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

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"The Art of Falling Apart?": Constitutional conundrums surrounding a potential Brexit

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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.[*] 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.[*] This pledge has been given force in the European Union Referendum Act 2015 which mandates that a referendum must be held before 31 December 2017[*] 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).[*]

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

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

[*] 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 .

[*] 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

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,[*] 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,[*] 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."[*] It also has important implications for the three 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[*]).

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

January 2016: http://www.bbc.co.uk/news/uk-politics-eu-referendum-35275297. Accessed 10 January 2016.

[*] 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.

[*] 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).

[*] 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.

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

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,[*] already in place in London and now championed by the current Conservative British Government in respect, *inter alia*, of the "Northern Power-House,"[*] 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,[*] 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 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

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[*] 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.

[*] 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.

[*] 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.

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.[*]

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.[*] This crisis has produced much academic discussion on the topical constitutional unsettlement being experienced in the UK.[*]

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.[*] Some commentators have even argued the similarity of circumstances surrounding that first popular vote with respect to the present one.[*] The Labour Party, under the leadership of Harold Wilson, was riven with deep divisions over the EEC and thus promised in its election manifesto to renegotiate the terms of British entry, putting the results to the test in a referendum.[*]

Once in power, the Labour Government conducted its renegotiations[*] – 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[*] to be voted on by one

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[*] P. Gillespie, "The Complexity of British-Irish Interdependence" (2014) 29(1) *Irish Political Studies* 37, at 51.

[*] E. Meehan, "The changing British–Irish relationship: the sovereignty dimension" (2014) 29(1) *Irish Political Studies* 58–75.

[*] N. Walker, "Our constitutional unsettlement" [2014] *Public Law* 529-548.

[*] A.F. Tatham, *Enlargement of the European Union*, Kluwer Law International, Alphen aan den Rijn (2009), at 22-25.

[*] 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.

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

[*] 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.

[*] 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.

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.*

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.* 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.* Nevertheless this has not stopped the Scottish First Minister in particular from trying to recapitalize on the "success" of the Scottish Nationalist Party (SNP), stemming from its increase in popularity following the Scottish independence referendum of September 2014* 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."*

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* 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).

* "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.

* 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.

* 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.

* 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-

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,[*] 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.[*]

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."[*] 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.[*] 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 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."[*]

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

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1988.aspx. Accessed 10 June 2015.

[*] 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.

[*] Ibid. This condition is known as the "triple majority."

[*] *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.

[*] Ibid., at 17-18.

[*] 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.

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.[*]

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.

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,[*] Wales,[*] and Northern Ireland.[*] 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

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[*] 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.

[*] 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."

[*] 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.

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

devolved legislatures to amend the relevant parts of their own foundational devolution legislation at the same time.[*]

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[*] and now encapsulated in the main intergovernmental agreement,[*] 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 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

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[*] 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.

[*] 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.

[*] 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.

further encourage a vote to remain in the UK[*] – 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.[*] 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 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."[*]

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[*] 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.

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

[*] A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 6th ed., Macmillan and Company, London (1902), at 37-38.

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."[*] In fact, it is arguable whether the concept of parliamentary supremacy arose from the Acts of Union or was a doctrine that evolved thereafter.[*] 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."[*]

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.[*] 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 commentators[*] 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*[*] 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

[*] T. Harris, *Revolution: The Great Crisis of the British Monarchy 1685–1720*, Allen Lane, London (2006), at 498.
[*] J. Alder, *Constitutional and Administrative Law*, 7th ed., Palgrave Macmillan, Basingstoke (2009), at 167.
[*] *R. (Jackson) v. Attorney General* [2005] UKHL 56 [9].
[*] See generally, E.J. Cowan, *For Freedom Alone: The Declaration of Arbroath, 1320*, Birlinn Ltd., Edinburgh (2014).
[*] 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.
[*] 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.

> 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."[*]

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*[*] 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."[*]

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.[*]

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

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[*] 1953 SC 396, at 411.
[*] 1975 SC 136, at 144.
[*] 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: 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.
[*] 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.

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.[*] Instead, according to Jones,[*] 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."[*]

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.

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.[*] 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,[*] in view of the cross-border implications, and the Irish *Taoiseach* has called on the UK to stay in the EU.[*]

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[*] 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.

