European and External Relations Committee

The EU referendum and its implications for Scotland

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Personal

1. **Publications on Scotland, the 1707 Union and the EU**


   c) “‘The Union and the Law” revisited”, *Journal Online of the Law Society of Scotland*, July 2014¹.

   d) “Dissolving the Union”, *Journal Online of the Law Society of Scotland*, July 2014².


Reason for submitting evidence

2. To assist on legal but not political issues. Views expressed are personal views, not on behalf of any institution or body.

Executive summary

3. This paper focuses on the third introductory paragraph of the call for evidence and the first bullet point “the implications for the devolution settlement of withdrawal from the EU” under the heading “The domestic process for dealing with a withdrawal from the EU”. It further explores whether effect may be given to the result of the recent EU referendum other than by giving notice to the European Council of an intention on

¹ [http://www.journalonline.co.uk/Magazine/59-7/1014185.aspx](http://www.journalonline.co.uk/Magazine/59-7/1014185.aspx)
² [http://www.journalonline.co.uk/Referendum/1014265.aspx#.V6XztI-cERA](http://www.journalonline.co.uk/Referendum/1014265.aspx#.V6XztI-cERA)
³ [http://www.journalonline.co.uk/Magazine/59-12/1016739.aspx](http://www.journalonline.co.uk/Magazine/59-12/1016739.aspx)
⁴ [http://www.journalonline.co.uk/Magazine/61-7/1021968.aspx](http://www.journalonline.co.uk/Magazine/61-7/1021968.aspx)
the part of the UK to leave the EU under article 50 of the Treaty of European Union. The exploration has as its object that of examining an alternative way to implement the referendum result in a manner respectful (i) of the electorate of the various parts of the United Kingdom (and of Gibraltar), (ii) of the modern devolution process and (iii) of the Sewell convention.

4. The UK government has the power to end Scotland’s part in the EU by ending UK membership pursuant to the article 50 route but to complete the process entailed by this, issues as to the Sewell convention may well arise. To breach the Sewell convention by legislating in a devolved area without the consent of the Scottish Parliament would be to act unconstitutionally. (Declaratory article 2 of the Scotland Act, 2016).

5. Considering the creativity of the EU in providing solutions hitherto to a variety of anomalous situations, a solution whereby the UK retained membership of the EU, albeit with dis-application to the territory of England and Wales, could well be achievable without taking the article 50 route. The UK government contended prior to the 2014 Scottish referendum that the UK would continue as a member of the EU without Scotland were a ‘yes’ vote to have been recorded. Mutatis mutandis the UK could seek to negotiate with the EU dis-application to the territory of England and Wales whilst retaining UK membership of the EU.

6. Representations were made to the Scottish electorate prior to the 2014 referendum inferring that Scotland’s position in the EU was safe only within the UK. Such representations arguably created a legitimate expectation akin to a covenant with the Scottish electorate that the UK government could guarantee that Scotland would, if it so desired, remain within the EU. The EU referendum vote in Scotland in favour of remaining in the EU should accordingly be viewed within the context of such legitimate expectation.

Reviewing the third introductory paragraph of the call for evidence

7. According to the third paragraph there is a “lack of certainty about the date on which the UK will notify the European Council of its intention to leave the European Union”. The call for evidence therefore presupposes that the only way in which the referendum result may be implemented is through the article 50 route. In my submission this presupposition should not be made. Whereas reliance upon article 50 inevitably necessitates the United Kingdom’s withdrawal as a whole from the EU, the alternative of dis-applying EU participation only as to the nations of the UK which have actually voted to leave, permits of a properly democratic respect for the votes cast nation by nation in the UK.

Considerations pertinent to the article 50 route

8. One should accept first of all that the referendum question did indeed refer to the United Kingdom leaving the European Union as opposed to naming its component

nations as such. On the other hand it made no reference to the manner in which that would be achieved in the event of a vote in favour of leaving.

9. The February 2016 Foreign and Commonwealth Affairs Office document *The Process for Withdrawing from the European Union* (Cm 9216), did however anticipate that the article 50 route would be employed. Thus it is stated at para. 2.1 ‘The Prime Minister made clear to the House of Commons that: “if the British people vote to leave, there is only one way to bring that about, namely to trigger Article 50 of the Treaties and begin the process of exit, and the British people would rightly expect that to start straight away.”’6

10. In practice the above assertion would in all probability have given rise to little difficulty had the electorate of each part of the United Kingdom (with Gibraltar) voted in the same way. Nonetheless the assertion that article 50 would be triggered ‘straight away’ has proved to be ill founded. Doubts have arisen in addition as to whether constitutionally a vote in Parliament is or is not required prior to such notice being given.

