Textes et contextes
ISSN : 1961-991X
: Université de Bourgogne

18-2 | 2023
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Article publié le 15 décembre 2023.

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Introduction

1 In the wake of the referendum on Scotland's independence, held on 18 September 2014, the pro-Union parties - Labour, Conservatives and Liberal Democrats - promptly claimed that the outcome of the referendum had settled once and for all the question of Scotland's independence. There was evidence to the contrary, however, in the weeks that followed the vote, when the SNP and the Scottish Green

Party saw an influx of independence supporters join their ranks, to such an extent that within a couple of weeks of the referendum, membership of the two parties had tripled, from around 25,000 and 2,000 respectively, to reach 75,000 and 6,000. By the end of the year, the membership figures unveiled by both parties amounted to just over 93,000 members for the SNP, and 7,800 for the Scottish Greens.[1]

2 As a matter of fact, the commitment made in the last days of the campaign by David Cameron, Nick Clegg and Ed Miliband, the British leaders of the three parties campaigning in the 'Better Together' campaign, to transfer extensive new powers to the Scottish Parliament in the event of a 'No' vote did not - and could not - lead to the "decisive" outcome which the one-question referendum was expected to deliver.[2] In the end, the Lib-Con Coalition Government of David Cameron acknowledged that the Scottish people had not voted for the *status quo* (British Government 2015: 5). The Prime Minister himself had conceded as much in the statement he made on the referendum results on the morning of 19 September 2014. Declaring that "Scotland voted for a stronger Scottish Parliament backed by the strength and security of the United Kingdom", David Cameron announced the setting-up of an independent commission, to be chaired by Lord Smith of Kelvin, and whose task was to "take forward the devolution commitments" made by the three pro-union parties to the Scottish voters during the referendum campaign.[3]

3 The Smith Commission submitted its report on 27 November 2014, and two months later, on 22 January 2015, the British Government published a White Paper entitled *Scotland in the United Kingdom: An enduring settlement*, aimed at presenting plans to implement the devolution of new powers to the Scottish Parliament, as recommended by the Smith Commission. The White Paper contained a commitment to introducing a new *Scotland Bill* in the following session of the British Parliament, therefore after the general election of May 2015. The new Conservative Government brought into office after the party's victory in the election, this time with an overall majority, laid before the House of Commons, as promised in the party manifesto, a *Scotland Bill*, which was enacted in March 2016. The *Scotland Act 2016* transferred new powers to the Scottish Parliament on issues such as equal opportunities, abortion law and speed limits, and also con-

tained provisions for the transfer of new powers on taxation and welfare, though at a later date. [4]

4 Meanwhile, the general election of 2015 was the first general election in which the contest in England, Scotland and Wales was won by three different parties, namely respectively by the Conservatives, the SNP and Labour, which, Nicola Sturgeon argued, meant that the new majority Conservative Government had been given a clear mandate to govern only in England, while it had no democratic mandate in Scotland. More importantly still for the future of the UK, the Conservative Party's victory paved the way for the "in-out referendum" on EU membership which the party committed itself to organising after renegotiating the terms of Britain's membership of the European Union (British Conservative Party 2015: 72). Consequently, by the time of the first anniversary of the independence referendum, and after the SNP's landslide victory in Scotland in May 2015, [5] the question of Scotland's constitutional future in the United Kingdom took centre stage again, ahead of the Scottish Parliament election of May 2016. Thus, while the new *Scotland Bill* was going through the House of Commons, the demand for more extensive devolution, whether in the form of "devolution-max" - also known as "fiscal devolution" - or "independence-lite" gathered momentum in the public debate.

5 The first time the term "devolution-max" appeared in an official document was in the Scottish Government's White Paper on the constitutional future of Scotland, *Your Scotland, Your Voice*, published in November 2009. The SNP had then been in office in Edinburgh for two years, as a minority government, and its White Paper – the second on the constitutional future of Scotland – listed four options for Scotland's future, among which was "devolution-max", presented as the "full devolution of the maximum range of responsibilities to Scotland while remaining in the United Kingdom" (Scottish Government 2009: 16). [6] In recent years, while no party has endorsed "devolution-max" as its favoured constitutional option for Scotland, the term has been used to designate a third option between full independence and the *status quo*, in which the Scottish Parliament would have full fiscal powers, with defence and foreign affairs remaining the prerogative of Westminster. [7] The notion of "independence-lite" also emerged in the political debate at the time when the Scottish Government published its 2009 White Paper on the constitutional future

of Scotland, which stated that independence "would complete the responsibilities of the Scottish Parliament and Government while allowing existing structures and services to continue" (Scottish Government 2009: 18). The term conveyed the idea that rather than meaning separation pure and simple, independence was aimed at "updating the relationship between Scotland and England" and "creating a new partnership of equals – a social union to replace the current political union", which would result in what was presented as a more appropriate relationship allowing Scotland and England to share the same Queen, the same currency and, as members of the European Union, to continue to enjoy the benefits of free trade and extensive co-operation (Scottish National Party 2010: 17-22, Scottish National Party 2011: 28).

6 The EU referendum of 23 June 2016, in which 62% of the people who voted in Scotland voted 'Remain', put the demand for a second independence referendum back on the SNP Government's agenda. The prospect of Scotland being taken out of the European Union against her will was indeed one of two developments which the SNP explicitly considered as justifying the right to hold another referendum on Scotland's independence, as it represented a "significant and material change in the circumstances that prevailed in 2014" (Scottish National Party 2016: 23).[8] Unsurprisingly therefore, Nicola Sturgeon, in her statement on the EU referendum, on 24 June 2016, declared: "Scotland does now face that prospect - it is a significant and material change in circumstances - and it is therefore a statement of the obvious that the option of a second referendum must be on the table. And it is on the table".[9]

7 In every election held since the EU referendum, whether it was an election to the British Parliament, as in 2017 and 2019, or an election to the Scottish Parliament, as in 2021, the SNP has consistently argued that the people of Scotland should have the right to choose their own future and that a vote for the SNP was a vote to give the party a democratic mandate to organise a second independence referendum (Scottish National Party 2017: 29, Scottish National Party 2019: 10, Scottish National Party 2021: 11). Regardless of the pressure from within her party, as well as from the wider independence movement, Nicola Sturgeon has been adamant, however, that the only route to a second referendum her Government would consider was

the legal route, which requires the consent of the British Government and Parliament. In this regard, despite the fact that both the 2016 and the 2021 Scottish Parliament elections delivered a pro-independence majority in the Scottish Parliament, the demands made officially by the First Minister to Theresa May, and then to Boris Johnson, for a Section 30 Order allowing the Scottish Government to organise a second independence referendum were rejected, both Prime Ministers arguing that in the context of the preparation for the UK's exit of the EU, the time was not right for a second independence referendum.

8 This article investigates the challenge for the SNP of delivering on its pledge for a second independence referendum while acting within the British constitutional framework. It will first look into the concept of sovereignty - parliamentary or popular - which has informed the constitutional debate in Scotland for the past 70 years or so. It will then discuss the two issues which have been central to the request for a Section 30 Order on the part of the Scottish Government, namely the question of the legal authority to hold a referendum on Scotland's independence and that of Scotland's right to self-determination. It will thereafter examine how the British constitutional framework, which has been redefined in unitary terms by the British Government in the context the UK's exit of the European Union, has brought back to the fore two antagonistic visions of the British state, as a unitary or as a union state. Finally, it will explore how the unitarist unionism advocated by the British Government has added a new dimension to the case for independence put forward by the SNP, which is that, paradoxically, only independence can protect the Scottish devolution settlement in place since 1999.

1. Popular v parliamentary sovereignty: devolution as a constitutional turning point

9 The Labour Government of Tony Blair in the late 1990s left no doubt as to the fact that it subscribed to the Diceyan view of parliamentary sovereignty as one and indivisible characteristic of the vision of the UK as a unitary British state when it stated in its White Paper entitled

Scotland's Parliament unveiled in July 1997 that "the UK Parliament is and will remain sovereign in all matters" and that Westminster would choose to "exercise that sovereignty by devolving legislative responsibilities to a Scottish Parliament without in any way diminishing its own powers" (Scottish Office 1997: 12).[10] Yet the devolution framework put in place, while preserving the sovereignty of the British Parliament, established new constitutional relationships between the four component parts of the United Kingdom (Bogdanor 2009: 111-112).

