Philip Rycroft: David Hume Institute lecture, 9 September 2019, 6pm

Brexit and the Union: what next for Scotland in the UK?

Thank you, Jane-Frances, and thank you for the opportunity to speak here tonight.

I am a recovering civil servant. After 30 years of biting my tongue, I'm happy to say that any views I express tonight are entirely my own. A surprisingly sweet liberation.

I have had the immense privilege to witness some of the great events that have shaped this country over the last couple of decades. As an historian to trade, I am looking forward to the chance to reflect on those experiences, to marshal and share my own thinking and to contribute more widely to the public debate. I'm delighted that – with thanks to Peter Mathieson – Edinburgh University has offered me an Honorary Professorship to enable me to do just that, something I look forward to immensely. For now, however, you get my raw, untutored thoughts.

We live in parlous times. The UK, once a by-word for stable and broadly civilized politics, is a country bitterly divided. Political time has collapsed. We are trapped in the prism of the present, obsessed with the next spin of the political wheel.

Understandably so; for we are in the grip of a political and constitutional crisis the like of which the UK has not experienced for decades or, arguably, in its peculiar dimensions, ever. Who could have imagined when we trudged to the polling booths a little over three years ago that now, in September 2019, we would be witnessing a titanic battle between the UK Parliament and the Executive to prevent a no deal Brexit, the most scything possible rupture?

There is an urge for resolution, for the decisive break that will allow us to move on, to get back to something like politics as normal, where for most the political battle is a distant, grumbling noise, largely non-threatening, rather than the insistent cacophony we face now, drowning out even the possibility of thinking straight.

It is not going to be that simple. It seems all but inevitable that there will now be a general election before Christmas. Given the stalemate in Parliament, and a Government that cannot win agreement to its proposed way forward on the only policy that really matters, this is surely appropriate. We still live in a representative democracy. While the Fixed Term Parliaments Act may have occluded the process somewhat, the underlying principle remains true: a Prime Minister who cannot command the will of the House must go to the country.

But it would be a very brave person who would predict right now the outcome of the election. A first past the post system is peculiarly ill-suited to dealing with a situation where politics is so fractured, both country-wide and in each nation. With serious three- or four-way contests in constituencies across the country, marginal swings in voter sentiment will be amplified, with quite uncertain consequences for the overall outcome.

So a lecture that has 'what next' in its title is right now in itself a brave venture. I am happy to confess that these paragraphs that I read to you have gone through more than one iteration over the last few days.

It is extraordinary that over three years since the EU referendum, we still simply do not know how we will leave the EU or even if we will leave the EU.

Peering into this murky future is challenging, to say the least. There are no fixed points, no way signs to guide us on the path forward.

One thing though we do know. The Brexit drama is already having profound consequences for our life as a country, for our place in the world, for our economy and our patterns of trade, for our sense of self and our notions of citizenship, for the institutions of state and the constitution, and for the relationships between the different parts of the United Kingdom.

And we are not even at the end of the beginning. If we come out, the challenge in each of those domains intensifies as the UK comes to terms with its new place in the world. If we stay in, there can be no return to the status quo ante, either in our relationship with the EU or for politics within the UK. The world has changed, irrevocably, forever. On any score, it will be years before we have a clear sense of what the UK's future will look like, or if, indeed, the UK has a future.

Many themes here, but tonight I want to focus on one, what this all means for Scotland and the Union of the United Kingdom. This is as inherently unpredictable as the Brexit process itself, but I will attempt to sketch out at least some delineations of that future.

Brexit has already asked hard questions of the relationship between the UK Government and the Scottish Government. I will look at the handling of the tough practical issues that have dominated the dealings between the two governments over the last three years.

Knowing what we know now, I will ask what might characterise the relationship between the two governments if Brexit does indeed proceed.

More tentatively, I will speculate on the impact on the Union if Brexit, through whatever mechanism, is stalled or stopped altogether.