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

[*] 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.

[*] 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.

[*] 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.

[*] 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.

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[*] 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).[*] 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.

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[*] 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[*] 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).

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[*] 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).

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

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

[*] *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.

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."[*] In order to maintain the status quo, post-Brexit, it was proposed[*] 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.[*] 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 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."[*] It has been suggested that a "British withdrawal, however unlikely, would be a source of enormous instability and turbulence for Ireland,"[*] and it is possible that the political arrangements established by the Belfast (Good Friday) Agreement would not be entirely protected from this instability.

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

[*] Ibid.

[*] 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).

[*] 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.

[*] 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.

The Agreement[*] 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.[*] 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.[*]

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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[*] 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.

[*] 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.

[*] 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.

4. Crown Dependencies: Jersey, Guernsey and the Isle of Man

The Channel Islands of Jersey and Guernsey as well as the Isle of Man are not part of the UK but rather are self-governing dependencies of the Crown. This means they have their own directly-elected legislative assemblies, administrative, fiscal and legal systems and their own courts of law. The Crown Dependencies are accordingly not represented in the UK Parliament.[*]

Under international law, they are not regarded as sovereign states but rather as territories for which the UK is responsible. Thus, while the UK Government remains responsible for their defence and international representation, they have never been colonies of the UK nor are they Overseas Territories (like Gibraltar) which have a different relationship with the UK. The three dependencies cannot sign up to international treaties under their own aegis but can have the UK's ratification of such treaties extended to them.

From the foregoing, it is evident that the three Crown Dependencies (or Islands) are not members of the European Union but rather have a special relationship with it, provided by Protocol 3 of the UK's 1972 Treaty of Accession to the European Community (and confirmed in what is now Article 355(5)(c) TFEU). Under Protocol 3, the Islands are part of the customs territory of the Community. The common customs tariff, levies and agricultural import measures apply to trade between the Islands and non-Member States. Since other EU legislation does not generally apply, implementation of the internal market provisions on the other three freedoms is not required.[*] Nevertheless, all three Crown Dependencies follow legal developments in the EU and voluntarily harmonize their laws to that of the Union where they deem this necessary.

Needless to say, all three Dependency governments are viewing the possible Brexit with concern and have already endeavoured to have their views made known at Westminster and in Whitehall as well as in Brussels.[*]

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[*] For an analysis, *inter alia*, of the position of the Crown Dependencies as well as the islands off the coast of Scotland, see D. Moore, *The Other British Isles: A History of Shetland, Orkney, the Hebrides, Isle of Man, Anglesey, Scilly, Isle of Wight, and the Channel Islands*, McFarland and Company, London (2005).

[*] Still some differences remain in their relationship with the EU. Although all three are part of the EU customs union, Jersey and Guernsey have no VAT and are therefore outside the VAT area whereas the Isle of Man is in that area and imposes VAT: Article 6 of Council Directive 2006/112/EC of 28 November 2006 (as amended) on the common system of value added tax (2006 OJ L 347/1).

[*] See, e.g., Senator Sir Philip Bailhache, External Relations Minister of the States of Jersey, "Conduct of Jersey's external relations – now and in the future," speech delivered to the Jersey Chamber of Commerce, *Jersey Government website*, 18 June 2014: http://www.gov.je/news/speeches/ministerexternalrelationsspeeches/pages/speechjerseychambercommerce.aspx; the comments of Allan Bell, Chief Minister, Isle of Man Government reported in "Island will remain vigilant on EU referendum," *Isle of Man Government website*, 13 November 2015: https://www.gov.im/news/2015/nov/13/island-will-remain-vigilant-on-eu-referendum/; and "Joint visit to Brussels by the Chief Ministers of Guernsey and Jersey," *Channel Islands Brussels Office website*, 7 May 2015: http://www.channelislands.eu/joint-visit-to-brussels-by-the-chief-ministers-of-guernsey-and-jersey/. All accessed 20 December 2015.

Interestingly, from the EU referendum viewpoint, Channel Islanders and Manx people are British citizens and hence European citizens.[*] However, they are not entitled to participate in the freedom of movement of people or services unless they are directly connected (through birth, or descent from a parent or grandparent) with the UK. However, after five years' continuous residence in the UK, islanders are entitled to participate in the freedom of movement of people or services throughout the EU.[*] This also means that a number of the citizens of these Dependencies will be able to vote in the referendum if they are resident in the UK, together with Commonwealth and Irish citizens, but other EU citizens (except Cypriots and Maltese) residing in the UK will not be able to vote.