10 The unitary state paradigm has long been contested in the case of the United Kingdom, especially by Scottish academics, who have underlined the fact that the Union between England and Scotland, while it created a new state, namely the United Kingdom of Great Britain, did not eradicate pre-existing nations. While James Mitchell has described the idea of the sovereignty of the British Parliament, derived from the vision of England as the prototypical unitary polity, as a 'myth' (Mitchell 2009: 3-11), Neil MacCormick has called Scotland an "anomaly" in an otherwise "ostensibly unitary state", as the Union of 1707, beside preserving the Church of Scotland as Scotland's established Church, also provided "a special dispensation for Scots laws, Scots Courts, Scottish education and Scottish local government" thereby allowing for "the continuing assertion of a submerged constitutional tradition of a distinct Scottish stamp" including "the claim to a historically attested sovereignty of the people" (MacCormick 1998: 142-143).

11 The Scottish principle of popular sovereignty is traditionally said to find its expression in the Declaration of Arbroath of 1320, in which the signatories to the petition stated that their allegiance to the Scottish monarch was not unconditional and that a monarch who abused his or her power could be deposed by his or her subjects directly or by parliament. There is still much debate today about the historical authenticity of this tradition of popular sovereignty, and indeed about the relationship between crown and parliament in Scotland before 1707, although George Buchanan's constitutional treatise of 1579 gave it some theoretical authenticity.[11] However, two episodes in Scotland's history prior to the Union are often cited as illustrating the existence of the doctrine in Scottish constitutional law, namely the deposition of Mary Queen of Scots in 1567, and the Scottish Claim of

Right of 1689, which stated explicitly that James II had by his actions forfeited the throne of Scotland, and had consequently been deposed, while the English Bill of Rights of the same year declared that James II had left the English throne vacant. Whether these two examples can be considered as illustrating a limitation of the monarchy by popular sovereignty can be disputed since the notion of a 'the people' as a political agent was developed by modern political theory, and consequently the term 'popular sovereignty' can hardly apply to pre-Union Scotland with the same meaning it has today.

12 The argument of the distinctiveness of Scotland's constitutional tradition of popular sovereignty, compared to the unlimited sovereignty of Parliament, deemed to be emblematic of England's constitutional tradition, was given sacrosanct status by Lord Cooper's *obiter dicta* in the now famous case of MacCormick v Lord Advocate in 1953 (Bogdanor 2019: 175, Kidd 2008: 116-118). By the late 1980s, as Scotland had been governed by successive Conservative governments since 1979, while the first party in Scotland at every general election was the Labour Party, it became the founding principle of the Scottish Constitutional Convention (SCC), in a Claim of Right adopted at its inaugural meeting on 30 March 1989, which read: "We, gathered as the Scottish Constitutional Convention, do hereby acknowledge the sovereign right of the Scottish people to determine the form of Government best suited to their needs and do hereby declare and pledge that in all our actions and deliberations their interests shall be paramount" (Scottish Constitutional Convention 1990: 1). At the time, only two of the four main parties represented in Scotland participated in the Convention, namely Labour and the Liberal Democrats. The Conservative Party had refused to take part in it for obvious reasons, since it was opposed to devolution, while the SNP had initially joined the Convention, before leaving it on the ground that the option of full independence was excluded from the debates.

13 The SCC produced two sets of proposals for a Scottish Parliament, *Towards Scotland's Parliament* in 1990 and *Scotland's Parliament. Scotland's Right* in 1995, which both endorsed the principle of popular sovereignty as being the cornerstone of the democratic renewal their proposals were set to bring about. It is worth noting in this regard that in the first blueprint for a parliament, unveiled on 30 November 1990, the SCC acknowledged that while it favoured the setting-up of

a Scottish parliament with law-making powers within the United Kingdom, the principle of popular sovereignty at the core of the Claim of Right entailed "the right of the people of Scotland to opt for a wholly independent state" (Scottish Constitutional Convention 1990: 7). The second blueprint, published five years later, confirmed the endorsement to the Claim of Right as the SCC was presented as being rooted in "the historical and historic Scottish constitutional principle that power is limited, should be dispersed, and is derived from the people" (Scottish Constitutional Convention 1995: 10). Unlike the first blueprint, however, it did not expressly recognise that on the basis of the principle of popular sovereignty, the Scottish people could legitimately choose independence. Rather, devolution was presented as the "settled will of the Scottish people" in the words of the late (Scottish) leader of the British Labour Party, John Smith, who had used the phrase in his speech to the Scottish Labour Party Conference in Dundee in March 1994, in his assessment of the support for devolution among the Scottish people.

14 Adopting as the foundation of its proposals for a Scottish Parliament the idea that devolution was the settled will of the Scottish people, was both a tribute to the former party leader and longstanding advocate of devolution and evidence of the leading role played by John Smith, and the Labour Party, in the work of the SCC. After his sudden death in April 1994, the phrase became emblematic of the Labour Party's commitment to devolution for Scotland, and was part of the legacy Tony Blair inherited from his predecessor as party leader. It is therefore no surprise that the SCC's proposals for a Scottish Parliament should have formed the basis of the Labour Government's devolution plans for Scotland after Labour's victory at the 1997 general election, and as Vernon Bogdanor explains, by following the proposals of the SCC, the claim that sovereignty lay with the people of Scotland was "implicitly accepted by the Blair Government" (Bogdanor 2009: 116-117). The fact that ten years after it was initially adopted by the SCC, the 'Claim of Right' was ceremoniously handed over to the Presiding Officer of the new Scottish Parliament, ahead of the official inauguration of the Parliament on 1 July 1999, can be interpreted as confirming that the principle of popular sovereignty was the cornerstone of the devolution framework in Scotland.

15 It is in this sense that devolution has been seen as a constitutional turning point (McHarg 2016 : 108, Bogdanor 2009 : 116-117), in that it has brought about the necessity to rethink the British state as a plurinational state, and eased the process of 'delinking' sovereignty from the state and redefining it as a right to self-determination, as Michael Keating demonstrates: "…an entity, whether it be a people or a territorial unity, may be sovereign where it has the rights to determine its own future" (Keating 2001: 15). Consequently, while in theory there is a potential conflict between the idea of the sovereignty of Parliament and the idea of the sovereignty of the Scottish people, in practice, however, it is accepted that the constitutional status of Scotland and Northern Ireland "depends not only upon the decisions of a supposedly sovereign Parliament at Westminster but also upon the wishes of their people. The Unions with Scotland and Northern Ireland rest on the consent of the people of Scotland and Northern Ireland" (Bogdanor 2009: 117-118).

2. Issues left unsettled in the aftermath of the 2014 independence referendum

16 The 2014 independence referendum has been described as 'an accidental referendum' (McCorkindale 2013, McHarg 2016: 101-102), because the two developments which made it happen could not have been anticipated: indeed, not only was the victory of the SNP at the 2011 Scottish Parliament election with an overall majority of seats exceptional, but it was unanticipated, since the architects of devolution had opted for an electoral system which made single-party majority governments virtually impossible.[12] Besides, it was widely believed that organising a referendum on the constitutional future of Scotland was not within the remit of the Scottish Parliament, as the Union between Scotland and England was a matter reserved to Westminster under the *Scotland Act* 1998. The British Government's decision to allow the power to legislate for a referendum to be transferred to the Scottish Parliament could therefore not have been anticipated either. As a result, two issues were left unresolved in the aftermath of the 2014 independence referendum, which were central to the Scottish

Government's case for a second independence referendum: the question of who has the legal authority to allow for a referendum on independence, and that of Scotland's right to self-determination (McHarg 2017, Tierney 2017).

17 The question as to whether legislating for a referendum on Scotland's independence was within the competence of the Scottish Parliament was put to constitutional lawyers in the wake of the 2011 Scottish Parliament election.

18 David Cameron, then Prime Minister, and Michael Moore, the Secretary of State for Scotland, and a Liberal Democrat MP, had immediately acknowledged that the Scottish Government had the democratic legitimacy to deliver on its promise to legislate for a referendum on independence (Martin 2021: 6). Yet, in its consultation paper on Scotland's constitutional future, published on 10 January 2012, the British Government, while confirming that it had no intention to put obstacles in the way of a referendum, also insisted that the Scottish Parliament did not have the legal authority to legislate for an independence referendum, as the constitution and the Union were matters reserved to Westminster (British Government 2012: 6-7).

