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By David Torrance
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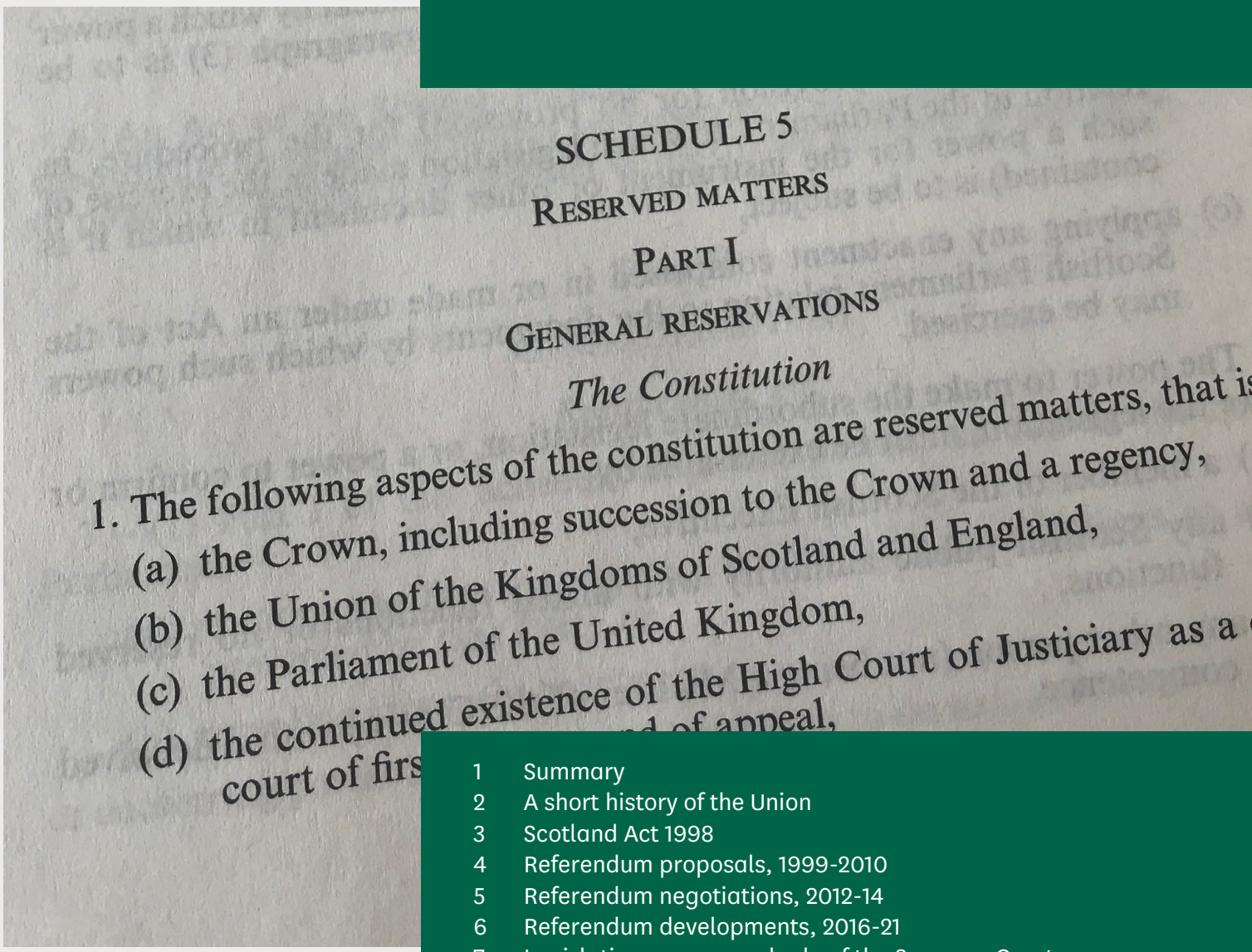
Scottish independence referendum: legal issues



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1 Summary

On 18 September 2014 Scotland voted in an independence referendum. It was said at the time that the process was beyond legal doubt. Not only had the Scottish and UK governments agreed to honour the outcome, but both Holyrood and Westminster had temporarily guaranteed (via a statutory device known as a Section 30 Order) that the Scottish Parliament would have the legislative competence for that historic event.

The "Edinburgh Agreement", however, paused rather than resolved disagreements over the Scottish Parliament's ability to legislate in this area. The Scottish Government maintained that a referendum of some sort was already within its devolved powers. Successive UK Governments, on the other hand, maintained that it was reserved to Westminster.

Even in 2014 this debate was not new, having first arisen during parliamentary debates around what became the Scotland Act 1998 ("the 1998 Act"). And having been paused between 2012 and 2014, the arguments resurfaced following the European Union referendum in June 2016. By 2020-21, the Scottish Government was indicating that the question might have to be referred to the Supreme Court.

What does the Scotland Act 1998 say?

If referendum legislation were to be referred to the Supreme Court, the starting point for its Justices would be the 1998 Act itself. Under section 29(1), Acts of the Scottish Parliament which fall outwith its legislative competence (or powers) are "not law". An Act (or a provision thereof) is beyond competence so far as it "relates to reserved matters". Reserved matters are set out in Schedule 5, Part 1 of which reserves "aspects of the constitution" to Westminster. This includes, among other things, "the Union of the Kingdoms of Scotland and England" and "the Parliament of the United Kingdom".

The 1998 Act also provides a set of principles to assist the courts when approaching questions of competence. Those questions are also known as "devolution issues". Whether a provision of an Act "relates to" a reserved matter is to be determined "by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances".

Disagreements over "purpose" and "effect"

Although the UK and Scottish governments agree that the Scottish Parliament cannot unilaterally end the Union (i.e. enable Scottish independence) they differ as to the "purpose" and "effect" of referendum legislation. They therefore disagree whether it would necessarily "relate to" reserved matters.

Constitutional academics are also divided. This disagreement is not only legal, but political and historical, concerning differing sources of "sovereignty" as well as competing political mandates.

This briefing paper at first summarises the constitutional development of the United Kingdom of Great Britain and Northern Ireland, including past means of secession from the UK and its former Empire. It then examines debates prior to the creation of the Scottish Parliament in 1999 before tracing the Scottish Government's attempts to legislate for a referendum in 2010-11. It looks at the debates and negotiations which led to the 2014 referendum, as well as subsequent requests for a s30 Order. Finally, it examines recent legislative and legal developments in Scotland, including the Lord Advocate's referral of draft independence referendum legislation to the Supreme Court in June 2022.

2 A short history of the Union

The political scientist James Mitchell has characterised the United Kingdom of Great Britain and Northern Ireland "as a state of evolving unions".[1] He and other academics make the point that the UK has never been a fully unitary state. Rather it comprises a series of unions made (and in one case partly **unmade**) between the 16th and 20th centuries. Lord Reed, the President of the Supreme Court, has described the United Kingdom as "composed of three ancient nations, and part of a fourth".[2]

2.1 Constitutional evolution

This section provides a short overview of the constitutional development of the UK, secession from it, as well as the use – and status – of referendums within the British constitutional tradition.

England and Wales

The first of the UK's "evolving unions" was that between England and Wales, although this could not be described as voluntary. Under the Laws in Wales Acts of 1535 and 1542, England and Wales became a single state, and the law of England the law of Wales.

England and Scotland

Following the 1603 Union of the Crowns, England (which was taken to include Wales) and Scotland remained separate states but shared a monarch. This was a "personal union" of crowns, with different laws of succession in Scotland and in England.[3]

This was followed by unsuccessful attempts to deepen this personal union by merging the kingdoms and parliaments of England and Scotland. This was finally achieved in 1707 with an "incorporating" rather than "federal" union.

Article I of the 1706 Treaty of Union stated that the two kingdoms of Scotland and England would in 1707 "and forever after be United into One Kingdom by

1 James Mitchell, "Devolution" in D. Brown, R. Crowcroft & G. Pentland (eds), The Oxford Handbook of Modern British Political History, 1800-2000, Oxford: Oxford University Press, p187

2 Lord Reed, "Scotland's Devolved Settlement and the Role of the Courts", Inaugural Dover House Lecture, 27 February 2019

3 The Parliament of Ireland had earlier passed the Crown of Ireland Act 1542, which created the title of King of Ireland for King Henry VIII of England and his successors

the Name of Great Britain".[4] The Treaty required ratification and legislation in both parliaments. The Union with Scotland Act 1706 was passed by the Parliament of England, and the Union with England Act 1707 by the Parliament of Scotland.[5] These are often referred to collectively as the "Acts of Union 1707".

On 1 May 1707, the Scottish and English parliaments were replaced by a single "Parliament of Great Britain". In Scotland, separate legislation guaranteed the status of the presbyterian Church of Scotland and dealt with Scottish representation in the new parliament at Westminster (45 MPs and 16 "representative" peers). The Parliament of Great Britain subsequently passed the Union with Scotland (Amendment) Act 1707, which united the Privy Councils of England and Scotland.

Scotland nevertheless retained institutional autonomy under the terms of the Treaty, with its own system of law, local government, religion, and education. Some lawyers in Scotland argued that (in Scots, if not English, law) union legislation enjoyed a special status which made it unalterable by the GB/UK Parliament.[6]

One of the challenges for this argument is that numerous amendments have subsequently been made to the Acts of Union by the UK Parliament, including to provisions referred to in the Treaty text as being permanent or fundamental. Fourteen Articles of the Union were repealed wholly or in part by the Statute Law Revision Acts of 1867, 1871, 1906 and 1948.[7] Scotland's representation in the Commons was also increased via legislation, while the Peerage Act 1963 altered the system of representative peers agreed in 1707. The UK Parliament is de facto sovereign even if, theoretically, it might be argued it has limits in relation to Scotland and to Scots Law.

Great Britain and Ireland

Another significant development took place in the early 19th century when the Union with Ireland Act 1800 and Act of Union (Ireland) 1800 abolished the Parliament of Ireland and declared that "for ever after" the Kingdoms of

4 For a discussion of whether this created a new state or simply expanded England to include Scotland, see James Crawford and Alan Boyle, Annex A Opinion: Referendum on the Independence of Scotland – International Law Aspects, London: HM Government, 10 December 2012, paras 33-39

5 The discrepancy in the dates is due to the fact the English legal year then ran from 25 March to 24 March, thus the passage of the English Act fell within the 1706 legal year

6 See T. B. Smith, "The Union of 1707 as Fundamental Law", Public Law 99, 1957, and J. D. B. Mitchell, Constitutional Law, 1968. The argument was encouraged, if not inspired, by some obiter dicta in *MacCormick v Lord Advocate* [1953] SC 396, when a challenge to the Queen's chosen designation as "Elizabeth II" was dismissed, not entirely unsympathetically. See Alan Page, Constitutional Law of Scotland, Edinburgh: W. Green, 2015, pp6-9 for a full discussion.

7 See Colin Munro, "The Union of 1707 and the British Constitution" in P. S. Hodge (ed), Scotland and the Union, Edinburgh: Edinburgh University Press, 1994, p98

Great Britain and Ireland would "be united into one Kingdom, by the name of the United Kingdom of Great Britain and Ireland".[8]

This British-Irish union, much like its Anglo-Welsh and Anglo-Scottish antecedents, was contested. During the 19th century, a campaign for "Home Rule" gathered strength. As Ireland returned majorities of pro-Home Rule MPs, Westminster attempted to legislate for a devolved parliament in Dublin. Bills introduced in 1886 and 1893 failed, while a third received Royal Assent in 1914 but was suspended for the duration of the First World War.

The Government of Ireland Act 1920 partitioned Ireland and created devolved parliaments in Southern and Northern Ireland. Following a two-year war of independence, however, the 1921 Anglo-Irish Treaty acknowledged southern Ireland's secession from the UK.[9]

The Irish Free State Constitution Act 1922 received Royal Assent on 5 December 1922, granting "Dominion status" to the Irish Free State. This gradually loosened its remaining ties with the UK until the Ireland Act 1949 recognised Ireland's departure from what had become known as the British Commonwealth of Nations.

Great Britain and Northern Ireland

The Anglo-Irish Treaty and ratifying legislation enabled the Parliament of Northern Ireland to determine its own constitutional future.

On 7 December 1922, the House of Commons and Senate of Northern Ireland resolved to remain a devolved part of the United Kingdom rather than form an autonomous part of the Irish Free State.[10]

At the instigation of the Free State, Westminster passed the Royal and Parliamentary Titles Act 1927. This changed the name of the "Parliament of the United Kingdom of Great Britain and Ireland" to the "Parliament of the United Kingdom of Great Britain and Northern Ireland". The monarch also changed his titles by royal proclamation.

2.2 Devolution and the Union

While Northern Ireland possessed legislative devolution within the UK, Scotland and Wales did not. Instead, a system of what became known as

8 The Union with Ireland Act 1800 (as amended) remains on the UK statute book. In the Republic of Ireland, the Statute Law Revision (Pre-Union Irish Statutes) Act, 1962 repealed the Act of Union (Ireland) 1800, while the Statute Law Revision Act, 1983 repealed the Union with Ireland Act 1800.

9 It has been suggested that the Anglo-Irish Treaty flowed from Sinn Féin winning a majority of Irish seats at the 1918 UK general election. The UK did not recognise this as a basis for independence, indeed it refused to recognise the Dáil established in 1919 and later declared it illegal.

10 For a detailed account of Northern Ireland's constitutional development, see Commons Library Briefing Paper CBP8884, Parliament and Northern Ireland, 1921-2021

"administrative devolution" developed from the late 19th century. A Scottish Office was created in 1885, followed by "Welsh departments" within UK ministries in the early 20th century. As the name implied, "administrative" devolution referred to specific allocations of civil servants working on a territorial rather than policy basis.[11] A Welsh Office was created in 1965,[12] as was a Northern Ireland Office in 1972, following the prorogation and abolition of the Parliament of Northern Ireland in 1972-73.

These reforms were accompanied by broader debates regarding legislative devolution in Scotland and Wales. A Royal Commission on the Constitution was established in 1969 to consider these questions as well as general constitutional reform in the UK and its Crown Dependencies. This reported in 1973 and proposed devolved Assemblies in Edinburgh and Cardiff.[13]

The Labour governments of Harold Wilson and James Callaghan introduced legislation to that end. This was amended by Labour backbenchers so that referendums were required to give effect to the Scotland Act 1978 and Wales Act 1978. A majority of voters in Wales rejected devolution, while in Scotland the necessary threshold of the electorate (40%) did not endorse an Assembly. Both Acts were subsequently repealed.

There were attempts to restore devolution in Northern Ireland in 1973-74 and between 1982 and 1986. The Belfast/Good Friday Agreement of 1998 included a further attempt, this time as a unicameral Northern Ireland Assembly. This was elected (following a referendum) in 1998 and began to function in late 1999. It was suspended at various points, including between 2002 and 2007, while between 2017 and 2020 it was not fully functioning.

Following referendums in Scotland and Wales, a devolved Scottish Parliament and National Assembly for Wales were established in Edinburgh and Cardiff in 1999.[14] Both bodies gradually assumed more powers via amending Acts and in 2020 the National Assembly became known as Senedd Cymru/the Welsh Parliament. The UK Parliament remains legislatively supreme in relation to Scotland, Wales, and Northern Ireland.

