

## **Inquiry into EU reform and the EU referendum: implications for Scotland**

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### **Would a renegotiated settlement between the UK and EU or UK withdrawal from the EU following a referendum require a Legislative Consent Motion from the Scottish Parliament?**

There are many complex dimensions to the current proposals for constitutional reform proposed by the UK government in the light of the Conservative party's electoral win earlier this year from the viewpoint of the devolution of powers to Scotland. The question of repeal of the Human Rights Act 1998 has received considerable attention, and the now confirmed referendum on EU membership will receive increasing attention in the run up to the referendum next autumn. In evidence to this committee I wish to focus specifically on the constitutional implications of changes in the relationship between the UK and the EU, from the viewpoint of the devolution of powers to Scotland, and more specifically whether the proposed reforms would require a Legislative Consent Motion from the Scottish Parliament.

As is well known, the event triggering a legislative consent motion has crystallised over the life of the Scottish Parliament such that the recent Smith Commission proposals have recommended putting it on a statutory footing.<sup>1</sup> However this proposed change will not alter the basic position under the British and Scottish Constitutions regarding the powers of the respective parliaments. It is trite law that the Westminster Parliament retains the power, *in law* to repeal the European Communities Act 1972 (ECA) which gives legal and constitutional effect to the UK's current membership of the EU, as well as amend or repeal parts or all of the Scotland Act 1998 (SA).<sup>2</sup> It is political convention which gives the legislative consent motion its bite such that any attempt by the Westminster parliament to act in breach of the convention would have significant political ramifications.

### **The Sewel Convention**

The proposed Scotland Bill 2015-16 Draft Clauses provides the following formulation of the Sewel Convention:<sup>3</sup>

*'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.'*

Whereas this has been interpreted as relating exclusively to legislating on matters under the competence of the Scottish Parliament at any particular

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<sup>1</sup> 'The Sewel Convention will be put on a statutory footing'. 22, Smith Commission report.

<sup>2</sup> Although recent judgments suggesting that the Courts would disregard the doctrine of parliamentary sovereignty complicate the picture somewhat. See for example, *R (Jackson) v Attorney General* [2005] UKHL 56

<sup>3</sup> Scotland Bill 2015-16 Clause 2 (emphasis added).

time,<sup>4</sup> it is being increasingly accepted that the Convention also extends to the *modification of the powers of the devolved institutions* through amendments to the Scotland Act.<sup>5</sup> The invocation of the convention during the passage of the Scotland Act 2012 arguably confirms this position. It is not clear whether the proposed wording of the Scotland Bill 2015-16 will have any impact on the current expansive understanding of the convention as relating both to legislation on current powers *and* an attempt to vary those current powers.

Adopting this expansive definition, the question to be addressed in this analysis is whether the proposed amendments to the status quo with respect to the UK's EU membership would result in the UK Parliament a) legislating on a devolved power or b) attempting to vary the powers of the Scottish Parliament.

There are a variety of matters in the Scotland Act which would complicate UK secession from the EU such as provisions on the consolidated fund, electoral provisions which refer to or rely on elections to the European Parliament, references to EU citizenship among others. In this analysis, however, I will focus specifically on the question of devolved and reserved powers relating to the effects of EU law in Scotland.

The question of EU membership affects the division of powers between the Scottish and Westminster Parliament in two ways:

1. EU law-related powers in the Scotland Act 1998 based on the European Communities Act 1972
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 reserved under a specific reservation under Schedule 4 of the SA, some of the powers under the ECA have been devolved to ensure the uniform implementation of EU law.

Thus whereas schedule 4, part 1(2)(c) SA reserves the power to define EU law for the purposes of the Act (s. 1 ECA), the power to give direct effect to EU law (s. 2(1) ECA) and power to determine the jurisdiction of the EU courts and the relevance of their decisions within the UK (s. 3(1)-(2) ECA), the

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<sup>4</sup> See for example, Lord Sewel's evidence to the Scottish Parliament Procedures Committee (7<sup>th</sup> Report 2005, *The Sewel Convention*, SP Paper 4278, Annexe C, 5 October 20015, paras. 8-9). For discussion see C. MacCorkindale, <http://ukconstitutionallaw.org/2015/05/13/chris-mccorkindale-echo-chamber-the-2015-general-election-at-holyrood-a-word-on-sewel/>

<sup>5</sup> The interpretation given in Devolution Guidance Note 10 and Rule 9B.1 of the standing Orders of the Scottish Parliament, 4<sup>th</sup> Edition, 8<sup>th</sup> Revision (June 2014).

powers of the Scottish government to observe and implement EU law through executive powers are devolved as part of the bundle of executive powers devolved in s. 53 SA read in conjunction with the explicit devolution of s. 2(2) ECA in Schedule 4 part 1(2)(c) SA. Also the power of Scottish ministers to have regard to the objectives of the EU when exercising powers granted by an Act of the Scottish Parliament as well as the power of the Parliament to annul such an exercise by resolution are also devolved through the non-reservation of s. 2(2) ECA in Schedule 4, part 1(2)(c) SA. Finally the devolution of executive powers contained in s. 2(2) ECA does not preclude UK ministers from exercising these s. 2(2) ECA powers for Scotland (s. 57(1) SA).

Even if the devolved powers of the ECA are relatively limited, it could be argued that a repeal of the ECA would trigger the Sewel convention given the way the ECA is embedded in the SA 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, through the devolution of these powers under schedule 4, and the amendment of the ECA itself to include the Scottish ministers and parliament under sch. 8, para 15. The repeal of the ECA would empty these transfer of powers of their meaning, thereby creating a more general power of the Scottish government to implement EU law unconstrained by the wording of s. 2(2) ECA, triggering the convention.

