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Brexit, Devolution and Scottish Independence. Political and Legal Impact of the Sewel Convention in the UK

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Abstract

The upcoming withdrawal of the United Kingdom from the European Union is a source of tensions within the political system of the UK. Devolution is most likely to be affected by Brexit which can lead to conflicts between the UK as a whole and Scotland as its part. The Sewel Convention is a political constitutional norm establishing non-legal rules of cooperation between these two political bodies. Despite having been written in a statute, the Sewel Convention remains unenforceable by the courts. Nonetheless, the political consequences of diminishing it may be severe. The discrepancy between the political strength of Scottish nationalism, confirmed in the latest general election, and constitutional lack of Scottish "voice" in regard to Brexit may lead to a severe political crisis within the UK.

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Streszczenie

Brexit, dewolucja i niepodległość Szkocji. Znaczenie prawne i polityczne konwenansu Sewela w Zjednoczonym Królestwie

Nadchodzące wystąpienie Zjednoczonego Królestwa Wielkiej Brytanii i Irlandii Północnej z Unii Europejskiej jest źródłem napięć w ramach systemu politycznego tego kraju. Brexit z dużym prawdopodobieństwem wpłynie na dewolucję w UK, powodując konflikty pomiędzy Zjednoczonym Królestwem jako całością oraz Szkocją jako jego częścią. Konwenans Sewela jest polityczną normą konstytucyjną ustanawiającą pozaprawne reguły współpracy pomiędzy oboma ciałami politycznymi. Pomimo tego, że konwenans został umieszczony w ustawie, nie jest możliwy do wyegzekwowania przez sądy, polityczne konsekwencje jego złamania mogą być jednak znaczne. Rozdźwięk pomiędzy siłą polityczną szkockiego nacjonalizmu, potwierdzoną w ostatnich wyborach parlamentarnych, a konstytucyjnym brakiem „głosu" Szkocji w odniesieniu do Brexitu może doprowadzić do poważnego kryzysu politycznego w Zjednoczonym Królestwie.

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The notion of upcoming Brexit has a tremendous influence not only on UK[2] external relations but also on its internal constitutional order. The aim of this paper is to depict possible legal and political consequences of the Sewel Convention, which establishes modus vivendi – the mode of living – between the Westminster and Scotland, particularly in light of the British withdrawal from the European Union. The first part of this paper shortly depicts basics of the British constitutional system and the history behind the emergence of the Sewel Convention. The latter part explores issues regarding possible justiciability and enforceability of the convention after it was put on a statutory footing in the context of the famous Miller case. The paper ends with conclusions regarding a political impact of the convention, arguing that the current setting strengthens the Scottish independence movement and may lead to a severe constitutional and political crisis with respect to devolution.

[2] Abbr. United Kingdom.

I. Key features of the British constitutional system

Several remarks have to be made at the beginning in order to depict a background against which the subject of this article will be presented. Firstly, the United Kingdom neither enjoys a codified, single constitution, nor centralised judicial review of the constitutionality of legislation[3]. Often this system is referred to as a system of an "unwritten" constitution, but this description does not entirely fit the legal reality, since many rules forming the British constitution are indeed written in the form of statutes[4]. It is true however that these constitutional legal rules do not form a single body of law and they are not entrenched and not formally superior over other laws. What is more, by and large the Parliament cannot be restricted by the courts in executing its legislative functions under the doctrine of parliamentary sovereignty. As it was stated in the watershed case of Madzimbamuto v. Lardner-Burke: "It is often said that it would be unconstitutional for the United Kingdom Parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. But that does not mean that it is beyond the power of Parliament to do such things, If Parliament chose to do any of them the courts could not hold the Act of Parliament invalid"[5]. However, it is important to note that the courts are entitled to deliver effective judicial review of executive basing on legal rules enacted by the Parliament and constitutional precedents.