11 See James Mitchell, Governing Scotland: The Invention of Administrative Devolution, London: Palgrave Macmillan, 2003

12 The Scottish and Welsh Offices survived devolution in 1999, but were rebranded as the Scotland Office and Wales Office and, later, the Offices of the Secretary of State for Scotland and Wales

13 See Alan Page, pp21-24

14 Section 37 of the Scotland Act 1998 stated that the Acts of Union had "effect" subject to the 1998 Act, meaning that the 1998 Act could not be challenged on grounds of inconsistency with the 1706-07 Acts

2.3 Secession and independence from the UK/Empire

Neither the United Kingdom nor its former Empire possesses (or possessed) a formal, codified constitution.

Between 1776 and 1997 dozens of colonies, protectorates, mandates, and territories became independent from the UK. The vast majority did so via negotiation followed by legislation at Westminster; some "Dominions" gradually moved towards full autonomy under the Statute of Westminster, 1931;[15] while a minority unilaterally declared independence (the United States in 1776 and Southern Rhodesia in 1965).

Within the United Kingdom itself, Irish independence was achieved via negotiated treaty and ratifying legislation in 1921-22, while there have been two referendums on possible secession: Northern Ireland in 1973 and Scotland in 2014. In both cases, a majority of electors in each area voted to remain part of the UK.[16] Since 1967, several British Overseas Territories have voted in referendums to maintain UK sovereignty: Gibraltar (1967), Bermuda (1995) and the Falkland Islands (2013).

In the case of Northern Ireland, between 1921 and 1972 its parliament possessed a statutory power of "self-determination", a "principle of consent" transferred to its people in 1973. This was confirmed by the 1998 Agreement.

Unlike in Scotland, there is a statutory process in Northern Ireland for the holding of a referendum. The Northern Ireland Act 1998 compels the Secretary of State to hold a ballot on Irish unification should it "appear" likely that a majority of its electors would support that proposition. The Secretary of State also has a more general power to hold a referendum on whether Northern Ireland should form part of Ireland at any time.

If the majority of people voting in Northern Ireland were to endorse Irish unification in a "border poll", the Secretary of State for Northern Ireland must then:

> lay before Parliament such proposals to give effect to that wish as may be agreed between Her Majesty's Government in the United Kingdom and the Government of Ireland.[17]

No equivalent provision exists for Scotland and Scottish independence polls in either the Scotland Act 1998 or in other legislation concerned with Scotland's

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15 The Canadian constitution was only fully "patriated" via UK legislation in 1982, and those of Australia and New Zealand in 1986

16 The 1973 "Border Poll" in Northern Ireland was boycotted by many nationalist voters. See David Torrance, "'Taking the border of politics' – the Northern Ireland referendum of March 1973", Constitution Unit, 21 November 2019, for a detailed account

17 s1(2) Northern Ireland Act 1998

constitutional status. Northern Ireland's arrangement can therefore be said to be exceptional: there is not a "general" legal right, under the UK's constitutional arrangements, for all or part of it to secede unilaterally. For secession to take place in accordance with the UK's constitutional requirements requires, in effect, a negotiated political agreement and implementing legislation passed by the UK Parliament. Previous examples of secession, whether in the context of Empire or of Ireland, may provide a guide or a precedent as to how future secessions might be approached.

The "constitutional silence"[18] of the UK's constitution as to the availability and process of secession contrasts with, for example, the European Union (EU). Article 50 of the Treaty of Lisbon sets out the process by which a Member State can leave that multinational organisation. In June 2016, a majority of the UK electorate voted to "Leave" the EU. Majorities in Scotland and Northern Ireland, however, voted to "Remain". Article 50 was triggered in 2017 and the UK left the EU in January 2020.

Although the Anglo-Scottish union of 1707 and British-Irish union of 1800 were intended to last "for ever after", both were subsequently amended. Furthermore, Scottish independence would not in itself "end" or "break up" "the Union", for there is not a single union. Rather it would end, or at least radically alter, one of the UK's "evolving unions".

2.4 Sovereignty of the Scottish people

The Anglo-Scottish union was increasingly contested after the 1960s, particularly when the Scottish National Party (SNP) became electorally successful in the late 1960s. The SNP's aim was to achieve independence for Scotland.

The SNP was not alone in arguing that "the Scottish people" were "sovereign" and could therefore exercise "self-determination" in constitutional terms. In 1975, for example, the then UK Liberal leader David Steel argued that a referendum on devolution would constitute "badly needed recognition of the sovereignty of the Scottish people".[19]

There developed a general consensus that Scottish devolution or independence should take place if a majority of Scottish MPs committed to that course were returned at a UK general election.[20] Successive SNP

[18] See V. C. Jackson, "Secession, transnational precedents and constitutional silences" in S. Levinson (ed), Nullification and Secession in Modern Constitutional Thought, University of Kansas, 2016, p333

[19] The Times, 26 November 1975. Some historians have argued that England as well as Scotland has a long tradition of articulating popular sovereignty.

[20] This was challenged. The constitutional academic and SNP supporter Neil MacCormick, for example, argued that a majority of votes rather than seats would be necessary to secure democratic legitimacy for a new Scottish state.

manifestos made clear that negotiations with London would follow such an electoral outcome.[21]

This appeared to be accepted by successive Conservative Prime Ministers. In her memoirs, Margaret Thatcher stated that:

> As a nation, they [the Scots] have an undoubted right to national self-determination; thus far they have exercised that right by joining and remaining in the Union. Should they determine on independence no English party or politician would stand in their way, however much we might regret their departure. What the Scots (nor indeed the English) cannot do, however, is to insist upon their own terms for remaining in the Union, regardless of the views of the others [...] it cannot claim devolution as a right of nationhood inside the Union.[22]

John Major, Prime Minister between 1990 and 1997, concurred.[23]

The existence of a distinct and separate Scottish "mandate" was another prominent feature of Scottish political discourse during the 1980s and 1990s. This was an argument about political legitimacy rather than constitutional law but reflected the fact that between 1979 and 1997 Conservative governments were elected in Great Britain but with only minority support in Scotland. Related to this was the idea of a "democratic deficit", under which Scotland had not consented to Conservative majority rule. Devolution was viewed as a means of mitigating that "deficit".

The most prominent expression of Scottish popular sovereignty occurred in 1988 with "A Claim of Right for Scotland",[24] which critiqued Scotland's then status within the Union. More broadly, it advocated the formation of a constitutional convention to draw up a scheme for a devolved Scottish Assembly or Parliament, "within the framework of United Kingdom government". While the Claim did not explicitly reject independence, it argued that its negotiation "would be a vastly more complex task" than planning for devolution. "The Scots", it added, "could not be faced with independence either suddenly or in ignorance of its implications."[25]

A much-quoted line about the "sovereign right" of the Scottish people to "determine the form of Government best suited to their needs" does not actually feature in the July 1988 document. Rather it formed part of a declaration signed at the first meeting of the Scottish Constitutional Convention (SCC) on 30 March 1989. This stated that:

> We, gathered as the Scottish Constitutional Convention, do hereby acknowledge the sovereign right of the Scottish people to determine the form

21 See the SNP's 1997 manifesto. This stated that talks between "two mature democracies" need only take between 6 and 12 months, after which Scots would be asked to approve the "independence settlement" in a single-question referendum.

22 Margaret Thatcher, The Downing Street Years, London: HarperCollins, 1993, p624

23 See John Major, "Foreword by the Prime Minister", in Scotland in the Union: A Partnership for Good, Edinburgh: HMSO, 1993

24 This was drafted by the Constitutional Steering Committee of the Campaign for a Scottish Assembly

25 See Owen Dudley Edwards (ed), A Claim of Right for Scotland, Edinburgh: Polygon, 1989, p20

> 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.[26]

Most Labour and Liberal Democrat MPs in Scotland signed this declaration. No SNP MP did so, although Isobel Lindsay, a prominent SNP activist, added her name. The Claim, like the SCC, were symbolic expressions rather than binding law.[27]

In written evidence submitted to the House of Commons Political and Constitutional Reform Committee in October 2012, Professor James Mitchell observed that the Claim of Right embodied "a political rather than justiciable claim" to the "sovereignty of the Scottish people". Similarly, the constitutional academics C. M. G. Himsworth and C. R. Munro have argued that "an interpretation of political history which is not entirely free from romantic myth cannot justifiably be treated as legal principle".[28] Professor Alan Page has also urged caution in "accepting claims of a distinctive Scottish constitutional tradition at face value".[29]

The SCC produced its final report in 1995, which bore a strong resemblance to the devolution settlement which took shape in 1997-99. The Claim of Right was subsequently considered or reaffirmed by the Scottish Parliament in 2012 and Westminster in 2016 and 2018.[30]

The "sovereignty" of the Scottish people has often contrasted with what the constitutional writer A. V. Dicey's termed "the sovereignty of Parliament". It is important to note, however, that Dicey himself appreciated that the UK electorate could also be said to be sovereign, and that Parliament was, in reality, constrained by both moral considerations and practical politics.[31] In 1999, Professor Sir Neil McCormick developed a theory of "post-sovereignty", in which sovereignty was shared or pooled both within Europe and within the United Kingdom.[32]

2.5 Referendums and constitutional change

As a matter of law, a referendum is not required for Scotland to become independent, nor were they necessary to devolve power to different parts of the UK during the 20th century. Northern Ireland was granted devolution in

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26 See Commons Library, "Claim of Right for Scotland", 8 July 2018

27 See David Torrance, "The history behind Nicola Sturgeon's call for a Claim of Right for Scotland", Constitution Unit, 19 February 2020, for a full account of the Claim of Right in Scottish political discourse

28 C. M. G. Himsworth & C. R. Munro, Devolution and the Scotland Bill, Edinburgh: W. Green, 1998, p26

29 Alan Page, p1

30 In a January 2020 speech, Scottish First Minster Nicola Sturgeon said she intended to invite Scotland's "elected representatives" to "come together to endorse a modern Claim of Right for Scotland through a new Constitutional Convention"

31 See A. V. Dicey, Introduction to the Study of the Law of the Constitution (10th edition), 1959

32 See David McCrone and Michael Keating, "Questions of Sovereignty: Redefining Politics in Scotland?", Political Quarterly, January 2021, for a full discussion

1921 via an Act of the UK Parliament,[33] which was also the UK government's intention when it unsuccessfully attempted to devolve power to Scotland and Wales in the late 1970s.

However, it is arguable that sub-state referendums have become a conventional part of constitutional change in the UK. These have taken place in Northern Ireland in 1973 and 1998, Scotland in 1979, 1997 and 2014, and in Wales in 1979, 1997 and 2011. Only three UK-wide referendums have taken place, all on constitutional matters: continuing membership of the European Economic Community in 1975, on the Alternative Vote (AV) in 2011, and on the UK's membership of the European Union in 2016.

The Scotland Act 2016 and Wales Act 2017 also included statutory referendum "locks" against the unilateral abolition of the Scottish Parliament or Welsh Parliament.[34] While the Northern Ireland Assembly can be suspended **without** a referendum, there can be no broader change in Northern Ireland's "constitutional status" without reference to its people.

In its 2010 report, Referendums in the United Kingdom, the House of Lords Constitution Committee concluded that referendums "are most appropriately used in relation to fundamental constitutional issues". Proposals "for any of the nations of the UK to secede from the Union" fell within this definition.[35] Furthermore, it stated that even where a referendum had no direct legal effect, "it would be difficult for Parliament to ignore a decisive expression of public opinion".[36]

Although legislation for some UK referendums have included direct legal effects (for example that on AV in 2011),[37] most have been pre-legislative in that they have possessed no such effect. Rather they are advisory in a technical sense but operate on the understanding that a government (or governments) will regard them as binding politically, the most recent example being the Brexit referendum of 2016.

The same has been true of some non-legislative referendums. In 1994, Strathclyde Regional Council organised a referendum on the potential privatisation of the water and sewerage industry in Scotland. An overwhelming majority of voters rejected the privatisation plans. Although the then UK government opposed the referendum and did not have to recognise its outcome, it subsequently decided **not** to privatise water in Scotland.

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33 A. V. Dicey was an early advocate of referendums on constitutional matters such as Irish Home Rule. There were, he argued, some decisions that "must be referred to a more august tribunal than the House of Commons, or even than Parliament" (see A. V. Dicey, "The Referendum", National Review 23, 1894).

34 These "locks" could themselves be repealed by a further Act of Parliament

35 See para 94

36 See para 197

37 The referendums which formed part of the Scotland Act 1978 and Wales Act 1978 were post-legislative. Both Acts required 40 per cent of the electorate to endorse devolution before their provisions would take effect, and both included provisions for the laying of repeal Orders should that electoral threshold not be reached.

By contrast, in 2000 a privately funded postal referendum aimed to stop the repeal of Clause 28 of the Local Government (Scotland) Act 1988, which prevented the "promotion" of homosexuality in schools. A majority of voters supported maintenance of the clause, but the then Scottish Executive did not recognise the referendum and ignored its outcome.

1 Unilateral Declaration of Independence

The Unilateral Declaration of Independence (UDI) was a statement adopted by the Rhodesian Cabinet on 11 November 1965. This announced that Southern Rhodesia (later Zimbabwe), a self-governing UK territory in southern Africa, now regarded itself as an independent sovereign state under the Crown.

The UK, the Commonwealth and the United Nations all deemed UDI illegal. Sanctions were imposed and the Southern Rhodesia Act 1965 asserted that the Government and Parliament of the United Kingdom had "responsibility and jurisdiction as heretofore for and in respect of it".

3 Scotland Act 1998

In 1995, the Labour Party committed to holding a pre-legislative two-question referendum on establishing a Scottish Parliament with tax-varying powers.[38] Two years later, the Labour Party won the 1997 UK general election.

A White Paper, Scotland's Parliament (Cmnd 3658), set out government policy in more detail.[39] Government papers later released by the National Archives revealed concerns following media speculation "over whether the Scottish Parliament would be able to hold a referendum on independence" shortly before the White Paper was published. In an email to colleagues, Pat McFadden, an adviser to Tony Blair, wrote that:

> The reserved powers model means that the Scottish Parliament will have the power to legislate on anything not in the reserved list. Therefore it can have referendums on anything it wants, even if it cannot enact the result [...] Donald [Dewar]'s view is that the Scottish parliament can have a referendum on whatever it likes, even matters outside its competence, which is in line with the logic of the White paper. The only way to stop this would be to insert what would be called a glass ceiling – to put forward a measure in the [Scotland] Bill that the Scottish parliament could only hold referendums on matters within its competence.[40]

The Referendums (Scotland and Wales) Bill was introduced in the House of Commons on Thursday 15 May, the first Bill of the new Labour government, and received Royal Assent on 31 July 1997.

