

Scotland, Brexit and Independence

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The past month has been important for Brexit developments, with UK Prime Minister Johnson attempting a 'last minute' Brexit deal with the EU. In particular, arrangements concerning Northern Ireland have featured prominently. But now, all appears to have been set aside for a December UK general election.

However, the UK is composed of four nations, and Scotland's position in the UK union, often ignored in the Brexit context, now appears near to 'tipping point', especially after First Minister Sturgeon's recent [confirmation](#) that Scotland would hold an independence referendum in 2020.

There are two things to note here. First, Scotland's desire to remain in the EU, with a 62% vote in favour of remaining in the 2016 EU referendum, and consequences flowing from this. Second, the apparent increase in support for Scottish independence since the first independence referendum in 2014. This increase partly results from support from those preferring an independent Scotland in the EU to membership of a UK embarked on a 'hard Brexit' seen as damaging to Scotland, although not every Scottish 'remain' supporter favours an independent Scotland.

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To take the desire to remain in the EU first: In the 2016 EU referendum, in which overall the UK voted by 51.9% to leave the EU, [Scotland voted by 62% : 38% to remain](#). (This was a bigger margin than the 55% of voting Scots voting to remain in the UK in 2014). The EU referendum was non-binding, but the UK Government declared that it would act on the result. The Scottish government argued that it is undemocratic for Scotland to be driven out of the EU against its will. Notably, there were no 'quadruple lock' requirements in the EU referendum for voter majorities in each constituent nation of the UK. The UK government declared that the UK would leave the EU as one nation, and negotiate withdrawal as one nation. No mention was made in the Article 50 letter, issued by the UK Government under the EU treaty to trigger the UK's EU withdrawal, of any particular arrangements for Scotland, nor to the Scottish Government's proposals for a differentiated solution for Scotland, as published in '[Scotland's Place in Europe](#)' (although Northern Ireland was singled out as a special case). This 'UK-wide' approach has left little space for Scotland to protect its interests in EU withdrawal. While recently questioning UK Brexit secretary, Stephen Barclay, in the Westminster Parliament 'Brexit' Committee, SNP MP [Joanna Cherry QC repeatedly asked](#) Barclay to explain Westminster's engagement with the devolved governments, adding, 'it is my suspicion that there has been none'.

In this atmosphere, relations between Scotland (both its Government and Parliament) and the UK Government have not blossomed. In Westminster, where

the SNP are the third largest party, the perception is that SNP MPs are too often [‘snubbed’ or ignored altogether](#). The EU Withdrawal Act 2018, a huge and sprawling piece of constitutional legislation, was notably adopted without the consent of the Scottish Parliament, in breach of the ‘Sewel’ convention (which requires consent of devolved legislatures in UK wide statutes concerning devolved matters) – unconstitutional, if not illegal, behaviour by the UK Government. Matters were not helped when [Prime Minister Johnson stated in the House of Commons](#) that the Scottish Parliament would have no role in approving the Withdrawal Agreement Bill implementing his Brexit deal, in spite of the fact that, even by the UK Government’s notes on the Bill, Scottish consent would be needed 16 times (the Scottish Government claims it is more). In return, Nicola Sturgeon threatened court action if Scotland were ignored in this way. Indeed, some hugely important cases regarding Brexit (ie the [Wightman](#) case, in which the European Court of Justice confirmed the UK could unilaterally revoke Article 50, and the [Miller/Cherry](#) case, in which the UK Supreme Court held Prime Minister Johnson had unlawfully prorogued – ie suspended – Parliament) have originated in the Scottish courts.

Britain is not a federal state. It does not have a codified Constitution in which component nations have legally enforceable protections against constitutional change such as Brexit (as is eg the case in the USA or Germany). Instead there is Devolution, a much more delicate and frangible settlement – a mixture of law and constitutional convention – that staple of the British Constitution. But Brexit has placed that Constitution under severe strain.