Secondly, there are also non-legal rules called "conventions" which form a significant part of the British constitutional and political system. Constitutional conventions regulate political behaviour in the form of unenforceable norms originating from mutual compliance, often – though not always – based on custom[6]. T. Wieciech indicates that they are composed of the following features: 1) normative character which means that they

[3] C. Turpin, A. Tomkins, *British Government and the Constitution*, 7th edition, Cambridge 2011, p. 4.

[4] See for example: Human Rights Act 1998 (c42).

[5] Madzimbamuto v Lardner-Burke [1969] 1 AC 645 (PC).

[6] For definitions see: A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, ed. R.E. Michener, Indianapolis 1982, p. 82; K.C. Wheare, *Modern Constitutions*, Oxford 1966, p. 122.

are binding, 2) the status of constitutional rules, 3) informality, 4) non-legal character, 5) lack of precise legal sanction and enforcement procedure[7]. The strict distinction between constitutional conventions and customs tends to be overlooked, however the authors underline the special constitutional value of conventions in contrast to customs and their normative, though non-legal status (points 1 and 2 above)[8]. The conventions can be either unwritten or written, for example in the form of a manual. Although they cannot be subject to decisive judicial review, sometimes they can help to unveil the meaning of an enforceable legal rule and be used as an interpretative tool[9]. Lacking direct legal sanction, conventions base their effectiveness either on a long tradition of their application or on common sense of involved parties. A great example of such a convention is the rule stating that the British monarch acts upon the advice of his or her Government[10]. Formally there is no law to force the monarch to adhere to this convention and the courts could not enforce it, nonetheless political and social consequences of breaking it would be so severe that it could mean the end of the British parliamentary monarchy.

Thirdly, contrary to a cursory impression the United Kingdom is rather a unitary country, not a federal one, though a degree of autonomy granted to particular regions is relatively high. Some propose to call it a "union state" as in fact it is "neither straightforwardly unitary nor systematically federal in character"[11]. The Government is centrally organised and there is a lack of any kind of constitutionally binding, formal agreement between particular parts of the UK such as Scotland, England, Wales and Northern Ireland. However, the structure of the state is organised around the doctrine of devolution. Devolution means the delegation of some powers from one institution to another. In continental law, for example in Poland, it can mean the situation when a court of higher instance takes a case which is usually

[7] T. Wieciech, *Konwenanse konstytucyjne*, Kraków 2011, p. 20.

[8] Ibidem, p. 54.

[9] See: N.W. Barber, *Laws and constitutional conventions*, "Law Quarterly Review" 2009, No. 125/294, pp. 1–2; A. McHarg, *Constitutional Change and Territorial Consent: the Miller case and the Sewel Convention*, [in:] *The UK Constitution after Miller: Brexit and Beyond*, ed. M. Elliott et al., London 2018, p. 12.

[10] V. Bogdanor, *The Monarchy and the Constitution*, Oxford 1995, pp. 65–66.

[11] C. Turpin, A Tomkins, op.cit., p. 210.

heard before a court of lower instance[12]. In the context of British constitutionalism devolution stands for administrative decentralisation of the state. Devolved territories, such as Scotland, receive a power to decide a variety of enlisted subjects on their own, through their own legislative and executive bodies[13]. The scope of these powers is referred to as "devolved matters" and includes such topics as education or health[14]. Some powers are reserved only for the central Government – they include foreign affairs and army[15]. It is important to note that the source of devolution always lies in Westminster. The Parliament decides about vesting some particular powers in devolved bodies, but under the current constitutional setting it can also arbitrarily reverse its decision.

II. Short history behind the Sewel Convention

There is one constitutional convention particularly important for relations between the United Kingdom as a whole and Scotland as its part. As the Scotland Act 2016 stipulates: "But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament"[16]. This provision introduced the so-called Sewel Convention into the written statute of the Scotland Act. The Sewel Convention was originally formed during the debate on the Scotland Act 1998 when Lord Sewel, at that time the Under-Secretary of State at the Scottish Office, gave a following statement: "as happened in Northern Ireland earlier in the century, we would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish parlia-

[12] See for example: art. 25 § 2 of the Polish Code of Criminal Procedure, Act of 6th June 1997 (Dz.U. No. 89, item 555 with chang.).