The Referendum (Scotland and Wales) Act 1997 made legal provision for a non-binding referendum. Unlike the Scotland Act 1978, it did not include an electoral threshold. Ballot papers for the referendum, which was held on 11 September 1997, read as follows:

> I agree there should be a Scottish Parliament
>
> or
>
> I do not agree there should be a Scottish Parliament
>
> and
>
> I agree that a Scottish Parliament should have tax-varying powers

38 See James Mitchell, "The Evolution of Devolution: Labour's Home Rule Strategy in Opposition", Government and Opposition 33:4, 1998, pp479-96

39 See Commons Library Research Paper 98/1, The Scotland Bill: Devolution and Scotland's Parliament

40 "A referendum was in Scotland's gift, Blair's Labour believed", The Times (£), 14 July 2021

> or
>
> I do not agree that a Scottish Parliament should have tax-varying powers

74% of voters agreed there should be a Scottish Parliament, while 63% agreed it should have tax-varying powers. The turnout was 60.4%.[41] Following the referendum, the UK government proceeded to legislate for a devolved Scottish Parliament with tax-varying powers.

The Scotland Bill was published in December 1997 and received its second reading in the Commons on 12 and 13 January 1998.[42] This gave effect, with no substantial changes, to proposals in the earlier White Paper.

In contrast to the Claim of Right's assertion of Scottish popular sovereignty, the Scotland Bill included a conventional statement of Westminster's legislative supremacy, that the devolved parliament's legislative power would "not affect the power of the Parliament of the United Kingdom to make laws for Scotland".

3.1 Legislative competence

The question of whether the new Scottish Parliament would be able to hold a referendum on independence was discussed as the Scotland Bill made its way through both Houses of Parliament.

Clause 28 on "legislative competence" was debated in the Commons on 12 May 1998. Donald Dewar, the then Secretary of State for Scotland, was questioned by Michael Ancram and Dominic Grieve, both Conservative MPs, who asked if an independence referendum would be within the new parliament's competence.

Dewar replied that "constitutional change—the political bones of the parliamentary system and any alteration to that system—is a reserved matter. That would obviously include any change or any preparations for change." Dewar also stated that the SNP could not "find a vehicle" for "taking Scotland out of the United Kingdom" in "the machinery laid down in this legislation".[43]

When further clarification was sought, Dewar stated that:

> A referendum that purported to pave the way for something that was ultra vires is itself ultra vires. That is a view that I take, and one to which I will hold. But, as I said, the sovereignty of the Scottish people, which is often prayed in aid, is still there in the sense that, if they vote for a point of view, for change,

41 See Commons Library Research Paper 97-113, Results of Devolution Referendums 1979 & 1997

42 For a full analysis of the Scotland Bill as introduced, see C. M. G. Himsworth and C. R. Munro, Devolution and the Scotland Bill, Edinburgh: W. Green, 1998

43 HC Deb 12 May 1997 Vol 312 c257

> and mean that they want that change by their vote, any elected politician in this country must very carefully take that into account.[44]

Here Dewar appeared to be suggesting that if, at some future point, a majority of parliamentarians committed to independence were elected,[45] then the UK government and parliament would be compelled to respond to that, perhaps by altering the devolution settlement. Questioned by Alex Salmond, Dewar made this point again, saying that "the way in which he [Salmond] progresses his cause [...] is by trying—I believe in vain—to persuade people to vote for candidates who are committed to his point of view".[46]

To summarise: Dewar was clear that an independence referendum would **not** be legal under the terms of the Scotland Bill, but he also believed that UK parliamentary sovereignty could (in political practice if not in law) be overtaken by a clear political statement of the "sovereignty of the Scottish people".

3.2 Reserved matters

Reserved matters under the Bill were debated in the Commons on 19 May 1998.[47] Initially, the Scotland Bill simply stated that "The Constitution" was to be reserved, but the government moved an amendment (No. 73) to clarify that only certain "aspects" of the constitution were to be reserved, including:

> (a) the Crown, including succession to the Crown and a regency,
>
> (b) the Union of the Kingdoms of Scotland and England,
>
> (c) the Parliament of the United Kingdom [...]

This amendment was discussed alongside another (No. 58), in the name of Conservative MP Michael Ancram. This stated that:

> Paragraph 1 does not preclude the holding by the Scottish Executive of a referendum on any reserved matter, provided that the decision to hold such a referendum has been approved by a resolution of each House of Parliament.

Henry McLeish, a Scottish Office minister, explained that the government's amendment was intended to make clear that the reservation did not include local government or the courts. "The other matters listed are a central

44 HC Deb 12 May 1997 Vol 312 c257

45 As they were in 2011. It is not entirely clear whether Dewar was referring to Scottish seats at Westminster or the Scottish Parliament to be

46 HC Deb 12 May 1997 Vol 312 c258

47 See Commons Library Briefing Paper CBP8544, Reserved matters in the United Kingdom, for a full analysis of reserved matters, not only in Scotland but in Wales and Northern Ireland

feature of the constitution", he added, "and are required to be reserved to preserve the integrity of the United Kingdom."[48]

Michael Ancram described his amendment (which was not passed) as "a probing one", which would "allow the Scottish Parliament to apply to this Parliament as the custodian of the constitution, which is how I understand the Bill, for permission" to hold a referendum on any reserved matter. Ancram was not satisfied with Donald Dewar's previous reassurances, remarking that the "jungle" had become "thicker".[49]

The Labour MP Tam Dalyell also wanted clarification. He predicted that "Sooner rather than later there will inevitably be a referendum on the question of independence. Therefore, we should clear up the issue of who has the power to initiate it."[50]

In his contribution to the debate, the SNP MP Alex Salmond said he had received reassurances from Donald Dewar, publicly and privately, that the Scotland Bill would contain no "glass ceiling" which prevented Scotland becoming independent at some point in the future.[51] This had been considered important in terms of getting SNP "buy in" for devolution during the cross-party referendum campaign.[52] On 24 July 1997 Dewar had stated:

> If I did try to build such barriers, they would be futile and without effect. At the end of the day, in practical politics, what matters is what people want. If the hon. Gentleman is able to carry the people of Scotland, no doubt he will be able to advance his cause.

Salmond interpreted this as meaning that the UK government "envisaged a devolved Parliament within the state of the United Kingdom, but the sovereign right of the Scottish people to choose to change that arrangement, if they so wished, was upheld".[53] He also quoted Dewar on 4 June 1997, saying that:

> when it comes—if it ever does—to the point where he wishes to implement a specific constitutional scheme, he should put that to the people of Scotland in a single-question referendum to get it endorsed.[54]

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48 HC Deb 19 May 1998 Vol 312 c789. The 1997 White Paper, Scotland's Parliament, had used similar language in stating that the "Government believe that reserving power in these areas will safeguard the integrity of the UK" (para 3.4).

49 HC Deb 19 May 1998 Vol 312 cc791-92

50 In earlier Commons debates, Dalyell would describe devolution as a "motorway without exit to a destination that may not have been intended" (31 July 1997) and the Scotland Bill as "the paving Bill for the dissolution of the United Kingdom" (12 January 1998)

51 Speaking in May 1998, Alex Salmond believed the most important challenge for the SNP was "to build a majority in the Scottish parliament" to allow a referendum to take place. He believed a referendum would be legal so long as it was not set up by an Act of the Scottish Parliament (Peter MacMahon, "Lib Dems split over ballot on breakaway", Scotsman, 19 May 1998).

52 See David Torrance, Salmond: Against the Odds, Edinburgh: Birlinn, 2015, pp125-27

53 HC Deb 19 May 1998 Vol 312 c794

54 In 1997, Dewar had told the Herald newspaper that the "only way in which we could move to independence would be if people voted for independence. That is clearly their right and I would not wish to deny them their right" (Herald, 16 May 1997)

Jim Wallace, the then Scottish Liberal Democrat leader, said it was clear the Scottish Parliament established by the Bill could not "claim independence for Scotland", the Union clearly being a reserved matter. But, he added:

> We run into difficulty on whether there can be a referendum on a reserved matter. The notorious—or famous—clause 28 states that an Act of the Scottish Parliament would not be law so far as the Act related to a reserved matter. The question is whether a reserved matter in this case is the Union between Scotland and England or—if it were an advisory referendum—the holding of referendums. If it is the latter, I do not see any problem.

At the end of the day, added Wallace, "that might be a matter for the courts to interpret. That is why it would be better if the matter were cleared up in the Bill."[55] He later concurred with Dewar and Salmond in stating that:

> At every election in Scotland—general elections and Scottish elections—we have a referendum on whether the people of Scotland want independence. At the most recent general election, the overwhelming majority rejected independence, and I believe that they will do so again. If the Scottish National party managed to get a majority of votes, it would have a mandate to hold a referendum and put the case for independence.[56]

Summing up the debate, Henry McLeish said that in previous exchanges the Secretary of State for Scotland had "captured the essence of linking the sovereignty of the people to the constitutional underpinning that forms the core of the Bill".[57]

House of Lords debate

The Scotland Bill was read for a second time in the House of Lords on 18 June 1998.

In response to Lord Campbell of Croy's prediction that there would be an early referendum on independence, Lord Hardie, the then Lord Advocate said: "With respect to the noble Lord, that is not so. The present Government have no plans for such a referendum, nor can the Scottish parliament legislate for such a referendum."[58]

On this basis, the UK government rejected clarifying amendments at the Bill's committee stage in the House of Lords, including from Lord Rowallan on 21 July 1998. Lord Sewel, a Scottish Office minister, said he wished:

> the Committee to be in no doubt that as the Bill stands the Scottish parliament will not be able to legislate to hold a referendum on independence as the union of the kingdoms is already a reserved matter under Schedule 5. Explicit reference along the lines proposed by the noble Lord, Lord Rowallan, is just not needed. In determining what relates to a reserved matter, the government amendments tabled to Clause 28 are of help here, because they indicate that

55 HC Deb 19 May 1998 Vol 312 c802
56 HC Deb 19 May 1998 Vol 312 c804
57 HC Deb 19 May 1998 Vol 312 c806
58 HL Deb 18 June 1998 Vol 590 c1787

> we must look at the purpose of what is being done. If the parliament passed an Act to hold a referendum about whether the Union should continue, it would thus clearly be legislating in relation to the reserved matter of the Union. Any such Act would be about the continuation of the Union and it would therefore be beyond the parliament's competence and would not be law.[59]

Lord Rowallan was satisfied with this explanation and withdrew his amendment. Lord Mackay of Drumadoon (the then Conservative shadow Lord Advocate and subsequently a Court of Session judge) was unconvinced. He believed that:

> it would be perfectly possible to construct a respectable legal argument that it was within the legislative competence of the Scottish parliament to pass an Act of Parliament authorising the executive to hold a referendum on the issue of whether those who voted in Scotland wished Scotland to be separate from the UK. It would be perfectly possible to construct an argument that it would assist members of the Scottish parliament in the discharge of their devolved legislative and executive duties to be aware of the thinking of Scottish people on that very important issue [...]

Lord Mackay added that he remained "convinced that the law on this matter should be clarified. If it is not then the festering issue as to whether the Scottish parliament is competent to hold such a referendum will rumble on."[60]

Lord Sewel also stated that in interpreting what was meant by "relates to", it was "intended that the courts should rely upon the respection doctrine which they developed in dealing with cases arising from the Commonwealth constitutions and the Government of Ireland Act 1920". He quoted Lord Atkin in *Gallagher v Lynn* (1937):

> It is well established that you ought to look at the true nature and character [...] the pith and substance of the legislation. If, on the view of the statute as a whole, you find that the substance of the legislation is within the express powers, then it is not invalidated if incidentally it affects matters which are outside the authorised field.[61]

Clause 28(5) therefore provided that "a provision does not relate to reserved matters merely because it makes provision for purposes relating to devolved matters which incidentally affects reserved matters". Government amendment No 153 also required the courts "to have regard, among other things, to its effect in all the circumstances". Lord Sewel stated that:

> Whether the effect of a provision on reserved matters is minor or significant, if it is to be within the powers of the Scottish parliament it must in every case satisfy the test that its purpose is a devolved one. The Gallagher case which I mentioned earlier provides a very good illustration of how substantial an incidental effect can be. Northern Irish legislation about milk was found to be for the lawful purpose of promoting the health of the inhabitants of the

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59 Lord Sewel was equally clear that the Scottish Parliament, unlike the National Assembly for Wales, would possess "legislative competence" to arrange for a referendum "on a devolved matter" (HL Deb 21 July 1998 Vol 592 c854)

60 HL Deb 21 July 1998 Vol 592 c854

61 HL Deb 21 July 1998 Vol 592 c854

> Province, even though it had a substantial effect upon the reserved matter of cross-border trade by preventing such trade in milk.[62]

But as Lord Clyde stated during Lords proceedings, "purpose" was "not the same as the pith and substance" of a provision. Thus the wording around "its effect in all the circumstances" acted to urge the courts "to range as widely as is necessary in order to arrive at a proper understanding" of a provision's "purpose".[63] The pith and substance approach proved unnecessary because, as Lord Hope later observed, "the Scotland Act provides its own dictionary".[64]

At the Scotland Bill's report stage in the Lords, the government inserted a new clause (which became s101 of the Scotland Act 1998) intended to provide a further interpretive steer to the courts in determining, as Lord Sewel had mentioned, what "relates to" a reserved matter. Its assumption was that the courts would use this to give effect to Acts of the Scottish Parliament, where possible, rather than invalidate them.

Lord Hardie gave an illustrative example on 28 October 1998:

> An Act of the Scottish parliament might make general provision enabling the Scottish ministers to hold a referendum on any matter.[65] It would be possible to read that Act as enabling Scottish ministers to hold a referendum on some reserved matters such as independence or the monarchy. The Act would be ultra vires to that extent. However, in order to preserve the validity of that Act, the new clause would require the courts to read the Act as narrowly as is required for it to be intra vires, so far as it is possible to do so. In other words, the courts will be required to read the Act of the Scottish parliament as enabling only the holding of referendums on matters within the competence of the parliament. In that way, the Act is not rendered ultra vires to any extent.

Lord Hardie called this "the principle of efficacy":

> However, if a provision can clearly only be read as making provision outwith competence—for example, an Act of the Scottish parliament providing only for a referendum on independence or the monarchy—the new clause will not enable or require it to be read as being within competence.[66]

Parliamentary debates on the Scotland Bill suggest that the then UK government did not intend to be ambiguous. It believed that the reservation of the "Union of the Kingdoms of Scotland and England" and "the Parliament of the United Kingdom" prevented the Scottish Parliament from enacting legislation, the purpose of which would be to end the monarchical or parliamentary unions of 1707. Some MPs and peers, however, disagreed.

The legal academic Andrew Tickell believed that analysis of parliamentary proceedings in 1997-98 clearly strengthened "the case of those who argue

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62 HL Deb 21 July 1998 Vol 592 cc818-20

63 Alan Page, p126

64 *Martin v Most* [2010] UKSC 10

65 It later did so with the Referendums (Scotland) Act 2020, see **Section 6.5**

66 HL Deb 28 October 1998 Vol 593 c1953

such a referendum would be unlawful, but with too many inconsistencies and ambivalences to answer the matter conclusively".[67]

Here, case law could be relevant. *Pepper (Inspector of Taxes) v Hart* established that when, and to the extent that, primary legislation is ambiguous, the courts may refer to statements made in the Commons and Lords to aid the task of interpreting the meaning of legislation, although any statements relied upon had to be themselves unambiguous.[68]

3.3 Pertinent provisions of the 1998 Act

The Scotland Act 1998 received Royal Assent on 19 November 1998. The Scottish Parliament it established is not a sovereign body. It is, as the late Lord Rodger put it "a body which – however important its role – has been created by statute and derives its powers from statute".[69] Its powers, therefore, are limited by the 1998 Act.