11. *The Process for Withdrawing from the European Union*, anticipates (para. 4.7) that there would be serious implications for Gibraltar were the UK to withdraw from the EU and that Northern Ireland would be confronted with difficult issues about the relationship with Ireland.7

12. In contrast there is no reference to any anticipated issue arising as to Scotland. Yet in the Law Society of Scotland discussion paper *Referendum on EU Membership*8 it is noted (p.8) that “The Scotland Act 1998 embeds EU law into the fabric of devolution.” Clearly one needs to have regard to the risk run that withdrawing the UK from the EU under article 50 may only be possible, in the absence of consent from the Holyrood Parliament, through Westminster enacting legislation in breach of the Sewell convention.

13. One may of course argue, as seems to be the current standpoint of the UK government, that all that is necessary is to take the majority in the United Kingdom as a whole (with Gibraltar) and implement that as the decision of the ‘country’ without regard to the Union (or unions) involved. One difficulty with this lies in finding consistency in United Kingdom government statements in differing contexts as to what sort of ‘country’ the UK is.

14. The UK government policy paper *Scotland in the UK* was published immediately prior to the 2014 Scottish referendum. Targeting the electorate in Scotland, the paper

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8 [https://www.lawscot.org.uk/media/860525/EU-Referendum-web-2-.pdf](https://www.lawscot.org.uk/media/860525/EU-Referendum-web-2-.pdf)
included the statement that: “The UK is four nations united and free of borders. Together we … built the best and most enduring union of nations in the world.”

15. On the other hand and again prior to the 2014 referendum the UK government espoused the theory of two international lawyers who seemingly viewed matters differently. (See Scotland analysis: Devolution and the implications of Scottish independence. The international lawyers’ preferred theory was that Scotland, far from being a nation, had ceased to exist in 1707 whereas England continued albeit under the name of Great Britain or the UK. (See Annex A to Scotland Analysis at paras: 35, 37, 43, 95 and 114.) What the theory required was that ‘Great Britain’ or the ‘UK’ were simply names for post 1707 England – or what one might, taking this theory to its logical conclusion, refer to as ‘greater England’. This theory meant that had a ‘yes’ vote been recorded no question of the dissolving of a ‘Union’ as between England and Scotland would have arisen because Scotland, far from being in ‘union’ with England was simply a piece of previously incorporated territory which would therefore have to be treated as a ‘new state’. The UK would continue just as before according to this theory, albeit with a reduced territory. It might however according to the international law experts retain rights over Faslane if it so desired. (See Annex A to Scotland Analysis at para.96.2).

16. In “The “State”, the “Crown” and the Union of Scotland and England”, “The Union and the Law” revisited” and “Dissolving the Union” I have given reasons for regarding the theory of the international law experts as unsound both in history and law.

17. The Conservative party won the 2015 election and duly became the party of government upon a manifesto, echoing the UK government paper Scotland in the UK (para.14 above). The manifesto asserted: “England, Scotland, Wales and Northern Ireland - ours is the greatest union of nations the world has ever seen.” This was clearly intended to convey the meaning to the electorate, contrary to the theory of the international lawyers noted above, that Scotland was a nation, and that the Union lived on.

18. While it may be difficult to give a precise constitutional or international law definition of “the best and most enduring union of nations in the world” or of “the greatest union of nations the world has ever seen” it is clear that those expressions form a yardstick against which the actions of the previous UK coalition government and the actions of the UK government as now formed by the Conservative party have to be measured. One would be hard pressed to justify that forcing Scotland to leave the EU pursuant to the article 50 route (unconstitutional no doubt if in breach of the Sewell convention) would be compatible with a manifesto promising the electorate that “ours is the greatest union of nations the world has ever seen.”

19. It seems that what is in my submission the flawed theory of the international lawyers espoused by the UK government prior to the Scottish referendum lives on.

Thus Prime Minister May in a recent exchange at Prime Minister’s questions on 20 July 2016 commented, basing herself no doubt on the international lawyers ‘rUK continuator’ theory, that “only two years ago in the Scottish referendum, the Scottish National party was campaigning for Scotland to leave the United Kingdom, which would have meant leaving the European Union.” (Accessible at col.8211)

20. Prime Minister May thereby demonstrated that she presumably supported the view that had a ‘yes’ vote been recorded in the Scottish referendum the ‘territory’ known as Scotland could in a manner of speaking have been simply ‘dis-applied’ as far as the EU was concerned. The fact that such view is based on what is in my submission a flawed premise is not the crucial fact in this context. The important point is that if one accepts that the UK can remain a member of the EU without Scotland then there is no reason why by analogy the UK could not remain within the EU albeit with dis-application as to England and Wales. The fact that on the one hand Scotland it is claimed would have ceased to be part of the United Kingdom and on the other hand England and Wales would not, is of course a distinction, but is not material to the legal principle in so far as dis-application is concerned.