[13] M. Keating, *The Government of Scotland. Public Policy Making after Devolution*, 2nd edition, Edinburgh 2010, pp. 34–35.

[14] Devolved matters are not enlisted in the statute. The rule is that what is not reserved for the UK Parliament is devolved to the Scottish Parliament. See: the Scotland Act 1998.

[15] For a typical list of those powers see: Schedule 5 to the Scotland Act 1998, https://www.legislation.gov.uk/ukpga/1998/46/schedule/5 (1.11.2019).

[16] Scotland Act 2016 (c11), p. 2, inserting 28(8) into the Scotland Act 1998 (c42).

ment"[17]. Later, when Scottish people decided to stay in the United Kingdom in the Scottish independence referendum 2014, the so-called Smith Commission started its work in order to fulfil "the Vow" to increase the devolution powers vested in Scotland[18]. One of the effects was a recommendation to introduce the Sewel Convention into the Scotland Act and this notion was indeed approved by the Government and Parliament. However, the convention, even on a statutory footing, does not legally constrict the UK Parliament in a sense that the Parliament is still sovereign and independent, and can "make or unmake any law whatever"[19], including legislating on devolved matters or changing the scope of Scotland's political freedom without the consent of the Scottish Parliament. What is more, the convention is in no sense permanently entrenched and does not form any kind of binding "federal agreement" between Scotland and the United Kingdom as a whole, hence it can be removed from the statute just like every piece of legislation. The issue of its justiciability and enforceability will be explored in greater detail in the following paragraph.

III. Enforceability of the Sewel Convention

There are many arguments to back a thesis that section 28.8 of the Scotland Act 1998 is not enforceable and hence its legal role is strictly constrained. Firstly, the origin of this provision is the convention already described above and the nature of constitutional conventions is that they work more like political guidelines, some kind of constitutional "savoir-vivre" and not like enforceable legal rules. Arguably, conventions are binding even though they lack sanction but it does not change the distinctive feature of their unenforceability. As put it J. Jaconelli: "The categorisation of constitutional conventions as a species of social rule simultaneously captures two of

[17] *Lords Hansard,* vol. No. 592, part No. 191, 21 July 1998, column 791, https://publications.parliament.uk/pa/ld199798/ldhansrd/vo980721/text/80721–20.htm#80721–20_spnew2 (27.10.2019).

[18] Scottish Parliament Information Centre, *The Smith Commission Report – Overview,* pp. 4–6, 11, http://www.parliament.scot/ResearchBriefingsAndFactsheets/S4/SB_15–03_The_Smith_Commission_Report-Overview.pdf (27.10.2019).

[19] A.V. Dicey, op.cit., p. 20.

their fundamental features: their normative quality, in prescribing standards of behaviour; and the fact that they are not enforced in the courts"[20]. When it comes to the Sewel Convention the UK Government openly explained its approach in the Memorandum of Understanding: "The United Kingdom Parliament retains authority to legislate on any issue, whether devolved or not. It is ultimately for Parliament to decide what use to make of that power"[21]. The main question was: had the Sewel Convention become enforceable by the courts of law when the amendment of the Scotland Act had been issued by the UK Parliament? In the above mentioned Miller case this very question was addressed to the Justices of the UK Supreme Court, since it was important to determine whether Scotland can exercise a "legal veto" against the Withdrawal Bill based on the argument that it would significantly interfere with devolved matters or at least modify their range. Although conventions have been written down at times, they have historically not been placed on a statutory footing, making the case potentially distinguishable[22]. The Supreme Court however decided that the convention remained political in nature and was not transformed into an enforceable legal rule. One of the arguments was the use of certain words by the lawmaker such as "it is recognised" and "will not normally legislate" – these phrases suggest that it was not an intention of the Parliament to convert the Sewel Convention into an absolute rule which could be then enforced by the courts[23]. This judgment fits into the British judiciary's prudent approach to matters of political importance and upholds restrictive views on constitutional conventions. However as points out T. Mullen, the Supreme Court presented in Miller even more cautious approach than usual, since it

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[20] J. Jaconelli, *Do Constitutional Conventions Bind?*, "The Cambridge Law Journal" 2005, No. 64, p. 151.

