European and External Relations Committee

The EU referendum and its implications for Scotland

Written submission from Andrew Syme

Introduction

The UK’s vote to leave the EU and Scotland’s emphatic vote to remain provides Scotland with an unprecedented economic opportunity. It requires constitutional issues to be resolved with open mindedness and flexible thinking.

The UK famously or notoriously has an unwritten constitution. The current debate about whether the Prime Minister can simply invoke Article 50 or whether she needs parliamentary approval is an example of the constitution’s ambiguous nature. It is this ambiguity that Scotland needs to exploit.

Constitution

The UK can be seen as an eighteenth century precursor of the EU – nations pooling sovereignty to their mutual betterment. Within this arrangement Scotland has retained its own nationhood. In particular it has its own legal system with Westminster Acts being passed separately for Scotland [which is noted in their title]. There are many other ways in which Scotland has retained its identity including its own education system and a quite different relationship with the Church. Devolution since 1999 has only served to accentuate Scotland’s separate nationhood. Perhaps the Corries were wrong - there is no need ‘to rise up and be a nation again’, because Scotland always has been and remains a nation.

Other members of the EU may not fully appreciate that Scotland has retained its separate nationhood and thus differs from, for example, Catalonia. Thus the threat of regional secession would not be given a precedent by Scotland’s retaining its EU membership – or perhaps simply assuming the UK’s membership. So England and Wales could become parts of the UK that are outside the EU. [This is what was proposed in an article in The Scotsman, given at Appendix 1.]

The whole concept of what constitutes a nation within the EU has been shown to be flexible. Most notably the Czech Republic and Slovakia were until quite recently one nation but are now two. Slovenia was part of Yugoslavia until 25 years ago and only a part of Cyprus is in the EU while the other remains outside.

Scotland’s retaining its membership of the EU while remaining part of the UK would require significant constitutional change within the UK. The House of Commons would probably become the English and Welsh Parliament with, ideally, the House of Lords being replaced by a UK Federal chamber [congress or senate]. The remit of this body might become limited over time as the separate national bodies develop.

Economics

None of this is easy of course. But the economic opportunities for Scotland as an Anglophone member of the EU are enormous. Many businesses – some currently based in England or Wales – might choose to relocate to Scotland. Scotland’s
traditional skills would be attractive to manufacturers and could revive deprived areas in Strathclyde, Tayside and the Central belt. Scotland’s newer and highly developed skills in Financial Services could attract more businesses to Edinburgh, Glasgow and Perth. Scotland also has excellent IT skills. Scottish Universities could attract those academics who want to remain part of the important EU networks.

Politics

Politically this arrangement would be attractive in not requiring an independence referendum. If such a referendum were called with a result similar to that of 2014, then Scotland would plainly have to leave the EU and be subject to what for the foreseeable future appears to be an increasingly far right one party state. [See article from The Guardian at Appendix 2.]

The approach here will also be attractive to ardent Brexeters. It might actually suit them for England and Wales to become semi-detached members of the UK but outside the EU – a similar situation [although obviously on a rather different scale] to that of Greenland. In such a scenario invoking Article 50 would be redundant and the whole process would be under Westminster’s control.

Appendix 1
From The Scotsman 24th August 2016

With Brexit looking ever more complex, how about another solution, ask European law experts Peter Sellar and John Bell

Imagine that the United Kingdom (as represented by the Crown in Scotland and Northern Ireland) remains in the European Union, but Wales and England leave (“WEexit”). This would fit with the expressed wishes of the different peoples. It would also remove some explosive issues from the agenda. There would be no need to talk of Indyref2, a second referendum on Scotland’s independence. There would be no need to think about how to deal with the land border between Northern Ireland and the Republic, nor how to square Brexit with the Good Friday agreement. Like the Queen’s other territories which are not part of the EU, the Channel Islands and the Isle of Man, Wales and England could control migration numbers and manage passporting in financial services. And all that without ever triggering Article 50!