19 The British Government was in fact particularly concerned about the nature of the question which might be put to the Scottish people in the referendum, and the possibility of a multi-option referendum on Scotland's constitutional future rather than a referendum on independence with a single question and a simple choice between 'Yes' and 'No'. Such concern was based on the two White Papers on the constitutional future of Scotland published by the first SNP government, in 2007 and 2009, and on the consultation paper on the draft Referendum Bill published in February 2010. The first White Paper made it clear that the Scottish Government, while advocating full independence, envisaged the possibility to "design a referendum with more than one option, to give Scottish electors the choice between independence, the *status quo*, and significant additional devolution" (Scottish Government 2007: 33).[13]

20 On the basis of their commitment not to stop the Scottish Parliament from legislating for a referendum, the British Government envisaged two options: the first was to give the Scottish Parliament the power to legislate for a referendum on Scottish independence, while the

second was to legislate directly in the British Parliament for a referendum on Scottish independence. Regarding the second option, at the time when the UK Government published its consultation paper, the *Scotland Bill* introduced before the House of Commons by Michael Moore on 30 November 2010 had not yet been enacted, but it had been adopted by the House of Commons, and was due to be examined in committee in the House of Lords at the end of January 2012. Therefore it was still possible, in theory, for the Bill to be amended and provision to be added to give the Scottish Parliament the power to legislate for a referendum on independence; the British Government, however, considered that, because the Bill had already gone through all the stages of the parliamentary process in the Commons, if that second option was the one chosen to ensure that the referendum on Scottish independence was lawful, it would be more sensible to introduce a new Bill aimed specifically at addressing the issue of the independence referendum. In the end, the British Government, while leaving the second option open, made it clear that its preferred option was for the powers to be transferred to the Scottish Parliament under a Section 30 Order. Indeed, while Paragraph 1(b) of Schedule 5 of the *Scotland Act 1998* states that "the Union of the Kingdoms of Scotland and England" is a matter reserved to Westminster, Section 30 of the Act provides that Schedule 5, which establishes the list of matters reserved to Westminster can be altered by an Order in Council. A Section 30 Order can therefore be used "to increase or restrict – temporarily or permanently – the Scottish Parliament's legislative authority" (Torrance 2022).

21 It is worth mentioning that the Scottish Government had suggested, in its White Paper of 2007, putting in place a mechanism similar to that provided in the *Government of Wales Act 2006*, which empowered the Welsh Executive to hold a referendum on whether the Welsh Assembly should be granted primary legislative powers (Scottish Government 2007: 33-34).

22 In the months leading up to the Edinburgh Agreement, signed by the British Prime Minister and the Scottish First Minister on 15 October 2012, the Scottish Government argued that the Scottish Parliament had inherent power to legislate for a referendum as there was no explicit 'prohibition' on holding a referendum on independence in the founding statute of the Scottish Parliament. The devolution settle-

ment put in place in Scotland was based on the reserved-powers model, which implied that unless powers were explicitly listed as 'reserved' to Westminster in the *Scotland Act 1998*, they were within the legislative competence of the Scottish Parliament. At the same time, Alex Salmond's Government acknowledged that if they were forced to legislate for a referendum without a Section 30 Order, the legality of the legislation would without any doubt be challenged in the courts.

23 In the end, the British and Scottish Governments, after months of discussions and negotiations, eventually came to an agreement on a Section 30 Order which transferred the power to the Scottish Parliament to introduce legislation aimed at organising a referendum on Scotland's independence. The Edinburgh Agreement finally paved the way for a Section 30 Order, which was laid before the British Parliament on 22 October, and after it was duly approved by both Houses of Parliament and by the Scottish Parliament, the *Scotland Act 1998 (Modification of Schedule 5) Order 2013* became law in February 2013, giving legal authority to the Scottish Government and Parliament to legislate for a referendum on Scotland's independence. As a result, the referendum legislation enacted by Holyrood was made legal beyond any doubt. However, the power to legislate for a referendum on independence was transferred to the Scottish Parliament on a temporary basis, since the Order provided that the referendum must be held before the end of the year 2014. Consequently, the question of whether the Scottish Parliament had the legal authority to legislate for a referendum on independence remained unresolved at the time.

24 After the Brexit vote, the Scottish First Minister officially called on the Prime Minister to grant power to the Scottish Parliament to legislate for a second independence referendum under a Section 30 Order, on three occasions. Nicola Sturgeon made a formal request to Theresa May on 31 March 2017, and later renewed her demand to Theresa May's successor, Boris Johnson, on two occasions, the first a week after the Conservatives' victory in the general election of December 2019, and the second on 15 June 2022. On each occasion, the request made in the name of the Scottish Government was dismissed by the Prime Minister. Eventually, on 28 June 2022, Nicola Sturgeon announced, in a statement to the Scottish Parliament on a second independence referendum (https://www.parliament.scot/chamber-an

, that her Government was publishing a draft *Scottish Independence Referendum Bill*, aimed at providing for a consultative referendum, and that, because the legislative competence of the Scottish Parliament to pass the Bill in the absence of a section 30 order was contested, she had decided to ask the Lord Advocate to put the question of the legality of an independence referendum organized without the consent of Westminster to the UK Supreme Court. The Court ruled, on 23 November 2022, that legislating for a referendum on Scotland's independence was beyond the powers of the Scottish Parliament. It follows from that decision that if any Scottish Government legislated for a second independence referendum without having secured beforehand a section 30 Order, the legality of the legislation would most likely be immediately challenged in the courts by the British Government.

25 The question as to who has the legal power to authorize a second referendum on independence has therefore now been settled. However, the second question, on Scotland's right to self-determination, still attracts divergent opinions. While the position of the SNP and of the wider independence movement is that the people of Scotland have the right to determine the form of government best suited to their needs, in the ranks of the pro-Union parties the discourse has been more ambivalent. Yet, the Claim of Right adopted by the Scottish Constitutional Convention at its inaugural meeting in 1989 was signed by 58 of the 72 MPs representing Scotland in the House of Commons at the time, an overwhelming majority of whom were Labour MPs.

26 In recent years, it is the SNP which has consistently put the principle of self-determination as endorsed in the Claim of Right at the centre of its case for independence. Thus, on 26 January 2012, that is to say the day after the Scottish Government unveiled its consultation paper on the independence referendum (Scottish Government 2012), the Scottish Parliament adopted a motion presented by Nicola Sturgeon, then leader of the SNP in the Scottish Parliament and Deputy First Minister, calling all parties to commit themselves to the Scottish constitutional principle of popular sovereignty.[14] Five years later, in the early stages of the Brexit process, on 28 March 2017, as the *European Union (Notification of Withdrawal) Bill* had been enacted at Westminster, and Article 50 of the Lisbon Treaty was set to be triggered the following day, the Scottish Parliament adopted a motion

on Scotland's choice introduced by Nicola Sturgeon, then First Minister.[15] Through this motion, the Scottish Parliament endorsed Scotland's right to self-determination and mandated the Scottish Government to start discussions with the British Government aimed at securing a Section 30 Order to allow for a second referendum on Scottish independence.

27 It is worth pointing out that the Smith Commission, which was an all-party commission, including therefore all five of Scotland's main political parties, the three pro-Union parties as well as the two pro-independence parties, endorsed the principle of popular sovereignty in its report to the Lib-Con Coalition Government in November 2014. The first recommendation it made was that the constitutional settlement for the governance of Scotland must reflect "the sovereign right of the people of Scotland to determine the form of government best suited to their needs" (The Smith Commission 2014: 13). In fact, the Smith Report even acknowledged the right for Scotland to become independent if the people of Scotland so chose (The Smith Commission 2014: 12).

