Associate Statehood for Scotland as the Way to Stay in both the United Kingdom and the European Union: the Liechtenstein Example

Hakan Kolçak[1]

Abstract: *The Brexit Referendum in which the United Kingdom (UK) voted to leave the European Union (EU) without a nation-wide consensus upon this vote has resulted in a new constitutional crisis in Britain. As an outcome, Scotland, which strongly backed the Remain vote, is now searching for a constitutional option that enables it to stay in both the UK and the EU. As an interdisciplinary study which pays a particular attention to the confederal relationship between Liechtenstein and Switzerland, this article emphasises that associate statehood might be a constitutional option that would allow Scotland to stay in both of the unions.*

Keywords: *Brexit referendum, constitutional crisis, Scottish independence, associate statehood, European Union membership*

Introduction

Scottish politics, which used to be driven mainly by the administrative devolution system, began being shaped through the mechanism of legislative devolution following the establishment of the Scottish Devolved Administration in 1998. Having been ruled by unionist political parties seeking to safeguard Scotland's constitutional ties with the United Kingdom (UK), the Devolved Administration – a constitutional system bestowing Scotland with the right to exercise territorial autonomy – began acquiring a separatist character in 2007 that would ultimately result in a Scottish independence referendum in 2014.

The 2014 referendum in which Scots rejected the option of secession could have settled the issue of Scottish independence for a generation; however, the 2016 Brexit Referendum in which the UK voted to leave the European Union (EU) without a nation-wide consensus upon the leave vote has led to another constitutional crisis in Britain. As an outcome, Scotland, which overwhelmingly voted to remain in the EU, now faces the prospect of being taken out of the EU, stimulating Scottish First Minister Nicola Sturgeon to take all constitutional options, including the Scottish independence, into account for safeguarding Scotland's relations with the EU (Sturgeon 2016b).

[1] **Hakan Kolçak** has a BA (honour) in Public Administration from Selcuk University, Turkey and an MA (merit) in Global Politics and Law from the University of Sheffield, UK. He is currently a PhD candidate at the Human Rights Centre, University of Essex. Email: hkolca@essex.ac.uk

The First Minister has recently announced that there might be some potential options enabling Scotland to stay in both the UK and the EU even after the former has left the latter (Kirkaldy 2016). In supporting this announcement, Hepburn (2016) and Ramsay (2016) argue that Scotland could stay in both unions if it became a federacy akin to Greenland. This constitutional option has, however, been rejected by some representatives of the UK Government, including Scottish Secretary David Mundell and Brexit Secretary David Davis (see Andrews 2016; Dathan 2016), encouraging Nicola Sturgeon and her cabinet to present Scottish independence as the best way to preserve Scotland's position in the EU (Sturgeon 2016c).

Is an independent Scotland obliged to completely leave the UK? Can a confederal arrangement between an independent Scotland and the UK that renders the former an associate state of the latter permit Scotland to stay in both the UK and the EU? How can associate statehood enable Scotland to stay in the UK? How can a potential Scottish associate state become an EU member state? Can associate statehood prevent Scotland from becoming an EU member state? This research addresses all these questions by paying a particular attention to the confederal relationship between the Principality of Liechtenstein and Switzerland that renders the former an associate state of the latter.

As an interdisciplinary study, which asserts that associate statehood might be a constitutional option allowing Scotland to stay in both the UK and the EU, this article proceeds in the following order. It initially examines the recent episodes of Scottish politics and the Brexit Referendum. The article then turns its attention to the question of how Scotland can stay in both the UK and the EU. Having looked at the option of federacy that has been rejected by some members of the UK Government, the article begins analysing the Liechtenstein case with the main purpose of demonstrating that Scottish independence which takes its shape in the form of associate statehood may provide Scotland with the opportunity to stay in both the UK and the EU.

Brexit referendum: a new constitutional crisis

Scotland, which has been part of the UK since the adoption of the 1707 Act of Union, has not been subject to any (coercive) assimilation policies aimed at eradicating or destroying its distinct national identity; rather, the UK Government has not only respected Scottish national characteristics, but also allowed for their maintenance and development through enabling Scotland to pursue its own national policies, e.g. a separate judicial system based on Roman law instead of English common law; a distinct educational system teaching Scottish features; a Protestant Church constructed upon Calvinism rather than Anglicanism; and separate financial institutions able to issue Scottish banknotes.[2]

A distinct Scottish political way of life was driven mainly by the Scotland Office, a UK governmental department headed by the Secretary of State for Scotland, until the late 1990s. The Office was the main actor of Scottish politics through exercising administrative devolution in such areas as local government, public health, roads and water supplies, but the

[2] For more details on these policies, see Connolly (2013); Dardanelli and Mitchell (2014); Loughlin (2011); Meer (2015); Pittock (2012).

leading role to shape Scottish politics was then given to the Scottish Parliament (Holyrood) and Executive in 1997, when Scots endorsed the foundation of the Scottish Devolved Administration capable of exercising territorial autonomy as a corollary of the affirmative referendum on legislative devolution for Scotland (Loughlin 2011; McGarry 2010).