**Scotland - sovereign equal in the Union to England and Wales**

21. The self-contradictory standpoints taken by the UK coalition government and seemingly echoed by its successor ranging on the one hand from espousal of the opinion of international lawyers that Scotland ceased to exist with the ‘Union’ in 1707 (whereas England did not), to the assertion on the other hand that the UK is “the best and most enduring union of nations in the world” compel one to look for more reliable sources as building blocks of sound principle.

22. In fact the analysis of an earlier UK government merits respect. Thus in the UK government White Paper *Scotland in the Union: a partnership for good* (1993, ISBN 0 10 122252 1) it was stated (at para. 10.3.) “It should be a mark of Scotland’s self-confidence in her own status as a nation that she shares her sovereignty with the other parts of the United Kingdom. But the willingness to share that sovereignty must never be taken for granted.” In his foreword to the White Paper the then Prime Minister Major stated (at page 5) “… no nation could be held irrevocably in a Union against its will.” It would seem in logic to follow that if a sovereign nation - as Scotland was thus categorised - could not be held in a Union against its will, then it would be wrong in principle to contemplate such a nation and its citizens being forced out of a union against its and their clearly expressed will.

23. Turning from the UK government to the Crown it may be noted that the official Royal web-site contained the statement (until its April 2016 ‘modernising’ update): “The Union of the Crowns was followed by the Union of the Parliaments in 1707. Although a new Scottish Parliament now determines much of Scotland’s legislation, the two Crowns remain united under a single Sovereign, the present Queen.”

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11 [https://hansard.parliament.uk/commons/2016-07-20/debates/1607202500019/Engagements](https://hansard.parliament.uk/commons/2016-07-20/debates/1607202500019/Engagements)
24. The Union of the Crowns in 1603 was thus followed by the Union of the Kingdoms in 1707 whereby the new Kingdom of Great Britain was created from the two sovereign and equal Kingdoms of England and Scotland. It is of course the Queen as Head of State, now of the UK of Great Britain and Northern Ireland, in whose name international agreements are signed. The better view in my submission is that had the Union ended following proper constitutional procedures after the 2014 referendum, both newly separated Kingdoms headed by the Queen in her English and Scots capacities respectively would have been required to be treated by the European Union upon the same legal footing.

25. It is furthermore worth reminding ourselves that in the Balfour Royal Commission on Scottish Affairs Report 1952-1954 it was stated (chapter 1, para 13(iii)) that “…Scotland is a nation and voluntarily entered into union with England as a partner and not as a dependency”.

26. It would appear clear from paras. 22-25 above that despite difference in size and population, the Kingdoms and Crowns of England and Scotland which joined to form the Kingdom of Great Britain are and were of equal sovereignty. (Wales passed by conquest to Edward I in 1282).

27. It should be remembered on the other hand that the devolution process however important politically has not in fact returned any measure of legal sovereignty from the UK Parliament to Holyrood. The then PM Cameron’s assertion as to what was to become the 2016 Scotland Act that it would “deliver a powerhouse parliament for Scotland and enable us to meet our commitment to make Holyrood one of the most powerful devolved parliaments in the world” lives ill as a description of a Parliament lacking the power to prevent Scotland losing its position in the EU should the UK government trigger the article 50 route. (Cameron’s assertion12). In contrast the form of devolution enjoyed by the Faroe Islanders meant that the Faroes had the power to choose to remain outside the European Union (then the EEC), when Denmark chose to enter as a member state.” (As to the Faroes see13)

Could the UK remain a member of the EU were the provisions of EU membership to be dis-applied as to the territory of England and Wales?

28. As noted above the UK government asserted prior to the Scottish referendum that the UK would continue as a member of the EU without Scotland. Of course the context was there different and as noted above the theory espoused by the UK government to justify this, namely that Scotland had ceased to exist in 1707 but that England had continued as ‘Great Britain’ or the ‘United Kingdom’ may be analysed as unsound both in history and in law. Be that as it may the UK government having once urged that the UK would continue its EU membership despite a ‘yes’ vote in the Scottish referendum, it would seem that there is a legitimate case for arguing that the UK might continue as a member of the EU without such membership applying to the territory of

13 http://www.govoment.fo/foreign-relations/the-faroe-islands-in-the-international-community/
England and Wales. A protocol could in such circumstances regulate the future relations between England and Wales and the EU.