28 The Claim of Right for Scotland was also debated on two occasions in the House of Commons, in 2016 and in 2018. The first occasion was a Westminster Hall debate, on 6 September 2016, that is to say a few months only after the EU referendum. The debate was initiated by Patrick Grady, SNP MP for Glasgow North, whose main line of argument was that the Claim of Right was "a concept, indeed a fundamental principle that underpins the democracy and constitutional framework of Scotland".[16] On that occasion, the Labour MP for Edinburgh South, Iain Murray, opposing the motion, reminded the SNP that they did not participate in the Scottish Constitutional Convention, before adding that it was the Labour Government in 1997 which had delivered the referendum on devolution, mobilised popular support for its approval, "asserted the sovereign right of the Scottish people" and delivered on the result of the referendum, setting the Scottish Parliament in place since 1999.[17] The second occasion was an Opposition Day Debate on 4 July 2018, shortly after the *European Union (Withdrawal) Bill* was enacted by Westminster. This time the motion, laid before the House by the leader of the SNP in the Commons, Ian Blackford, called for MPs to "endorse the principles of the Claim of Right for Scotland, agreed by the Scottish Constitutional

Convention in 1989, and by the Scottish Parliament in 2012, and therefore acknowledge the sovereign right of the Scottish people to determine the form of government best suited to their needs". [18]

29 However, the argument of the democratic mandate put forward relentlessly by the SNP in government has been falling on deaf ears in London, even when the party made it explicit, as in the campaign for the 2021 Scottish Parliament election, that a vote for the SNP was "a vote for Scotland's right to choose our own future in a new independence referendum" (Scottish National Party 2021: 6, 10). As a matter of fact, since 2016, the narrative of Brexit as providing the opportunity for the UK Parliament to recover its full sovereignty by leaving the EU has revived an old debate on two different conceptions of the British state – unitary or union state – which were at the centre of the political debate on devolution in the late 1980s and early 1990s, and which the implementation of the devolution arrangements were deemed to have brought to a close.

3. The new paradigm induced by Britain's exit of the EU: a return to a unitarist unionism

30 It has long been argued that, even before 1999, the British state had never, strictly speaking, been a unitary state, in the sense meant by Stein Rokkan and Derek Urwin, of a state built around a political centre, with a dominant position economically, and where administrative standardisation across the entire territory is such that the regions are all treated in the same way, and pre-union institutions are all placed directly under the authority of the political centre. With regard to the union between Scotland and England, there has long been a consensus of opinion on the fact that the pre-Union institutions preserved in Scotland after 1707, giving Scotland a considerable degree of autonomy, were evidence that the British state bore much resemblance to another type of state which Rokkan and Urwin called a 'union' state, i.e. a state which is the result of the union of several nations, by consent, and in which pre-union rights and institutional infrastructures have survived and ensure a degree of autonomy to some of the territories that make up the state (Rokkan, Urwin 1982).

In this regard, it is worth mentioning that the Lib-Con Coalition Government itself, in the first of a series of papers aimed at discussing the devolution arrangements in place and the implications of independence, ahead of the referendum on Scottish independence, explicitly linked the origin of devolution to the *Acts of Union* of 1707 "marking the beginning of a multi-national state" (British Government 2013: 16).

31 Such distinction between unitary state and union state was central to the arguments developed by the various actors taking part in the debate on devolution in the UK in the 1980s and 1990s. Indeed, for those who considered the UK as a unitary state, reform of the constitutional status of Scotland and of Wales within the UK was necessarily limited in scope, because the setting-up of devolved institutions, whether it was a parliament with law-making powers or an assembly with executive powers, was perceived as a threat to the cornerstone of the British constitution, namely the sovereignty of the Westminster Parliament. By contrast, people who conceived of the UK as a union state, did not see the transfer of some powers from the centre to the periphery as potentially threatening the foundations of the British state.

32 In fact, the devolution settlements put in place in 1999 in three of the four component parts of the UK have been seen as confirmation of the fact that the UK was not a unitary state (Mitchell 2007: 24-47, Bogdanor 2019: 177-178, Paun *et al* 2019). The multinational nature of the UK was explicitly acknowledged with the implementation of the Labour Government's devolution plans, as devolution has "converted the United Kingdom into a new union of nations, each with its own identity and institutions, a multinational state" (Bogdanor 2019: 197). In other words, it is because the United Kingdom was never strictly speaking a unitary state, in the sense meant by Stein Rokkan and Derek Urwin, that devolution was possible (Mitchell 2007: 47).

33 The vision of the UK as a voluntary union based on the consent of its four territorial parts was reinforced and given formal expression in the Northern Ireland Peace Agreement of 1998[19] - also known as the Good Friday or the Belfast Agreement - and in the Edinburgh Agreement of 2012 (Kenny *et al* 2021). The former ensured that Northern Ireland would remain part of the UK as long as the people of North-

ern Ireland so wished. [20] Besides, it also provided that if the people of the island of Ireland exercised their right to self-determination, it would be "a binding obligation on both Governments to introduce and support in their respective Parliaments legislation to give effect to that wish". Consequently, Section 1 of the *Northern Ireland Act 1998*, which is the founding statute of the devolved institutional framework put in place in Northern Ireland, provides that if a majority of the people of Northern Ireland express the wish in a poll that Northern Ireland should cease to be part of the UK and become part of a united Ireland, the British Government will legislate to enforce the people's decision. This provision recognises therefore, explicitly and legally, that the relationship between Northern Ireland and the rest of the UK is based on consent.

34 The Edinburgh Agreement of 2012, meanwhile, made it explicit that both the British and the Scottish Government agreed to respect the outcome of the referendum on independence, thereby acknowledging, on the part of the UK Government, Scotland's right to self-determination: "Successive UK governments have said that, should a majority of people in any part of the multi-national UK express a clear desire to leave it through a fair and democratic process, the UK Government would not seek to prevent that happening " (British Government 2013: 32)

35 The case of Northern Ireland is particularly relevant to mention because the partition of Ireland in 1921 itself was evidence that membership of the UK was based on the principle of 'union by consent'. The *Northern Ireland Act 1998* meanwhile confirmed that the British constitution allowed for the right of a territory which was an integral part of the UK to a lawful secession.

36 By comparison, Scotland's right to self-determination has been given political legitimacy by Conservative Governments and Prime Ministers in the past. In 1993, in the Foreword to the White Paper on Scotland's place in the Union unveiled by his Government, at a time when the campaign for devolution launched in 1979 was gathering momentum, John Major, while praising the longevity of the Union, highlighted the importance of finding ways of strengthening the ties between the nations of the United Kingdom, because "no nation could be held irrevocably in a Union against its will" (British Govern-

ment 1993: 5). The Lib-Con Coalition Government of David Cameron went further, by recognising in the first paper it published as part of its contribution to the independence debate: "Should a majority of voters in Scotland vote in favour of independence in that referendum, the UK Government would, in the same spirit, move to initiate negotiations for Scotland's departure from the UK" (British Government 2013: 32). Yet, no law has recognised explicitly the right for Scotland to secede.

37 The EU referendum marks a turning point in the British Government's discourse on the nature of the United Kingdom, however. The Conservative Party manifesto for the general election of 2015 - the first election after the Scottish independence referendum - made a point of naming and celebrating each of the "great nations" which together made up "the greatest union of nations the world has ever seen" (British Conservative Party 2015: 69). On the issue of devolution, the manifesto acknowledged that "it was right to create the Scottish Parliament and the Welsh Assembly" and confirmed the commitment made in the wake of the Scottish independence referendum to strengthen and extend devolution across the United Kingdom. More interestingly still, by accepting that there was "no one-size-fits-all solution", the narrative of the Union pulled away from a unitary vision of the UK.

38 By comparison, the vision of the Union presented by the party in the manifestos published for the two general elections held after the 2016 EU referendum was more ambivalent. This is especially true of the manifesto for the 2017 general election, the first general election held after the EU referendum. In her Foreword to the party manifesto, Theresa May celebrated the "precious union of nations", yet not mentioning the nations individually but referring rather to the UK "from north to south and east to west" (British Conservative Party 2017: 5), therefore in terms of a single territory. In fact, the second chapter of the manifesto, dedicated to the future of the Union, promoted Britain as "a great nation", presenting a positive narrative of the UK leaving the EU and going forward "as a nation", while referring at the same time to "one nation made of four" and insisting on the party's "determination to defend the integrity of the UK and to strengthen the Union, bringing the peoples of the United Kingdom together" (British Conservative Party 2017: 31). Under Boris Johnson's leadership, the

party manifesto for the 2019 general election likewise pledged to strengthen the "great union between the UK's four nations" (British Conservative Party 2019: 5) which, once Brexit was truly delivered, would be "working together as one United Kingdom" (British Conservative Party 2019: 44).

