

Scotland Can Veto Brexit (sort of ...).

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Cormac Mac Amhlaigh Di 28 Jun 2016

And so it has come to pass. What many thought was unthinkable has happened. The UK will leave the European Union. Many questions still remain unanswered in the heady days after the momentous vote on Thursday last week, not least the role of the UK's devolved regions in all of this.

The day after the vote, and shortly after the Prime Minister David Cameron had announced his resignation, Nicola Sturgeon, leader of the Scottish National Party and First Minister of Scotland gave a [confident stateswomenlike speech](#). Quoting from the SNP's manifesto of last month's Scottish Parliamentary elections she stated that where a majority of the UK voted to leave the EU but a majority of Scotland voted to stay, that this would constitute the 'material change in circumstances' which would trigger a new independence referendum. The fact that Scotland voted by 62% to stay in the EU whereas the UK as a whole voted by 52% to leave, mean, she said, that a second Scottish Independence Referendum was firmly back on the agenda again.

On Sunday morning, she further noted in an [interview with the BBC](#), that she would veto any attempt by a future British government to effect the withdrawal of the UK from the EU following the referendum result. This has raised a flurry of questioning of whether this is actually constitutionally permissible.

In this blogpost I will argue why I think it is; that is that the Scottish Parliament does, constitutionally, have the power to use the constitution to attempt to veto an attempt by a British government to take the United Kingdom out of the European Union.

Legislative Consent Motions

Firstly, a brief primer on the constitutional relationship between the British and Scottish Parliaments. The Scottish Parliament was established by an Act of the Westminster parliament, the Scotland Act 1998, but the main constitutional mechanism regulating this relationship is the Sewell convention (named after the Parliamentarian who announced the policy during the passage of the Scotland Act 1998). This Convention was recently codified in (another) Scotland Act in 2016 which formulates the convention in the following way:

'it is recognized that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament'

As such, the convention provides that Westminster will, all things being equal, request the permission of the Scottish Parliament to pass legislation on issues on which the Scottish Parliament has competence. This 'permission' takes the form of a Legislative Consent Motion (LCM) of the Scottish parliament as a means of endorsing legislation from the UK Parliament which affects an area of policy that has been devolved.

Whereas this has been interpreted as relating *exclusively* to legislating on matters under the competence of the Scottish Parliament at any particular time,^[1] it now seems clear that it also extends to the *modification of the powers of the devolved institutions* through amendments to the Scotland Act.^[2] That is, any attempt to *vary* the powers of the Scottish Parliament, whether to restrict or augment its legislative or administrative powers, requires the permission of the Scottish Parliament in the form of a Legislative Consent Motion. The invocation of the convention during the passage of the Scotland Act 2012 arguably confirms this position.

Of course, notwithstanding the existence of the Sewell Convention applying to the relationship between the two legislatures, under the British constitution it remains a *convention* not a formal rule of positive law. That is that it is a norm of political understanding between the parliaments rather than a legally enforceable rule. It is clear that the Westminster Parliament retains the power, *in law* to legislate on areas over which the Scottish Parliament

has competence and can ignore the protestations of a Scottish Parliament to give effect to EU withdrawal. An aggrieved Scottish parliament would have no recourse to the courts to air their grievance; generally speaking a court will not entertain an action based on breach of a convention as it is not generally considered a rule of formal constitutional law.

It is *political* enforcement which gives the convention its bite such that any attempt by the Westminster parliament to act in breach of the convention would have significant political ramifications; potentially sparking a constitutional crisis. As such the 'veto' is consequential rather than normative, that is it is a threat to spark a constitutional crisis, rather than a power to formally legally stop Brexit, which is at stake.

The Sewel Convention and EU Law

There are two ways in which the Sewell convention is implicated in the question of the UK's departure from the EU: 1) Relating to the EU law-related powers in the Scotland Act 1998 based on the European Communities Act 1972 and 2) EU law-related powers under the definition of 'EU law' contained in the Scotland Act 1998.

1. The European Communities Act 1972

The European Communities Act 1972 (ECA) is the legal measure which essentially gives effect to the UK's EU Membership. It is the portal through which the vast amount of EU law is recognised and enforced within the UK as well as providing for its direct effect and for the jurisdiction of the EU courts. Whereas the most significant powers contained in the ECA are within the exclusive competence of the Westminster Parliament, some of the powers under the ECA have been devolved to the Scottish Parliament to ensure the uniform implementation of EU law. In particular:

- the powers of the Scottish government to observe and implement EU law through executive powers,
- the duty of Scottish government to have regard to the objectives of the EU when exercising powers granted by an Act of the Scottish Parliament
- the power of the Parliament to annul the exercise of statutory powers by the Scottish government for failure to have regard to the objectives of the EU

Even if the devolved powers of the ECA are relatively limited, a repeal of the ECA to give legal effect to Brexit would trigger the Sewell convention given the way the ECA is embedded in the Scotland Act in the devolution of powers to the Scottish Parliament.

Firstly, the power of Scottish ministers to implement EU law and the powers of the Scottish parliament to annul orders of Scottish ministers interpreting EU law rely on interpretations of the ECA. Repealing the ECA without subsequently amending the Scotland Act would mean that the administrative powers devolved to the Scottish government would be powers stemming from an Act which was not longer in force. This would potentially have the result of

- depriving the Scottish government of the power to implement EU law,
- creating a more general power of Scottish ministers to exercise their powers under Acts of the Scottish Parliament, released from a duty to have regard to the objectives of the EU in so exercising
- depriving the Parliament to annul such exercise for failure for having regard to the objectives of EU law.