Important for consideration of the legality of an independence referendum, therefore, are Sections 28-33, 35 and 101 of the Act, as well as Schedules 4-6 (all as amended in 2012 and 2016).

Section 28

> (7) This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.
>
> (8) But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.

Section 28(7) has been viewed as an orthodox expression of UK parliamentary sovereignty. The 1997 White Paper had also stated that Westminster would "remain sovereign in all matters" and was "choosing to exercise that sovereignty by devolved legislation responsibilities to a Scottish Parliament without in any way diminishing its own powers".[70]

The courts have upheld this view, including the United Kingdom Supreme Court in *R (Miller) v Secretary of State for Exiting the European Union* (2017),[71] and in the *Scottish Continuity Bill Reference* (2018).[72]

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67 Andrew Tickell, "The Technical Jekyll and the Political Hyde" in Aileen McHarg et al (eds), The Scottish Independence Referendum: Constitutional and Political Implications, Oxford: Oxford University Press, 2016, 337

68 *Pepper (Inspector of Taxes) v Hart* [1992] UKHL 3

69 *Whaley v Watson* [2000] SC 125

70 See para 4.2

71 *Miller v Secretary of State for Exiting the European Union* [2017] UKSC 5

72 [2018] UKSC 64

Section 28(8) was inserted by the Scotland Act 2016 as a statutory (but legally unenforceable) expression of the Sewel Convention, that Westminster would "not normally" legislate in devolved areas without the consent of the Scottish Parliament. A similar convention had applied to the Parliament of Northern Ireland between 1921 and 1972 but received no statutory recognition.[73]

Section 29

> Legislative competence
>
> (1) An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament.
>
> (2) A provision is outside that competence so far as any of the following paragraphs apply— [...]
>
> (b) it relates to reserved matters,
>
> (c) it is in breach of the restrictions in Schedule 4 [...]
>
> (3) For the purposes of this section, the question whether a provision of an Act of the Scottish Parliament relates to a reserved matter is to be determined, subject to subsection (4), by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances [...]

Himsworth and Munro believed this section to be "not without difficulties", predicting in 2000 that the "interpretation of legislation bridging the reserved and devolved areas will certainly be problematic".[74]

Section 30

> Legislative competence: supplementary
>
> (1) Schedule 5 (which defines reserved matters) shall have effect.
>
> (2) Her Majesty may by Order in Council make any modifications of Schedule 4 or 5 which She considers necessary or expedient [...]

This allows for a Statutory Instrument[75] to be made under s30 of the 1998 Act. As the Calman Commission explained in its 2009 report:

> Such an Order may extend the competence of the Scottish Parliament into a new area of responsibility currently reserved, or add an area to the list of reserved matters, thus taking it out of the Parliament's control or preventing it coming within that control in the first place. The Order can modify the

[73] See David Torrance, "100 years of the Government of Ireland Act: how it provided a model for Westminster-Edinburgh relations", Constitution Unit blog, 22 December 2020

[74] C. M. G. Himsworth and C. R. Munro, The Scotland Act 1998 (second edition), Edinburgh: W. Green, 2000, p40

[75] See Commons Library Briefing Paper CBP6509, Statutory Instruments

> provisions of Schedule 4, which restrict the competence of the Scottish Parliament to legislate, or of Schedule 5, which list the reserved matters.[76]

Section 30 Orders can be initiated either by the Scottish or UK parliaments, but can only become law with the agreement of both.[77]

Section 31

> Scrutiny of Bills for legislative competence and protected subject-matter
>
> (1) A person in charge of a Bill shall, on or before introduction of the Bill in the Parliament, state that in his view the provisions of the Bill would be within the legislative competence of the Parliament.
>
> (2) The Presiding Officer shall, on or before the introduction of a Bill in the Parliament, decide whether or not in his view the provisions of the Bill would be within the legislative competence of the Parliament and state his decision [...]

Rule 9.3 on "Accompanying documents" of the Scottish Parliament's standing orders also deals with this procedure. The Scottish Government is not obliged to withdraw or change legislation that the Presiding Officer declares incompetent. This occurred, for example, with the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill (known as the Scottish Continuity Bill).

Section 32

> Submission of Bills for Royal Assent
>
> (1) It is for the Presiding Officer to submit Bills for Royal Assent.
>
> (2) The Presiding Officer shall not submit a Bill for Royal Assent at any time when—
>
> (a) the Advocate General, the Lord Advocate or the Attorney General is entitled to make a reference in relation to the Bill under section 32A or 33,
>
> (b) any such reference has been made but has not been decided or otherwise disposed of by the Supreme Court, or
>
> (c) an order may be made in relation to the Bill under section 35 [...]
>
> (3) The Presiding Officer shall not submit a Bill in its unamended form for Royal Assent if—
>
> (a) the Supreme Court has decided that the Bill or any provision of it would not be within the legislative competence of the Parliament [...]

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[76] Commission on Scottish Devolution, Serving Scotland Better: Scotland and the United Kingdom in the 21st Century, June 2009

[77] See Commons Library Briefing Paper CBP8738, Scottish Devolution: Section 30 Orders

Section 33

> Scrutiny of Bills by the Supreme Court (legislative competence)
>
> (1) The Advocate General, the Lord Advocate or the Attorney General may refer the question of whether a Bill or any provision of a Bill would be within the legislative competence of the Parliament to the Supreme Court for decision [...]

Such a reference has to take place within a four-week period from the Bill's passing. It can be made by one or more of the Lord Advocate or the Advocate General for Scotland and the Attorney General for England and Wales. It is possible for referrals to be made jointly by the UK and Scottish law officers.

Section 33 was designed as a deliberate grace period which anticipated disagreements between the UK and Scottish governments. If the Supreme Court decides that a Bill or a section thereof is not within competence, then under s32(3) it must not be submitted for Royal Assent in unamended form. S36(4), (5) sets out the procedure for submission in amended form.

The section 33 reference power has been described by the Supreme Court as one of three "pre-enactment safeguards" built into the Scotland Act, the other two being found in section 31. Two involve parliamentary scrutiny of what is stated when a Bill is introduced to the Scottish Parliament, and the other judicial scrutiny once a Bill has been passed.

Section 35

> Power to intervene in certain cases
>
> (1) If a Bill contains provisions— [...]
>
> (b) which make modifications of the law as it applies to reserved matters and which the Secretary of State has reasonable grounds to believe would have an adverse effect on the operation of the law as it applies to reserved matters, he may make an order prohibiting the Presiding Officer from submitting the Bill for Royal Assent [...]

This has been called the Secretary of State for Scotland's "veto" power, although the Memorandum of Understanding refers to the use of section 35 as "very much as a matter of last resort". An "adverse effect on" is also much narrower than whether something "relates to" a reserved matter. Neither this, nor its equivalents in Welsh and Northern Ireland devolution legislation, have ever been used.[78]

Section 101

> Interpretation of Acts of the Scottish Parliament etc

[78] Alan Page, p216

> (1) This section applies to—
>
> (a) any provision of an Act of the Scottish Parliament, or of a Bill for such an Act, and
>
> (b) any provision of subordinate legislation made, confirmed or approved, or purporting to be made, confirmed or approved, by a member of the Scottish Government, which could be read in such a way as to be outside competence.
>
> (2) Such a provision is to be read as narrowly as is required for it to be within competence, if such a reading is possible, and is to have effect accordingly [...]

Section 101 provides the courts with an interpretive steer when assessing whether a legislative provision is beyond devolved competence. Where it is necessary to interpret provisions more restrictively in order that they are within competence, that narrower interpretation will be preferred over another that would place the provision beyond competence.

Section 107

The constitutional expert Robert Hazell has called Section 107 of the 1998 Act a "safety valve" in that it enables:

> the UK government to repeal by subordinate legislation acts of the Scottish parliament which it deems to be ultra vires. The consent of the Scottish parliament is not required; the subordinate legislation is subject only to negative resolution at Westminster.[79]

What Hazell called an "extraordinary power" has only been used once, to repeal part of the Regulation of Care (Scotland) Act 2001, which purported to amend provisions for two tax incentives in the UK Finance Act 2000.

Schedule 4

> Part I The protected provisions
> Particular enactments
>
> 1(1) An Act of the Scottish Parliament cannot modify, or confer power by subordinate legislation to modify, any of the following provisions.
>
> (2) The provisions are—
>
> (a) Articles 4 and 6 of the Union with Scotland Act 1706 and of the Union with England Act 1707 so far as they relate to freedom of trade [...]
>
> The law on reserved matters
>
> 3(1) Paragraph 2 does not apply to modifications which—

[79] Robert Hazell, "Out of Court: Why Have the Courts Played No Role in Resolving Devolution Disputes in the United Kingdom?", Publius: The Journal of Federalism 37:4, 2007, pp578-98

> (a) are incidental to, or consequential on, provision made (whether by virtue of the Act in question or another enactment) which does not relate to reserved matters, and
>
> (b) do not have a greater effect on reserved matters than is necessary to give effect to the purpose of the provision [...]
>
> This Act
>
> 4(1) An Act of the Scottish Parliament cannot modify, or confer power by subordinate legislation to modify, this Act [...]

Schedule 4 prevents the Scottish Parliament from modifying certain UK Acts of Parliament, regardless of whether or not their subject matter is devolved or reserved.[80] It similarly "entrenches" (most of) the 1998 Act itself. Nor can the Scottish Parliament amend or repeal "the law on reserved matters", i.e. the "law about reserved matters rather than law that applies or may apply to reserved matters" (see Schedule 5 below).[81]

This restriction is subject to exceptions, one of which allows the Scottish Parliament to make modifications which are "incidental to, or consequential on" provision which does not "relate to" reserved matters, in other words minor modifications necessary to give effect to a piece of devolved legislation. However, as Professor Alan Page has observed, there must "come a point" at which "the effect on reserved matters is so great as to call into question whether the provision's purpose is indeed a devolved one".[82]

Schedule 5

> Reserved matters
> Part I General reservations
> The Constitution
>
> 1 The following aspects of the constitution are reserved matters, that is—
>
> (a) the Crown, including succession to the Crown and a regency,
>
> (b) the Union of the Kingdoms of Scotland and England,
>
> (c) the Parliament of the United Kingdom [...]

Part 2 sets out "specific reservations", including Para B3 which reserves to Westminster the possibility of making legislative provision in respect of:

> The combination of (a) polls at elections or referendums that are outside the legislative competence of the Parliament with polls at (i) elections for membership of the Parliament, or (ii) local government elections in Scotland.

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80 With any other UK legislation, the Scottish Parliament can amend provisions provided they are not specifically reserved under Schedule 5 of the 1998 Act

81 Alan Page, p120

82 Alan Page, p127

By necessary implication, this means that the Scottish Parliament **is** empowered to make provision in respect of referendums that **are** clearly within the legislative competence of the Parliament.

Schedule 6

> Devolution issues
> Part I Preliminary
>
> 1 In this Schedule "devolution issue" means—
>
> (a) a question whether an Act of the Scottish Parliament or any provision of an Act of the Scottish Parliament is within the legislative competence of the Parliament [...] (f) any other question about whether a function is exercisable within devolved competence or in or as regards Scotland and any other question arising by virtue of this Act about reserved matters [...]

The Explanatory Notes for the Scotland Act 1998 state that the questions "swept up into" sub-paragraph 1(f) can arise:

> in various circumstances. For example, there could be a question whether Her Majesty is making an Order in Council within devolved competence (see note on section 118) or whether a function is exercisable "in or as regards Scotland" so that it may transfer by an order under section 63 or whether a public body is a Scottish public authority whose functions are exercisable only "in or as regards Scotland" (see definition in section 126(1)) or whether the functions of a body relate to a reserved matter (see section 126(3)).[83]

Paragraph 34 of Schedule 6 states that:

> The Lord Advocate, the Attorney General, the Advocate General or the Advocate General for Northern Ireland may refer to the Supreme Court any devolution issue which is not the subject of proceedings.[84]

The court in which a question on a "devolution issue" may be raised at the first instance is not determined by the 1998 Act. In addition to the law officer route set out in s33, action can be initiated in the Court of Session by anyone with sufficient interest to bring proceedings.

3.4 Constitutional academics

Between 1998 and 2000 several constitutional academics expressed a view as to the legality of an independence referendum. Colin Munro, Professor of Constitutional Law at the University of Edinburgh, was quoted by the

83 Scotland Act 1998 Explanatory Notes, Schedule 6 Part 1

84 The Explanatory Notes for Schedule 6 para 34 states that this "power enables the Law Officers to refer any vires question to the Judicial Committee if it is not already the subject of a judicial dispute"

Scotsman in 1998 as saying there "is nothing to stop the parliament arranging to hold a referendum, because that would not involve a change in the law".[85]

In 1999, the legal academic Mark D. Walters wrote that:

> a consultative referendum – even on secession – would not conflict with the policy of the [Scotland] Act so long as its purpose is to assist the Scottish Parliament in determining the democratic will of the electorate.[86]

And in an article published in 2000, Professor Neil MacCormick stated that:

> The Scottish Executive has unlimited powers to negotiate with the Westminster government about any issues which could be the subject of discussion between them, therefore it could seek an advisory referendum.[87]

Writing in 1998, Professor Rodney Brazier had disagreed. While he believed the Scottish Parliament could legislate for a referendum on devolved matters, it would be "ultra vires its powers to legislate for a referendum on independence".[88]

2 Canadian Clarity Act

The Clarity Act, 2000, is legislation passed by the Parliament of Canada which established the conditions under which the Government of Canada would negotiate the secession of a Canadian Province.

A response to the 1995 Quebec referendum, its provisions were based on the 1998 secession reference to the Supreme Court of Canada.

The Supreme Court ruled that Quebec could not declare independence unilaterally and that any obligation on Canada to negotiate with Quebec was conditional upon sovereigntists asking a clear question in a referendum.

85 Scotsman, 11 March 1998

86 Mark D. Walters, "Nationalism and the pathology of legal systems considering the Quebec secession reference and its lessons for the United Kingdom", Modern Law Review 62:3, 1999, p387

87 Neil MacCormick, "Is there a constitutional path to Scottish independence?", Parliamentary Affairs 53:4, 2000, p726

88 Rodney Brazier, "The Constitution of the United Kingdom", Cambridge Law Journal 58:1, March 1999, pp96 & 107

4 Referendum proposals, 1999-2010

The first elections to the Scottish Parliament took place in May 1999. Following that election, Labour and the Liberal Democrats formed the first coalition Scottish Executive. The Scottish National Party became the principal opposition party.