[21] *Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee,* p. 8, 14, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/316157/MoU_between_the_UK_and_the_Devolved_Administrations.pdf (1.11.2019).

[22] A. Gordon, *Devolution, Brexit, and the Sewel Convention*, p. 5, https://consoc.org.uk/publications/devolution-brexit-and-the-sewel-convention (26.12.2019).

[23] *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)* [2017] UKSC 5, para. 148 and 149.

not only ruled on non-justiciability, but also refrained from specifying the meaning and requirements of the convention[24]. It suggests that courts can only confirm the existence of conventions, but not elaborate on their understanding. Such a narrow view met criticism among scholars – some suggested that it was not clearly justified and that in fact the Supreme Court seemed not to be aware that it took a more stringent stand when compared with previous judgments[25]. However controversial, this restrictive approach should not surprise taking into consideration how heated the political discussion regarding both Brexit and Scottish independence has been. Enough to say that after this case the Justices became the subject of vicious attack in media, having even been called "the enemies of the People" for ruling that the UK Government needed to obtain the consent of the Parliament to withdraw from the EU[26].

Although legally sensible, the Supreme Court's ruling stripped section 28.8 of any practical meaning, making this statutory provision no more signifiant than an informal manual. The final political effect of the judgment is that it empowered the Parliament and strengthened the rule of parliamentary sovereignty at the expense of the executive and devolved administrations. On a side note it is worth reminding that even if the convention had been deemed justiciable due to its statutory footing, the judgment could not restrict the Parliament's power to "unmake" such law in the future.

IV. Possible political consequences of the Sewel Convention in light of Brexit

The true significance of section 28.8 seems to manifest itself in its political reasons and possible political consequences. As it was mentioned before, the convention was written down in a form of statute as part of recommendations of the Smith Commission after a positive for the UK outcome

[24] T. Mullen, *The Brexit case and constitutional conventions,* "Edinburgh Law Review" 2017, vol. 21(3), pp. 1–2, http://eprints.gla.ac.uk/144492/7/144492.pdf (25.12.2019).

[25] See: T. Mullen, op.cit., p. 4; A. McHarg, op.cit., p. 14.

[26] R. Pells, *Daily Mail's 'Enemies of the People' front page receives more than 1,000 complaints to IPSO,* https://www.independent.co.uk/news/media/daily-mail-nazi-propaganda-front-page-ipso-complaints-brexit-eu-enemies-of-the-people-a7409836.html (25.12.2019).

of the Scottish independence referendum 2014. Increasing the scope of devolution and placing the convention into the statute were all part of "the Vow" – a promise made by leaders of unionist UK political parties in order to convince the people of Scotland to remain within the UK[27]. It is said that "the Vow" had "an enormous impact on the campaign", though it is even not certain if such a document like the one presented on the cover of the Scotland's Daily Record ever existed[28]. Nevertheless it is quite obvious that a discussion about the level of freedom and self-reliance of Scotland as part of the United Kingdom is embedded in the sensitive dispute whether Scotland should stay within the UK or not. A greater level of autonomy granted to Scotland and Westminster's respect of the legal boundaries preventing it from interfering with devolved matters is clearly helpful in convincing part of the Scottish people that the union with England, Wales and Northern Ireland is not detrimental to their interests. It may change drastically when Westminster and the HM Government chooses to legislate and decide on devolved matters and to ignore the disapproval of the Scottish Parliament. There is a clear conflict of interests when it comes to Brexit since the majority of Scots voted against it and so did the Scottish Parliament when it initially decided not to support the Withdrawal Bill[29]. Arguably, The Scottish Parliament was able to do so since the Withdrawal Bill was clearly going to change the state of many devolved matters, speaking precisely: the scope of Scotland's freedom would have been altered since the matters of UE law were to return under Westminster power and not directly to de-

[27] See an article on the BBC website summarising the history of the Vow: J. Cook, *What now for 'the vow'?*, https://www.bbc.com/news/uk-scotland-29443603 (1.11.2019).