Scotland began exercising legislative devolution after the *Scotland Act 1998*, the backbone of the autonomous arrangement for Scotland, came into effect in November 1998 (Brown 1999; Laycock 2001). The Scottish Parliament, the 129-member legislative branch of the Scottish Devolved Administration, was initially dominated by unionist political parties (mainly the Scottish Conservative Party, the Scottish Labour Party (SLP) and the Scottish Liberal Democrats (SLD)) who seek to preserve the existing constitutional ties of Scotland with the UK, but Holyrood began changing its unionist character upon the 2007 parliamentary election in which the pro-independence Scottish National Party (SNP) came into power through a minority government. The Parliament ultimately gained a secessionist character following the 2011 parliamentary elections in which the pro-independence parties (the SNP and the Scottish Green Party) obtained 71 out of 129 seats. This separatist personality of Holyrood consolidated its existence in the 2016 parliamentary elections in which the secessionist bloc obtained 69 seats in total.

Table 1: Members of Scottish Parliament (MSPs) (1999-present)

Elections	SNP	Scottish Labour	Scottish Conservatives	Scottish Liberal Democrats	Scottish Greens	Others	Total
1999	35	56	18	17	1	2[a]	129
2003	27	50	18	17	7	10[b]	129
2007	47	46	17	16	2	1[c]	129
2011	69	37	15	5	2	1[d]	129
2016	63	24	31	5	6	0	129

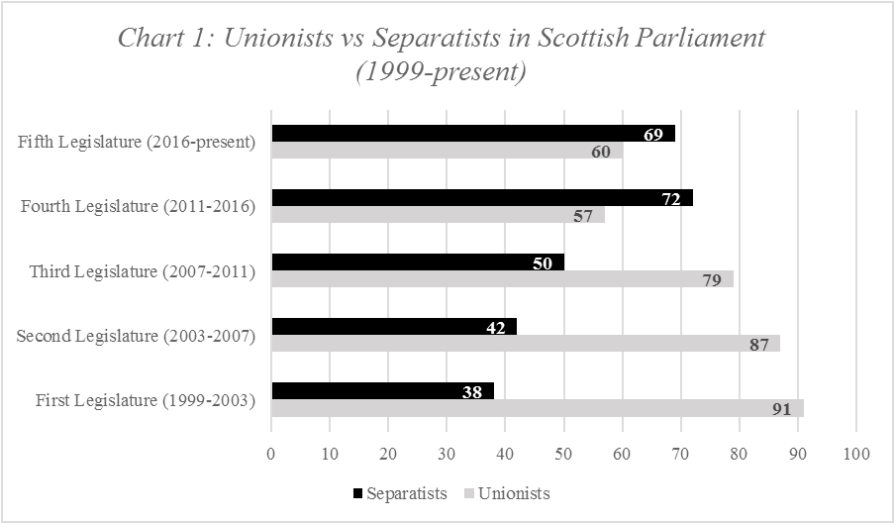
Notes:

a. While one of the last two seats was gained by the pro-independence Scottish Socialist Party (SSP), independent candidate Dennis Canavan obtained the other one.

b. The last ten seats were won by the followings: the SSP (6), the Scottish Senior Citizens Unity Party (1) and three independent candidates, Dennis Caravan, Jean Turner and Margo MacDonald.

c. The last seat was secured by independent candidate Margo MacDonald.

d. Independent candidate Margo MacDonald gained the last seat.

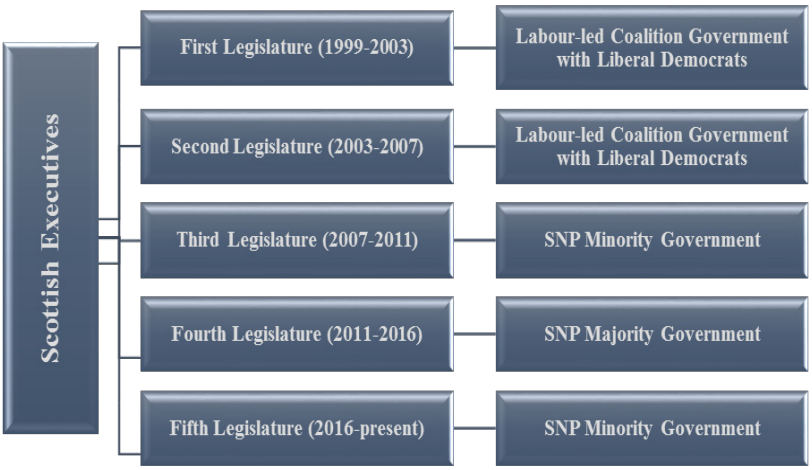


In parallel to the composition of the Parliament, the Scottish Executive, the executive organ of the Scottish Devolved Administration headed by the First Minister, also embraced a unionist character in its first years. The Devolved Administration was ruled by a SLP-led coalition government with the SLD during the first legislature (1999-2003), and this alliance was pursued during the second legislature (2003-2007) as well. The third legislature (2007-2011) was the one during which the Scottish Executive changed its unionist character to a secessionist one represented by a SNP minority government. This separatist personality of the Scottish Executive strengthened its position with a SNP majority government during the fourth legislature (2011-2016). The current Scottish Executive still maintains its secessionist feature through a SNP minority government.