SNP policy on achieving independence evolved during this period. As already mentioned, its historic position had been that a majority of seats in the new parliament (or a majority of Scottish constituencies at Westminster) would constitute a "mandate" for independence negotiations. The party's 1999 manifesto, however, stated that:

> Scotland is the process of independence – and the Parliament is a vital part of that process. The process will only end with independence within the European Union. In Government an SNP administration will hold a referendum on independence within the first four years of the Parliament.[89]

This only became formal SNP policy in 2000, shortly before Alex Salmond resigned as party leader.[90]

Labour and the Liberal Democrats formed a second coalition Scottish Executive following elections in 2003. In 2005, the SNP – once again led by Alex Salmond – published Raising the Standard, a consultation paper on independence.[91] This was followed by a two-page Draft Referendum Bill in 2006. On the basis that the SNP became the largest party in 2007, this was to ask all adult residents in Scotland if they agreed that:

> The Scottish Parliament (led by Executive ministers) should negotiate a new settlement with the British Government so that Scotland becomes a sovereign and independent state.[92]

At this stage, the SNP did not discuss the legality of such a referendum.

4.1 2007 Holyrood election

The 2007 SNP manifesto included the following pledge:

89 Scotland's Party: Manifesto for the Scotland's Parliament 1999 Election, SNP: Edinburgh, p10

90 David Torrance, p156

91 See "Salmond's independence blueprint; SNP leader tells what he would do if his party wins in 2007", The Herald, 29 November 2005

92 See "SNP pledges independence vote", Scottish Sunday Express, 9 April 2006

> Publication of a White Paper, encompassing a Bill, detailing the concept of Scottish independence in the modern world as part of preparations for offering Scots the opportunity to decide on independence in a referendum, with a likely date of 2010.[93]

At that election, the SNP emerged as the largest single party by one seat. When negotiations with the Scottish Liberal Democrats failed to produce an agreement,[94] SNP leader Alex Salmond decided to form a minority administration.

In August 2007, the First Minister and his deputy, Nicola Sturgeon, published a White Paper entitled Choosing Scotland's Future: A National Conversation. In a foreword, Alex Salmond stated that:

> We in the Scottish Government are ambitious for the future of Scotland. We also believe that sovereignty in our country lies with its people. As a sovereign people, the people of Scotland – and we alone – have the right to decide how we are governed.

The White Paper went on to argue that the Acts of Union had not removed "from the people of Scotland their fundamental political right to determine their own constitutional future", adding that Ireland and "the countries of the former British Empire chose to move to independence from similar constitutional arrangements".[95] It envisaged "an overall agreement" between the UK and Scottish governments, "enshrined in legislation enacted at both Westminster and Holyrood".[96] The United Kingdom of Great Britain and Northern Ireland would become "a monarchical and social Union – United Kingdoms rather than a United Kingdom – maintaining a relationship first forged in 1603 by the Union of the Crowns".[97]

The White Paper also stated that a:

> referendum could be held under the authority of an Act of the Scottish Parliament, depending on the precise proposition in the referendum Bill, or any adjustments made to the competence of the Parliament before the Bill is introduced. Legislation for a referendum could also be passed by the United Kingdom Parliament, most likely consulting the Scottish Parliament for its views.[98]

One other option would "empower the Scottish Parliament and Scottish Government (or the Parliament alone) to call for a referendum at a time of its choosing, rather than relying on Scottish or United Kingdom Ministers to bring

93 Manifesto 2007, Edinburgh: Scottish National Party, p15
94 The Scottish Liberal Democrats refused to agree to a referendum on independence
95 Para 3.3
96 Para 3.16
97 Para 3.25
98 Para 5.9

forward proposals", similar to a mechanism in the Government of Wales Act 2006.[99]

The White Paper included a draft Referendum (Scotland) Bill. Like its 2006 predecessor, this was intended to provide the Scottish Government with "an explicit mandate to negotiate" independence following a referendum. While it acknowledged that, at present, "the constitution is reserved", the Scottish Government believed it was "arguable that the scope of this reservation does not include the competence of the Scottish Government to embark on negotiations for independence with the United Kingdom Government".

A proposed form of ballot paper was also included:

> The Scottish Parliament has decided to consult people in Scotland on the Scottish Government's proposal to negotiate with the Government of the United Kingdom to achieve independence for Scotland:
>
> Put a cross (X) in the appropriate box

I AGREE that the Scottish Government should negotiate a settlement with the Government of the United Kingdom so that Scotland becomes an independent state.

OR

I DO NOT AGREE that the Scottish Government should negotiate a settlement with the Government of the United Kingdom so that Scotland becomes an independent state.

Scottish Labour Party policy

The Scottish Labour Party, then led by Wendy Alexander, initially opposed the idea of a referendum on independence, but in May 2008 press reports suggested that she and Prime Minister Gordon Brown were "considering" support. Interviewed by the BBC, Ms Alexander said:

> Of course, there have been tactical discussions on these issues. The SNP appear to be toying with the electorate, saying 'we want this, it is the reason we came into politics, but by the way we are frightened to bring the matter forward'. I don't fear the verdict of the Scottish people. Bring it on.[100]

[99] Sections 103-106 of this made provision for a referendum on extending the then National Assembly's powers

[100] BBC News online, "'Bring on' referendum – Alexander", 4 May 2008

A few days later, the then Leader of the Opposition at Westminster, David Cameron, asked the Prime Minister if he agreed with Ms Alexander's remarks. Mr Brown replied:

> That is not what she has said [...] What the leader of the Labour party in Scotland was pointing to was the hollowness of the Scottish National Party, which said that it wanted independence, said that it wanted it immediately, and now wants to postpone a referendum until 2010-11. That is what she was pointing out. She was making it clear that what the Scottish National Party was doing was against its election manifesto.[101]

Scottish Labour spokespeople suggested there was no inconsistency in that Ms Alexander had not called for a referendum "now". The party said it still intended to pressure the Scottish Government to bring forward its Referendum Bill while suggesting an opposition Bill was also "an option".[102]

Wendy Alexander resigned as Scottish Labour leader on 28 June 2008.

In a November 2007 speech, Ms Alexander had proposed a cross-party Commission on Scottish Devolution. This was established in 2008 by the Scottish Parliament and UK government. The Commission published its first report in December 2008 and final recommendations in June 2009. Its terms of reference did not include consideration of independence or a referendum. One recommendation was that the Scottish Parliament could be permitted by Westminster to legislate on a one-off basis in relation to reserved matters, something Professor Alan Page called a "reverse Sewel".[103]

4.2 Your Scotland, Your Voice

In November 2009, the Scottish Government (as it was now known) published another White Paper, Your Scotland, Your Voice: A National Conversation. This reiterated material and arguments from the 2007 paper.

In addition to summarising responses to National Conversation, this White Paper argued that the:

> sovereignty of the people of Scotland could be recognised legally and constitutionally within the United Kingdom if the Scottish Parliament had full responsibility for determining its own functions and role, as well as its structure and elections, consulting either or both the Scottish people (by way of referendum) and the United Kingdom Parliament. There are precedents for such a model.[104]

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101 HC Deb 7 May 2008 Vol 475 c695-96

102 See "Gordon Brown snubs Wendy Alexander over referendum call", Daily Record, 8 May 2008

103 Alan Page, p117

104 Para 9.28

The paper referenced the 1931 Statute of Westminster as well as the 1989 Claim of Right.[105] It said the "next step" would be for the "whole of Scotland" to "give its view on the extension of the responsibilities of the Scottish Parliament".[106] A Referendum Bill was to be introduced early in 2010,[107] with a view to holding a referendum that November. The Scottish Government also said that were an opposition party to bring forward proposals for further devolution, then the referendum could include a further question, "even though the Scottish Government does not favour this option and will not campaign for it".[108]

4.3 Draft Referendum (Scotland) Bill consultation

In February 2010, the Scottish Government published Scotland's Future: Draft Referendum (Scotland) Bill Consultation Paper. This built upon the proposals outlined in its 2009 White Paper.

This observed that Acts of the Scottish Parliament had to conform with the provisions of the 1998 Act, though it noted that section 30 included the flexibility to extend its legislative powers:

> It is therefore legitimate for a referendum held under an Act of the Scottish Parliament to ask the people questions related to an extension of its powers insofar as this is within the framework of the Scotland Act.[109]

The consultation document also said the referendum would "be advisory, in that it will have no legislative effect",[110] although the Scottish Government "would expect the UK and Scottish Parliaments and the respective Governments to listen to the views of the Scottish people and act on them".[111]

Recognising that there were a range of views on Scotland's constitutional future, the consultation paper included two proposed ballot papers. The first consulted on a further transfer of powers to the Scottish Parliament (**Proposal 1**), either "devo max" or the Calman Commission proposals.

The second ballot paper (**Proposal 2**) differed from that in the 2009 White Paper and took the following form:

> Proposal 2 – Additional power to enable Scotland to become an independent country
>
> The Scottish Government proposes that, in addition to the extension of the powers and responsibilities of the Scottish Parliament set out in Proposal 1, the

105 Paras 9.13 & 10.4
106 Para 10.8
107 Para 10.23
108 Para 10.20
109 Para 1.26
110 Para 1.30
111 Para 1.32

Parliament's powers should also be extended to enable independence to be achieved.

Do you agree with this proposal?

Please put a cross (X) in one box only

YES, I AGREE	
OR	
NO, I DO NOT AGREE	

4.4 Referendum Bill progress

The Referendum (Scotland) Bill was never considered by the Scottish Parliament. In September 2010, the Scottish Government confirmed that it would not be introduced before the 2011 Holyrood election. With the Scottish Labour, Liberal Democrat and Conservative parties all having made clear they opposed such a Bill, the Scottish Government knew it was unlikely to progress if introduced.[112]

4.5 2011 Holyrood election

At the fourth elections to the Scottish Parliament on 5 May 2011, the SNP won an overall majority of seats (69 out of 129) with 44.7% of the vote. This was an unprecedented result given that the Additional Member electoral system had been intended to prevent any single party gaining a majority.

The SNP manifesto had referred to bringing forward "proposals to give Scots a vote on full economic powers through an independence referendum", later adding that:

> Independence will only happen when people in Scotland vote for it. That is why independence is your choice. We think the people of Scotland should decide our nation's future in a democratic referendum and opinion polls suggest that most Scots agree. We will, therefore, bring forward our Referendum Bill in this next Parliament.[113]

[112] See "Independence Referendum Bill to be delayed until after election", Press Association Scotland, 6 September 2010

[113] Scottish National Party Manifesto 2011, Edinburgh: Scottish National Party, pp3 & 28

Although the manifesto gave no indication of timescale, during the election campaign Alex Salmond had suggested a referendum would take place in the second half of the 2011-16 Scottish Parliamentary term.

Following the election, Prime Minister David Cameron appeared to accept that the Scottish Government possessed a "mandate" to hold an independence referendum:

> I passionately believe in our United Kingdom, so I congratulate Alex Salmond on his emphatic win, but I will do everything obviously as British prime minister to work with the first minister of Scotland, as I always do, and treat the Scottish people and the Scottish government with the respect they deserve. But on the issue of the United Kingdom, if they want to hold a referendum, I will campaign to keep our United Kingdom together, with every single fibre that I have.[114]

There was speculation that the Supreme Court might become involved in a dispute regarding legislative responsibility for an independence referendum. In May and June 2011, the new First Minister, Alex Salmond, criticised the Supreme Court's role in hearing certain Scottish appeals as well as its then Deputy President, Lord Hope.

Lord Hope noted in his diary that any "leverage" was:

> on the side of the UK Parliament, as the holding of a referendum on independence is very obviously a reserved matter under Schedule 5 to the Scotland Act. [Alex] Salmond's response is to say that his legal advice is to the contrary, without disclosing what that advice is. The issue could be referred to the Supreme Court, but I hope that this can be avoided. A ruling by us on these issues would add yet more to the impression of interference against the wishes of the Scottish people. The root of the problem is that the SNP, and Alec [sic] Salmond in particular, think and behave as if Scotland is already an independent country. That mind-set does not accept the rule of law, which is to the contrary.[115]

[114] BBC News online, "Scottish election: SNP majority for second term", 7 May 2011

[115] Lord Hope, Lord Hope's Diaries: UK Supreme Court…and Afterwards, 2009-2015, Edinburgh: Avizandum, 2019, p129. Diary entry for 21 January 2012.

5 Referendum negotiations, 2012-14

Following the 2011 Holyrood election there was renewed debate as to the prospect of an independence referendum given the SNP's manifesto pledge and the Prime Minister's apparent acceptance that it possessed a political mandate to proceed. Some argued that the Scottish Parliament should be responsible for a vote, others that Westminster should take the lead.[116] Consideration also turned to the legality of such a referendum.

5.1 A "fair, legal and decisive" referendum

In a television interview on 8 January 2012, the Prime Minister stated his intention to offer a "fair, legal and decisive" referendum on independence. Two days later, the then Secretary of State for Scotland, Michael Moore, proposed that the powers for a referendum could be devolved "under the section 30 order-making provisions in the Scotland Act 1998".[117]

3 Section 30 Orders

A section 30 Order is a type of subordinate or secondary legislation which is made under the Scotland Act 1998. It can be used to increase or restrict – temporarily or permanently – the Scottish Parliament's legislative authority. It does this by altering the list of "reserved powers" set out in Schedule 5, and/or the protections against modification set out in Schedule 4 of that Act.

Such Orders have been used several times since 1999. The most high-profile example was the Scotland Act 1998 (Modification of Schedule 5) Order 2013, which temporarily devolved authority to legislate for a Scottish independence referendum. This took place on 18 September 2014.

Section 30 Orders can be initiated either by the Scottish or UK Governments but require approval by the House of Commons, House of Lords, and the Scottish Parliament before becoming law. There are equivalent provisions in the Government of Wales Act 2006 and Northern Ireland Act 1998.

116 See BBC News online, "UK 'will not block' Scottish independence referendum", 8 May 2011

117 HC Debs 10 January 2012 Vol 538 c52

In a UK government consultation paper published the same day, Scotland's constitutional future, a foreword by David Cameron and Deputy Prime Minister Nick Clegg "openly acknowledged" the SNP's "significant electoral victory", but added "grave concerns" that the Scottish Government's referendum proposals "would not be lawful". Michael Moore added that it was necessary:

> for the Scottish Parliament to have the legal power to legislate, and authorise spending arrangements, for such a referendum. It is the view of the UK Government that the Scottish Parliament does not have that legal power. We have been asking the Scottish Government to explain its position since May last year, but the Scottish Government has not set out a formal view on the issue of legal competence nor come forward with any further proposals for a referendum.

The consultation paper also stated that in the UK government's view both the "purpose and effect" of the Scottish Government's 2010 draft Referendum Bill related "directly to the reserved matter of the Union of the Kingdoms of Scotland and England". A "referendum that called for the Scottish Parliament to be given powers to enable independence to be achieved" was "still a referendum about independence and so would be unlawful".

