

Westminster Cannot Block Scottish Independence

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***Boris Johnson's** [facetious, point-scoring](#) reply to the formal request from the Scottish government for agreement to a second Independence referendum is an act of extreme arrogance. An off-the-cuff campaign remark from a single politician has no weight in weighing the will of a nation, and I presume Johnson is not arguing that every political statement **Nicola Sturgeon** or **Alex Salmond** has ever made has the force of law.*

The “once in a generation” remark has no more force than “die in a ditch”. It is not contained in any official document, and appears in neither the Edinburgh Agreement nor the Smith Commission report. For Johnson to base his refusal of a vital democratic step on such a flimsy pretext is extremely arrogant. It is born of colossal self-confidence. He is perfectly confident the highly centralised Westminster system will allow him simply to ride roughshod over Scotland.

Johnson is of course right. You may be surprised to hear that I agree with the analysis of McHarg and McCorkindale [published today](#) that a legal challenge arguing the Scottish Government's right to hold a referendum is a waste of time, not least because if such legal challenge looked like succeeding the Tories would simply pass Westminster legislation outlawing the referendum explicitly. There is no doubt whatsoever that such legislation would be upheld by the UK Supreme Court under the doctrine of the Sovereignty of (Westminster) Parliament.

I also have no doubt that a futile and time-wasting court action is going to be a key part of the Scottish Government's approach in response to Johnson, of pretending to do something about Independence a few more years.

McHarg and McCorkindale are quite right on UK Constitutional Law, which is where their expertise lies. They know very little about public international law and still less about international politics.

The truth is that UK Constitutional Law is as irrelevant to Scottish Independence as Soviet Constitutional Law was to the question of Latvian, Lithuanian and Estonian Independence. The UK is disintegrating and not the smirk of Johnson, the frippery of the UK Supreme Court nor the witterings of lawyers can hold it together.

Independence is not a matter of domestic law. It is a matter of international law alone. Independence is the existence of a state in relation to other states. It is gained not by any internal process- internal process is utterly irrelevant, and in 95% of cases does not involve a referendum - but by recognition of other states, formalised through the General Assembly of the United Nations.

I touched on these points in my brief statement at the AUOB press conference after the march on Saturday.

In its judgement on Kosovo, the International Court of Justice (ICJ) specifically confirmed that the agreement of the state being seceded from was not necessary for Independence. That is the position in law, whatever any UK court may say. Indeed it was the UK government itself that put this argument most clearly to the ICJ in the Kosovo case.

5.5 Consistent with this general approach, international law has not treated the legality of the act of secession under the internal law of the predecessor State as determining the effect of that act on the international plane. **In most cases of secession, of course, the predecessor State's law will not have been complied with: that is true almost as a matter of definition.**

5.6 Nor is compliance with the law of the predecessor State a condition for the declaration of independence to be recognised by third States, if other conditions for recognition are fulfilled. The conditions do not include compliance with the internal legal requirements of the predecessor State. Otherwise the international legality of a secession would be predetermined by the very system of internal law called in question by the circumstances in which the secession is occurring.

5.7 For the same reason, the constitutional authority of the seceding entity to proclaim independence within the predecessor State is not determinative as a matter of international law. In most if not all cases, provincial or regional authorities will lack the constitutional authority to secede. The act of secession is not thereby excluded. Moreover, representative institutions may legitimately act, and seek to reflect the views of their constituents, beyond the scope of already conferred power.

That is a commendably concise and accurate description of the legal position. It is the [legal opinion of the Government of the United Kingdom](#), as submitted to the International Court of Justice in the Kosovo case. The International Court of Justice endorsed this view, so it is both established law and the opinion of the British Government that a state has the right to declare Independence without the agreement or permission of the original state and its political or legal authorities.

I have continually explained on this site that the legality of a Declaration of Independence is in no sense determined by the law of the metropolitan state, but is purely a matter of recognition by other countries and thus acceptance into the United Nations. [The UK Government set this out plainly](#) in response to a question from a judge in the Kosovo case:

2. As the United Kingdom stated in oral argument, international law contains no

prohibition against declarations of independence as such. Whether a declaration of independence leads to the creation of a new State by separation or secession depends not on the fact of the declaration but on subsequent developments, notably recognition by other States. As a general matter, an act not prohibited by international law needs no authorization. This position holds with respect to States. It holds also with respect to acts of individuals or groups, for international law prohibits conduct of non-State entities only exceptionally and where expressly indicated.

So the key question is, could Scotland get recognition from other states for a Declaration of Independence? The attitude of the EU will be crucial and here Catalonia is obviously a key precedent. But it is one that has been totally misunderstood.

The vast majority of the politicians and functionaries of the EU institutions viewed the actions of the Francoist government of Spain in assaulting the people of Catalonia who were trying to vote, with extreme distaste. But they held their noses and supported Spain. Because over 20 years experience as a diplomat taught me that the EU functions as a club of member states, who will support each other in almost any circumstance. So Spain was supported.

But the UK is shortly going to stop being a member. It is Scotland, as a potential member with a long history of valued membership and a firm intention to join, which will have the natural support of the EU, the more so as there will be a strong desire to get Scotland's fishing, energy and mineral resources back within the bloc. The disintegration of the UK will also be encouraged as a salutary lesson to any other states that consider leaving the EU. The political forces within the EU are very, very strongly behind recognition of Scottish Independence.

Once the EU decides to recognise Scotland (and crucially it is not a decision that needs unanimity in the EU vote, an extremely important and overlooked fact) the rest will be easy. The UK is detested in much of the developing world for its continued refusal to decolonise Diego Garcia, for the Iraq War, and for the whole history of colonialism.

So how should Scotland proceed? My advice would be to declare Independence at the earliest possible opportunity. We should recall all Scottish MPs from Westminster immediately. We should assemble all of Scotland's MEP's, MP's and MSP's in a National Assembly and declare Independence on the 700th Anniversary of the Declaration of Arbroath, thus emphasising the historical continuity of the Scottish state. The views and laws of London now being irrelevant, we should organise, as an Independent state, our referendum to confirm Independence, to be held in September 2020.

The key criterion which governments have traditionally used to recognise another state is control of the state's internal territory. (They do not have to use that criterion, each state can recognise on whatever basis it wishes, but that is the usual one cited). This is where the Catalonian Declaration of Independence failed, the Catalan Government never managed to enforce it on its own ground.

There is going to be no process of Independence agreed with the British government. We

have to take Independence, not beg for it. At some stage, there is always the danger that the British government may try to react by sending in the British Army to enforce Westminster's will. If we believe we are an independent nation, we have to be prepared to defend ourselves as an independent state should the worst happen. Calling a confirmatory referendum as the first act of the Independent state would make it difficult for Johnson to justify sending in the British Army to try to prevent it, but we cannot rule it out. Hopefully that will not involve anyone getting killed, but we must be plain that Westminster will never voluntarily allow us to leave and may physically attack us if we try.

I appreciate this may all sound very unpleasant and confrontational.

We have two alternatives now - we stand up for ourselves and our inalienable right of self-determination in international law as defined in the UN Charter, or we grovel before Johnson's smirk and try various "legal" and "constitutional" avenues in terms of the UK's utterly irrelevant domestic legislation. Which will get us nowhere, slowly.

The time has come for Scottish Independence. With a referendum denied by no fault of ours, we must seize the moment and take the Independence for which they will not let us vote.

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