As a natural result of its composition, the Scottish Executive was headed by unionist First Ministers during the first two legislatures, namely Donald Dewar (1999-2000), Henry McLeish (2000-2001) and Jack McConnell (2001-2007); however, the chief position started to be occupied by the SNP leaders, who stand up for Scottish independence following the 2007 parliamentary election: Alex Salmond (2007-2014) and Nicola Sturgeon (2014-present).

After taking up the reins of government in May 2007, the SNP not only formed a secessionist cabinet, but it also initiated a concrete political movement, known as the 'National Conversation', asking for a referendum on Scottish independence (Scottish Executive 2007). Accordingly, the Scottish Nationalists joined the 2011 parliamentary election with a manifesto pledge for a Scottish independence referendum (Adam 2014). Having witnessed the SNP's landslide victory in this parliamentary election, the UK Parliament (Westminster) officially authorised Holyrood to organise a single-question referendum on the constitutional future of Scotland in accordance with the so-called 'Edinburgh Agreement', signed between the UK and Scottish Governments on 15 October 2012 (Tierney 2013).

Figure 1: Scottish Executives (1999-present)



Following various parliamentary debates, on 14 November 2013, the Scottish Parliament passed the Independence Referendum Bill that then received Royal Assent on 17 December 2013, officially starting the referendum campaign. During this process, the Scottish Nationalists and the Scottish Greens represented the secessionist camp standing up for an independent Scotland, while the Scottish Tories, Scottish Labour and the Scottish Lib Dems formed the unionist camp seeking to preserve Scotland's constitutional ties with the UK (Cairney 2015; Dardanelli and Mitchell 2014; Jeffery 2015).

On 18 September 2014, Scottish voters eventually determined whether Scotland should be an independent country: 44.7 per cent of the voters backed Scottish independence whilst 55.3 per cent rejected this constitutional option.[3] The referendum's result could have settled the independence issue for a generation; however, it was the UK referendum on its EU membership, regarded as the 'Brexit Referendum', that began recording a different constitutional scenario.

The Conservative Party had won the UK parliamentary elections of 2015 with a manifesto pledge for holding a Brexit referendum before the end of 2017 (see Conservative Party 2015: 72). To enable such a referendum to take place across the UK and Gibraltar, a British overseas territory located on the south coast of the Iberian Peninsula, the Conservative Government enacted two pieces of legislation: i) the *European Union Referendum Act 2015*, which entered into force in December 2015; and the *European Union Referendum (Conduct) Regulations 2016*, which came into effect in January 2016, formally starting the referendum campaign. Two cross-party blocs were formed during the campaign: (i) Britain Stronger in Europe, which argued that "Britain is stronger, safer and better off in the European Union than we would be out on our own" (Calamur 2016); and (ii) Vote Leave, which asserted that leaving the EU would permit Britons to "take back control and … spend our money on our [British] priorities" (*ibid*).

On 23 June 2016, British voters ultimately endorsed the UK to withdraw from the EU: from a voter turnout of 72.2 per cent, 51.9 per cent voted to leave whilst 48.1 per cent voted

[3] For all details about the referendum, see Keating (2015); Tierney (2015); *The Guardian* (2014).

to remain in the EU. There was, however, no UK-wide consensus upon the leave vote: while England (53 %) and Wales (52 %) backed the Leave vote, Scotland (62 %), Northern Ireland (56 %) and Gibraltar (96 %) opted to Remain. In Scotland, there was a nation-wide consensus upon the Remain vote since all local authority areas saw Remain majorities.[4]

The Brexit Referendum not only resulted in the resignation of Prime Minister David Cameron, who had backed Remain,[5] it also engendered a new constitutional crisis for Scotland's future. The SNP had already won the 2016 Scottish parliamentary election with a manifesto reading that Holyrood should have the right to hold a second independence referendum if there has been "a significant and material change in the circumstances that prevailed in 2014, such as Scotland being taken out of the EU against our will" (SNP 2016: 24). Just one day after the referendum, First Minister Nicola Sturgeon announced by referring to the manifesto that:

> Scotland faces the prospect of being taken out of the EU against our will. I regard that as democratically unacceptable […]. [T]here is no doubt that yesterday's result represents a significant and a material change of the circumstances in which Scotland voted against independence in 2014 […]. [I]t is therefore a statement of the obvious that the option of a second referendum must be on the table. And it is on the table (Sturgeon 2016a).