[28] R. Greenslade, *'The Vow' and the Daily Record – creative journalism or political spin?*, https://www.theguardian.com/media/greenslade/2014/oct/31/daily-record-scottish-independence (1.11.2019).

[29] The results of the EU referendum by regions can be found at the Electoral Commission website: *Results and turnout at the EU referendum*, https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/elections-and-referendums/past-elections-and-referendums/eu-referendum/results-and-turnout-eu-referendum (1.11.2019). See the *Motion S5M-12223* of 15.05.2018 of the Scottish Parliament, https://www.parliament.scot/parliamentarybusiness/28877.aspx?SearchType=Advance&ReferenceNumbers=S5M-12223&ResultsPerPage=10 (1.11.2019), later described by S. Carrell, *Scottish parliament decisively rejects EU withdrawal bill*, https://www.theguardian.com/politics/2018/may/15/scottish-parliament-decisively-reject-eu-withdrawal-bill-brexit (1.11.2019).

volved bodies. The Scottish Parliament would not have a legal power to autonomously retain parts of EU legislation after Brexit if it was not compliant with Westminster policy. Since the Sewel Convention does not only apply to substantive legislation on devolved matters, but also regulates changes to the scope of powers vested in devolved administrations, approval of the Scottish Parliament might have been formally needed in order to pass such legislation[30]. Although the Supreme Court did not elaborate on the scope of the convention in Miler and merely decided it not to be justiciable, this itself led to a conclusion that the British Parliament could without legal reservation ignore Scottish disapproval. However, political consequences may be severe – breaking or diminishing the Sewel Convention along with taking a course on Brexit may lead to a significant drop of Scottish people' approval towards staying in the United Kingdom. Apart from resorting to the protection of the Sewel Convention, Scotland tried to prepare itself to Brexit by adopting The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill 2018 in order to stipulate that legislation on devolved matters being currently controlled by the European Union would return under the power of the Scottish Parliament. As it seems, Scots were not eager to let the powers exercised by the EU be vested in Westminster. The bill was partially held by the UK Supreme Court to be out of the Scottish Parliament devolved legislative competence, especially in case of the enactment of the UK Withdrawal Act which indeed happened, leaving a huge part of the Scottish bill invalid[31]. The result is that the bill cannot be submitted for Royal Assent in its present form. It is worth comparing with Miller where the Supreme Court did not impose any restrictions on Westminster with respect to the Sewel Convention. As stated it A. Gordon: "there are limits to the powers of the devolved, but not those of the 'devolver'"[32]. While this asymmetry is constitutionally justifiable, it surely creates a burning political problem.

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[30] In reference to the scope of the Sewel Convention see for example: *Devolution Guidance Note 10* https://www2.gov.scot/Resource/Doc/37349/0066833.pdf (1.11.2019), section 4, point III together with section 6.

[31] *The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill – A Reference by the Attorney General and the Advocate General for Scotland (Scotland),* [2018] UKSC 64.

[32] A. Gordon, op.cit., p. 6.