More recently, the UK Government has actively supported the development of international identities of the Crown Dependencies. In 2007, the UK Government signed a framework agreement with each of the Crown Dependencies stating that the UK would not act internationally on their behalf without prior consultation; the UK recognized their interests might differ from those of the UK; and that the UK would seek to represent any differing interests when acting in an international capacity.[*]

Further examples of the evolution in UK-Crown Dependency relations includes the establishment of the Islands' own representative offices in Brussels[*] as well as the increase the use of Letters of Entrustment, by which, in certain circumstances, the Crown Dependencies may be authorized to conclude their own international agreements. Such entrustment is currently used, e.g., for agreements which provide for the exchange of information on tax matters with EU Member States.[*] This trend is likely set to continue with the evolving (case-by-case delegated) competence of the Dependencies in external relations, particularly trade, thereby allowing them to articulate

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[*] Section 1 of the British Nationality Act 1981, c. 61, grants citizenship to (most) people born in the "United Kingdom." Section 50 of the Act defines the "United Kingdom" as including the Channel Islands and the Isle of Man (collectively known as "the Islands").

[*] Protocol 3 to the United Kingdom's Treaty of Accession to the EEC: 1972 OJ L73.

[*] The three agreements are similarly worded. For Jersey, Framework for developing the international identity of Jersey, signed 1 May 2007: http://www.gov.je/SiteCollectionDocuments/Government_and_administration/R_InternationalIdentityFramework_20070502.pdf. For Guernsey, Framework for developing the international identity of Guernsey, signed 18 December 2008: http://www.gov.gg/CHttpHandler.ashx?id=2174&p=0. For the Isle of Man, Framework for developing the international identity of the Isle of Man, signed 1 May 2007: https://www.gov.im/media/622895/iominternationalidentityframework.pdf. All accessed 12 January 2016.

[*] In 2011, the governments of Guernsey and Jersey jointly established a government office in Brussels (www.channelislands.eu) as did the Isle of Man (http://isleofman.com/News/details/20504/chief-minister-says-brussels-office-is-a-significant-step-forward-). Both accessed 13 January 2016.

[*] Guernsey and Jersey voluntarily entered into automatic information exchange and bilateral withholding arrangements respectively with all 28 Member States under the EU Savings Directive (EUSD). Guernsey has applied mandatory automatic information exchange under the EUSD since 1 July 2011 and it became mandatory in Jersey from 1 January 2015. Further, Jersey and Guernsey each have many Tax Information Exchange Agreements (TIEAs) and Double Taxation Agreements (DTAs) signed and (in most cases) in force. The policy being pursued by both islands is to complete negotiations and sign agreements with all G20, OECD and EU Member States.

their own interests that the UK Government would need to recognize more fully when the UK is negotiating internationally.

Thus, if the UK were to exit the Union, the governments on each of the three Crown Dependencies would clearly wish to have their interests properly protected in any withdrawal settlement from the Union.[*] Moreover, post British withdrawal, and following the practice of the Letters of Entrustment, the three Dependencies would need to call on the UK to allow them a broader power to further develop their own economic and trade relationships with the Union rather than to depend on the UK Government to do it for them. This devolution of power to the Crown Dependencies would certainly impact on their constitutional relationship with the UK, perhaps leading to calls for their development as mini-states like Andorra or Liechtenstein.

5. Crown Dependencies: Possible New Additions from the Northern Isles?

In the previous section, I dealt with the issue of the three current Crown Dependencies; I should now like to mention a small point concerning the Northern Isles, located in the north Atlantic to the north of Scotland and considered part of that nation. These Isles comprise two distinct though linked groups, viz. the Shetland Islands and the Orkney Islands. Within the Shetland waters lie much of the remaining oil deposits in the North Sea. Together with the Orkney Islands which are much closer to the Scottish mainland, they were both formerly part of the Kingdom of Norway.

