

Scotland's Constitutional Conundrum

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In the independence referendum in 2014, the citizens of Scotland voted by 55 per cent to remain in the United Kingdom. While this was a clear majority, it did not settle the matter. Support for independence had increased substantially during the campaign, from the low thirties, where it had been for several years. In the subsequent years, support for independence has not fallen below this level and has sometimes exceeded 50 per cent. This is, moreover, a more solid vote, strengthened by the United Kingdom's departure from the European Union (EU) in the 2016 Brexit referendum, which Scotland had voted heavily against. While the votes in the two referendums were not connected, that has now changed. Some of those who voted No in 2014 and Remain in 2016 have moved towards independence as the only way to get back into Europe. A smaller number who voted Yes in 2014 and Leave in 2016 have moved in the opposite direction.

The dominance of the constitutional question has polarised opinion into a pro-independence/pro-Europe bloc on the one hand and a much smaller, pro-Brexit/pro-union bloc on the other. The former vote heavily for the Scottish National Party (SNP) while the Conservatives built a modest revival of their fortunes on the latter. The 'middle ground' of more powers for Scotland short of independence, which used to be the most favoured option has shrunk. The middle ground has been undermined in practice, since no reform of devolution within the UK will reverse Brexit.

The strategy of the SNP, who have won every election in Scotland since the 2014 referendum, is to force another referendum on the grounds that, with Brexit, there has been a material change of circumstances. The victory of the pro-independence parties at the 2021 Scottish Parliament elections is taken as a mandate for another vote. The UK Conservative Government, supported by Labour and the Liberal Democrats, has steadfastly refused, arguing that this is not the time. This rules out a repeat of the 2014 experience, when the UK Government passed a decree (Section 30 Order) allowing for an independence referendum during a limited time period. Yet that remains the only way to get around the clear statement in the Scotland Act that the issue of the Union is reserved to Westminster. The position of the SNP Scottish Government is that Section 30 would provide the ideal way to resolve the issue but, in the face of the UK Government's refusal, is seeking an alternative. It has recently proposed that it could stage a purely consultative referendum which, because it would not in itself affect the Union, should be legal. To expedite the process, it has asked the Supreme Court for an advisory ruling rather than passing a Bill and waiting for the UK Government to

challenge it. The UK Government response has been to ask the Supreme Court not even to consider the matter, since, in the absence of a Bill passed by the Scottish Parliament, this is a hypothetical question. A ruling is expected in the Autumn. Even if the Supreme Court were to allow a referendum, however, it could only be on the basis that it had no affect, thereby undermining its status. Moreover, the unionist parties could simply boycott any referendum, thus depriving it of political legitimacy, as happened in Catalonia in 2014. It is highly unlikely that the UK Government would follow the Spanish authorities in 2017, when they forcibly shut down a second referendum attempt in Catalonia and prosecuted its leaders.

The UK Government holds all the legal cards, then, and the Scottish Government is committed to legality. Yet what really matters is the political dimension. The Conservative Party can form majority governments with hardly any Scottish seats at all. They can make political capital in England by standing up to Scottish nationalism and accusing the Labour Party of planning to take power in a deal with the SNP. Labour, for its part, does need to recover in Scotland in order to have a realistic chance of forming a UK Government, but it cannot risk being soft on Scottish nationalism.

At the same time, the anti-nationalist parties have strategies for winning back Scotland. Both have turned to a revived British nationalism, described as ‘patriotism’ to distance it from the Scottish version. There is talk of ‘British values, although these are universal values and fully shared by Scottish, Welsh and Irish nationalists. Leaders of both parties have taken to speaking in front of outside Union flags and drawing on historical tropes of Britishness. The Conservative Government seeks greater presence in Scotland with an outside office labelled ‘UK Government in Scotland’. It has taken powers to spend in devolved competences and sought direct links with local governments. Brexit has provided opportunities for measures such as the UK Internal Market Act, which undermines Scottish regulatory powers.

Labour is still trying to capture the constitutional middle ground with a forthcoming report from a commission led by former Prime Minister Gordon Brown. They are also trying to move the agenda from the constitution to social and economic issues. Yet the UK Labour leadership’s recent acceptance of ‘hard’ Brexit (outside the Single Market and the Customs Union) is not going to help them in Scotland.

The Scottish Government has recently unveiled its fallback plan, failing a referendum, to treat the next UK elections as a referendum on independence. It is difficult to see what this would achieve. The SNP have won most Scottish seats at the last three UK elections without it making any impact.

The present constitutional deadlock could persist for a long time, without definitive resolution. Yet the longer the unionist parties insist that ‘now’ is not the time for another referendum, the more they will be asked when is the time. They have frequently conceded that the United Kingdom is a union of consent rather than of constraint but that consent may increasingly be lacking.