39 In the aftermath of the Brexit vote, the narrative of the Union put forward by the Conservative Prime Ministers shifted therefore from the vision of a United Kingdom embodying a family of nations to stress being laid on the UK as 'one and united'. Such change in the narrative of the Union has shown that devolution had not brought to a close the debate on two conceptions of the British state, as unitary or union state, which now seem irreconcilable. Michael Keating argues that devolution has been compatible with the sovereignty of the British parliament only as long as Westminster accepted self-restraint in exercising its absolute sovereignty. Keating explains that while from Westminster the UK was seen as a unitary nation-state, from the periphery it was seen rather as a plurinational union consisting of four territories each with its own constitutional traditions and institutions (Keating 2018). In the context of Britain's membership of the European Union, the Union was held together by the doctrine and the practice of a unionism which was aimed at guaranteeing economic stability and social unity across the whole territory of the UK, while recognising and accommodating national diversity. Writing at a time when the British Government was still negotiating the terms of its Brexit deal, Vernon Bogdanor argued that the Brexit process was showing "that the basic premise of devolution – that the sovereignty of Parliament could be reconciled with recognition of the Scottish claim to autonomy – was now in doubt" (Bogdanor 2019: 222).

40 The Scottish Government has argued that Brexit itself provides evidence that the Union is not a partnership of equals, since two of the four territories which make up the UK voted to remain in the EU.[21] Its paper arguing the case for giving the people of Scotland the right to choose their constitutional future, published just a week after the Conservative Party's landslide victory in the general election of 12 December 2019, illustrates that point. Nicola Sturgeon's assessment then of what was at stake for Scotland in the coming years left no doubt as to the fact that with the prospect of Scotland being forced to leave the EU, two irreconcilable visions of the UK had re-emerged:

"Scotland is not a region questioning its place in a larger unitary state; we are a country in a voluntary union of nations" (Scottish Government 2019: 1).

4. Arguing the case for independence after Brexit: the necessity to protect the devolution settlement

41 The most important consequence for the Scottish Government of the Conservative Party's landslide victory at the general election of 12 December 2019 was that it made Brexit inevitable. The main objective of Brexit was to restore the full sovereignty of the UK deemed to have been undermined by its membership of the EU, but under Boris Johnson's Premiership it became obvious that leaving the EU provided also the opportunity to take back control within the Union. In this regard, the constitutional standing of the Sewel Convention has been described as another casualty of Brexit (McHarg 2022). While the convention was considered from the outset as an important element in the devolution settlement put in place in Scotland and in Wales, it has indeed been undermined in two ways in the aftermath of the Brexit vote, first by a ruling of the UK Supreme Court which has made clear that it had no legal weight, and by the fact that it has been set aside by the British Parliament on a number of occasions in the course of preparing the legislative framework for the UK after Brexit.

42 There was never any doubt that the Sewel convention, being a convention, was not legally binding. Yet, it was thought that it could in practice limit the authority of the British Parliament to legislate on matters devolved or have an impact on devolved matters without obtaining first the consent of the devolved legislatures. By acknowledging and accepting the Sewel convention, the UK Parliament agreed in a way to restrain itself from exercising its absolute sovereignty, and thus the convention was seen as protecting the devolution settlements put in place in Scotland and in Wales (Keating 2018).

43 The Sewel convention was given statutory status in the *Scotland Act 2016* and the *Wales Act 2017*. Thus, section 28(8) of the *Scotland Act 2016* provides that "the Parliament of the United Kingdom will not

normally legislate with regard to devolved matters without the consent of the Scottish Parliament". It was one of the recommendations made by the Smith Commission, and it was thought that this new statutory status would give legal force to the convention. Yet, in its ruling of 24 January 2017 on the 'Miller 1' case, the UK Supreme Court dismissed the appeal by the Secretary of State for Exiting the EU and ruled that the British Government could not trigger Article 50 without an Act of Parliament authorising it to do so.[22] On the question of whether the devolved legislatures should also get to vote on Article 50 of the Lisbon Treaty before it was triggered, however, the Court unanimously rejected the appeal from the Northern Ireland Assembly, and ruled that the Sewel Convention did "not give rise to a legally enforceable obligation". Consequently, the UK Government was under no obligation to consult the devolved legislatures.

44 The *European Union (Withdrawal) Bill* was the first Brexit-related Bill on which consent was initially withheld by both the Scottish Parliament and the Welsh Assembly, with the result that the British Government made some concessions, which secured the consent of the Welsh Assembly, though not that of the Scottish Parliament. On 15 May 2018, Mike Russell, then Minister for UK Negotiations on Scotland's Place in Europe, presented a motion asking Parliament to withhold its consent to the *European Union (Withdrawal) Bill*. Opening the debate on the Scottish Government's motion, Michael Russell insisted that the devolution settlement had worked effectively over the first 19 years of its existence thanks to the mutual trust between all the Governments of the UK, regardless of which party or parties had been in office in Edinburgh and London. Yet the robust system of governance put in place by devolution, he argued, was jeopardised by the British Government's Brexit plans: "Today the challenge of Brexit – or rather the challenge of the proposed power grab by the UK Government under the guise of delivering Brexit – puts our devolved settlement at risk".[23] The motion was adopted by 93 votes to 30, with Conservative MSPs voting against the motion, while Labour, Green and Liberal-Democrat MSPs united behind the SNP in rejecting the Bill.

45 The British Government decided to proceed, however, regardless of the fact that the Scottish Parliament had withheld its consent a second time. The *European Union (Withdrawal) Bill* was enacted in

June 2018, which was considered by the Scottish Government as evidence of Westminster exercising its absolute sovereignty, thereby overturning 19 years of constitutional convention and precedent on which confidence and trust between central government and the devolved institutions was based. Meanwhile, the British Government justified the decision to proceed with the Bill by the fact that it was committed to "respecting the democratic outcome" of the 2016 EU referendum.

46 With hindsight, the *European Union (Withdrawal) Act 2018* turned out to be the first in a series of statutes related to devolved matters which were enacted by the British Parliament without the consent of the Scottish Parliament. Between the referendum of 2016 and September 2022, the Scottish Parliament refused to give its legislative consent to no fewer than eight Bills introduced by the British Government at Westminster, among which five were Brexit-related Bills,[24] while prior to 2016, by comparison, legislative consent had been denied only once, in 2011, on some provisions of the *Welfare Reform Bill*. The British Government's response to the position of the devolved legislatures on these Brexit-related Bills has been that, although it was committed to respecting the Sewel convention, according to which a UK Government will not 'normally' legislate with regard to devolved matters without the consent of the devolved legislatures, in accordance with the *Scotland Act 2016*, these were not 'normal' circumstances. It is worth underlining the fact that, by contrast, in the context of the Covid pandemic, the UK Government did not set aside or ignore the Sewel convention, and yet the circumstances can be deemed to have been equally 'abnormal' (McEwen 2022).

47 The reality of Brexit has undeniably exacerbated tensions between Westminster in London and the devolved legislatures, and led both the Scottish and the Welsh Governments to accuse the British Government of being set on undermining the devolution settlements in place since 1999. While the UK Governments of Theresa May and Boris Johnson had claimed that the result of EU powers being repatriated to the UK after Brexit would be a 'power surge' for all institutions of government across the UK, the devolved administrations, and in particular the Welsh and the Scottish Governments, argued that Brexit would result rather in a 'power grab' by Westminster over the

devolved institutions. In this regard, the *United Kingdom Internal Market Act 2020* has been seen as emblematic of such power grab. Indeed, of all the Brexit-related laws enacted by the British Parliament, the *UK Internal Market Act 2020* is the one that has been seen as having the most significant detrimental effect on devolution.

48 The British Government published a White Paper on the UK Internal Market in July 2020. The aim, the Government argued, was to protect the flow of goods and services across the UK after the end of the transition period (i.e. after 31 December 2020). In other words, the Government intended to introduce legislation which would enable goods and services to flow freely across England, Scotland, Wales and Northern Ireland after 1 January 2021. The Bill was also aimed at giving UK Ministers the power to spend money in the devolved territories on matters devolved, such as transport and education.

49 The Bill immediately came under scathing attack from the devolved administrations. Indeed, it meant, if enacted, that goods or services which met the standards of one part of the UK could be sold in any other part of UK, without having to meet the standards in those other parts, even if standards there were different. In other words, Scotland would be required to accept standards for goods and services set elsewhere in the UK, regardless of whether they met the standards set by the Scottish Parliament. To take one example, if the Scottish Parliament decided to pass a law prohibiting all single-use plastics, under the *UK Internal Market Act*, this ban would apply only to goods produced in Scotland, and it would not apply to single-use plastics produced elsewhere in the UK or indeed imported from overseas into other parts of the UK where they were not prohibited.