In 1469, the Northern Isles were pledged by the Norwegian king, Christian I, as security against the payment of the dowry of his daughter Margaret, betrothed to King James III of Scotland. As the money was never paid (Christian's descendants on several occasions sought to redeem them by paying the relevant price but the Scots kings refused to countenance this), the connection with the Crown of Scotland (and after the 1707 Act of Union, with the British Crown) therefore became perpetual.[*]

Even though part of Scotland for centuries, Shetland and Orkney return a more Scandinavian-based culture and view themselves primarily as Shetlandic or Orcadian. In the 1979 Scottish and Welsh referendums on devolution,[*] a change of status for the Islands was raised,

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[*] See, e.g., the words of Isle of Man Chief Minister Allan Bell on the situation where the Crown Dependencies and Gibraltar wish to remain in the EU and the UK votes to leave in "Chief Minister and Treasury Minister in Brussels and London," *Isle of Man Government website*, Friday, 29 May 2015: https://www.gov.im/news/2015/may/29/chief-minister-and-treasury-minister-in-brussels-and-london/. Accessed 12 January 2016.

[*] See generally, Lord Kilbrandon (chmn.), *The Shetland Report: A constitutional study prepared for the Shetland Islands Council*, The Nevis Institute, Edinburgh (1978). For an interesting analysis of the Northern Isles' sovereignty in a 2012 case before the Scottish Court of Session, Outer House, see the discussion in K. Anderson, "Case Comment: Royal Bank of Scotland v Stuart Hill" (2013) 4 *Aberdeen Student Law Review* 105-113.

[*] R. Grønneberg (ed.), *Island Futures: Scottish Devolution and Shetland's Constitutional Alternatives*, Thuleprint, Sandwick (1978).

allowing them to pursue some form of self-determination along the lines of the Isle of Man – a matter recently broached within the context of the 2014 Scottish independence referendum.[*]

In June 2013, the leaders of the Scotland's island councils – the Shetland Islands Council, the Orkney Islands Council, and *Comhairle nan Eilean Siar* (formerly the Western Isles Council in the Outer Hebrides) – called for greater autonomy for the islands.[*] In response, the then Scottish First Minister, Alex Salmond (SNP), made the Lerwick Declaration on behalf of the Scottish Government[*] in which announced that a ministerial working group would be established to examine the prospect of decentralizing further powers to the Island councils.[*]

Not to be left out, the UK Government has also set up an Islands Working Group with the three island councils and UK ministries or departments, as provided for in their own framework agreement.[*]

While the Shetlanders are entitled under legislation to a certain percentage of the revenues generated from the North Sea oil industry and have set up the Shetland Charitable Trust from those revenues, if Scotland were to secede from the UK following a Brexit decision at the EU referendum, some observers wondered whether the UK Government would first move to detach the Shetland Islands (together with the Orkney Islands) from Scotland by their own independence referendum and offer them a status similar to the Isle of Man, thereby effectively denying any new Scottish state a large share of its main source of future revenue.[*]

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[*] S. Johnson, "SNP admits Shetland and Orkney could opt out of independent Scotland," *Daily Telegraph website*, 20 March 2012: http://www.telegraph.co.uk/news/politics/9156220/SNP-admits-Shetland-and-Orkney-could-opt-out-of-independent-Scotland.html; and E. Addley, "Shetland may reconsider its place in Scotland after yes vote, says minister. Scotland secretary says if islands were to vote no but national vote was yes, it could become self-governing like Isle of Man," *The Guardian website*, 17 September 2014: http://www.theguardian.com/politics/2014/sep/17/shetland-may-reconsider-place-scotland-yes-vote-alistair-carmichael. Both accessed 15 December 2015.

[*] The Shetland Islands Council, the Orkney Islands Council, and *Comhairle nan Eilean Siar, Our Islands – Our Future. Constitutional Change in Scotland – Opportunities for Island Areas*, Joint Position Statement, June 2013: http://www.orkney.gov.uk/Files/Council/Consultations/Our-Islands-Our-Future/Joint_Position_Statement.pdf. Accessed 26 November 2015.

[*] "Scottish ministers to look into extra powers for isles," *BBC News website*, 25 July 2013**:** http://www.bbc.co.uk/news/uk-scotland-highlands-islands-23438879. Accessed 24 November 2015.