Therefore, it was also the UK government's view "that a legal challenge to the legislation would be very likely":

> Were the Scottish Government to request a joint referral to the Supreme Court we would of course consider that, but a better remedy to end uncertainty would be to ensure that the Scottish Parliament is given the powers to deliver the referendum in Scotland.[118]

This it said could be done via primary legislation at Westminster, either a standalone Bill or in an amendment to the Scotland Bill then before the House of Lords.[119] But as Michael Moore had already indicated, a s30 Order was Westminster's preferred approach. Speaking in the House of Commons, the Scottish Secretary said that:

> Given the clear legal problem that exists, we want to work with the Scottish Government to provide the answer. This is not about the mandates of Scotland's two Governments, or about who calls the shots. It is about empowering the people of Scotland to participate in a legal referendum. That means that the UK Government are willing to give the Scottish Parliament the powers to hold a referendum, which it cannot otherwise do legally.[120]

The UK government consultation included a draft s30 Order. This amended Schedule 5 of the 1998 Act so that it "does not reserve a referendum on the independence of Scotland from the rest of the United Kingdom" as long as certain requirements were met.[121]

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118 HM Government, Scotland's constitutional future, Cmnd 8203, 10 January 2012

119 This implemented many of the Calman Commission's and took effect as the Scotland Act 2012.

120 HC Debs 10 January 2012 Vol 538 c52

121 HM Government, Scotland's constitutional future

5.2 Scottish Government response

Two weeks later, the Scottish Government published its own consultation document, Your Scotland, Your Referendum. In a foreword, First Minister Alex Salmond stated that "Scotland is not oppressed and we have no need to be liberated". He said a single-question referendum would be held in the autumn of 2014.

The consultation paper maintained that the Scottish Parliament had "the power to legislate for a referendum as long as that would not change any reserved law or relate to those aspects of the constitution which are reserved by the Scotland Act 1998". It added that the referendum question proposed in 2010 had been "carefully phrased to comply with that requirement". The Scottish Government said much "independent legal opinion" supported its view but did not cite any sources or provide further legal analysis,[122] something later criticised by two UK parliamentary committees (see **Section 5.4**).

However, the Scottish Government said it was:

> ready to work with the UK Government to agree a clarification of the Scotland Act 1998 that would remove their doubts about the competence of the Scottish Parliament and put the referendum effectively beyond legal challenge by the UK Government or any other party.[123]

Its preference, like that of the UK government, was for a s30 Order as this would require the consent of the Scottish Parliament as well as Westminster, but the Scottish Government said it would "not accept the proposed imposition of conditions on the Section 30 order", such as those proposed in the UK government consultation paper, as "a matter of democratic principle".[124]

The consultation proposed the following question: "Do you agree that Scotland should be an independent country?"

Apparently acknowledging that this form of words would not be within the Scottish Parliament's legislative competence, the paper observed that:

> An adjustment of legislative competence under Section 30 of the Scotland Act 1998 would enable the Scottish Parliament to legislate for a referendum on the basis set out above. If the UK Government is unwilling to agree to such an adjustment without dictating unacceptable conditions, the Scottish Government will have the option of a referendum on the basis set out in paragraph 1.5.[125]

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122 Para 1.5. Para 1.6 asserted that a referendum on further powers or "devolution max" would also be "clearly within the existing powers of the Scottish Parliament"

123 Para 1.8

124 Para 1.9

125 Para 1.12

The consultation concluded with another Draft Referendum (Scotland) Bill.

5.3 Legal arguments

Legal arguments focused on whether referendum legislation would, having regard to its "purpose" and "effect", "relate to" a reserved matter.

Dr Cormac Mac Amhlaigh, a Lecturer in Public Law at the University of Edinburgh, observed that the Scottish Government's reading of s29 of the 1998 Act appeared to be a "narrow" one, in which "the purpose of such a provision would be to hold a referendum and there the analysis by the court would stop", its "effect in all the circumstances" being null in legal terms. The UK government, however, took a "broader level analysis" which argued that a referendum "should not be considered an end in itself, but rather an instrument to achieve a further goal", that of independence.[126]

Although the Scottish Government had indicated a willingness to negotiate the terms of a s30 Order with the UK government, it maintained that whether or not a referendum related to reserved matters depended upon how the question was asked and the nature of any legal consequences flowing from the outcome. It agreed with the UK government, however, that the Scottish Parliament could not unilaterally end the Union or pass legislation to that end.

UK government position

Lord Wallace of Tankerness, the Advocate General for Scotland, set out the UK government's thinking in a lecture at Glasgow University on 20 January 2012. He reiterated the consultation paper's view that any Act of the Scottish Parliament relating to a reserved matter was "not law". This, he argued, should be interpreted literally:

> So, of course, an Act to bring about the end of the Union would "relate to" the Union and bringing an end to it would be its purpose – it would be outside competence. What then, about a referendum on the Union? It seems to me that a referendum, "advisory", "consultative" or whatever, about the Union, would relate to the Union. That seems clear both as a matter of common sense, and on a straightforward reading of the plain words of the statute.[127]

Lord Wallace also observed that a referendum "is not merely an opinion poll" but "a form of political decision making, where a decision is best made directly by the public rather than by their representatives in Parliament". And

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126 Cormac Mac Amhlaigh, "…yes, but is it legal? The Scottish Independence Referendum and the Scotland Act 1998", UK Constitutional Law Association, 12 January 2012

127 This had not been Lord (Jim) Wallace's view during a 1998 Commons debate on Schedule 5, when he said he did "not see any problem" with the holding of "an advisory referendum" on independence as "the holding of referendums" was not a reserved matter (see **Section 3.2**)

while not "legally binding", such a decision "especially if it is not marginal or ambiguous, is hard for a democratic government to ignore".

He added that an "advisory" referendum would be "a wolf in sheep's clothing":

> We know their aim – quite honestly and openly – is to achieve an independent Scotland, by democratic and constitutional means. They have set out their stall quite clearly on that point, and one need look no further than their manifesto, published for the election in May last year in which they won so convincing a majority: it states quite clearly that the result of a yes vote would mean that Scotland becomes an independent nation.

Lord Wallace went on to cite case law relating to s29(3) of the 1998 Act, the "purpose test", which he said supported his argument. He referenced *Martin and Miller v HM Advocate*,[128] which concerned an Act of the Scottish Parliament that raised the sentence for offences tried summarily to 12 months. The Supreme Court had considered whether this was outside the legislative competence of the Scottish Parliament because it "related to" a reserved matter, that is, the Road Traffic Acts.

The court had been divided as to whether the provisions were within competence, but there was a degree of unanimity as to how the purpose test ought to be applied. Lord Hope stated that:

> when consideration is being given to the "purpose" of the provision, regard is to be had to its effect "in all the circumstances". One of the circumstances to which it is proper to have regard is the situation before the provision was enacted, which it was designed to address. Reports to and papers issued by the Scottish Ministers prior to the introduction of the Bill, explanatory notes to the Bill, the policy memorandum that accompanied it and statements by Ministers during the proceedings in the Scottish Parliament may all be taken into account in this assessment.

Lord Wallace argued, therefore, that "we should look at the broader political context of a provision in legislation, rather than its immediate consequence". He quoted Lord Brown and Lord Kerr, who had noted that one would expect the purpose of a particular provision to bring about a desired effect:

> So, what would be the 'desired effect' of a referendum brought forward by the current administration in Scotland? Surely, it would be that Scotland becomes an independent state, or, at least, that its constitutional status would change? In this case, to determine purpose, we would not have to look further than the [SNP] manifesto – not to mention countless speeches and statements – of those who would be proposing the legislation.

To Lord Wallace, the "purpose" of any referendum, no matter how it was formulated, was clearly to end "the Union". Considered "in all the circumstances", the political (if not the strictly legal) effect of a "yes" vote would be to bring an end to the Union between Scotland and England. Any

[128] *Martin and Miller v HM Advocate* [2010] UKSC 10

legal challenge to legislation for such a referendum was therefore "likely to be successful":

> The challenge could invalidate the outcome of the referendum, it would cause delay, and it could stop any referendum from happening in the first place.[129]

UK Constitutional Law Group

In a January 2012 blog for the UK Constitutional Law Group, seven constitutional academics had set out a different view. They argued that for the Scottish Parliament to pass a Referendum Bill without a s30 order was a "more open question than has been generally acknowledged". Indeed, they believed "a plausible case can be made that such a Bill would be lawful".

The academics said the case for legality rested upon "a particular reading both of the purposes of a referendum Bill, and of the purposes of the Scotland Act". They contested both the UK government's literal interpretation of s29(2)(b) and that the referendum's purpose (as interpreted under s29(3)) "would be to dissolve the Union".

Taking the second point first, the blog observed that the UK government was relying on "a broad interpretation" of the Scottish Government's purpose, even though this was (as stated in the long title of the draft Bill published by the Scottish Government) to seek "the views of people in Scotland on a proposal about the way Scotland is governed".

Furthermore, they rejected Lord Hope's approach in *Martin and Miller v HM Advocate* as irrelevant, given that the reason for a broad interpretation in that case was to hold that the legislation was intra rather than ultra vires. This, argued the academics, was consistent with s101(2) of the 1998 Act, which instructed the courts to interpret Bills, where possible, as narrowly as was required to allow them to be upheld.

Secondly, the blog argued that a broad interpretation as to "purpose" conflated "the intention of the Scottish Government with the intention of the Scottish Parliament":

> It is perfectly conceivable that some MSPs may vote for a referendum, not because they support independence, but rather because they expect that the vote will be lost and that the issue of independence will thereby be removed from the political agenda, at least for the foreseeable future. Indeed, this seems to be the UK government's own reason for wishing a referendum to take place.

Finally, the academics regarded as curious the UK government's assumption that a referendum would be won by the "yes" side. Equally, a different outcome might "reinforce the Union":

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[129] Lord Wallace of Tankerness, "Scotland's Constitutional Future", speech at Glasgow University, 20 January 2012

> This then points to the true meaning of the 'effect' of a Bill as being its legal effect, rather than its practical effect. Since the legal effect of a referendum Bill is indisputably simply to seek the views of people in Scotland – and any further effect is both non-binding and speculative – this again points to the narrower, consultative, interpretation of the legislative purpose as being the correct one.

Looked at from this perspective, then the precise wording of a referendum question was a "red herring" in that "the legal effect of the referendum is not altered by asking an indirect rather than a direct question about whether Scotland should become independent".

The academics then addressed the "second limb" of the UK government's argument, that a consultative Bill would nevertheless "relate to" the Union. Literally, they acknowledged, it would, but they regarded the "weight of authority"[130] as suggesting that devolution statutes ought to be interpreted "generously and purposively".[131] A referendum Bill would not be ultra vires merely because it "has something to do with" a reserved matter, in this case the Union.

The blog also made broader points about differing interpretations the Supreme Court might adopt regarding the UK constitution (unitary, union-state or federalist) in reaching any decision. But, in conclusion, the academics suggested that the UK and Scottish governments would "be wiser to agree on an express transfer of powers", although without taking that "as an unequivocal endorsement of the view that Westminster alone is entitled to authorise a referendum on the constitutional future of any part of the UK".[132]

5.4 Committee inquiries

Committees in both Houses of the UK Parliament examined the legality of a referendum during 2012. There was no equivalent investigation by a Scottish Parliamentary committee.

Scottish Affairs Committee

The Scottish Affairs Committee published a report, The Referendum on Separation for Scotland: making the process legal, on 17 July 2012.

In the course of its inquiry, the committee took oral evidence from several constitutional experts. Alan Page, Professor of Public Law at the University of Dundee, said the Scottish Government would have to "persuade a court" that a referendum and legislation "was about something other than the Union

130 This was **before** *Imperial Tobacco Ltd v Lord Advocate*, which held that the 1998 Act was to be interpreted in the same way as any other statute

131 *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32

132 Gavin Anderson et al, "The Independence Referendum, Legality and the Contested Constitution: Widening the Debate", UK Constitutional Law Group blog, 31 January 2012

between the two Kingdoms", and that he had "yet to hear a convincing explanation of what this referendum would be about if it was not about the Union between the two Kingdoms".

Aidan O'Neill QC agreed:

> There can be little doubt that the Scottish Parliament under the Scotland Act as presently set up, does not have the power to call, organise and pay for a referendum relating to the Union of the Kingdoms of Scotland and England and/or relating to the Parliament of the United Kingdom, and independence clearly relates to both these matters.

Stephen Tierney, Professor of Constitutional Theory at the University of Edinburgh (and one of the UK Constitutional Law Group bloggers) disagreed, arguing that a plausible case could be made for an "advisory" referendum. He further argued that one should not "elide the political aspiration" of the Scottish Government's January 2012 draft Bill (independence), with "the legal effect of what a Bill can actually do", given that a referendum in and of itself would not end the Union. Only legislation at Westminster could achieve that.

Professor Page disagreed ("the court will look beyond the direct legal effects"), as did Aidan O'Neill, who said that insofar as he "could follow" Professor Tierney's argument, he had "found it unconvincing".

The Scottish Affairs Committee's own view was that an independence referendum would not only be illegal but run "contrary to the clearly expressed decision of the Scottish people" in the 1997 devolution referendum:[133]

> The Scottish people voted in 1997 to reserve to the UK legislation relating to the constitution, and so a referendum about the Union clearly relates to a reserved matter. This cannot be circumvented by drafting a contrived question—which pretends to be about something else but is still a referendum on separation. Nor do we find at all plausible or in the slightest convincing the argument (on which the Scottish Government themselves do not seem to rely) that a referendum is simply "advisory" with no real effect. The truth is quite the opposite. It would be a momentous decision about the future of our country.[134]

The Committee also found the "silence" of the Lord Advocate on this legal question "remarkable", believing that exceptional circumstances justified making normally private advice public. The legal academic Andrew Tickell later claimed it was "understood that the Scottish law officers advised ministers that the proposed referendum legislation would not withstand judicial scrutiny [...] and that Westminster cooperation would be necessary to escape the significant risk of litigation".[135]

133 Para 15
134 Para 38
135 Andrew Tickell, p340

House of Lords Constitution Committee

The question of legislative competence had also been examined by the House of Lords Constitution Committee in another report, Referendum on Scottish Independence, published on 15 February 2012.

This concurred with the Advocate General for Scotland's 20 January lecture, believing it "to be plainly correct" that a referendum would "relate to" a reserved matter because its "purpose" would be to achieve independence.[136] The committee also analysed case law regarding how restrictions on the Scottish Parliament's legislative competence had been interpreted by the courts.

While acknowledging Lord Hope's view, as expressed in *AXA General Insurance v Lord Advocate*, that "the elected members of [the] legislature [...] are best placed to judge what is in the country's best interests as a whole",[137] the committee argued that this applied only when the Scottish Parliament had acted within its legal powers. Its report quoted Lord Prosser in 2000:

> [F]aced with the suggestion that the courts might [allow] the [Scottish] Parliament perhaps to exercise power beyond its legal limits, from a fear that enforcement of those limits might be seen as stopping Parliament from doing what it wanted to do, I am baffled: a defined Parliament is there to do not whatever it wants, but only what the law has empowered it to do.[138]

Likewise, in *Imperial Tobacco v Lord Advocate*,[139] Lord Reed had stated (in the Inner House) that the:

> democratic legitimacy of the Scottish Parliament does not [...] warrant a different approach to interpretation from that applicable to Acts of Parliament: statutes which are, of course, also passed by a representative and democratically elected Parliament. Nor does it impinge upon the fact that the power of the Scottish Parliament to legislate is limited by the Act of Parliament which established it. It is the function of the courts to interpret and apply those limits, when called upon to do so, so as to give effect to the intention of Parliament. In performing that function, the courts do not undermine democracy but protect it.[140]

As to the "purpose test", the committee drew attention to the 2011 SNP manifesto, which had stated that a "yes" vote in any referendum on Scottish independence "will mean Scotland becomes an independent nation". Its report continued:

> While it may be that, on a formal view, the political purpose of the SNP should properly be distinguished from the legal purpose of any Act of the Scottish Parliament (even one promoted by the majority SNP Government), case law

136 Para 17

137 *AXA General Insurance v Lord Advocate* [2011] UKSC 46

138 *Whaley v Watson* [2000] SC 125

139 *Imperial Tobacco Ltd v Lord Advocate* [2012] UKSC 61. This case concerned whether Scottish legislation banning cigarette vending machines was a public health measure which related to the reserved matter of "product safety". The Supreme Court ruled that it did not.