More generally, given that the Scottish Parliament is prohibited from determining (and in particular restricting) the effects of EU law in Scotland as well as the nature and extent of the jurisdiction of EU courts in the interpretation of EU law as they are explicitly reserved in Schedule 4 SA; in the light of the 'reserved model' of devolution of powers under the SA, these impediments on the Parliament's powers through their explicit reservation in Schedule 4 would cease to exist if the ECA were repealed having the effect of expanding the powers of the Parliament, triggering the convention on the second ground.<sup>6</sup>

## **2. 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 SA, 'EU law' is defined in s. 126(9),<sup>7</sup> which, *significantly makes no*

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<sup>6</sup> For a similar argument in respect of the Human Rights Act 1998 see Iain Jamieson's analysis at <http://ukconstitutionallaw.org/2015/06/11/hra-watch-reform-repeal-replace-iain-jamieson-the-repeal-of-the-human-rights-act-and-the-sewel-convention-in-scotland/>.

<sup>7</sup> EU law is defined 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 SA. This can be

*reference to the ECA*. 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 Act. As such, EU law has effects vis-à-vis the activities of the devolved institutions *independently of the ECA*.

Alongside the specific transfer of executive competences to implement EU law through the provisions of the ECA discussed above, then, the SA arguably also contains a more general power to implement EU law stemming from the provisions of the SA itself. This can be read into para. 7 of Schedule 5 SA which explicitly states that that the observation and implementation of EU law (autonomous 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.

This has a number of implications. Firstly, were the UK to withdraw from the EU, making EU law inapplicable in the UK, 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 violate both grounds triggering the Convention.

With regard to the first ground, legislation which would attempt to deprive EU law of any effectiveness in the UK upon secession, would necessarily entail removing the general powers of the Scottish parliament and government to implement EU law within their respective competences, thereby constituting an attempt to legislate on a devolved matter triggering the first ground of the convention.

With regard to the second ground, legislation to amend the SA to relieve the devolved institutions from the obligation to respect EU law, in essence removing this significant encumbrance on the legislative and executive competence of the devolved institutions would constitute a *major augmentation* of the competences of the devolved institutions thereby triggering the second limb of the criteria of application of the convention, given that it would be a considerable *varying* of the legislative competence of the Parliament.

### **3. Modification of the European Communities Act 1972 or a new EU Act implementing the negotiated changes.**

Whereas the case of repeal of the ECA or the necessary amendments to give effect to UK withdrawal of the EU are relatively clear, the question of the renegotiation of the UK’s membership with the EU, short of withdrawal, is more complicated. Much will depend on the result of the negotiations by the UK government with its EU partners and the reforms that can be secured.

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contrasted with the case of ‘Convention rights’ which explicitly rely on the Human Rights Act 1998 for their meaning under s. 126(1) SA.

The UK government has set out the following list of aims in the renegotiation process:

- An 'opt out' from the reference to an 'ever closer union' in the Treaties
- restricting certain benefits of EU citizens
- bolstering the power of national parliaments to veto EU legislation
- supporting continued enlargement
- reducing regulation on business and boosting free trade globally
- protection from the City of London from EU regulation
- safeguards to protect the interests of non-eurozone EU Member States.

As a list of criteria it is extremely broad and it is not clear which, if any, will ever see the light of day in the renegotiated settlement. Any discussion of grounds for triggering the Sewel convention therefore remains wholly speculative. Two things are reasonably clear: any legislation introduced to give effect to the negotiated reforms at Westminster which touch upon devolved powers are a clear case of the first ground for triggering the convention; secondly, the question of the negotiations themselves, including the various reforms proposed, fall reasonably clearly within the 'foreign affairs' part of reserved powers under para. 7, Schedule 5 SA.<sup>8</sup>

One question that may emerge is whether the attempt to make changes to the foundational aspects of the EU Treaties would be a ground for triggering the convention. The definitions of EU law both within the ECA and SA are sufficiently broad to allow for EU Treaty amendments. However, it is arguable that there are limits to what, precisely, can be amended. For example, were such amendments to result in a fundamental change to the EU, for example, relating to its aims or objectives, there might be grounds for arguing that the convention is triggered. The key provision to illustrate this is the 'implementing' powers of the Scottish government pursuant to an ASP under, para. 15, Schedule 8 SA read in conjunction with s. 2(2) ECA. The effect of these combined provisions is to allow the Scottish Government to 'have regard to the *objects of the EU*' when exercising powers conferred on it by the Scottish Parliament. Were the negotiations to result in a fundamental change to such 'objects', then this could be interpreted as affecting the (devolved) power of the Scottish government to act pursuant to the provisions of ASPs. It is at least arguable that the removal of the commitment to an 'ever closer union' constitutes just such a fundamental change to the EU's 'objects' as it has been one of the original and prominent objectives of the EU since its inception.

## **Conclusion**

As is often the case under the wider British constitution, the simple legal position of UK parliamentary sovereignty belies a complexity of convention which place potentially significant restrictions on the ability of the UK government to deliver all of the promises made in respect of the

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<sup>8</sup> Albeit that the concordant would presumably apply.

renegotiations of the UK's membership of the EU. One significant feature of the triggering of the convention in this scenario, which doesn't apply to other potential Sewel cases, is the fact that the purported breach of the convention by the UK government would come with the considerable weight of a UK-wide referendum result behind it; something which could not be dismissed out of hand in the negotiations surrounding its application. These factors mean that UK secession would be much more complex and even more politically significant, than would first appear.

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