[*] This Group reported back the following year in Island Areas Ministerial Working Group, *Empowering Scotland's Island Communities*, June 2014, Scottish Government, Edinburgh (2014): http://www.gov.scot/Resource/0045/00452796.pdf. Accessed 10 January 2016.

[*] *UK Government and the three Scottish Islands Councils: A Framework for the Islands*, Scotland Office, 15 August 2014: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/344446/UKG_ISLANDS_FRAMEWORK_-_15_August.pdf. Accessed 26 November 2015.

[*] Based on median line divisions of territorial waters, by some estimates, England could claim some 1 per cent of North Sea proven reserves, Scotland another 46 per cent, while Shetland and Orkney would claim the remaining 53 per cent: M. Linklater & G. Rosie, "Secret plan to deprive independent Scotland of North Sea oil fields," *The Times*, 13 February 2009. Indeed, UK Government practice on this is not without precedent: e.g., following the express wishes of both dependent territory legislatures, the UK detached the Cayman Islands and the Turks and Caicos Islands from Jamaica before the latter's independence in 1962. The UK had previously made the Caymans a dependency of Jamaica in 1863, and Turks and Caicos in 1873.

Alternatively, other strategic considerations may also enter into this mix and the example provided by the Faroe Islands – outside the EU but still within the Kingdom of Denmark (as with Greenland) thereby allowing it to protect its fisheries which are also important for Shetland – may prove more useful to satisfying its economic and financial demands were Shetland instead to remain in a Scotland that itself became an EU Member State.

6. Gibraltar: About to be Cast Adrift?

Gibraltar is a British Overseas Territory and is part of the EU, having joined the EEC in 1973 under the United Kingdom. Article 355(3) TFEU applies the treaty to "the European territories for whose external relations a Member State is responsible," a provision which in practice only applies to Gibraltar. Although part of the EU, Gibraltar remains outside the customs union and VAT area. Moreover it is exempted from the Common Agricultural Policy. Like the UK, it does not form part of the Schengen area with the result that the border it shares with Spain is an external Schengen border through which Spain is legally obliged to perform full entrance and exit controls.

Since Gibraltar is a separate jurisdiction to the UK, its government and legislature remain responsible for the adoption and implementation of EU law on the Rock. However, with respect to the application of EU law to Gibraltar, the governments of Spain and the United Kingdom made the following Declaration appended (as Declaration 55) to the Treaty on European Union: "The Treaties apply to Gibraltar as a European territory for whose external relations a Member State is responsible. This shall not imply changes in the respective positions of the Member States concerned."

Gibraltarians have been counted as British nationals for the purposes of EU law since 1982,[*] and have enjoyed the status of EU citizens since such status was created by the 1992 Maastricht Treaty.[*] However, although EU citizens, Gibraltarians (and other EU nationals resident in Gibraltar) were unable to vote in elections for the European Parliament since the UK Government had failed to make the necessary legal arrangements and declined to do so. In a case brought before the European Court of Human Rights in Strasbourg, *Matthews v. United Kingdom*,[*] the applicant

[*] Owing to a declaration lodged by the United Kingdom with the EEC in 1982, Gibraltarians were to be counted as British nationals for the purposes of Community law (notwithstanding the fact that they were not all, at that time, British citizens but many were British Overseas Territories citizens): OJ 1983 C23/1.

[*] However, their status as British citizens was finally clarified in 2002. Since 21 May 2002, then, all Gibraltarians have been granted the right to register for full British citizenship, while those who previously held a British Overseas Territory citizenship automatically were converted now to have a full British citizenship. Any child born in Gibraltar after 21 May 2002 will automatically become a British citizen, if just one of its parents is a British citizen or a Gibraltarian resident: British Overseas Territories Act 2002 (c. 8).

[*] *Matthews v. United Kingdom*, Application no. 24833/94, 18 February 1999: (1999) 28 *European Human Rights Reports* 361.

claimed that the absence of elections in Gibraltar to the European Parliament was in violation of her right to participate in elections to choose the legislature under Article 3 of Protocol No. 1 to the European Convention on Human Rights 1950 (ECHR).