Following the First Minister's announcement, the Scottish Government, which has the diplomatic mission, backed by Holyrood (92 out of 129 MSPs), to conduct its own foreign policy in protecting Scotland's relationships with the EU,[6] also declared its intention to take any constitutional option other than independence into consideration in securing Scotland's place in the EU (Nutt 2016a, 2016b). Alongside to this declaration, Nicola Sturgeon argued that there might be some potential formulas by which Scotland could stay in both the UK and the EU even after the former has left the latter (Kirkaldy 2016; O'Neill 2016).

Hepburn (2016) and Ramsay (2016) offer such a formula by arguing that Scotland could retain its EU membership without separating from the UK through becoming a federacy[7] akin to Greenland, which seceded from the EU in 1985 whilst still being a part of the Kingdom

[4] For further details about the results, see *BBC* (2016); Davidson (2016); Settle (2016).

[5] For details about Cameron's resignation, see Owen (2016).

[6] The Scottish Conservative Party was the sole party who abstained rather than supporting the diplomatic mission (Freeman 2016; Learmonth 2016).

[7] As a federal-origin political system allowing a certain territory of a state to exercise territorial autonomy, federacy is defined by political scientists and constitutional lawyers in various ways. Rezvani, for instance, defines it as 'a territory within the international legal boundaries of a state that has been allocated some entrenched (very difficult to take away) final decision-making powers without being a member unit of a federation [or unitary state]' (2007a: 117). Wolff also underlines the uncharted territorial character of federacies through defining them as political arrangements whereby part of a state enjoys constitutionally-entrenched extensive self-rule while not being a territorial sub-division of that state (2011: 1785, 2013: 33). In parallel to Wolff, Swenden (2012: 619) also emphasises the constitutionality of federacies by saying that federacies are federal political systems authorising minority nations to exercise constitutional embedded powers that cannot be altered or abolished unilaterally. There is no exact form of federacies that exercises a certain list of constitutional powers; instead, each federacy has its unique features and takes its shape through distinct autonomy arrangements (Jakobson 2005). There are now a significant number of federacies in Europe, e.g. the Faroe Islands (Denmark), Greenland (Denmark), the Aland Islands (Finland), South Tyrol (Italy), Gagauzia (Moldova), the Azores Islands (Portugal) and Madeira (Portugal). For more details on federacies, see Jakobson (2005); Rezvani (2007a, 2007b, 2012); Swenden (2012); Wolff (2011, 2013).

of Denmark. The Kingdom is a EU member state which consists of Denmark, the Faroe Islands and Greenland. All these three territories are part of the Danish Realm; however, solely Denmark represents the Kingdom in the EU while the other two territories, which have not only their autonomous entities but also seats in the Danish Parliament (*Folketing*), are not represented in the EU. According to Hepburn (2016) and Ramsay (2016), a similar constitutional scenario may be written for the UK as well: having established their own federacies, Scotland and Northern Ireland, both of which voted to remain in the EU, could safeguard their EU membership as part of the UK, whilst England and Wales, both of which voted to leave the EU, could withdraw from the EU as the other part of the UK.

Although the idea of constructing a Scottish federacy was regarded by Nicola Sturgeon as a potential way enabling Scotland to secure its EU membership as part of the UK (see Sturgeon 2016c), this constitutional option was not only considered as fanciful by the Scottish Secretary David Mundell (Dathan 2016),[8] but it was also rejected by Brexit Secretary David Davis,[9] who is the UK cabinet minister in charge of leaving the EU:

> I do not think that [Scotland staying in the EU whilst the rest of the UK leaves] works. One of our really challenging issues to deal with will be the internal border we have with Southern Ireland, and we are not going to go about creating other internal borders inside the United Kingdom (cited in Andrews 2016).

This rejection was one of the main reasons encouraging Nicola Sturgeon to present Scottish independence as the best way to safeguard Scotland's relationships with the EU:

> If we find that our interests cannot be protected in a UK context, independence must be one of those options and Scotland must have the right to consider it [...]. I do not pretend that the option of independence would be straightforward. It would bring its own challenges as well as opportunities. But consider this. The UK that we voted to stay part of in 2014 – a UK within the EU – is fundamentally changing. The outlook for the UK is uncertainty, upheaval and unpredictability. In these circumstances, it may well be that the option that offers us the greatest certainty, stability and the maximum control over our destiny, is that of independence (Sturgeon 2016c).

Sturgeon's call for the Scottish independence was then backed by Holyrood (69 out of 129 MSPs), which, on 28 March 2017, provided the First Minister with the mandate to seek a second Scottish independence referendum between autumn 2018 and spring 2019 (Hughes and Johnson 2017). Just one day after this Scottish decision, the UK Government, led by Prime Minister Theresa May, the new leader of the Conservative Party, officially notified the European Council, the main EU institution in charge with defining the Union's overall political directions, of its intention to withdraw the UK from the Union in pursuit of Article 50 of the *Treaty on European Union* (TEU) (Asthana, Stewart and Walker 2017).