Too good to be true? Well, look at what we already know. The departure of the whole of the UK (“Brexit”) has to be achieved by giving notice to the European Council under Article 50 and then negotiating a withdrawal agreement within two years, covering a wide range of matters, such as on accrued pension and social security rights of citizens who have moved in and out of the EU over the last 43 years. In parallel, the UK has to negotiate agreements which will govern its new relationship with the EU on a wide range of trade, migration and other issues. These new relationship agreements are complex and will take many years to negotiate (Philip Hammond, our new Chancellor of the Exchequer, estimated that it could take six years).

These new relationship agreements would need the consent of 38 parliaments in the member states and the EU, so they will not be ratified quickly. Therefore, there needs to be an arrangement to govern the period between withdrawal taking effect and new
agreements coming into force, a period which could easily be as long as four years (that has been Michael Gove’s prediction). There are also agreements to be made with the World Trade Organisation and non-EU trading partners. All of these will take time. We are sure those who voted for Brexit will get frustrated by the slowness of this process.

WEexit operates differently. Article 50 only applies where a “Member State” seeks to withdraw from the EU, not where part of a Member State seeks to withdraw. There is no formal process for the exit of part of a Member State, but it has happened once, when Greenland (part of the Kingdom of Denmark) withdrew from the EU, though the geographically smaller Kingdom of Denmark is still a member.

The key agreement required is to amend Article 52 and Article 355 on “the territorial scope of the European Union”, which already makes provision for the status of the Channel Islands and the Isle of Man. The key new wording would add England and Wales to the list of territories of the Queen to which the Treaties do not apply. The advantage for England and Wales over Article 50 is that there is no timescale on this process and a solution can be reached on all relevant matters at the same time. It also means, aside from anything else, that the Falklands do not lose their current relationship with the EU, which is threatened by Brexit, and in which they had no democratic say.

The Queen’s territories in the Channel Islands and the Isle of Man are not part of the EU, but they are bound by EU rules in relation to free movement of goods and they have negotiated access to the Single Market for some of their financial products and services. In practice, they allow free movement of persons from the EU, though they are not bound by treaty to do so and they do operate restrictions on land acquisition. This is an illustration of the way some of Her Majesty’s territories outside the EU have a different status and a different relationship to the EU. WEexit would involve creating similar kinds of relationship.

The advantage of WEexit for England is that many of the arrangements have to be sorted out between Westminster and Edinburgh and Belfast, rather than with the EU 27. Since the United Kingdom of Scotland and Northern Ireland would be part of the EU, there is no need for a withdrawal agreement. Those countries retain the liabilities which the UK has acquired over the past 40+ years. Naturally, there would need to be a redistribution of these costs, but that would be a matter of internal negotiations between Westminster and the other parts of the UK, negotiations which can proceed at their own pace.

Of course, WEexit would lead to a more federal arrangement between Wales, England, Scotland and Northern Ireland. The Constitutional Reform Group, headed by Conservative peer Lord Salisbury, has anticipated this and drawn up a constitution for the UK which shows that a federal solution is possible.

The more the reality of the Brexit negotiations becomes apparent, the less attractive they become. Complex negotiations conducted over many years with a very awkward transition in the middle make Article 50 a very unattractive option, particularly if the process also triggers another independence referendum in Scotland. WEexit offers the Welsh and English a more orderly way out of the EU, and enables the peoples of
Scotland and Northern Ireland to get what they voted for. And while some may doubt its plausibility, the counter is simply to ask: why could WEexit not work?

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Appendix 2

From The Guardian 31st August 2016; opinion piece by Jackie Ashley

This was compelling political theatre. On Wednesday Theresa May sent the country a message about authority. Summoning the cabinet to Chequers and then summoning the television cameras to record her opening statement, she was saying unmistakably: “Keep calm and remember who’s boss.”