50 The *UK Internal Market Bill* was presented before the House of Commons on 9 September 2020. Unsurprisingly, the Scottish Parliament refused to give its consent to the British Parliament on the Bill as early as 8 October 2020. The Welsh Senedd refused consent on 9 December, while the Northern Ireland Assembly had also rejected the Bill in a motion adopted on 22 September. Yet the British Government decided to proceed with the Bill, which was enacted in December 2020. Lastly, what further exacerbated tensions between London and the devolved administrations was the fact that the *UK Internal Market Act* is known as a 'protected enactment', which means that the de-

volved legislatures do not have the power to amend or modify the application of its provisions. The UK Parliament meanwhile has the power to amend, set aside or repeal any provision of the law (Sergeant 2021).

51 Consequently, there is a sense that, since the Brexit vote, the devolution framework in Scotland has been undermined by a British Government taking powers back from the devolved institutions. This has added a new dimension to the SNP's case for independence, which is that, paradoxically, only independence can protect the devolution settlement put in place in 1999. In his Foreword to the Scottish Government paper on the implications of the *UK Internal Market Act* on the Scottish devolution settlement, Michael Russell, Cabinet Secretary for Constitution, Europe and External Affairs in Nicola Sturgeon's Government from 2020 to 2021, summarised the new argument in the case for independence in the following terms: "It is important to set out that the choice we are facing is not between independence and the possibility of a beefed up Scottish Parliament or even the *status quo*. The choice now, bluntly, is about saving the Parliament and the powers that people voted for in 1997" (Scottish Government 2021).

52 In what turned out to be her last Conference speech as First Minister and party leader, on 10 October 2022, Nicola Sturgeon also argued that only independence could protect the devolution settlement put in place in 1999 from the assaults of a British Government overriding decisions made by the Scottish Parliament and taking back powers over devolved matters:

> Independence is actually the best way. Right now – and make no mistake about this – it is an aggressive unionism that is undermining that partnership. Westminster's denial of Scottish democracy. Full frontal attacks on devolution. A basic lack of respect. If there is tension, that is what is causing it. It is Scottish independence – a new partnership of the isles – that can renew the whole idea of our nations working together for the common good.

Conclusion

53 Nicola Sturgeon's announcement, on 16 March 2023, of her decision to step down came as a shock to most people in Scotland, and

triggered the first leadership contest in the SNP in over twenty years. Among the reasons she gave in her speech for her decision to resign, she made no secret of the fact that her judgment on using the general election of 2024 as a plebiscite had attracted divergent opinions, and that, by stepping down, she wished to 'free' her party to make whatever choice would be deemed the best to achieve full independence for Scotland.

54 While the party will now have to agree on a strategy on independence for the years ahead, Nicola Sturgeon's successor as party leader and First Minister of Scotland, Humza Yousaf, has already made it clear that his priority will be to ensure that the pro-independence movement has won the argument for independence with the people first. It is impossible to tell whether that could happen in a near future, or take years, if not decades, but in any case, Humza Yousaf, in his first speech as First Minister, insisted that independence would only happen once it became the 'settled will' of the people of Scotland. In June, at the SNP Convention on Independence in Dundee, the First Minister confirmed that greater support for independence needed to be built ahead of the 2024 general election, and reiterated that the only route to independence was through a "lawful and democratic process".

Bibliography

Bogdanor, Vernon (1999). *Devolution in the United Kingdom*, Oxford: Oxford University Press.

Bogdanor, Vernon (2009). *The New British Constitution*, Oxford and Portland : Hart Publishing.

Bogdanor, Vernon (2019). *Beyond Brexit. Towards a British Constitution*, London: I.B. Tauris.

British Conservative Party (2015). *Strong Leadership, A Clear Economic Plan, A Brighter, More Secure Future*, The Conservative Party Manifesto 2015.

British Conservative Party (2017). *Forward, Together. Our Plan for a Stronger Britain and a Prosperous Future*, The Conservative and Unionist Party Manifesto 2017.

British Conservative Party (2019). *Get Brexit Done – Unleash Britain's Potential*, The Conservative and Unionist Party Manifesto 2019.

British Government (1993). *Scotland in the Union : A Partnership for Good*, Cm 2225, March 1993. Available via : http-

s://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/271977/2225.pdf. Consulted 20 February 2023.

British Government (2012). *Scotland's Constitutional Future*, Cm 8203, January 2012.

British Government & Scottish Government (2012). *Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland*, Edinburgh, 15 October 2012.

British Government (2013). *Scotland Analysis: Devolution and the Implications of Scottish Independence*, Cm 8554, February 2013. Available via : https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/79417/Scotland_analysis_Devolution_and_the_implications_of_Scottish_Independan..._1_.pdf. Consulted 20 February 2023.

British Government (2015). *Scotland in the United Kingdom : An Enduring Settlement*, Cm8990, January 2015.

Cowie, Graham, Torrance, David (2020). *Devolution: The Sewel Convention*, House of Commons Briefing Paper, CBP8883, 13 May 2020.

Curtice, John, Montagu, Ian (2020). *Is Brexit Fueling Support for Independence?*, Scottish Social Attitudes Survey 2019, November 2020.

Duclos, Nathalie (2014). "Charting a New Political Notion: 'Devolution Max' and its Circulation in Britain Since 2009", in *Miranda*, 9, 2014. Available via : https://journals.openedition.org/miranda/5852. Consulted 10 February 2023.

Independent Commission on Referendums (2018). *Report of the Independent Commission on Referendums*, Executive summary, conclusions and recommendations, July 2018. Available via: https://www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/EC_and_C_and_R_-_ICR_Final_Report.pdf. Consulted 10 February 2023.

Keating, Michael (2001). *Plurinational Democracy – Stateless Nations in a Post-Sovereignty Era*, Oxford : Oxford University Press.

Keating, Michael (2018). "Brexit and the Territorial Constitution of the United Kingdom", in *Droit et Société*, 98, 1, 53-69.

Kenny, Michael, Rycroft, Philip, Sheldon, Jack (2021). *Union at the Crossroads – Can the British State Handle the Challenges of Devolution?*, The Constitution Society.

Kidd, Colin (2008). *Union and Unionisms*, Cambridge: Cambridge University Press.

MacCormick, Neil (1998). "The English Constitution, the British State, and the Scottish Anomaly," in *Scottish Affairs - Special Issue on Understanding Constitutional Change*, 1998, 129-145.

Martin, Ciaran (2021). *Resist, Reform or Re-Run? Short- and Long-Term Reflections on Scotland and Independence Referendums*. Available via: https://www.bsg.ox.ac.uk/sites/default/files/2021-04/Scotland_Referendum_final.pdf. Consulted 10 February 2023.

McCorkindale, Christopher (2013). "An Accidental Referendum", *Scottish Constitutional Futures Forum blog*, 16 August 2013. Available via : https://ww-

w.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/2040/Christopher-McCorkindale-An-Accidental-Referendum.aspx. Consulted 10 February 2023.

McEwen, Nicola, *et al*. (2020). "Intergovernmental Relations in the UK: Time for a Radical Overhaul?", in *The Political Quarterly*, 91, 3, July-September 2020, 632-640. Available via: https://onlinelibrary.wiley.com/doi/epdf/10.1111/1467-923X.12862. Consulted 10 February 2023.

McEwen, Nicola (2022). *Legislative Consent after Brexit*, Briefing Paper for the Scottish Parliament Constitution, Europe, External Affairs and Culture Committee, CEEAC/S6/22/13/2, February 2022.

McHarg, Aileen, Mullen, Tom, Page, Alan, Walker, Neil, Eds. (2016). *The Scottish Independence Referendum – Constitutional and Political Implications*, Oxford: Oxford University Press.

McHarg, Aileen (2022). "*Devolution: A View from Scotland*", Constitutional Law Matters (Centre for Public Law, University of Cambridge), 23 May 2022. Available via: https://constitutionallawmatters.org/2022/05/devolution-a-view-from-scotland/. Consulted on 10 February 2023.

McHarg, Aileen (2017). "Indyref2: Who Decides?", Scottish Constitutional Futures Forum, 15 March 2017. Available via : https://www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/10276/Aileen-McHarg-Indyref2-Who-Decides.aspx. Consulted 10 February 2023.