I will end by setting out the big questions all this will pose for our politicians and ultimately for us as citizens, whatever our political persuasion and whatever our view on Brexit.

First we must dive into the muddy waters of Brexit practicalities.

Brexit has introduced three new things into the discourse between the UK and Scottish governments. All are politically significant in their own right; together, they have dominated inter-governmental relations over the last three years.

The first is the engagement, or otherwise, of the Scottish Government in the negotiations on Brexit.

The second is the preparation for Brexit, including for no deal. The intertwining of devolved and reserved competences means planning for exit has to be a joint exercise, however reluctant the participants.

Both conceptually simple. The third is more complicated; the question of what to do with the powers returning to the UK from Brussels, specifically those powers that lie in, or intersect, with devolved competence. There are many of them – around 160 across the competences of the three devolved parts of the UK – and strewn across a number of policy domains, from agriculture and fisheries management to police and civil justice cooperation to blood safety, waste management and road operator licensing.

Why does the destination of these powers matter? There are three things in play here:

- the first is that return of these powers to the UK will give the devolved institutions policy control that they do not have as long as we remain members of the EU. For the exercise of those powers by the devolved institutions has in practice been limited to implementation, since the rules have been made at the EU level and the reservation of international relations trumps devolution of domestic competence;

- the second is that the exercise of many of these powers has, or can have, cross-border consequences; that, after all, was the rationale for holding then at EU level in the first place;
- the third is that the UK has no structure to manage its own internal market. We joined the EU well before devolution to Scotland and Wales and the devolution settlements assumed continued membership, thereby obviating the need to define how governance of the UK internal market might operate under UK statute.

This matters. Scottish agriculture, for example, may be very different from English agriculture in the aggregate, but it is very similar in the proximate. Lambs raised on the hills of the Borders sell into much the same market as lambs off the fells of Cumbria. A supermarket which operates north and south of the border does not want to have to comply with different food labelling requirements for stores not many miles apart. Companies want to know that their competitors in the same market are not gaining unfair advantage from having to abide by less stringent environmental obligations.

It is also a matter of managing common resources. A haddock spawned in the North Sea has no concept of the England-Scotland median line. River systems are shared.

Having been instrumental in the creation of the EU single market that, quite effectively, sorted these issues out at European level, the UK now finds that we may have to repatriate the problem and sort it out all over again for our own market. Another of Brexit's little ironies.

These are big things, critical to our collective future – negotiations on exit, planning for Brexit, handling of returning powers.

The backdrop has of course been bitter political disagreement about the fact of Brexit at all. The starting point is the simple fact that Scotland, along with Northern Ireland, voted to stay in the EU by some margin, while England and Wales voted to leave, by a narrower margin. This cannot be gainsaid or massaged away; different parts of a four-part Union spoke differently, when the people, not Parliaments, were sovereign for a day. This reverberates through all that has been said and done.

Layered over this has been the not unsurprising insistence of the Scottish Government that Brexit is reason enough to hold another referendum on Scotland's future in the UK Union. Insofar as it has accepted that Brexit might happen at all, the Scottish Government has argued for a very different sort of Brexit to the one to which we now appear to be heading, a Brexit which allows Scotland at least to stay in the Customs Union and Single Market.

From this unpromising starting point, it is perhaps surprising that there has been any discourse between the governments at all.

How has it worked out in practice?

Both Governments would claim that they have sought to be reasonable, that they have sought dialogue. Both signed up to the use of the existing inter-governmental machinery, the Joint Ministerial Committee, as the primary vehicle for the exchange of views, principally through the creation of a new sub-committee, the so-called JMC (European Negotiations).

The JMC has functioned, after a fashion. Both through it and the work it has spun out, Ministers and officials from both Governments have spent many hours in many rooms grinding through the issues that Brexit has thrown up.

And not without results.

