

A second independence referendum in Scotland: The legal issues

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14/03/2017

Following Nicola Sturgeon's announcement of a second independence referendum for Scotland, [Stephen Tierney](#) discusses how the next two years are set to be consumed by two parallel processes: We will see the UK leave the EU and could also see Scotland leave the UK in an effort to remain within the EU.



Holyrood Abbey, Edinburgh. Credits: [Laszlo Ilyes](#) (CC BY 2.0)

Scottish First Minister Nicola Sturgeon recently announced the Scottish Government's intention to hold a second referendum on independence between the autumn of 2018 and the spring of 2019. The move comes in the week when it is widely anticipated that the United Kingdom Government will serve notice under Article 50 of the Treaty of European Union of the UK's intention to withdraw from the EU. The next two years are set to be consumed by two parallel processes that will see the UK leave the EU and could also see Scotland leave the UK in an effort to remain within the EU.

Can the Scottish Parliament hold a referendum without the consent of Westminster?

Whether the Scottish Parliament can unilaterally hold an 'advisory' referendum on this issue has never been finally resolved. But it seems clear that the Scottish Government does not propose to test this issue; instead it will seek the consent of Westminster to a so-called s30 Order, thereby ensuring that the UK Government will have to accept the referendum result.

A s.30 Order would involve a temporary transfer of power from the UK Parliament to the Scottish Parliament to allow

the referendum to go ahead, along similar lines to the 2014 process. The Scottish Government indicated its intention to go down this route in its white paper, '[Consultation on a Draft Referendum Bill](#)' published in October last year, and this was also confirmed by the First minister today when she stated that she will ask the Scottish Parliament next week for permission to request a Section 30 order.

Will the UK Parliament grant such an order?

It is of course under no legal obligation to do so. The issue is, as it was in 2012 when the [Edinburgh Agreement](#) was signed, essentially political. The UK Government does not need the distraction of a Scottish independence referendum during Brexit negotiations, particularly as it will find it very difficult to concentrate fully on saving the Anglo-Scottish union while engaged in what could be very fraught and complex talks with Brussels; but nor will it want to be presented as frustrating the will of the Scottish Parliament, thereby strengthening support for independence.

In the end, it may well acquiesce in principle to a second referendum, but lay down requirements as to timing, insisting that the referendum only be held after an exit agreement with the EU has been achieved. One argument will be that Scots are unable to make an informed choice on independence until they know what the final terms of Brexit will be.

Framing the referendum's rules

The Edinburgh Agreement in 2012 laid out the rules for the 2014 referendum, providing that it would be overseen by the independent Electoral Commission, stating that it had to be held by the end of 2014 and that the question could only offer two options: independence or the status quo, and not a third option such as devo-max. The Scottish Parliament was given discretion to determine the franchise (which it set at 16 years), to set the wording of the question and to frame the funding and spending rules. These latter two powers were framed in line with UK legislation on referendums and elections ([PPERA 2000](#)) and as such they were also regulated by the Electoral Commission.

The process rules were relatively uncontroversial in 2014 and overall can be taken to have [worked well](#). The indications are that the Scottish Government is looking for similar controls this time.

The big argument could well be over timing if the UK Government insists that the referendum be held later than the Scottish Government would like. Another pressure point could be the wording of the question. The Scottish Parliament had relative control over this for the 2014 referendum but it is not inconceivable that the UK Government would want the UK Parliament to have a say on this for a second referendum: perhaps framing the options as Leave/Remain, rather than Yes/No.

Another issue is how many options should appear on the ballot. Interestingly, it was the UK Government that insisted upon only two options last time while the Scottish Government mooted the possibility of a third option on 'devo-max'. It is possible this time that unionist voices may suggest a third option. Federalism, long the constitutional solution favoured by the Liberal Democrats has found growing support among Conservatives and is now the official policy of the Scottish Labour Party. It is possible that a radical proposal for a written constitution, entrenching federalism, and proposing a significant reform of the House of Lords as a territorial second chamber of Parliament, could be put forward either for inclusion as an option on the ballot, or as a new '[Vow](#)', similar to that presented just before the 2014 referendum.

Is a second independence referendum inevitable?

The UK Parliament could of course refuse a s.30 Order. But this seems unlikely. It is also possible that the Scottish Government will, over time, withdraw its plan. The First Minister has indicated that there could be room for compromise with the UK Government if the latter is willing and able to negotiate a special status for Scotland in the Brexit negotiations. Even in the absence of this there are other factors that could frustrate the Scottish

Government's plans. For example, moves towards a good deal for the UK in Brexit negotiations and opinion polls showing support for independence diminishing, added to a commitment to further constitutional reform in a federal direction, could possibly combine to halt the process.

But what seems clear is that the Scottish Government is not bluffing. If, as looks likely, it can gain a majority in the Scottish Parliament to request a s.30 Order, and can convince Westminster to grant this, then the path will be set for a referendum process that could see Scotland leave the UK just as the UK leaves the EU. The onus is now firmly upon the UK Government to take extremely seriously the distinctive priorities of the devolved territories – Northern Ireland and Wales, as much as Scotland – as it begins the Brexit process.

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Note: This article originally appeared on the [UK Constitutional Law blog](#). It gives the views of the author, not the position of EUROPP – European Politics and Policy or the London School of Economics.

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