But the pith of her short message – no covert attempt to stay inside the EU, no second referendum – made clear which side she is coming down on, despite No 10’s “motherhood and apple pie” briefing that Britain’s future relationship with Europe will involve controls on immigration and be good for trade. The simple truth is that much as we may want access to the single market with no free movement of labour, that is not, and never will be, on offer. By promising to push ahead so firmly with no second referendum and no early general election, May has given comfort to the hardline cabinet Brexiteers.

We know now that her first priority is Conservative unity, even above an easy election victory. Some Tory commentators and politicians are horrified that she has not chosen to go to the country early. Labour, they say, is in a worse state to fight an election than for 35 years, riven from top to bottom. This is the moment to strike, they plead. You shouldn’t waste chances like this.

But May is a cool customer, and she has decided to play long. I assume that during her Alpine walking holiday she concluded that she has nothing to fear from other parties and everything to fear from her own.

If, as the polls strongly suggest, Jeremy Corbyn wins the Labour leadership again, there will be moves in the parliamentary Labour party for a breakaway, plunging constituency parties into the turmoil of loyalty oaths and feuds. If (unlikely, I know) it’s Owen Smith, the base and the leadership will be at war. Either way, it doesn’t seem likely that the official opposition will grow more appealing or stronger in the next few years. Let them stew and twist, seems to be May’s approach.

This has profoundly disturbing implications. We have a one-party hegemony. The prime minister, looking around for sources of serious political pushback, knows they are inside her party. The momentum isn’t coming from Momentum: it’s all from the right.

And they are riding high on recent good economic news, which helps the narrative that Brexit was a triumph of popular common sense. However, consumer confidence and employment figures mean nothing yet.

Until new tariffs start to bite, until major City players unable to get their “passporting” deals to continue trading inside the EU start to leave London, until there are concrete
examples of major investment being withheld, we can’t begin to assess what leaving the EU actually means for our long-term prosperity. Declaring Brexit a triumph now is like punching the air with delight because you’ve beaten the field in the first 100 yards of a 10-mile race.

Does May understand this? Maybe she does. And perhaps what she’s doing is carefully giving rope to the hard right, so they can hang themselves. Plenty of time – no election yet, no “backdoor” EU membership – let’s see what Boris Johnson, David Davis and Liam Fox actually come back with from their negotiations. If it’s grim for business and prosperity by the time of a 2020 general election, the right will be discredited.

However, there is a darker possibility, which is that May isn’t playing a tactical game; that she has accepted their agenda. In normal political times the not insignificant number of Tory MPs who don’t like Brexit would be able to argue for delay, for another chance for the electorate to have their say, pointing out that getting the terms of Brexit wrong would be a gift to Labour.

But at the moment, with opinion polling suggesting a future Tory majority of well over 100 seats, there is no political pressure at all. Labour’s rhetoric about “taking the fight to the Tories” seems merely forlorn.

The Tories are waiting and watching for a Jeremy Corbyn victory followed by the deselections of “Blairites” and moderates. Labour’s battles will be vicious and local, and will leave lasting scars across the political landscape. There is no chance that it will all be healed, forgotten and forgiven by 2020.

But if the Labour centre-right decides to break away and form a new party then the Tories are in an even better position. Across most constituencies, the anti-Tory vote would be divided at least three ways – Corbynite Labour, the new party and the Liberal Democrats – perhaps with the Greens challenging too. Under our first-past-the-post system, with the Tories facing such a divided opposition the result would be slaughter.

And then, as the Guardian revealed at the weekend, there is the potentially devastating effect of the boundary changes, which can’t really be brought in before an early election but will radically tilt the field by 2020. We are, in short, lacking the usual checks and balances that parliamentary politics normally provides. We are going into the huge Brexit experiment with the tiller of state tied fast in a single position, without proper parliamentary opposition and under a new leader who has only to look in one direction to maintain her position.

That’s what May’s political theatre on Wednesday implied. Perhaps she was playing a cynical political game – but I fear she wasn’t.