140 *Imperial Tobacco Ltd v Lord Advocate* [2012] CSIH 9

> shows that the courts will examine a broad range of background materials in order to distil the purpose of legislation, including "reports to and papers issued by the Scottish Ministers prior to the introduction" of a Bill, as well as explanatory notes, policy memoranda and the like. The SNP's political purpose in introducing any Referendum (Scotland) Bill is therefore highly likely to be relevant to considering the legal purpose of that legislation.[141]

The Lords Constitution Committee also concluded that s101(2) of the 1998 Act could not lead a court to read a referendum provision narrowly so as "for it to be within competence", as this section neither applied to reserved matters nor to the 1998 Act itself. The court would not, therefore, be permitted to "read down" the key terms of "relates to", "purpose" and "effect".[142]

Finally, the Committee report examined *Robinson v Secretary of State for Northern Ireland*, in which the Appellate Committee of the House of Lords had interpreted the relevant provisions of the Northern Ireland Act 1998 "generously and purposively" (as Lord Bingham had put it) so as to rule that the November 2001 election of the First Minister and deputy First Minister had been lawful. This it did so on the basis that the relevant Act was "in effect a constitution".[143] A minority of Law Lords hearing the appeal (Lords Hutton and Hobhouse) had taken a stricter approach and ruled that the November 2001 election was in fact unlawful.

If the Northern Ireland Act 1998 had been of a particular constitutional character, asked the Committee rhetorically, then was the same not true of the Scotland Act 1998? But the report (again citing *Imperial Tobacco*) argued that this was to take *Robinson* "out of context", for not only had the Northern Ireland Act 1998 implemented an international treaty (forming part of the 1998 Belfast/Good Friday Agreement), but the "issue at stake in that case was whether devolved government could continue in Northern Ireland or whether it would once again be liable to be suspended". The committee noted that both factors would be "absent" from any litigation arising from referendum legislation:

> Indeed, the First Division in Imperial Tobacco went further to distinguish the Northern Ireland position. Lord Reed ruled that "The Scotland Act is not a constitution, but an Act of Parliament". Lord Brodie agreed, adding that "the principle derived from Robinson that legislation should be interpreted generously and purposively … is not readily applicable to resolving the issue of what has been devolved as opposed to what has been reserved". The First Division ruled that while a more generous and purposive approach to interpretation may be applicable to "the more open textured language" of a true constitution, the Scotland Act was "dense, detailed and precise" and should be interpreted neither expansively nor restrictively, but simply in accordance with the natural meaning of the language.[144]

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141 Para 18

142 Para 26

143 *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32

144 Paras 28-29

These views were later endorsed by the Supreme Court.[145] The Imperial Tobacco case also came to be viewed by constitutional scholars as significant in the context of long-standing debates as to whether the Scottish Parliament could unilaterally legislate for an independence referendum.[146]

5.5 The Edinburgh Agreement

Following months of negotiations between the UK and Scottish governments, ministers from each signed the Edinburgh Agreement on 15 October 2012. This included a draft s30 Order which would enable the Scottish Parliament to hold a referendum by the end of 2014.

The draft Order stipulated that there should be a single question on independence, but the wording of the referendum question, the franchise, campaign finance and the detailed roles of the Electoral Commission and other bodies were to be a matter for the Scottish Parliament.

The Order was laid before the UK Parliament on 22 October 2012. Like the draft published on 10 January 2012, this altered Schedule 5 of the Scotland Act 1998 so that paragraph 1 did not "reserve a referendum on the independence of Scotland from the rest of the United Kingdom" if certain "requirements" were met:

> The date of the poll at the referendum must not be the date of the poll at any other referendum held under provision made by the Parliament;
>
> The date of the poll at the referendum must be no later than 31 December 2014;
>
> There must be only one ballot paper at the referendum, and the ballot paper must give the voter a choice between only two responses.
>
> The Order also made supplementary provision in relation to Part 7 of the Political Parties, Elections and Referendums Act 2000.

On 5 December 2012, the Scottish Parliament debated and approved the draft s30 Order.

On 15 January 2013, the House of Commons also debated and approved the draft Order. Angus Robertson, leader of the SNP at Westminster, said:

> This section 30 order is a testament to all who believe in the democratic process, democratic debate and the sovereignty of the people. Our challenge—this is for those on both sides of the referendum debate—is to ensure we do this in a way worthy of the proposition, the opposing case and, most importantly, the electorate.[147]

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145 *Imperial Tobacco Ltd v Lord Advocate* [2012] UKSC 61

146 See Stephen Tierney, "The Scottish Parliamentary Elections and the 'Second Referendum' Debate", UK Constitutional Law Association Blog, 10 May 2021

147 HC Debs 15 January 2013 Vol 556 c773

On 16 January 2013, the House of Lords approved the draft s30 Order. On 12 February 2013, therefore, the Privy Council approved the Scotland Act 1998 (Modification of Schedule 5) Order 2013.

Although now legally valid, the independence referendum remained advisory and not legally binding: neither the UK nor Scottish Governments were obliged to give practical effect to a vote for independence. At the same time, in the Edinburgh Agreement both governments had "committed to continue to work together constructively in the light of the outcome, whatever it is, in the best interests of the people of Scotland and of the rest of the United Kingdom".[148]

After the s30 Order became law, the Scottish Parliament debated and passed the Scottish Independence Referendum (Franchise) Act 2013, which extended the franchise for the referendum to 16 and 17 year-olds, and the Scottish Independence Referendum Act 2013, which established the referendum question and rules. The latter Act received Royal Assent on 17 December 2013.

Interviewed by GQ magazine in May 2014, Alex Salmond recalled his private discussions with Donald Dewar in 1997 (see **Section 3.2**), observing that their strategic "point" had been to "make sure that [the Scottish] Parliament could have a Referendum when the majority was there".[149] It was, stated the First and Deputy First Ministers during the campaign, a "once in a generation opportunity" to achieve independence.

The Scottish independence referendum was held on 18 September 2014. The question asked was: "Should Scotland be an independent country?" 55% of Scots replied "No"; 45% "Yes". Turnout was 84.6%.[150]

On 19 September, David Cameron announced the cross-party Smith Commission. This was to agree additional powers for the Scottish Parliament, as promised by Labour, the Liberal Democrats and Conservatives in a joint "vow" published towards the end of the referendum campaign. The SNP and Scottish Greens also took part. The Smith Commission reported on 27 November 2014.

As with the Calman Commission, its remit did not include consideration of independence, although it agreed that "nothing in this report prevents Scotland becoming an independent country in the future should the people of Scotland so choose".[151] In its submission to Smith, the Scottish Government said "the sovereign right of the people of Scotland to determine their form of government should be enshrined in law". The proposal was not taken up.[152]

148 Para 30

149 See David Torrance, p127

150 See Commons Library Research Paper 14/50, Scottish Independence Referendum 2014: Analysis of results

151 The Smith Commission, Report of the Smith Commission for further devolution of powers to the Scottish Parliament, 27 November 2014, p12

152 See Andrew Tickell, p333

Ciaran Martin, a civil servant involved in negotiating the Edinburgh Agreement, later reflected that following the 2014 vote, "London showed no interest [...] in imposing clear and legally binding triggers for a future referendum on a defeated nationalist movement".[153]

As per the s30 Order, legislative competence to hold an independence referendum reverted to Westminster on 31 December 2014.[154] The Scottish Independence Referendum Act 2013 and the Scottish Independence Referendum (Franchise) Act 2013 also became "spent".

As the legal academic Andrew Tickell has observed of the Edinburgh Agreement, it:

> represented only a temporary compromise between political claims of a right to Scottish self-determination, and legal uncertainty about the Scottish Parliament's power unilaterally to embark on a democratic process resulting in independence. The 2012 pact left those tensions fundamentally unresolved.[155]

4 *Imperial Tobacco v The Lord Advocate*

In *Robinson v Secretary of State for Northern Ireland*, Lord Bingham argued that the Northern Ireland Act 1998 was "in effect a constitution" and that, therefore, its provisions "should, consistently with the language used, be interpreted generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody".[156]

In the 2012 case of *Imperial Tobacco v The Lord Advocate* it was argued on behalf of the Scottish Ministers that the Scotland Act 1998 too was a constitutional statute which should be interpreted generously in favour of the Scottish Parliament. That argument was rejected. Rather the Court held that the rules in the 1998 Act should be interpreted in the same way as the rules in any other UK statute; that they must "be taken to have been intended to create a system [...] that was coherent, stable and workable".

In deciding whether an Act of the Scottish Parliament had exceeded the limits set out in the 1998 Act, therefore, there was to be no presumption one way or the other, only a "plain reading" of the statute and relevant case law.[157]

153 Ciaran Martin, "Referendum bill: the logic behind Nicola Sturgeon's strategic gamble", UK in a Changing Europe website, 5 July 2022

154 The amendment itself was repealed by the 1998 Act, so as to erase all trace of the concession – and its time-limited nature – from the text of the Act

155 Andrew Tickell, pp327-28

156 *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32. It is important to note that this case related to the validity of the election of the First Minister and deputy First Minister of Northern Ireland rather than a question of whether an Act of the Assembly was within competence.

157 *Imperial Tobacco v The Lord Advocate* [2012] UKSC 61

6 Referendum developments, 2016-21

At the 2015 UK general election, the SNP won all but three of Scotland's 59 House of Commons seats. The party's manifesto had stated that:

> The SNP will always support independence – but that is not what this election is about. It is about making Scotland stronger. We will use the influence of SNP votes at Westminster to ensure that promises made during the referendum are delivered.[158]

During the campaign, Nicola Sturgeon – who had succeeded Alex Salmond as SNP leader and First Minister of Scotland after the independence referendum – said she was "not planning or proposing another referendum", adding that something "material would have to change in terms of the circumstances or public opinion before I think it would be appropriate to have a proposal for a referendum".

In an interview with the Guardian newspaper shortly after the 2015 general election, the then Scottish Conservative leader Ruth Davidson said that:

> If the SNP puts in its manifesto that it has an intention to hold a second referendum, and if it wins an outright majority, I think it does have a mandate to hold one.

In a research paper published after the 2015 general election, Nick Barber, a law lecturer at the University of Oxford, argued that Scotland's right to secede from the UK ought to be recognised in law but that the frequency of referendums to that end should be limited to every 30 years (although a "super-majority" of MSPs might all an early vote "in exceptional circumstances").[159]

6.1 Brexit and independence referendum

In its manifesto for the 2016 Scottish Parliament elections, the SNP formalised Nicola Sturgeon's earlier remarks, stating that:

> the Scottish Parliament should have the right to hold another referendum if there is clear and sustained evidence that independence has become the preferred option of a majority of the Scottish people – or if there is a significant

158 Stronger for Scotland: SNP Manifesto 2015, Edinburgh: Scottish National Party, 2015, p10

159 Nick Barber, "The Constitutional Regulation of Scottish Secession", Oxford Legal Studies Research Paper No. 38/2015, June 2015

> and material change in the circumstances that prevailed in 2014, such as Scotland being taken out of the EU against our will.

Following the election, the SNP emerged as the single largest party but lost its overall majority. It formed a minority government, as it had in 2007.

At the European Union referendum in June 2016, 62% of voters in Scotland supported the UK remaining part of the EU. The First Minister suggested that a second independence referendum was, therefore, "highly likely".[160] She also said her officials would prepare the necessary legislation to facilitate a second independence referendum.

The SNP argued that together with the Scottish Greens the Scottish Parliament possessed a pro-independence majority of MSPs.[161] Whereas in 2011 the UK government had appeared to accept that the Holyrood election result provided the SNP with a "mandate" to hold a referendum, it did not take a similar view in 2016.

Some UK government ministers took a different view. On 26 June 2016 David Mundell, the then Secretary of State for Scotland, said:

> if the people of Scotland ultimately determine that they want to have another [independence] referendum there will be one [...] Could there be another referendum? The answer to that question is yes. Should there be another referendum? I believe the answer to that question is no.[162]

On 20 October 2016, the Scottish Government launched its Consultation on a Draft Referendum Bill, as announced in its September Programme for Government. This document did not dwell on the legality of referendum legislation as it assumed that the 2014 precedent would be followed:

> In the 2014 referendum, an Order in Council under section 30 of the Scotland Act 1998 was agreed by Westminster and the Scottish Parliament, recognising the mandate of the Scottish Government, and the support of the Scottish Parliament, for a referendum on independence. The Order put it beyond doubt that the Scottish Parliament could legislate for that referendum. If the Scottish Government decided to formally introduce this Bill to Parliament, it would be expected that a section 30 order would be sought and agreed, as in 2014.[163]

The Scottish Government's draft Bill proposed that the question should be identical to that asked on 18 September 2014: "Should Scotland be an independent country?"

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160 BBC News online, "Brexit: Nicola Sturgeon says second Scottish independence vote 'highly likely'", 24 June 2016

161 In its 2016 Holyrood manifesto, the Scottish Green Party said its "preferred way of deciding to hold a second referendum on Independence" was for the presentation of "a petition signed by an appropriate number of voters"

162 "Westminster won't stand in way of indyref2, says Scottish Secretary", The Courier, 26 June 2016

163 Para 1.4

Nicola Sturgeon said the consultation would "ensure that a referendum bill, if it is the chosen route, will – like the 2014 referendum – meet the gold standard of democracy and fairness".

Legal challenges arising from Brexit, meanwhile, produced case law of relevance to ongoing debates regarding the political or legal effect of referendums. The Supreme Court's decision in the first Miller case in January 2017 highlighted that the effect of any particular referendum must depend upon the terms of the statute which had authorised it:

> [T] he referendum of 2016 did not change the law in a way which would allow ministers to withdraw the United Kingdom from the European Union without legislation. But that in no way means that it is devoid of effect. It means that, unless and until acted on by Parliament, its force is political rather than legal. It has already shown itself to be of great political significance.[164]

6.2 Nicola Sturgeon's 2017 s30 request

On 31 March 2017, the First Minister wrote to then Prime Minister Theresa May:

> As you are aware, the Scottish Parliament has now determined by a clear majority that there should be an independence referendum [...] I am therefore writing to begin early discussions between our governments to agree an Order under section 30 of the Scotland Act 1998 that would enable a referendum to be legislated for by the Scottish Parliament [...]