The Strasbourg Court held that (a) the European Parliament formed a part of Gibraltar's legislature within the meaning of the said Article 3; and (b) EU Member States had obligations to ensure that citizens of each state were given the opportunity to vote in European parliamentary elections. Since Britain had failed to give the vote to its citizens in Gibraltar for such elections, the Court determined, the UK was in breach of the ECHR right to participate in free elections. As a consequence of this decision in 1999 and after consultation by the UK Electoral Commission, Gibraltar was included in the South West England constituency for the European Parliament election in 2004.[*] Spain nevertheless subsequently took a complaint about Gibraltar participating in European parliamentary elections to the European Court of Justice in *Spain v. United Kingdom*[*] but this was unsuccessful.

Given this close relationship, it comes as no surprise to learn that no British Government, of whatever political hue, has so far admitted any option on Gibraltar's part to cancel its EU membership separately from the UK, as it is bound to the same destiny that the UK chooses. Unsurprisingly then Gibraltarians have also been given the right to vote in the EU membership referendum according to the terms of the 2015 Act.[*]

Gibraltar is though mindful of projecting its own interests vis-à-vis the EU and has thus followed the Crown Dependencies by opening a representative office in Brussels in summer 2015.[*] A Brexit would, in all events, have a dramatic impact on Gibraltar whose current Chief Minister Fabian Picardo has already indicated that the internally self-governing UK dependent territory wishes to remain part of the EU as well as the UK: in the event of a Brexit, the Chief Minister said that Gibraltar should be given the opportunity to remain in the European Union with a "different degree of membership."[*] Admittedly this approach stems from the fact of its relationship with Spain

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[*] The European Parliament (Representation) Act, c. 7, sections 9-13. By virtue of article 3(6)(d) of the European Parliamentary Elections (Combined Region and Campaign Expenditure) (United Kingdom and Gibraltar) Order 2004 (S.I. 2004/366: http://www.legislation.gov.uk/uksi/2004/366/contents/made), Gibraltar was combined with the South West electoral region for the purpose of European Parliamentary elections.

[*] Case C-145/04 *Spain v. United Kingdom*, ECLI:EU:C:2006:543.

[*] European Referendum Act 2015, c. 36, section 5.

[*] "Gibraltar Government opens office in Brussels," *Gibraltar Lawyers website*, 4 June 2015: http://www.gibraltarlawyers.com/news/gibraltar-government-opens-office-in-brussels. Accessed 5 January 2016.

[*] S. Swinford, "Gibraltar suggests it wants to stay in EU in the event of Brexit. Fabian Picardo, the chief minister, says that 'even the most rabid anti-Europeans' do not want to sever all economic ties with Europe," *Daily Telegraph website*, 14 April 2015: http://www.telegraph.co.uk/news/worldnews/europe/gibraltar/11534580/Gibraltar-suggests-it-wants-to-stay-in-EU-in-the-event-of-Brexit.html. Accessed 25 November 2015. Some commentators have questioned the enthusiasm of the Chief Minister for staying in the EU in view of the stricter financial and tax regulation as well as

that, although "rocky" at times, is nevertheless vital for its economy and security. However, despite progress from the 1980s and the 1990s within the overarching context of EU membership, this Union umbrella has not been able to provide the necessary cover for change in the relations between the territory, Spain and the UK as it has done between the UK, Ireland and Northern Ireland.

Outright Gibraltarian opposition to a Brexit would necessarily entail serious consequences: at the least, it would require reconsideration of its relationship with Spain. In recent years, the Gibraltarian Government has promoted its right to political decolonization* and to self-determination with an attitude of going it alone, if necessary.* Yet under the reversion clause of the 1713 Treaty of Utrecht, Article X, the UK is required to offer first refusal to Spain to return the peninsula before considering any form of independence.* Nevertheless, given consistent Spanish objections before the UN and its various agencies, it is extremely unlikely that Spain would ever be prepared to accept an independent Gibraltar, even one part of the EU.*

IV. Conclusion: Should we be worried?

If the UK voters choose to remain in the EU this year or in 2017, it will not mean the end of the "European" question any more than the 1975 referendum did.* And we would still have the European Union Act 2011 to provide locks on the transfer of the exercise of further competences to the EU which would lead to future referendums (perhaps similar to Ireland under its written Constitution).

Indeed, whatever the outcome of the EU in-out referendum, the UK will still have to address various constitutional issues that will require more foresight and indeed more collaboration among all the political parties and civil organizations than are currently apparent. The 2015 general election left us with, essentially, the SNP representing Scotland in the House of Commons and the Conservatives as the major voice representing England in that chamber.