The notification is, however, not the only condition to finalise the exit procedure. After the invocation of the so-called 'Article 50 process', the UK and the EU are now expected to

[8] The formal name of the Scottish Secretary, which is a UK cabinet position, is the Secretary of State for Scotland.
[9] The formal name of the Brexit Ministry is the Secretary of State for Exiting the EU.

negotiate and conclude a withdrawal agreement consonant with Article 218(3) of the *Treaty on the Functioning of the European Union* (TFEU) within two years. If such an agreement is concluded within two years, the UK would leave the EU in accordance with the exit terms identified in the agreement; if such an agreement cannot be concluded within two years, there are two potential paths: (i) the negotiation period can be extended through a *unanimous* agreement of all EU member states; or (ii) the UK can leave the EU without any exit agreement should there be no unanimous agreement to extend the period.[10]

Upon which cornerstones, the forthcoming negotiation period should be built on is one of the main questions which has recently urged Prime Minister Theresa May to call a snap general election, to be held on 8 June 2017. Having announced her Brexit plan, which would most likely result in a hard Brexit creating a UK that leaves the EU single market, refuses to compromise on such issues as the free movement of people, and trades with the EU as if it were any other non-European country, but not a soft Brexit, enabling the UK to keep some degree of its EU membership (McTague 2017; Wood 2017), the Prime Minister was criticised by all main opposition parties in Westminster: Labour threatened to vote against the eventual Brexit agreement the UK Government would reach with the EU; the Liberal Democrats, who argued that there should be a new referendum on the terms of the Brexit deal struct between the UK Government and the EU, underscored their anti-Brexit attitude while also declaring that they would stand against any hard Brexit deal; and the SNP called on the UK Government to negotiate with its Scottish counterpart on the issue of a second independence referendum, whilst also announcing that they would vote against the future legislation formally repealing the UK's EU membership (*BBC* 2017a, 2017b). In the existence of this huge division in Westminster, on 18 April 2017, Theresa May, who maintained that the UK should have a stable and strong leadership while preparing to enter Brexit talks, called the snap general election with the goal of securing a certain mandate for her Brexit plan. The following day the House of Commons backed the government motion to hold a general election on 8 June (522 MPs voting in favour and 13 MPs against), formally starting the election campaign (Crouch 2017; Maidment 2017; Stewart and Asthana 2017).

The snap election is, of course, a significant consequence of the Brexit referendum, but another one is that the option of independence is now demonstrated by the Scottish Government as the best way for securing Scotland's position in the EU. Is an independent Scotland obliged to completely leave the UK? Can such a Scotland stay in both the UK and the EU? It is, this article argues, possible for Scotland to stay in both unions through a new confederal arrangement between Scotland and the UK which renders the former an associate state of the latter. This argument will be expounded in more detail, in the next section.

Associate statehood: the way to stay in both unions

Associate statehood is a confederal-origin arrangement that allows a sovereign state to devolve some of its powers (e.g. diplomatic, financial and/or military) to another sovereign state without endangering its sovereignty status in international law, meaning that associate

[10] For more details about the exit process, see Gripper and Campbell (2016); Rankin, Borger and Rice-Oxley (2016).

statehood neither prevents the associate state from being recognised by other states and the United Nations (UN) as a sovereign independent state, nor hinders the associate state from becoming party to international agreements and/or organisations (Benedikter 2009; Stevens 1997).

The devolution process is generally completed through bilateral treaties which can be terminated by any of the two states without receiving permission from the other one, indicating that their sovereignty is fully recognised in the treaties. In the existence of such treaties, the associate state still has its own constitution, under which it can construct, maintain and develop its own public and private law spheres through various constitutionally-entrenched legislative, executive and judicial powers (Lapidoth 2001; Mautner 1981).

There are currently a significant number of sovereign states which are in free association with other sovereign states: the Principality of Andorra (Spain-France), the Principality of Liechtenstein (Switzerland), the Principality of Monaco (France), the Republic of San Marino (Italy), the Republic of the Marshall Islands (United States of America (USA), the Federated States of Micronesia (USA) and the Republic of Palau (USA) (Dumienski 2014). Among these states, we are going to examine the confederal relationship between Liechtenstein and Switzerland, enabling us to better understand how a prospective Scottish associate state would stay in both the UK and the EU.

The Principality of Liechtenstein was established by its Princely Family, who purchased the Dominion of Schellenber and the Country of Vaduz in 1699 and 1712 respectively (Kohn 1967). The two lordships were united by means of an imperial diploma issued by Emperor Karl VI on 23 January 1719, thereby rendering the lordships an imperial principality of the Holy Roman Empire (Veenendaal 2015). The imperial principality was left intact after the Roman Empire had been terminated by Napoleon in 1806, and it was acknowledged as a sovereign member state of the Napoleonic Rhenish Confederation (Bartmann 2012). Liechtenstein retained its sovereignty during the French Revolution, and it was recognised as a sovereign member state of the German Confederation, which was created in the aftermath of the 1815 Congress of Vienna (Stringer 2011).