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And so to the second major issue, that of Scottish independence: In Scotland, [support for independence reached 50%](#) in October. If the premiership of Boris Johnson and a possible ‘no deal’ Brexit are factored into this, support for independence takes the lead. As noted pollster, John Curtice, [argued](#), increasing support for independence is linked to Brexit, with many remain voters now supporting independence.

The Scottish Parliament has already drafted referendum legislation (generally [supported by the lead Hollywood committee’s report on it, which did however suggest amendment](#) to allow more scrutiny of the question posed in a referendum). On 15 October, at the SNP’s annual conference, Nicola Sturgeon confirmed she would request ‘a section 30 order’ (under s 30 of the Scotland Act 1998), from the UK Government in order to hold an independence referendum by 2020. This s. 30 order, whereby the UK Government consents to transfer the power to hold a referendum to Scottish institutions, is necessary, because UK-wide constitutional matters are reserved to the UK under the Devolution settlement. Prior to the 2014 independence referendum, (then) Prime Minister Cameron gave consent to such a s. 30 order which enabled the Scottish Parliament to table legislation for an independence referendum. (Notably, the Scottish Government has also stated that an independent Scotland would seek to rejoin the EU – but that is a matter for another article).

However, Johnson has [made it clear that he would refuse such an order](#). (Labour leader Corbyn [has been more ambivalent](#)). What attitude should Scotland adopt if a s. 30 order were refused? The consequences of holding a referendum, and proclaiming independence in a context viewed as illegal by the central state, have been painfully obvious, [given the custodial sentences of key Catalanian politicians](#) who proclaimed independence. Indeed, it was the constitutionality of the 2014 Scottish independence referendum, held with the UK government's blessing, which singled it out from previous Catalanian attempts at independence.

Faced with the prospect of a determined Whitehall refusal to grant permission for a referendum, the Scottish Government has not been without further ideas. One possibility is to engage the courts again – a suggestion recently made by Michael Russell, Scotland's Brexit minister. This could build on recent legal successes led by SNP politicians, including the *Cherry* litigation and *Wightman* litigation.

However, it seems political tactics will also be in play. Ian Blackford, SNP leader in Westminster, suggested that a s. 30 order request would be made ahead of a (now definite December) UK General Election, and if refused by Johnson, could be cast in Scotland as a [dictatorial UK conservative government blocking](#) Scots' right to decide their own future. This sounds dramatic – however, since the EU referendum, the UK government has often cast the 'will of the people' and popular sovereignty and democracy, as crucial principles, necessitating the honouring of a non-binding referendum. Notably, Nicola Sturgeon stressed the importance of popular consent in [her recent conference speech](#):

'If there is to be a deal, it seems inevitable that it will include a process to allow Northern Ireland to decide if and for how long it will stay aligned to the single market and customs union. And that's exactly as it should be. But think about what that will mean. Wales will have voted to leave. England will have voted to leave. Northern Ireland will be given a say over its future. Scotland will be the only country in the UK to be taken out of the EU against our will and with no say over our future relationship with Europe.'

Of course, much depends on the outcome of a December general election. Boris Johnson may not obtain an outright majority. Current polling suggests that, in the general election, the conservative party could lose most of their 13 Scottish MPs in Westminster, with the SNP likely to make substantial gains. A large cohort of SNP MPs in Westminster might prove powerful in a hung Parliament, where Sturgeon has said that [having another independence ballot would be an automatic condition for gaining the SNP's support](#). (But this of course, would not please Scottish remain or leave voters who do not favour independence).

But just as important might be [the argument also made by Sturgeon](#) at the SNP conference – that 'seven out of the ten wealthiest developed countries are of a size similar to or smaller than Scotland. From Luxembourg to Ireland from Austria to Switzerland and Norway, countries of our size lead the world. And they tend to be happier as well.' In a UK riven by Brexit conflict, and chaos, the scenario of an independent Scotland in the EU may appear very attractive to many in Scotland.

But the Brexit discord originated with a referendum. Can we be sure that another (independence) referendum would not generate still more conflict?

