 'temporary cover', could potentially provide Scottish firms guaranteed access to both the British and the European single markets for years to come.

In the meantime, however, there are three other specific proposals that could benefit Scotland in the present circumstances, that impact on European relations but could be secured within the United Kingdom. First, after Brexit, areas of law previously within the competence of the European Union will be returned to the UK. In key areas within the competence of the Scottish parliament – agriculture, fisheries, and environmental protection – European law will no longer apply. It is therefore right that in these devolved areas, both power and resources should be repatriated – ensuring that important new power over key sections of Scotland's rural economy passes directly from Brussels to Edinburgh.

Second, the London Mayor, Sadiq Khan has initiated a dialogue with UK government Ministers arguing that it makes sense for London to be able to issue work permits based on the needs of the London economy. I would argue that the ability to issue work permits to skilled workers should be examined, as a route to ensuring the needs of Scotland's public services and private sector development are appropriately addressed post Brexit. Under the terms of the Scotland Act 1998, international relations are, of course, predominantly reserved to the UK government (HM Government, 1998). The Foreign Secretary is responsible for the foreign policy of the United Kingdom and as such holds responsibility for concluding treaties and other international agreements on behalf of the UK. In the case of a number of those neighbours, like Austria, Belgium, Italy and Germany, there already exists the capacity for regions to enter treaties within

areas that fall within their competence, subject to review, consent or abrogation by the Nation State Government. In Belgium, under the ‘in foro interno, in foro externo’ principle of its constitution, Flanders has reached international agreements, for example with UNESCO, within areas of its competence such as education, infrastructure and the environment (Flanders International Treaty Competence, 1993). In light of the Brexit vote, it is clear that the majority of Scots are keen to maintain links with partners and neighbours across Europe.

Thirdly, therefore, we should now consider new constitutional arrangements here in the UK to better ensure effective engagement with the EU on devolved issues like health care, transportation, agriculture and education. That new engagement would be of particular interest to Scotland’s world-leading universities sector, who benefit greatly from the attendance of European students and have made clear their appetite to remain within the ERASMUS + scheme that facilitates so many of these students coming to Scotland. Similarly, access to EU research funding has been a key element of Scottish universities’ achievements in recent decades.

Whether these proposals will be argued for, or accepted, remains uncertain as Scottish and English nationalists seem more intent on myth-making than searching for solutions. Too much of the energy, time, and thinking required in these new circumstances is instead being diverted into entrenching a sense of ‘us and them’, whether it’s denying sanctuary for unaccompanied child refugees or conflating the people of England with the politics of the Tories and UKIP. Shaping stories about ‘others’ seems more the order of the day than figuring out solutions together.

For the constitutional arrangements post-Brexit to be durable they will need to be judged as in the service of, rather than in opposition to, Scotland’s sense of self and the values and outlook we hold dear. Frankly, amidst the present rubble, that feels difficult but remains doable. It is vital that the proposals that emerge are interpreted as an affirmation of both the pride and partnership that has shaped most Scots’ sense of who we are and how we want to be governed. They should enable our internationalism and minimise isolationism – a solution that allows Scotland both autonomy and cooperation – which let us recognise new circumstances without denying our enduring interdependence.

Of course, both the First Minister and the Prime Minister will face pressures from those within their respective parties to hold firm to a nationalism that shapes their negotiating demands: ‘Patriotism needs no enemy but Nationalism demands one’ (Gopnik, 2016), whether in the form of the British state or the European Union. This is an era when nationalism, populism and xenophobia are providing many with a story by which to make sense of their political

choices. In a different time – in the age of the Scottish Enlightenment – our small northern European nation became a beacon to the world through its optimistic belief in the capacity of reason to guide change for the betterment of society. Neither independence nor the status quo can unite our nation or offer the best future for Scotland's people. So, let us hope, and continue to work to ensure, the spirit of reason can yet inform the negotiations which lie ahead in these troubled and troubling times.

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