Take planning for the practical effects of Brexit, latterly mostly focused on no deal planning. However vociferously the Scottish Government might reject no deal as a concept, it recognises its responsibilities to do what it can to mitigate the consequences. For the UK Government's part, there was acceptance that it couldn't pursue its no deal planning in isolation from the devolved governments. Despite the planning being highly sensitive, it simply had to open its books, which slowly, a bit reluctantly in places, it did. By the end of 2018, Scottish Government ministers and officials were literally in the room, attending the meetings of the exit planning cabinet sub-committee and its official offshoot.

The story is more complex when it comes to the handling of returning powers. This path was rocky, leading to the first over-riding by the UK Parliament of the refusal of a legislative consent motion by the Scottish Parliament. But there was a genuine issue to resolve here. The UK internal market is real and it matters.

The difficulty was the way in which the manner of doing it played into not just the deep distrust between the governments but also the different conceptions of the devolution settlements. What for Whitehall ministers looked like an explicable, even if in its original conception heavy handed, assertion of UK Parliamentary sovereignty to protect the UK internal market, appeared to the Scottish Government to be an abrogation of the basis of devolution.

In the event, the EU Withdrawal bill was amended, in such a way as to allow the Welsh Assembly to pass its own legislative consent motion. The objective of the UK government, to stabilise the UK internal market, is to be achieved through a more consensual approach of developing common frameworks in the policy areas affected. Beneath the politics, officialdom has worked constructively and in detail to map the issues, to assess their salience and to work out a way of handling them in the short term. Of the 160 policy as few as 20 or so are likely to require UK legislation, in whole or in part, and these are all subject of detailed inter-governmental discussion to seek to agree as far as possible the legislative way forward.

It was in the over-arching question of how the UK approached the negotiations to leave the EU that the political differences were laid most starkly bare. The rubric for JMC(EN) reads bravely: that the committee should 'seek to agree a UK approach to, and objectives for, Article 50 negotiations'. Unsurprisingly, given the different starting points, that has been uphill work.

The incentives for either Government to accept the compromises necessary to give that brave approach a fighting chance were always weak. The Scottish Government was never likely to resile on its principled objection to Brexit or risk the opprobrium of the SNP base by putting aside the question of independence while the UK navigated into a post-Brexit future.

The May Government had more of a choice in the early post-referendum days, as to what sort of Brexit to pursue. But the scope for some sort of rapprochement with the devolved governments of the UK faded with that series of early, precipitate decisions that pushed the UK negotiating position towards a sundering of ties with both single market and customs union. Once committed to the Lancaster House redlines, and harassed by the irreconcilables in the European Research Group, the UK Government found itself with no room for manoeuvre. Riven with internal dissent, an open books approach to the devolved governments was simply impossible.

What do we learn from this?

Two things, mainly.

The first is that Brexit cuts deep into the governance of the UK. The issues that the withdrawal process have thrown up have dominated interaction between the governments of the UK, to the exclusion of almost everything else. Brexit adds another layer of almost exponential complexity to the already complex arrangements through which the UK, post-devolution, is now governed.

The second is that Brexit has further soured the relationship between the Scottish and the UK governments. An SNP-led government in Scotland and a Conservative-led UK Government were never likely to agree on very much, but Brexit has allowed the relationship to be characterised by disagreement and conflict and not much else. While Ministers have talked, while officials have ground through endless policy detail to try and ensure as much order in the exit process as possible, most of what the public has seen is two governments pulling in wildly opposing directions.

This is profoundly uncomfortable. But is not half of what we will see if Brexit does, indeed, proceed. These were the Brexit foothills; the real climb lies ahead.

At some point, deal or no deal, the UK Government will have to enterprise a negotiation with the EU on our future relationship. Whatever the fantasies of the no dealers, the mutual trading and security interests of the UK and the EU are too important not to be ordered in a formal, structured relationship.