Against this backdrop a proposition to conduct a second independence referendum was introduced by the Scottish Government[33]. Nicola Sturgeon, Scotland's first minister, wrote a letter to then newly appointed British prime minister, Boris Johnson, asking to discuss her proposal of carrying out the referendum[34]. After that, The United Kingdom general election of 12th December 2019 brought a major victory for The Conservative Party, but at the same time strengthened the Scottish National Party[35]. That intensified the SNP's engagement in lobbying for the referendum. Ms. Sturgeon argues that there has been a significant change of circumstances due to upcoming Brexit – "I accept, regretfully, that he [Boris Johnson] has a mandate for Brexit in England but he has no mandate whatsoever to take Scotland out of the EU", said Scotland's First Minister. Current Brexit extension deadline is set at 31st January 2020 after PM Borris Johnson was legally forced by the previous UK Parliament to request for it[36]. The Conservatives' electoral success makes it almost certain that indeed the UK will leave the EU in January. At the same time, PM Johnson decisively rejected any propositions of having the second Scottish independence referendum[37]. Nevertheless, the latest polls show that the support for the independence in Scotland is growing, though not conclusively yet[38]. The discrepancy between the political strength of Scottish nationalism, confirmed in the latest elections, and constitutional lack of Scottish "voice" in regard to Brexit will most probably give rise to further controversies, especially if Northern Ireland finally receives a special status under the new Brexit deal.

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[33] The Referendums (Scotland) Bill was introduced on 28th May 2019 and is currently going through the first stage of legislative process. See The Scottish Parliament website: *Referendums (Scotland) Bill*, https://www.parliament.scot/parliamentarybusiness/Bills/111844.aspx (1.11.2019).

[34] L. Brooks, *Nicola Sturgeon calls for new Scottish independence vote*, https://www.theguardian.com/uk-news/2019/jul/25/nicola-sturgeon-calls-for-new-scotland-independence-vote (1.11.2019).

[35] BBC News, *UK results: Conservatives win majority*, https://www.bbc.com/news/election/2019/results (27.12.2019).

[36] See *the official letter from PM Boris Johnson to EU Council President Donald Tusk*, https://www.gov.uk/government/publications/prime-ministers-letter-to-president-donald-tusk-28-october-2019 (1.11.2019).

[37] BBC News, *General election 2019: PM Johnson 'remains opposed' to holding indyref2*, https://www.bbc.com/news/election-2019–50789771 (27.12.2019).

[38] See: Survation Archive, https://www.survation.com/archive/2019-2 (27.12.2019).

V. Conclusion

The whole discussion surrounding the Sewel Convention clearly depicts strengths and weaknesses of an uncodified constitution and unenforceable conventions. On the one hand, the whole system seems to be more flexible and efficient than in jurisdictions with written constitutions and expanded judicial review. One could argue that the balance between judiciary, executive and legislative in the UK is well-preserved mostly due to prudent and self-limiting judicial power which hardly interfere with policy-making and does not decide on most constitutional matters covered by political conventions. A real problem occurs when there is a dilemma of highest constitutional importance and both legislative and executive powers cannot restrain from breaking or bending the rules of conduct. That is the case of the Sewel Convention. It is argued that constitutional conventions are binding similarly to moral obligations even though they are not directly enforceable[39]. But what is the practical value of rules of conduct when there is a lack of legal sanctions for a misbehaviour? Consequences are only political, but they may lead to a situation far worse than if the judiciary was to intervene on earlier stages in order to enforce conventions. The Sewel Convention is an extraordinary example because differently from many others it organises a rule of conduct between a superior and inferior political body. In many cases observance of conventions may be secured by political pragmatism: "We will not breach this rule of conduct because when we do so the other party will most likely do the same when they are in power and everyone will suffer a loss". As observed both A.V. Dicey and W.I. Jennings, and as framed it M. Caulfield: "despite their ambiguity conventions are observed because of the problems that arise if they are not"[40]. That kind of thinking does not work in relations between Westminster and devolved administrations due to the asymmetry of power. In many legal systems it would be a role of the courts of law to secure that a superior administrative power observe the rules of conduct towards an inferior political body, but it seems very unlikely to happen under the predominant doctrine of the sovereignty of the Parliament. In consequence fur-

[39] J. Jaconelli, op.cit., p. 151.

[40] M. Caulfield, *Constitutional Conventions in the United Kingdom: Should they be codified?*, "The Manchester Review of Law, Crime and Ethics" 2012, vol. 1, p. 46.

ther political tensions are likely to arise in absence of a constitutional setting reflecting the role of Scotland as devolved government.

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