Mitchell, James (2007). "The United Kingdom as a state of unions : unity of government, equality of rights and diversity of institutions, " in: Trench, Alan, Ed., *Devolution and Power in the United Kingdom*, Manchester : Manchester University Press, 24-47.

Mitchell, James (2009). *Devolution in the UK*, Manchester : Manchester University Press.

Pawn, Akash, Sargeant Jess, Shuttleworth, Kelly (2019). *A Second Independence Referendum? When and How could Scotland Vote Again?*, Institute for Government, December 2019.

Rokkan, Stein, Urwin, Derek (1982). *The Politics of Territorial Identity: Studies in European Regionalism*, London: Sage.

Sargeant, Jess, Stojanovic, Alex (2021). *The United Kingdom Internal Market Act 2020*, Institute for Government.

Sargeant, Jess, Renwick, Alan (2018). *Reforming Referendums: How can their Use and Conduct be Improved?*, 10 July 2018. Available via: https://constitution-unit.com/2018/07/10/reforming-referendums-how-can-their-use-and-conduct-be-improved/. Consulted 10 February 2023.

Scholes, Alex, Curtice, John (2020), *The Changing Role of Identity and Values in Scotland's Politics*, Scottish Social Attitudes Survey.

Scottish Constitutional Convention (1990). *Towards Scotland's Parliament*.

Scottish Constitutional Convention (1995). *Scotland's Parliament. Scotland's Right*.

Scottish National Party (2010). *Elect a Local Champion*, General election ma-

nifesto.

Scottish National Party (2011). *Re-Elect a Scottish Government Working for Scotland*, Scottish Parliament election manifesto.

Scottish National Party (2015). *Stronger for Scotland*, General election manifesto.

Scottish National Party (2016). *Re-Elect*, Scottish Parliament election manifesto.

Scottish National Party (2017). *Stronger for Scotland*, General election manifesto.

Scottish National Party (2019). *Stronger for Scotland*, General election manifesto.

Scottish National Party (2021). *Scotland's Future*, *Scotland's Choice*, Scottish Parliament election manifesto.

Scottish Government (2012). *Your Scotland, Your Referendum*, 25 January 2012.

Scottish Government (2009). *Your Scotland, Your Voice – A National Conversation*, Edinburgh, November 2009.

Scottish Government (2019). *Scotland's Right to Choose - Putting Scotland's Future in Scotland's Hands*, December 2019.

Scottish Government (2021). *After Brexit: The UK Internal Market Act and Devolution*, March 2021.

Scottish Government (2022). *Building a New Scotland – Renewing Democracy through Independence*, July 2022.

Scottish Office (1997). *Scotland's Parliament*, Cm3658, July 1997.

The Smith Commission (2014). *Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament*, 27 November 2014.

Tierney, Stephen (2017). "A Second Independence Referendum in Scotland: The Legal Issues", Centre on Constitutional Change blog, 13 March 2017. Available via: https://www.centreonconstitutionalchange.ac.uk/opinions/second-independence-referendum-scotland-legal-issues. Consulted 10 February 2023.

Torrance, David (2022). *Scottish Devolution: Section 30 Orders*, House of Commons Research Briefing, CBP8738, 15 June 2022.

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1 Figures submitted to the Electoral Commission. Available via :

https://search.electoralcommission.org.uk//Search/Accounts?currentPage=1&rows=10&sort=TotalExpenditure&order=desc&open=filter&et=pp&et=pp&year=2014&register=gb&register=gb&regStatus=registered&regStatus=registered&rptBy=centralparty&rptBy=centralparty&optCols=BandName. Consulted 15 February 2023.

2 "They [the two governments] look forward to a referendum that is legal and fair producing a decisive and respected outcome." British Government & Scottish Government (2012), *Agreement between the United Kingdom*

Government and the Scottish Government on a referendum on independence for Scotland, Edinburgh, 15 October 2012, paragraph 30.

3 Full statement of the PM on the UK's future available via: https://www.bbc.com/news/uk-politics-29271765. Consulted 10 February 2023.

4 Taxation powers were to be transferred as from the financial year of 2017-18; as regards welfare, some powers were transferred in September 2016 - e.g. the power to top up reserved benefits, to award discretionary payments or to create new benefits in devolved areas - while other powers, notably the responsibility for carers and disability benefits, or for maternity and heating payments, have been transferred gradually since 2018 and the devolution of welfare powers is expected to be complete by 2024.

5 The Scottish National Party won 50% of the votes and 56 of the 59 Scottish seats in the House of Commons, becoming the third party in the Commons. Meanwhile, the Labour Party, the Conservative Party and the Liberal Democrats only won one seat each in Scotland.

6 The other three options were the *status quo*, a limited extension of the powers of the Scottish Parliament as recommended by the Calman Commission, and independence, which was the option favoured by the Government, presented as bringing "all the possibilities of full devolution with the additional responsibilities that could not be devolved within the United Kingdom, such as foreign affairs and defence" (Scottish Government 2009: 17). For an in-depth discussion of the political debate on "devolution-max" ahead of the 2014 independence referendum, see Duclos, Nathalie (2014).

7 See the definition used in the six opinion polls carried out in 2022 for the *Scotsman* by the polling research company Savanta in a question aimed to measuring support for devolution-max. Available via : https://www.whatscotlandthinks.org/questions/to-what-extent-do-you-support-or-oppose-the-concept-of-devo-max/. Consulted 10 February 2023.

8 The other development which could justify the right to hold a second referendum was if there was clear and sustained evidence that independence had the support of a majority of people in Scotland.

9 Nicola Sturgeon's statement in full is available via: https://www.bbc.com/news/uk-scotland-36620375. Consulted 15 February 2023.

10 The sovereignty of the British Parliament was thereafter made explicit in section 28(7) of the *Scotland Act* 1998.

11 See MacNeill, Duncan (1964), *The Art and Science of Government among Scots*, Glasgow, William Mclellan. MacNeill's book contains a translation of George Buchanan's well-known constitutional treatise entitled *A Dialogue on the Law of Kingship among the Scots* (*Dialogus de Jure Regni Apud Scots*), with a commentary.

12 The 'Additional Member System' (AMS) gives each elector two votes. It combines the First-Past-the-Post system (FPTP) in 73 constituencies and a regional vote which gets 56 additional members elected to the Scottish Parliament under a form of Proportional Representation. The regional seats (8 regions with 7 seats each) are allocated using the D'Hondt formula which secures a more proportional outcome. In order to allocate the regional seats, each party will see the regional votes it has won in a region divided by the number of seats the party has already won in the region + 1. For the first regional seat allocated, the seats already won by parties will be exclusively constituency seats, and thereafter, for the allocation of the 6 seats left, each regional seat won will be included in the total number of seats already won by the party in the region. As a result, the more seats a party wins under FPTP in the constituencies, the more difficult it will be to win additional seats under the D'Hondt formula. For an illustration of AMS see Bogdanor (1999: 221-222).

13 The second White Paper, *Your Scotland, Your Voice – A National Conversation*, published in November 2009, confirmed that the Scottish Government's preference was for a single choice put to the people of Scotland in the referendum, but envisaged the possibility of proposing a multi-option referendum, which was more likely to be accepted by other political parties in Parliament. Lastly, the consultation paper of February 2010 on the Government's draft referendum Bill, *Scotland's Future: Draft Referendum (Scotland) Bill Consultation Paper*, suggested that people should be consulted on two questions, the first about "an extension of the powers and responsibilities of the Scottish Parliament, short of independence", and the second about "whether the Scottish Parliament should also have its powers extended to enable independence to be achieved".

14 Motion S4M-01822 read as follows: "That the Parliament acknowledges the sovereign right of the Scottish people to determine the form of government best suited to their needs and declares and pledges that in all its actions and deliberations their interests shall be paramount." Scottish Parliament, *Official Report*, 26 January 2012, Col.5805.

