



Devolution/ UK Constitution

How much influence will the devolved administrations have over Brexit?

What's the story?

On January 24th 2017, the Supreme Court upheld, by eight votes to three, the High Court's November 2016 ruling that the UK Government needs parliamentary approval to trigger Article 50 of the Treaty on European Union, beginning the process of withdrawing from the EU. A new question answered by the Supreme Court was whether the Sewel Convention also requires legislative consent motions to be passed by the Scottish Parliament, Welsh Assembly and Northern Ireland Assembly before Article 50 can be triggered. The Justices unanimously ruled that, while the Sewel Convention plays an important role in the operation of the UK Constitution, it is a political, rather than legal, constraint on Parliament.

What does Article 50 say?

Article 50 of the Treaty on European Union sets out the process by which EU Member States can leave the European Union. The text says that a Member State must withdraw "in accordance with its own constitutional requirements". As the UK lacks a codified constitution, the 'constitutional requirements' for leaving are less clear than they might be for other nations. Lawyers representing the devolved Scottish and Northern Irish administrations argued that, as constitutional conventions are an important source of the UK Constitution, Article 50 required the UK Government to respect the Sewel Convention.

What is the Sewel Convention?

While the UK Parliament has devolved considerable legislative power to the Scottish Parliament, Welsh Assembly and Northern Ireland Assembly, it has ultimately retained the right to legislate on *any* matter, even those that have been devolved. For example, Section 28(7) of the Scotland Act (1998) states that the Scottish Parliament's power to make laws "does not affect the power of the Parliament of the United Kingdom to make laws for Scotland". The Sewel Convention was established to help the UK Parliament and devolved institutions manage their overlapping legislative powers. It is named after Lord Sewel, the Parliamentary Under-Secretary of State for Scotland, who said, during the passage of the Scotland Act, that the Government expected a convention to develop whereby "Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament." This convention was then recognised in a Memorandum of Understanding between the UK government and the devolved governments in 2001. Since then, the UK Government has not tried to pass legislation in devolved policy areas until the devolved legislatures have first passed a 'legislative consent motion' to signal their approval. Legislative consent motions have also been used prior to the UK Parliament enacting any provisions that alter the powers of the devolved bodies. Most recently, the Scotland Act (2016) "recognised" the Sewel Convention in statute, stating that the UK Parliament "will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament".

What did the Supreme Court decide?

The Supreme Court recognised the importance of the Sewel Convention, and agreed that triggering Article 50 will ultimately have a significant impact on the devolved institutions. However, the Justices ruled that judges cannot enforce political conventions. While the 2016 Scotland Act recognised the existence of the Sewel Convention, it did not give it legal force. The UK Government can only face political repercussions, for example, at the next general election, for undermining the convention.

Debate! The First Minister of Scotland, Nicola Sturgeon, responded to the Supreme Court's ruling by arguing that the current devolution settlement is "being shown to be worthless". Is the Sewel Convention 'worthless' because it can only be politically, rather than legally, enforced?



How does this fit into your exams?

Devolution / UK Constitution

Firstly, the Supreme Court's ruling that a legislative consent motion is not required to trigger Article 50 is a reminder of the limits of the UK's current devolution settlement. So much power has been devolved to Scotland, Wales and Northern Ireland since 1998 that it is no longer possible to simply label the UK as a unitary state, where sovereignty is concentrated in a powerful central government. While the UK Parliament has retained the legal power to make laws for Scotland, Wales and Northern Ireland on even devolved matters, this power is limited by clear political constraints. The backlash that would likely ensue were UK ministers to suddenly begin interfering in devolved matters is generally enough to limit how the Government exercises its legal powers. Lord Sewel's assurance, prior to the passage of the Scotland Act (1998), that Westminster would seek consent before legislating on devolved matters, has since hardened into a convention, giving it even greater political force. Legally, Parliament remains sovereign, with the power to abolish the devolved bodies and return all devolved power to Westminster. However, it is difficult to describe Parliament as politically sovereign. The Scotland Act (2016) affirms that the Scottish Parliament and Scottish Government "are a permanent part of the United Kingdom's constitutional arrangement" and that they "are not to be abolished except on the basis of a decision of the people of Scotland voting in a referendum." While this Act could be repealed, it nonetheless creates another political hurdle that must be overcome before power can be returned to Westminster.

However, the Supreme Court's ruling in *R (Miller) v Secretary of State for Exiting the European Union* shows that it is also difficult to simply describe the UK as a federal state, where sovereignty is shared by central and regional governments. The UK Government has argued that there is no need for a legislative consent motion before triggering Article 50 because foreign policy is one of the many policy areas that existing devolution laws 'reserve' for the UK Parliament. Lawyers representing the devolved administrations acknowledge that foreign policy has not been devolved, but argue that withdrawing from the EU will have such a substantial impact on devolved policy areas that consent is nonetheless needed. Many devolved policy areas have been greatly shaped by EU law, which the devolved bodies will no longer need to implement once the UK has left the EU. However, the Supreme Court argued that, while the Scotland Act (2016) formally "recognised" the existence of Sewel Convention, it did not make it legally enforceable by courts.

The EU referendum has highlighted how awkwardly the UK's 'quasi-federal state' can work in practice. While majorities in England (53.3%) and Wales (52.5%) voted to leave in the 2016 referendum on EU membership, larger majorities voted to remain in both Scotland (62%) and Northern Ireland (55.8%). Since the referendum, the differences between the devolved administrations and the UK Government have arguably only widened. The UK Government, now led by Theresa May, appears to be firmly in favour of a 'hard Brexit', while the devolved administrations have all indicated their preference for a 'soft Brexit', with continued membership of the European single market. The Prime Minister, Theresa May, has argued that "MPs representing every community in the UK will be fully involved in the passage of Article 50 through Parliament." The Joint Ministerial Committee, which includes the leaders of the UK and devolved governments, also met on the 30th January to discuss Brexit. The Prime Minister assured the leaders of the devolved administrations that their Brexit proposals will be considered, but she also made it clear that they would not be given a decisive role. Ultimately, without a codified constitution, the devolved bodies will have to rely on political rather than entrenched legal limits on the UK Parliament.

Think about how you could use this case study in the following questions...

In the style of AQA – "Devolution has only intensified the demand for Scottish and Welsh independence." Discuss. (25 Marks)

In the style of Edexcel – To what extent has the sovereignty of the UK Parliament been undermined by recent constitutional reforms? (40 Marks)

OCR – Discuss the view that the sovereignty of Parliament is the most important underlying principle of the British Constitution. (30 Marks)