The German Confederation was dissolved as a result of the 1866 Austro-Prussian War; however, not long before the dissolution, Liechtenstein had already concluded a customs union treaty with Austria in 1852, rendering the Principality an associate state of Austria. While dramatically benefiting from associate statehood through common currency, trade and postal systems, Liechtenstein had to terminate the customs union treaty just after the First World War, during which various sanctions were imposed upon the Principality owing to its relations with Austria (Duursma 2006).

Having split from Austria, Liechtenstein embarked on a new political process which ultimately rendered the Principality an associate state of Switzerland. The Swiss Federation, officially the Swiss Confederation, began undertaking Liechtenstein's consular and diplomatic representation in 1919. By adopting its new constitution in October 1921, Liechtenstein intensified its relations with Switzerland. The two countries established a customs union in 1923 which was then followed by the foundation of a currency union in 1924. The confederal relationship between the two countries was developed and strengthened in the following

years when many bilateral treaties authorising Switzerland to exercise Liechtenstein's sovereign powers in numerous areas – e.g. education, health, social security, environment, agriculture, to name but a few only – were concluded.

As an associate state of the Swiss Federation, the Principality of Liechtenstein is now, what Article 2 of its constitution states, "a constitutional, hereditary monarchy on a democratic and parliamentary basis". The Principality, which is recognised by the UN as a sovereign independent state, consists of two main regions: *Oberland* (Upper Country), which is composed of six communes;[11] and *Unterland* (Lower Country), which is made up of five communes.[12] Vaduz, a commune of the Upper Country, is the capital of Liechtenstein, and the Principality has its national flag, coat of arms and language (German) in accordance with its own constitution.[13] Liechtenstein has its domestic parliament,[14] government[15] and courts,[16] which enjoy constitutionally-entrenched legislative, executive and judicial powers in all areas of the Principality's public and private laws, except for those fields in which the authority has been voluntarily devolved to Swiss authorities through bilateral treaties. Let us now look at such fields in more detail.

Customs Union. Liechtenstein and Switzerland concluded a customs union treaty in 1923 which became effective on 1 January 1924. This treaty is indeed the backbone of the current confederal relationship between the two countries. It creates the legal basis for Liechtenstein's integration into the Swiss customs and economic zone whilst also contributing to the harmonisation of laws in many different areas. The Customs Union Treaty of 1923, under which Liechtenstein is attached to the entire Swiss customs area with no limitation on exports or imports, authorises Switzerland to appoint, pay and dismiss the Principality's customs officers and border guards. In addition, all Swiss laws pertaining to customs and trade, except for those provisions requiring Swiss cantons to make federal contributions, are fully applicable in Liechtenstein. Moreover, all trade and customs treaties which have been concluded by Switzerland are equally valid in the Principality. Accordingly, Switzerland is the legal actor who represents Liechtenstein in negotiating and concluding treaties in the

[11] The communes of the Upper Country are listed in Article 1 of the Constitution of Liechtenstein as follows: Vaduz, Triesen, Triesenberg, Planken, Schaan and Balzers.

[12] The communes of the Lower Country are listed in Article 1 of the Constitution of the Principality as follows: Schellenberg, Mauren, Ruggell, Gamprin and Eschen.

[13] For more details on the basic national characteristics of the Principality, see Articles 1-6 of the Constitution of the Principality.

[14] The Diet is the 25-member legislative organ of Liechtenstein. For more details about the Diet, see Chapter 5 of the Constitution of Liechtenstein.

[15] The executive organ of the Principality is made up of two entities: (i) the Prince Regnant, who is the Head of State; and (ii) the Collegial Government, which consists of the Head of Government (Prime Minister) and Government Councillors (Ministers). For more details about the Prince Regnant and the Collegial Government, see Chapters 2 and 7 of the Constitution of Liechtenstein.

[16] The judicial system of the Principality is composed of three sorts of courts: a) the Ordinary Courts, which deal with civil and criminal matters by way of its three-fold court system – the Princely Court (first instance), the High Court of Appeal (second instance), and the Supreme Court (third instance); b) the Administrative Court, which deals with governmental decisions; and c) the State Court, which settles jurisdictional conflicts between the courts of law and administrative authorities while also acting as a disciplinary court for government officials and as an electoral tribunal for election issues. For more details on the courts of the Principality, see Chapter 8 of the Constitution of Liechtenstein.

domains of trade and customs. Finally, the Principality is permitted by the treaty to become party to international agreements or organisations, but if it wants to become party to an international agreement or organisation to which the Swiss Federation has *not* adhered yet, Liechtenstein is obliged to conclude a special accession agreement with Switzerland by which the latter permits the former to complete its accession to that agreement or organisation.[17] The Customs Union Treaty, which is still in force, can be terminated by any of the two countries, but the country who intends to terminate the treaty should notice the other one at least one year earlier than the planned termination date.[18]