15 Motion S5M-04710 initially read as follows: "That the Parliament acknowledges the sovereign right of the Scottish people to determine the form of government best suited to their needs and therefore mandates the Scottish Government to take forward discussions with the UK Government on the details of an order under section 30 of the Scotland Act 1998 to ensure that the Scottish Parliament can legislate for a referendum to be held that will give the people of Scotland a choice over the future direction and governance of their country at a time, and with a question and franchise, determined by the Scottish Parliament, which would most appropriately be between the autumn of 2018, when there is clarity over the outcome of the Brexit negotiations, and around the point at which the UK leaves the EU in spring 2019." Scottish Parliament, *Official Report*, 21 March 2017, Cols.10-11. Following the adoption of an amendment introduced by Patrick Harvie, co-leader of the Scottish Green Party, the motion was passed on 28 March 2017 in its amended version by 69 votes to 59. Thus the following lines were added to the initial motion : " believes that this gives people in Scotland a choice at a time when there is both the most information and most opportunity to act; further believes that 16 and 17-year-olds and EU citizens, who were excluded from the EU referendum, should be entitled to vote, and considers that this referendum is necessary given the Prime Minister's decision to negotiate a hard exit from the EU, including leaving the single market, which conflicts with assurances given by the UK Government and prominent Leave campaigners, and which takes no account of the overwhelming Remain vote in Scotland". Scottish Parliament, *Official Report*, 28 March 2017, Cols. 80-81.

16 House of Commons, *Hansard*, Westminster Hall Debate, Volume 614, Col.84WH, 6 September 2016.

17 House of Commons, *Hansard*, Westminster Hall Debate, Volume 614, Cols. 95-96WH, 6 September 2016.

18 House of Commons, *Hansard*, Volume 644, Col.406, 4 July 2018.

19 Northern Ireland Peace Agreement 1998 – Agreement Reached in the Multi-Party Negotiations, Cm3883, 1998. Available via:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1034123/The_Belfast_Agreement_An_Agreement_Reached_at_the_Multi-Party_Talks_on_Northern_Ireland.pdf. Consulted 20 February 2023.

20 The Agreement ensures that the British and the Irish Governments "recognise the legitimacy of whatever choice is freely exercised by a majority of the people of Northern Ireland with regard to its status, whether they prefer to continue to support the Union with Great Britain or a sovereign united Ireland."

21 At the UK level, 51.9% of the people who voted in the EU referendum voted for the UK to leave the European Union. However, while in England and Wales the 'Leave' side gathered 53.4% and 52.5% of the votes respectively, in Scotland and in Northern Ireland a majority of the votes cast were in favour of 'Remain', 62% and 55.8% respectively.

22 The appeal was dismissed by a majority of 8 votes to 3.

23 Motion S5M-1223 read as follows: "That the Parliament notes the legislative consent memorandums on the European Union (Withdrawal) Bill lodged by the Scottish Government on 12 September 2017 and 26 April 2018, and the reports of the Finance and Constitution Committee of 9 January and 10 May 2018, and, because of clause 15 (formerly 11) and schedule 3, which constrain the legislative and executive competence of the Scottish Parliament and Scottish Government, does not consent to the European Union (Withdrawal) Bill."

24 The four Brexit-related Bills were the EU (Withdrawal) Bill enacted in 2018, as well as the EU (Withdrawal Agreement) Bill, the UK Internal Market Bill and the EU (Future Relationship) Bill, all passed in 2020, as well as the Retained EU Law (Revocation and Reform) Bill enacted in June 2023. The Scottish Parliament also denied consent to the Elections Bill, the Subsidy Control Bill and the Professional Qualifications Bill, all enacted in 2022.

English

The SNP's successive election victories since the referendum on Scotland's independence, in September 2014, have confirmed that, contrary to what the pro-Union parties had argued at the time, the question of Scotland's constitutional status was not settled there and then. In fact, with the prospect of Scotland being taken out of the EU against her will, in the wake of the general election of 2015, the demand for a second referendum on independence gathered momentum.

Since the EU referendum, the SNP has made of every election, whether to the Scottish or to the British Parliament, an opportunity for the people of Scotland to give them a mandate to argue the case for a second independence referendum. However, the 'double democratic argument' put forward by the Scottish Government has fallen on deaf ears in London: while Nicola Sturgeon has on many occasions reminded the British Government that the Scots had not voted for a Conservative Government in any of the three general elections held since the referendum on independence, and that, in 2016, they had voted for the UK to remain in the European Union, all four Conservative Prime Ministers in office since the Brexit vote have dismissed calls for discussions on a new Section 30 Order which would allow the Scottish Government to legislate for a second independence referendum.
This article investigates the challenge for the SNP of delivering on its pledge for a second independence referendum while acting within the British constitutional framework. It will first look into the concept of sovereignty - parliamentary or popular - which has informed the constitutional debate in Scotland for the past 70 years or so. It will then discuss the two issues which have been central to the Scottish Government's request for a Section 30 Order, namely the question of the legal authority to hold a referendum on Scotland's independence and that of Scotland's right to self-determination. It will thereafter examine how the British constitutional framework redefined in unitary terms by the British Government in the context the UK's exit of the European Union has brought back to the fore two antagonistic visions of the British state, as a unitary or as a union state. Finally, it will explore how the unitarist unionism advocated by the British Government has added a new dimension to the case for independence put forward by the SNP, which is that, paradoxically, only independence can protect the Scottish devolution settlement in place since 1999.

Français

Les victoires successives du Parti national écossais (Scottish National Party) aux cinq scrutins législatifs – britanniques ou écossais – qui se sont tenus depuis le référendum sur l'indépendance de l'Écosse sont la preuve que, contrairement à ce que les partis défenseurs de l'Union avaient affirmé à l'époque, le référendum du mois de septembre 2014 n'a pas réglé la question du statut constitutionnel de l'Écosse. De fait, au lendemain des élections législatives britanniques de 2015, la perspective que l'Écosse puisse être contrainte de sortir de l'Union européenne contre sa volonté, a accéléré la demande d'un second référendum sur l'indépendance.

Depuis le référendum sur le Brexit, le SNP a fait de chaque élection législative, britannique comme écossaise, l'occasion pour les électeurs écossais de lui donner mandat pour défendre l'idée d'un second référendum sur l'indépendance. Cependant, le double argument démocratique mis en avant par le Gouvernement écossais n'a pas été entendu à Londres : alors que Nicola Sturgeon a rappelé à plusieurs reprises au Gouvernement britannique que, d'une part, les électeurs écossais n'avaient voté en faveur d'un gouvernement conservateur à aucune des trois élections législatives britanniques organisées depuis le référendum de 2014, et que, d'autre part, en 2016 ils avaient voté pour le maintien du Royaume-Uni dans l'UE, les quatre Premiers ministres conservateurs qui se sont succédé à Londres depuis le vote sur le Brexit ont tour à tour rejeté les demandes d'ouverture de négociations de la part de l'exécutif écossais visant à obtenir du Gouvernement puis du Parlement britannique l'autorisation de légiférer sur l'organisation d'un second référendum sur l'indépendance, en vertu de l'Article 30 du Scotland Act 1998.

Cet article a pour objectif de mettre en lumière le défi que représente pour le SNP le fait de tenir ses engagements concernant la tenue d'un second référendum sur l'indépendance tout en agissant dans le respect du cadre constitutionnel britannique. Il interrogera tout d'abord le concept de souveraineté – parlementaire ou populaire – qui a nourri le débat sur l'avenir constitutionnel de l'Écosse au cours des soixante-dix dernières années, avant d'examiner les deux questions au centre de la requête du Gouvernement écossais auprès du Gouvernement britannique, à savoir celle de l'autorité légale s'agissant de l'organisation d'un référendum sur l'indépendance de l'Écosse, et celle du droit de l'Écosse à l'autodétermination. Il s'attachera ensuite à montrer comment le cadre constitutionnel britannique redéfini par le Gouvernement britannique dans le contexte de la sortie du Royaume-Uni de l'UE, avec pour objectif de réaffirmer l'unité politique et territoriale de l'État britannique, a remis au premier plan du débat public deux visions antagonistes du Royaume-Uni, État unitaire ou État d'union. Enfin, il s'intéressera au fait que l'unionisme unitaire prôné par le Gouvernement britannique a ajouté une nouvelle dimension aux arguments en faveur de l'indépendance avancés par le SNP, à savoir que, de façon paradoxale, seule l'indépendance peut protéger le cadre institutionnel mis en place par le Gouvernement travailliste en 1999.

Mots-clés

Parti national écossais, independence, unionisme unitaire, État unitaire, État d'union, souveraineté, referendum, auto-détermination

Keywords

SNP, independence, unitarist unionism, unitary state, union state, sovereignty, referendum, self-determination

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