Even at its simplest, a Canada-style free trade agreement, this will be the biggest negotiation undertaken either by the EU or the UK. Unlike most free trade agreements, it will have to encompass domains like transport, energy and fisheries. Given the proximity and interwoven nature of the markets, the so-called level playing field issues – rules on the environment, on health and safety, on workers' rights – will loom much larger than the trade deals done at greater distance between less integrated economies. And it will include foreign policy cooperation, security and international development.

Much of this will directly engage devolved competences. The Scottish Government will have an intimate, even predominant, interest in some chapters, like fisheries. The deals done on a vast array of subject areas will impact deeply on Scottish economic interests, from the protection of geographical indicators for the whisky industry to the meaning of equivalence in financial services. All of it will matter to everyone living in Scotland, as in the rest of the UK.

Alongside the negotiations with the EU, the UK will also be attempting to forge new trade deals with the rest of the world. While international trade relations are of course reserved to Westminster, the implementation of aspects of them is not and the impact reaches deep into devolved territory. To take the most salient issue; nearly every trade deal that the UK might seek to do will involve in one shape or another agri-food interests. Trade deal with New Zealand? More lamb on the UK market please. Trade deal with Mercosur? More beef please. Trade deal with the US? Our phyto-sanitary standards please. The flashpoints are self-evident and numerous. At what point does a Scottish Government commit to legislate to ban the sale of hormone-fed beef in Scotland, on health grounds?

Alongside the negotiations on our trading and wider relationships with the EU and the rest of the world, the UK will also be re-making its own domestic policy context. This will not be straightforward. Importing the rules once set by Brussels means importing the political controversy they inevitably attract. What is the right immigration system for EEA nationals post-Brexit? How should labour and environmental standards evolve in a post-Brexit UK? Should we aspire to a Singapore-off-Europe model? Some of these rules engage devolved competence, all impact on Scotland in one form or another.

Nested within this complex of change will be the rules that govern the internal market of the UK. Who sets the rules on state aid? Is this a reserved or a devolved competence? Either way, how will domestic rules on state aid interact with international commitments? Which authority replaces the European Commission as the state aid police force? If a UK authority, will the UK Government be subject to its disciplines?

As if life wasn't already complicated enough with the major increase in domains of shared power, notably in tax and welfare, that flowed from the Scotland Act 2016.

Simply put, the working through of Brexit will put immense pressure on the relationship between the two governments, at a practical and at a political level. The issues at stake will an order of magnitude more complex than those dealt with hitherto, and so the scope for disagreement, misunderstanding and grievance will grow in proportion. All this when the system of inter-governmental relations is already under huge stress.

What happens if Brexit is postponed or cancelled? This is even more uncertain territory. While some of the practical governance consequences of Brexit would to a large extent be avoided, other impacts would be highly unpredictable.

Uncertainty about the UK's destination would of course be prolonged. The holding of referendums is not a simple business. The assemblage of the political majority to pursue such a course will itself take time. A new deal will have to be negotiated. There is the need for primary legislation, for the painful process of agreeing the question or questions, for deciding on the official campaigns and the requirement for a regulated period for the campaign itself. This won't happen by Christmas. With a following wind, a vote might be held in time for the fourth anniversary of the 2016 referendum.

Uncertainty will continue to debilitate business confidence, with a knock-on effect on investment, jobs and the public finances. Uncertainty will continue to undermine the UK's standing in the world. But more than that, a second referendum campaign would not be a pretty thing. A country already divided would face another trauma. Quite how that would manifest itself in attitudes towards this Union, of the United Kingdom, could potentially be quite profound. To posit one, plausible, scenario: what if the votes of the devolved parts of the UK are sufficient to override a majority in England that continues to be in favour of Brexit? I doubt that in those circumstances our Brexit dilemmas would all be fixed.

What does all this mean for the future of Scotland in the Union of the United Kingdom?