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environmental protection and other rules coming from Brussels, given his earlier views: see, e.g., K. Morel, "Gibraltar's Chief attacks EU eGaming regulation," *Digital Quadrant website*, 21 March 2013*:* http://www.dqmagazine.com/news/gibraltar-chief-launches-scathing-attack-on-eu-egaming-regulation-10011/. Accessed 6 January 2016.

* J.J. Bossano, "The Decolonization of Gibraltar" (1994-1995) 18 *Fordham International Law Journal* 1641-1646.

* See generally, I.V. Porter, "Two Case Studies in Self-Determination: The Rock and the Bailiwick" (2003) 4 *San Diego International Law Journal* 339-380; and C. Leathley, "Gibraltar's Quest for Self-Determination: A Critique of Gibraltar's New Constitution" (2007) 9 *Oregon Review of International Law* 153-186.

* A.J.R. Groom, "Gibraltar: A pebble in the EU's shoe" (1997) 2(3) *Mediterranean Politics* 20, at 22.

* For an extensive analysis of the Gibraltar sovereignty issue from the British, Spanish and Gibraltarian perspectives, see S.J. Lincoln, "The Legal Status of Gibraltar: Whose Rock is it Anyway?" (1994-1995) 18 *Fordham International Law Journal* 285-331.

* A. Glencross, "Why a British referendum on EU membership will not solve the Europe question" (2015) 91(2) *International Affairs* 303–317.

Calls from the Institute for Public Policy Research* (an independent, centre-left think tank) for continued EU membership as well as for a constitutional convention for the UK* – similar to the one in Ireland set up in the wake of the 2008 financial crash and the collapse of trust in politics that crisis precipitated* or even similar in spirit and composition, though broadly more representative, to the one which laid the foundations for eventual Scottish devolution in the late 1990s* – may not, unfortunately, be heeded. We may thus progress in typical British fashion by trying to utilize the "grey areas" of the UK Constitution to evolve the asymmetrical federalizing tendencies within the country and allow for a more haphazard, case-by-case compromise on each particular topic.* But this is a discussion for another day.

In whatever way, the Brexit – whether successful or not – will act as a further catalyst for change in the UK constitutional (re-)settlement. There is clearly a serious risk for the fragmentation of the country through the breakdown of the peace accords in Northern Ireland and a new referendum on Scottish independence, together for example with casting away of Gibraltar. These grave matters have yet to be brought properly to the notice of the people of the United Kingdom.

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* N. Pearce & G. Lodge, "After No – what next?" *IPPR blog*, 19 September 2014: http://www.ippr.org/blog/after-no-what-next; and A. Renwick, "We need a proper constitutional convention, and the Irish have provided a model to follow," *IPPR website*, 19 September 2014: http://www.ippr.org/juncture/we-need-a-proper-constitutional-convention-and-the-irish-have-provided-a-model-to-follow. Both accessed on 14 November 2015.

* This proposal has also been made by other commentators, e.g., V. Bogdanor, *The Crisis of the Constitution: The General Election and the Future of the United Kingdom*, The Constitution Society, London (2015), at 36-40: http://www.consoc.org.uk/wp-content/uploads/2015/02/COSJ2947_The-Crisis-of-the-Constitution_WEB_FINAL.pdf; and A. Renwick, *After the Referendum: Options for a Constitutional Convention*, The Constitution Society and Unlock Democracy, London (2014): http://www.consoc.org.uk/wp-content/uploads/2014/05/J1847_Constitution_Society_Report_Cover_WEB.pdf. Both accessed 20 December 2015.

* D.M. Farrell , E. O'Malley & J. Suiter, "Deliberative Democracy in Action Irish-style: The 2011 We the Citizens Pilot Citizens' Assembly" (2013) 28(1) *Irish Political Studies* 99-113.

* J. McFadden, "The Scottish Constitutional Convention" [1995] *Public Law* 215-223.

* See the historical perspectives on the imbalances in the UK constitutional arrangements provided in Lord Sumption, "The disunited kingdom: England, Ireland and Scotland" (2014) 3(1) *Cambridge Journal of International and Comparative Law* 139-158.