29. The UK government is no stranger to such an outcome being itself, in the name of the Queen, signatory to the 1985 treaty whereby the then European Communities treaties were dis-applied as to Greenland.

**Legitimate expectation**

30. The UK government’s adoption of the ‘new state’ theory prior to the Scottish referendum was accompanied by its promotion to the Scottish electorate that Scotland’s future within the EU was safe only within the UK. This concept pervades the further *Scotland analysis: EU and international issues*.

31. Likewise the UK government publication *Scotland in the UK* (see para.14 above) asserted that “In the event of independence, an independent Scottish Government would need to apply to join international organisations, including the EU, which would need the agreement of all 28 member states.” As explained in 2014 revisited: *championing Scotland in the EU* the UK government thus encouraged voters in Scotland in 2014 to consider that their future in the EU was safe only through rejecting the option of an independent Scotland. If Scotland, having voted in the EU referendum to remain in the EU, were obliged to leave, then it would seem that a legitimate expectation of remaining would be dashed. *Championing Scotland in the EU* argues that by virtue of the representations made by the UK government prior to the 2014 Scottish referendum, the UK government has in effect made a covenant to advance the cause of Scotland remaining within the EU.

**The Sewell convention**

32. Section 2 of the Scotland Act 2016 referred to at para.5 above, states that the Westminster Parliament will “not normally” legislate for Scotland on devolved matters except with the agreement of the Scottish parliament. The convention clearly conveys according to the authoritative 2015 (16th) edition of Bradley, Ewing and Knight’s *Constitutional and Administrative Law* editors of *Constitutional and Administrative Law* that such legislation **should not** and **will not** happen.

33. The editors comment (p.23) “… conventions are observed for the positive reason that they express prevailing constitutional values and for the negative reason of avoiding the difficulties that may follow from ‘unconstitutional’ conduct.” They relate (at p.25) that there was a convention prior to 1965 that Westminster would not exercise its sovereignty over the domestic affairs of Rhodesia except with the agreement of the Rhodesian government. When the Smith cabinet unilaterally declared Rhodesia’s independence in 1965 the UK government enacted the Southern Rhodesia Act giving

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the UK government power to legislate in such fields. The editors make the point (at p.25) that “As constitutional rules often give rise to reciprocal obligations, one consequence of a breach may be to release another office-holder from the normal constraints that would apply.”

34. It is pointed out in *Constitutional and Administrative Law* that “There is an overriding obligation on government to conduct its affairs according to law.” (p.24) Indeed the editors observe “… developments in public law have broadened the scope for judicial decisions about the observance of conventions by public authorities.” (p.27) The editors comment further: “If law is not to be merely a means of achieving whatever ends a particular government may favour, the rule of law must go beyond the principle of legality. The experience and values of the legal system are relevant not only to the question, ‘What legal authority does the government have for its acts?’ But also to the questions, ‘What powers ought the government to have? And how ought those powers to be exercised?’” (p.84)

**Conclusion**

35. The key question, given that the electorate in Scotland has voted to remain in the EU, and given that the UK government has the power to ignore this, is - *ought* that power to be exercised? In turn this raises issues as to respect for the rule of law itself. It is submitted that only an act taken by the Holyrood government on a par with that taken by Rhodesia in 1965 would release the UK government from its constitutional obligation to respect the Sewell convention, should it indeed emerge that Holyrood’s consent to ‘Brexit’ legislation was required by the convention but not forthcoming.

36. Putting the question differently, what upon a strictly legal analysis would it be appropriate for the UK government of “the best and most enduring union of nations in the world” to do when confronted with differing EU referendum votes in its various nations? Bearing in mind the Faroese precedent (para.27 above) the best course consistent with the claimed character of such a union, would arguably be to remove EU relations altogether from the issues reserved to the UK government so that the Scottish government could play a full part with the UK government in seeking to negotiate the continuance of Scotland’s position within Europe. For its part the UK government would be seeking the outcome of dis-application as to England and Wales coupled with appropriate outcomes respectively as to Northern Ireland and Gibraltar. Since the United Kingdom joined the EU in the name of the Queen as Head of State and since Scotland as a sovereign equal part of this Kingdom was upon this basis to remain within the EU under that same Head of State no question as to implementing article 50 would arise.