What I have described of what we know already, and what we can surmise about what might be to come, exit or no exit, makes it almost certain that the pressure on the current settlement will only grow, in governance and political intensity.

That pressure is already translating into a weakening of support for the current dispensation.

In Scotland, support for independence edges up, driven by remainers who voted no in 2014 who now think that the risks of independence are outweighed by the costs of remaining tied to the UK.

Meanwhile, concern for the fabric of the UK seems to be draining away in England as the Brexit debate becomes more polarised. The polling evidence is sobering, not least the now notorious Yougov poll of 19 June showing that 63% of Conservative party members thought Brexit more important than keeping Scotland in the Union, this finding consistent with the work of Edinburgh University on attitudes of leavers more generally.

Even given an understandable impatience with lack of progress on Brexit, this is extraordinary. Who would have thought that a majority of members of the party traditionally most committed to the preservation of the concept of the United Kingdom, of conserving its constitutional and territorial integrity, would be seemingly willing to ditch a 300 year old Union, where the ties at every level run so deep, in order to come out of a 40-year old Union, mainly economic in its intent and purpose? It is frankly almost impossible to imagine a similar situation occurring in any other European country.

For those of a nationalist persuasion, this all might look like fair grist for the independence mill. It is, I guess, a given that those who advocate independence will not waste the opportunity of Brexit-induced uncertainty and discombobulation to push their cause.

I don't suppose for a minute that there would be pause for thought, but if Brexit has revealed anything, it is that breaking up is hard to do. Doing so on the back of opinion more or less evenly divided is desperately uncomfortable. Confirmation of a settled will is one thing, just scraping over a referendum line quite another. If independence is such a wonderful thing – and it will likely be forever – wouldn't it be worth waiting just a bit until more of us get it?

For those who wish to preserve this Union, the challenge is more complex. The question, ultimately, is whether there is a form of devolution settlement that could garner clear majority support in Scotland – and England and Wales and Northern Ireland – and would be sustainable in the long term, demonstrating unequivocally that the interests of the devolved parts of the UK are heard, understood and respected in the highest counsels of the land.

From the Unionist perspective, there might have been some hope that the outcome of the process of which Robert Smith was the brilliant impresario would have delivered stability to the devolution settlement. The vow made by the leaders of the main UK parties in the dying days of the referendum campaign was delivered, at considerable pace, and the Scotland Act 2016 brought new and extensive, and arguably long overdue, powers to the Scottish Parliament. There was a moment in the Scottish Parliamentary elections of May 2016 when it looked as though that formula was working, a perceptible shift from the constitutional debate to a discourse about how money is raised in Scotland and how it is spent. That looks now like a sandcastle in the Brexit tide.

There is an option to rely on existing structures, as encoded in the 2016 Act, perhaps buttressed by the assertion of a more vigorous unionism. This is the default, the simple path. Continue to assert the sovereignty of the UK Parliament, find ways to make the UK Government more visible in Scotland by building on the city deals. Defy the Scottish Government to do its worst and soak up the fallout from many more legislative consent motions refused.

On this prescription, the world would not end tomorrow. We have managed with this dispensation for the last three years; why not the next three? And possibly it could work, with opinion in Scotland accepting, however sullenly, that this is how things are going to be, at least for the foreseeable future.

But it doesn't feel sustainable. Remember, the debates and tensions that will come down the post-Brexit track will be in multiples of what we have seen to date. How would a state of constant dispute interact with an already febrile public opinion, in England as in Scotland? Risky, perhaps, to allow that experiment to run, particularly in the run up to the May 2021 elections in Scotland.

A second option is to work with current structures, but to seek a transformational shift in the way in which Whitehall works within the devolved system of governance of the UK. There are undoubtedly things that Whitehall can do to sharpen up its own capabilities. Devolution has for too long in too

much of Whitehall been an add-on to the main job, rather than an integral part of it. Experience of local or devolved government could become a prerequisite for senior promotion. There is a case for a department of the Union, embracing the whole of the current UK Governance Group and the Northern Ireland Office, to give greater heft to the management of constitutional and devolution issues. That could be buttressed by an enhanced place for the handling of devolution in the Cabinet committee structure.