Monetary Union. Liechtenstein had already introduced the Swiss Franc as its official currency in 1924, but a concrete legal basis for the monetary union between the Principality and Switzerland was formed with the Currency Treaty of 1980. According to this treaty, all Swiss laws relating to monetary, credit and foreign-exchange policy, in addition to the protection of Swiss coins and banknotes, are fully applicable in Liechtenstein. Furthermore, the Swiss National Bank is acknowledged by the treaty as the national bank of the Principality which can exercise all its powers over companies, banks and other financial entities operating in Liechtenstein. The existence of this acknowledgement is already the treaty provision preventing the Principality from developing its own independent currency and monetary policy. As concerns treaty infringements, should a financial institution operating in the Principality violate a relevant Swiss law, the violation is tried by the Princely Court of Liechtenstein in first instance and by the High Court of Liechtenstein in second instance; however, the rulings of the High Court can be annulled by the Swiss Court of Cassation, which is recognised as the court of last instance on matters concerning the Currency Treaty of 1980. Finally, as regards the termination of the treaty, there are two distinct paths: 1) any of the countries can terminate the currency treaty with noticing the other one at least six months earlier than its planned termination date; or 2) once Switzerland adopts a new currency law, Liechtenstein can renounce to all its treaty obligations within one month.[19]

Patent Protection Union. The Patent Protection Treaty of 1979, which entered into force on 1 April 1980, founded the patent protection union between Liechtenstein and Switzerland. In accordance with this treaty, the Swiss Federal Institute of Intellectual Property is the authority dealing with all patent matters in the two countries. The treaty also grants Swiss authorities the right to negotiate and conclude patent treaties with third states that are fully enforceable in the Principality. Moreover, Switzerland and Liechtenstein are named jointly on regional and international patent applications in pursuit of the treaty. Finally, all Swiss laws regarding patent issues are valid in the Principality, and Liechtenstein's courts are the competent authority to rule any breach of these laws in first and second instances, but the court of last instance is the Swiss Federal Supreme Court, which can abolish any sentence of the High Court of Liechtenstein – the court of second instance – on patent matters. The termination procedure of the Patent Union Treaty is similar to that of the Customs Union Treaty, meaning that any of the countries can withdraw from the patent protection union

[17] Liechtenstein followed this procedure in becoming party to the Agreement on the European Economic Area, which Switzerland has not joined.

[18] For more details on the customs union, see Duursma (2006); Liechtenstein Ministry of Foreign Affairs (LMFA) (2012, 2015); Manz-Christ (2009).

[19] For more details on the monetary union, Duursma (2006); LMFA (2012, 2015); Manz-Christ (2009).

with noticing the other one at least one year earlier than its planned withdrawal date.[20]

Aliens Office Union. The cornerstone of the Aliens Office Union between Liechtenstein and Switzerland is Article 33 of the Customs Union Treaty which enables the two countries to establish some cooperation mechanisms for the protection of aliens police and border controls. In implementing this treaty provision, Switzerland and Liechtenstein concluded two separate treaties on 6 November 1963, eliminating all border controls between the two countries. The treaty also renders all Swiss laws concerning the residence and sojourn of aliens fully operative in the Principality. Furthermore, the treaty stipulates that all expulsions from Swiss borders apply to Liechtenstein unless the Swiss aliens police explicitly acknowledge its expulsions as applicable solely to Switzerland. The dissolution procedure of this union is the same as that of the Customs Union Treaty, i.e. any of the countries can withdraw from the Aliens Office Union with noticing the other one at least one year earlier than its planned withdrawal date.[21]

The above unions are just a few keystones of the confederal relationship between Liechtenstein and Switzerland that renders the former an associate state of the latter. There are also many other areas in which similar unions have been formed. For example, there is now a value-added tax (VAT) union between the two countries. Having adopted its own VAT system in January 1995, Liechtenstein concluded a bilateral treaty with Switzerland that not only makes all Swiss laws relating to VAT issues fully applicable in the Principality but also renders the Swiss Federal Court Liechtenstein's court of last instance with regards to all VAT cases.[22]

As can be understood by looking at the Liechtenstein case, Scottish independence may not result in the full separation of Scotland from the UK; instead, an independent Scotland may still be part of the UK through bilateral treaties that render Scotland an associate state of the UK. Hence, we may argue that associate statehood provides Scotland with the opportunity to stay in the UK as an independent sovereign state.

Let us now look at the other part of the question: can Scotland stay in the EU as an associate state of the UK? The answer is, I think, yes. Associate states can become part of international organisations. The Principality of Liechtenstein, for instance, has full membership from the Council of Europe and the Organisation for Security and Co-operation in Europe. Similarly, Scotland may preserve its current position in the EU as an associate state of the UK. We should, however, ask the following question in this regard: how can a potential Scottish associate state safeguard its EU membership?