Alternatively, the non-existence of the Act from which the powers stemmed would result in an augmentation of those powers in the Scotland Act as they would no longer be constrained by the conditions on the exercise of those powers contained in the (repealed) ECA. Either way, unilaterally repealing the ECA without subsequently amending the Scotland Act would simultaneously restrict and augment the powers of the Scottish Parliament thereby triggering the convention.

Secondly, given that the Scottish Parliament is currently prohibited from doing certain things involving EU law as these are explicitly the competence of the Westminster parliament (for example determining the effects of EU

law in the UK and determining the jurisdiction of the EU courts in the UK), a repeal of the ECA to give effect to Brexit would allow the Scottish parliament to do things it was previously unable to do as the Act containing the prohibitions would cease to exist. Even if the subsequent 'knock-on' amendments were not made to the Scotland Act to take account of this, this would be a potentially large *increase* in the powers of the Scottish Parliament, again triggering the Convention.[3]

1. EU law related powers under the notion of 'EU law' embedded in the Scotland Act 1998.

The other main EU law relevant question of the competences of the devolved institutions relates to definition of EU law within the Scotland Act itself. The Scotland Act deprives the competence of the devolved institutions to violate EU law stating that any such act which purports to do so is simply 'not law'. In the Scotland Act, 'EU law' is defined in s. 126(9) as 'all those rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the EU Treaties', and 'all those remedies and procedures from time to time provided for by or under the EU Treaties'. Although this wording is clearly taken from s. 2(1) ECA, *no reference is made to the Act in defining EU law for the purposes of the Scotland Act.* (This can be contrasted with the case of 'Convention rights' under the Scotland Act which explicitly rely on the Human Rights Act 1998 for their meaning under s. 126(1) SA.) This has the effect of giving the term 'EU law', and the obligations stemming thereunder an *autonomous meaning*, for the purposes of the application of the (non-ECA based parts of) the Scotland Act. As such, EU law has effects vis-à-vis the activities of the devolved institutions *independently of the ECA.*

Were the UK to repeal the ECA to give effect to Brexit, it would *require fresh legislation specifically amending the Scotland Act in order for Scotland to 'leave' the EU as it were*, given that EU law has an autonomous meaning within the SA. This could provide clear grounds for triggering the Convention.

First of all, alongside the specific transfer of executive competences to implement EU law through the provisions of the ECA discussed above, the Scotland Act arguably also contains a more general non-ECA related power to implement EU law stemming from the provisions of the Scotland Act itself and in particular its autonomous definition of EU law. This can be read into para. 7 of Schedule 5 of the Scotland Act which explicitly states that that the observation and implementation of EU law (autonomously defined in the SA itself) is *not* a reserved matter. As such, both the Parliament and Executive have the competence to observe and implement EU law within their devolved competences, which relates directly to the provisions of the EU treaties themselves through the autonomous definition in s. 126 SA rather than being channelled through the ECA.

Secondly, legislation would be required to amend the Scotland Act to relieve the devolved institutions from the obligation to respect EU law to give effect to Brexit. Repealing the ECA would not be enough. This would remove a significant encumbrance on the legislative and executive competence of the devolved institutions in that they would then be free to violate EU law and would therefore constitute a *major augmentation* of the competences of the devolved institutions thereby triggering the convention.

Of course, Nicola Sturgeon will not veto Brexit legislation of the UK Parliament purely for its own sake. She will probably try to use a potential veto as leverage for something she wants. The most obvious candidate issue here is a second independence referendum. Constitutionally speaking, she needs the permission of British parliament to hold a second independence referendum following the precedent in the transfer of powers from Westminster to Edinburgh which paved the way for the 2014 independence referendum. It is arguable, then, that this will become a useful bargaining chip in the ensuing debate about the UK's future in Europe and Scotland's future in the UK and Europe. The constitutional position, however, means that the UK government can ignore Scotland's veto, repeal the ECA and amend the Scotland Act to give effect to withdrawal of the EU. This would be constitutionally permissible but politically highly risky. In the febrile political atmosphere from the resulting constitutional crisis, Scotland could make a unilateral declaration of independence. What would happen then is anyone's guess.

[1] See for example, Lord Sewel's evidence to the Scottish Parliament Procedures Committee (7th Report 2005, *The Sewel Convention*, SP Paper 4278, Annexe C, 5 October 20015, paras. 8-9). For discussion see [C. MacCorkindale at the UK Constitutional Law Blog](#).

[2] The interpretation given in Devolution Guidance Note 10 and Rule 9B.1 of the standing Orders of the Scottish Parliament, 4th Edition, 8th Revision (June 2014).

[3] For a similar argument in respect of the Human Rights Act 1998 see [Iain Jamieson's analysis at the UK Constitutional Law Blog](#).

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SUGGESTED CITATION Mac Amhlaigh, Cormac: *Scotland Can Veto Brexit (sort of ...)*, *VerfBlog*, 2016/6/28, <http://verfassungsblog.de/scotland-can-veto-brexite-sort-of/>.