But the key would be a serious overhaul of the system of inter-governmental relations, to bring the devolved governments earlier and deeper into the counsels of the UK government. With seriousness of purpose, there are structures to build on in the JMC itself – the form less important than the substance of the discussion. There is an offer to be made, but it would have to be made in earnest. With levels of trust so low, it would inevitably take time before people in Scotland were getting the sense that their two governments had finally got round to working together on the building of a common future.

There is a third option, to take that word 'Union' at its face value, to recognise that in a Union of four parts, each needs its voice at the highest level of decision-making and each its ability to hold in check decisions it deems existential, a sort of Luxembourg Compromise for the UK. Many have recommended this road already, advocates of Home Rule, a new Act of Union, in essence a federal construct for the United Kingdom. Indeed, one leading Conservative politician opined in the aftermath of the sweeping SNP success in the 2015 general election that a way could be found to 'continue to bubblegum this great Union of ours together'. It would, he said, be 'surprisingly simple, to work out a federal solution, through further devolution to the component parts'. In case you're wondering, one Boris Johnson.

Many have been the objections thrown in the path of a federal answer to the UK's conundrums, the principal among them the asymmetry of the UK and the English question. This is indeed tough territory, but not insuperable. England itself is under-represented, a means for expressing Englishness and English interests long overdue. Within England, the overly tentative experiments with metro Mayors and a cautious administrative decentralisation must surely give way to a more through-going devolution of real power and responsibility, not least to the great cities of England that forged the path for municipal governance in the 19th century. With the second chamber of the UK Parliament also long overdue an encounter with democracy, there is clearly scope for reforms that would allow genuine, territorial representation for the different parts of the UK.

The times are of course not propitious for the sort of serious, consensual process that might lead to the development of a coherent set of options for the future relationship between the Scottish and UK Governments and for Scotland in the Union. The Brexit frenzy sweeps all before it.

Done in the name of UK Parliamentary sovereignty, the drive for Brexit is self-evidently not one that prioritises the compromises and flexibility that successful Unions require. In many ways, the Brexit mindset appears to be peculiarly blind to the territorial implications of leaving the EU, dismissive of the implications for this Union and seemingly unconcerned about the local economic impact, including on those parts of England that have hauled themselves out of the mire of collapsed old industry on the back of manufacturing as part of integrated European supply chains.

UK politics has swivelled, from a broadly left-right axis to an axis determined by a question that is at its heart about identity, remain or leave. As we know in Scotland, that is what referendums do; they polarise opinion. Once forced to make a choice, even on an issue like membership of the EU that was

far from top of political mind for most people in this country, we tend to stick with it. Allegiance to political parties weakens, trumped by the over-riding adherence to identity.

On the old left-right axis, there was room in the centre ground. When political parties huddled there, the swing of the pendulum was dampened. It's hard to find the centre ground on questions of identity. You're either for leave or for remain, for the Union or for independence. Whether we like it or not, we all get labelled. Inevitably and inexorably, opinion is dragged away from the centre, away from compromise and consensus.

As things stand, people in Scotland really only have two imagined futures before them, one the dreamland of an independent state, the other an extrapolation of a squabble-some present into a dystopia of increasingly acrimonious disputes between two governments, bent on different paths.

That does not have to be it. Hard as it may be in these difficult times, people in Scotland and in the rest of the UK deserve a richer debate, a recognition that there are other choices, that out of the shattering Brexit mayhem could emerge a different dispensation for the UK. Leaving one Union does not have to lead to the foundering of another. But, unless the next Prime Minister, whoever that might be, puts this high up their agenda, that might be their legacy.