As the main product of a confederal arrangement, a Scottish associate state can be formed after Scotland has become an independent state; in other words, Scottish independence can take its shape in the associate state of Scotland. According to Article 49 TEU, a new independent European state who respects all principles enshrined in Article 2 TEU may apply to become an EU member state. Some may ask in this regard whether Scotland can be a successor state of the UK in lieu of a new member state. The answer is, I think, no. The

[20] For more details on the patent protection union, see Duursma (2006); Rigamonti (2011).
[21] For more details on the aliens office union, see Duursma (2006).
[22] For more details on the VAT union, see Duursma (2006).

withdrawal of the UK from the EU does not permit Scotland to fill this vacant position as the successor of the UK. This argument is supported by Professor Neil Walker:

> Some people may want to argue the continuing state could be Scotland. In international law, the assumption is the continuing state is the part that is dominant in terms of population and political authority. When you are talking about ten per cent of the state, such as Scotland, that is clearly not the case. That is even before you look at the specific rules of the European Union as an international treaty, which clearly understands the UK, as presently constituted, as the continuing state (cited in McCall 2016).

Should we turn our attention to some UN practices, we can affirm Walker's argument. When India was partitioned following independence from British rule into India and Pakistan, the UN recognised India as the successor state and Pakistan had to follow UN membership procedure. Subsequent cases support this stance, with Singapore applying for new membership while Malaysia treated as the continuing state in 1965; Bangladesh applying for membership and Pakistan retaining its membership status in 1971; Montenegro applying for membership whilst Serbia continued within the UN in 2006; and South Sudan applying for membership in 2011 with the remaining Sudanese Republic treated as the successor state.

In a nutshell, an independent Scotland which takes its shape in an associate state cannot retain its EU membership as the successor of the UK; rather, it should follow the procedure set out in Article 49 TEU. According to this treaty provision, "a new state needs to apply for EU membership leading to an accession agreement that would require to be agreed unanimously and ratified by all member states" (Tierney 2013: 382). There are a number of conditions laid down in Article 49 TEU, and if these are fulfilled, then accession is effected through EU institutions and member states: "the unanimous decision of the Council; a majority decision of the European Parliament; and subsequent ratification of the Accession Treaty by the member states in accordance with their own respective constitutions" (*ibid*: 383). Having completed this accession procedure, Scotland may become a EU member state with the endorsement of its citizens. In short, associate statehood may eventually provide Scotland with the chance to safeguard its relations with the EU following a successful accession process.

Some may argue that EU institutions and member states can question any possible confederal relationship between the UK and a Scottish associate state, and therefore may not be inclined to conclude an accession treaty rendering the associate state an EU member state. This cannot be a strong argument, however. The EU allows its member states to form separate confederal unions. This is the case with the Benelux Union, which is indeed a confederal union of the so called 'Low Countries' – Belgium, the Netherlands and Luxembourg.[23] Article 350 TFEU not only acknowledges the existence of this confederal union but also secures its presence in the EU by reading that:

[23] For a deep analysis of the Benelux Union, see Cogen (2015).

> [t]he provisions of the Treaties shall not preclude the existence or completion of regional unions between Belgium and Luxembourg, or between Belgium, Luxembourg and the Netherlands, to the extent that the objectives of these regional unions are not attained by application of the Treaties.

A potential confederal arrangement between the UK and Scotland which renders the latter an associate state of the former is thus not an element preventing the associate state of Scotland from becoming an EU member state.

Conclusion

As an interdisciplinary study, this article has sought to answer whether an independent Scotland can stay in both the UK and the EU. Scottish independence is an issue which could have been dealt with for a generation following the 2014 Scottish Independence Referendum. The 2016 Brexit Referendum in which the UK voted to leave the EU while Scotland clearly rejected this withdrawal, however, has resulted in a new independence crisis. Scottish politicians are now examining all potential constitutional options that may enable Scotland to retain its EU membership after the UK's exit from the EU.

Scottish First Minister Nicola Sturgeon has recently declared that there might be some constitutional alternatives allowing Scotland to stay in both the UK and the EU even after the former has left the latter. In supporting this declaration, the option of federacy has been recommended by Hepburn (2016) and Ramsay (2016) as a possible constitutional scenario permitting Scotland to safeguard its constitutional relations with the UK and the EU after the former has withdrawn from the latter. This constitutional alternative has, however, been rejected by both Scottish Secretary David Mundell and Brexit Secretary David Davis, stimulating the First Minister and her cabinet to present Scottish independence as the best way to secure Scotland's position in the EU (Sturgeon 2016c).

Scottish independence is a potential constitutional option that may let Scotland preserve its relations with the EU following the Brexit vote. According to this article, this constitutional option would not certainly mean the complete separation of Scotland from the UK, however. Rather, an independent Scotland which takes its shape in the form of associate statehood may allow Scots to stay in both the UK and the EU.

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