The First Minister added that "in anticipation of your refusal to enter into discussions at this stage, it is important for me to be clear about my position":

> It is my firm view that the mandate of the Scottish Parliament must be respected and progressed. The question is not if, but how. I hope that will be by constructive discussion between our governments. However, if that is not yet possible, I will set out to the Scottish Parliament the steps I intend to take to ensure that progress is made towards a referendum.[165]

The "steps" to which the First Minister referred were not set out, and in October 2017 Nicola Sturgeon stated that the Prime Minister had not formally responded to her letter of 31 March.

Two weeks after the First Minister's letter, Theresa May asked the UK Parliament to authorise a "snap" general election to be held on 8 June 2017. The SNP's manifesto for that election stated that:

> A democratic mandate for a referendum was delivered at the Holyrood election last year. The Scottish Parliament has now underlined that mandate. If

164 *Miller & Anor v Secretary of State for Exiting the European Union* [2017] UKSC 5

165 Scottish Government, Section 30 letter, 31 March 2017

> the SNP wins a majority of Scottish seats, that would complete a triple lock, further reinforcing the democratic mandate which already exists.

The Conservative Party manifesto did not completely rule out a second independence referendum but maintained, as the Prime Minister had already stated, "that now is not the time":

> In order for a referendum to be fair, legal and decisive, it cannot take place until the Brexit process has played out and it should not take place unless there is public consent for it to happen.

The SNP won 35 out of 59 Scottish seats at the election, a loss of 21, while the Conservatives won 13, a gain of 12.

Addressing the Scottish Parliament on 27 June, Nicola Sturgeon said she had "reset" her plan to introduce legislation for a second referendum but believed the "mandate" to do so at a later date still existed.[166]

6.3 Alternatives to a s30 Order

Following the UK government's refusal to grant another s30 order in March 2017, some supporters of independence suggested holding an "unofficial" referendum, an idea the First Minister consistently rejected. But speaking in November 2018, Nicola Sturgeon suggested that an alternative course of action would be to use the 2021 Scottish Parliament election to seek a mandate for another independence referendum.[167]

Other SNP figures suggested that "the pursuit of redress through the courts" would be one of the "likely consequences" of a continuing refusal by the UK government to grant a s30 Order.[168] First Minister Nicola Sturgeon made similar comments.[169] But writing on the UK Constitutional Law Association blog, Chris McCorkindale and Aileen McHarg said it was "extremely unlikely that such a challenge would be successful", as there was "no duty" on the UK government to agree to an Order.

Some in the SNP argued that the party needed to formulate a "Plan B" given that the UK government appeared unlikely to agree to change its position. Nicola Sturgeon addressed this in an October 2019 speech to her party's autumn conference:

> To be clear, if we were to try to hold a referendum that wasn't recognised as legal and legitimate – or to claim a mandate for independence without having demonstrated majority support for it – it would not carry the legal, political

166 Scottish Parliament Official Report 27 June 2017

167 See "Sturgeon: We'll vote on Indyref", Scottish Daily Mail, 20 November 2018

168 "Block indyref2 and you'll face court action, SNP warns Johnson", The Times (£), 11 November 2019

169 See BBC News online, "Sturgeon: 'All options' open if Scottish independence referendum blocked", 2 December 2019

> and diplomatic weight that is needed. It simply wouldn't be accepted by the international community, including our EU friends and partners.

6.4 2019 s30 Order request

At the 2019 UK general election, the SNP's manifesto confirmed its intention to ask again for a s30 Order. It said an "SNP election victory" would be "a clear instruction by the people of Scotland to Westminster to ensure a referendum is put beyond legal challenge and under the control of the Scottish Parliament". The manifesto also believed it would be "unsustainable for a UK Government to ignore such a democratic instruction".

The Conservative Party manifesto at that election stated: "We are opposed to a second independence referendum and stand with the majority of people in Scotland, who do not want to return to division and uncertainty."

Following the election, at which the SNP won 48 of Scotland's 59 seats and the Conservatives 6, the Scottish Government published Scotland's Right to Choose: Putting Scotland's Future in Scotland's Hands. This argued for a permanent transfer of the power to hold a referendum on independence, either by a s30 Order or via UK primary legislation, as well as an explicit statutory recognition of Scotland's "right to self-determination".[170]

Nicola Sturgeon also wrote to Prime Minister Boris Johnson making the same request:

> I said on Tuesday that I would be publishing the detailed democratic case for the transfer of power from Westminster to the Scottish Parliament [...] When we spoke on Friday, you reiterated your government's position on this issue – however, you also committed to engaging seriously with our proposals. Indeed, I believe that on this – as on any issue – you have a duty to do so in a considered and reasonable manner.[171]

The Prime Minister replied to the First Minister on 14 January 2020. He wrote:

> You and your predecessor [Alex Salmond] made a personal promise that the 2014 Independence Referendum was a "once in a generation" vote. The people of Scotland voted decisively on that promise to keep our United Kingdom together, a result which both the Scottish and UK Governments committed to respect in the Edinburgh Agreement.
>
> The UK Government will continue to uphold the democratic decision of the Scottish people and the promise that you made to them. For that reason, I

[170] Scottish Government, Scotland's Right to Choose: Putting Scotland's Future in Scotland's Hands, 19 December 2019, pp28-33

[171] "Text of Nicola Sturgeon's Indyref2 letter revealed", Herald, 19 December 2019

> cannot agree to any request for a transfer of power that would lead to further independence referendums.[172]

In a statement, Nicola Sturgeon said the Scottish Government would "set out our response and next steps later this month when we will also ask the Scottish Parliament to again endorse Scotland's right to choose".[173]

On 29 January 2020, Members of the Scottish Parliament voted by 64 to 54 to agree that another independence referendum ought to take place.[174]

In another statement on 31 January 2020, the First Minster reiterated that any independence referendum had to "be legal and legitimate" in order to secure international recognition. She said the "best way" to achieve that remained a negotiated transfer of power (as in 2014) with Westminster, but also addressed calls, in the absence of such an agreement, "for the Scottish Parliament to hold a consultative referendum":

> The issue of whether the specific constitutional reservation in the Scotland Act puts any form of independence referendum outside the powers of the Scottish Parliament – or instead leaves open scope for a non-binding consultative vote – has never been tested in court.
>
> That means it cannot be said definitively that it would not be legal, but equally it cannot be described as being beyond legal doubt. If a proposal for a referendum on that basis was brought forward it would be challenged in court. If a court ruled that it was legal, it wouldn't be a "wildcat referendum" as our opponents like to brand it – it would be within the power of the Scottish Parliament.
>
> Should the UK Government continue to deny Scotland's right to choose, we may reach the point where this issue does have to be tested. I am not ruling that out. But I also have to be frank. The outcome would be uncertain. There would be no guarantees. It could move us forward – but equally it could set us back.

6.5 Referendum legislation

Shortly before these remarks from the First Minister, Royal Assent was granted to the Referendums (Scotland) Act 2020, which provided a general framework for holding referendums on devolved matters. The Scottish Elections (Franchise & Representation) Act 2020 subsequently received Royal Assent on 1 April 2020.

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172 10 Downing Street, "Letter from PM Boris Johnson to Scottish First Minister Nicola Sturgeon", 14 January 2020

173 See Reuters, "Johnson rejects Sturgeon's request for independence referendum powers", 14 January 2020

174 See BBC News online, "Scottish independence: MSPs back new referendum in Holyrood vote", 29 January 2020

Under s101 of the 1998 Act, both were within the legislative competence of the Scottish Parliament. Under the first Act, any future referendum would require further legislation. The Scottish Government said – assuming Westminster agreed to a s30 Order – that it would prepare a further short Bill authorising a second independence referendum. However, work on this "and on other independence-related tasks was suspended on March 16, 2020 as a result of the need to deploy as many civil servants as possible to work on Scotland's response to the pandemic".[175]

Setting out the Scottish Government's Programme for Government in September 2020, the First Minister said that:

> before the end of this Parliament, we will publish a draft Bill, setting out the proposed terms and timing of an independence referendum, as well as the proposed question that people will be asked in that referendum. And then at next year's election, we will make the case for Scotland to become an independent country, and seek a clear endorsement of Scotland's right to choose our own future.

In a lecture to the Wales Governance Centre a few days earlier, the SNP MP Joanna Cherry (also a QC) said that, in her view, if:

> the pro-independence referendum parties obtain a majority at the Scottish election next year and the [Prime Minister] refuses to come to the table to negotiate a second Edinburgh Agreement, the avenue which the [First Minister] contemplated earlier this year should be pursued. It would require a carefully crafted bill to be piloted through Holyrood. Then, when the inevitable legal challenge came, it would be for the courts to decide whether the bill passed was within the competence of the Scottish parliament and, thus, whether the referendum so authorised could proceed.

Ms Cherry added that the courts would "do so by a process of statutory interpretation" and that a challenge "would undoubtedly end up in the UK Supreme Court":

> If they found the bill to be within competence, then we would have a lawful referendum. And one which would be hard for unionists to boycott. If we lost, then I do not believe we would be any further back than the stalemate that will ensue if Boris Johnson digs his heels in.

6.6 "Road to a referendum"

At a meeting of the SNP's National Assembly on 24 January 2021, Mike Russell, the Scottish Government's Cabinet Secretary for the Constitution, published a party document entitled: "The Road to a referendum that is beyond legal challenge".

Points 1-5 summarised the Scottish Government's referendum legislation to date, while point 6 stated that a "promise to enact" a draft Bill on an

[175] Mike Russell, "The Road to a referendum that is beyond legal challenge", 24 January 2021

independence referendum would appear in the SNP's 2021 manifesto. The remaining points were as follows:

> 7. The SNP Scottish Government continues to maintain that a referendum must be beyond legal challenge to ensure legitimacy and acceptance at home and abroad [...] It should be held after the pandemic, at a time to be decided by the democratically elected Scottish Parliament [...]
>
> 8. If the SNP takes office the Scottish Government will again request a Section 30 order from the UK Government believing and publicly contending that in such circumstances there could be no moral or democratic justification for denying that request. If the UK Government were to adopt such a position its position would be unsustainable both at home and abroad.
>
> 9. However, in the election, the SNP's proposition [...] will be clear and unambiguous – if there is a parliamentary majority so to do, we will introduce and pass a bill so that the necessary arrangements for the referendum can be made and implemented thereafter once the pandemic is over.
>
> 10. In these circumstances [...] the choice of the UK Government will be clear; to either (1) agree that the Scottish Parliament already has the power to legislate for a referendum or (2) in line with precedent, agree the Section 30 order to put that question beyond any doubt or (3) take legal action to dispute the legal basis of the referendum and seek to block the will of the Scottish people in the courts. Such a legal challenge would be vigorously opposed by an SNP Scottish Government.

Point 11 observed that the "issue of whether there should be such a referendum" was different from "the issue of whether Scotland should be independent". Mr Russell said a "national campaign of information and education on independence" would occur in parallel with "work being done to organise the referendum during and after the bill's passage".

The reference in Point 9 to "a parliamentary majority" suggested that the SNP would consider its own MSPs together with Scottish Green members (who also support independence) to constitute a "mandate" for a second independence referendum, as after the 2016 Holyrood election.

Asked to comment on the SNP's roadmap, the Prime Minister's official spokesman was quoted as saying that: "Holding an independence referendum goes beyond the powers of the Scottish Parliament."[176]

And Douglas Ross MP, the Scottish Conservative leader, said:

> Anything that constitutes [an] unofficial referendum should be boycotted. It shouldn't be given any credibility [...] I would take no part in that. And I would hope anyone – not just unionist supporters – but people who support democracy, should not take part in these wildcat, unofficial referendums.[177]

176 "Scottish independence: Downing Street rebuff SNP's 'wildcat referendum' plan", Press & Journal, 25 January 2021

177 "Scottish Tories would boycott unofficial independence referendum", Guardian, 25 January 2021

5 Catalan referendum

In October 2017 Catalonia voted in a referendum to secede from Spain. The legality of that referendum was disputed.

Article 2 of the Spanish Constitution refers to the "indissoluble unity of the Spanish Nation" as well as "the right to self-government of the nationalities and regions". Article 92 also states that referendums may only be called by the King, following a proposal by the Prime Minister authorised by parliament.

After the referendum, the President of Catalonia unilaterally declared independence. Spain responded with police interventions and court challenges. Ultimately, "direct rule" was imposed, suspending Catalonia's devolved powers.

The failed independence drive saw the movement's leaders either go into exile or put on trial and convicted for their part in the events of October 2017. The severity of the sentences was highly controversial and led to unrest in Catalan cities during October 2019.[178]

Santíago Vila, a former business minister, was fined £51,000 for civil disobedience. "The positive point of what happened is that it brought a large civic participation to the cause but there were some very negative results," he told the Sunday Post newspaper in June 2022:

> Supporters were led to believe the referendum would be binding by the Catalan government, but this was not the case. They were also led to believe that Catalonia had the authority to legally break away from Spain which it did not. This caused lots of companies to leave the region. We tricked ourselves.

Ernest Maragall, a Catalan MP, told the Sunday Post that:

> They [Spain] never thought we would be able to do it. Organising the electoral colleges, getting the urns. It was down to people volunteering despite all the efforts of the state to stop it happening. But only the people who supported independence voted in the referendum.

And Lluis Orriols, a professor of politics at the Carlos III University in Madrid, observed that:

> The Catalan independence movement has admitted that it made mistakes and moved on. So, in a way, it has matured. In real terms it has not achieved its aims of gaining independence from Spain but some of its followers would say it was not all in vain. The independence movement is now looking more long term and its supporters do not regard the unilateral route of independence as a route which succeeded.[179]

178 See Commons Library Briefing Paper CBP8976, Catalan independence

179 "Warning from Catalonia as Nicola Sturgeon fixes plan for second independence referendum", Sunday Post, 26 June 2022

7 Legislative process and role of the Supreme Court

Mike Russell's 11-point plan appeared to follow the strategy suggested by Joanna Cherry MP in her November 2020 lecture: that if the UK government refused a s30 Order then the Scottish Government ought to proceed with referendum legislation. In the event that this was challenged by the UK government and thus reach the Supreme Court it would, as Mr Russell made clear, "be vigorously opposed by an SNP Scottish Government".

The Scottish Government published its Draft Independence Referendum Bill on 22 March 2021 (see **Section 8**). The process for this Bill, should it be introduced to Holyrood by the Scottish Government, is set out in the Scottish Parliament's standing orders, the Scottish Ministerial Code, and in s31-33 of the Scotland Act 1998:

1. Paragraph 3.4 of the Ministerial Code provides that a Bill's introduction "must also be accompanied by a statement, which will have been cleared with the Law Officers, that the Bill is within the legislative competence of the Scottish Parliament" (the Ministerial Code is not legally binding).[180]

2. The Presiding Officer shall also, on or before the introduction of a Bill, decide whether or not in their view its provisions would be within legislative competence and make a statement (providing reasons if not).[181]

3. As the Presiding Officer's view as to competence is not binding, the Scottish Government could proceed to introduce its Bill, after which it would follow the normal legislative process.[182]

4. At the end of that process, the Presiding Officer can only submit a Bill for Royal Assent if no reference has been made by Scottish or UK law officers, or if no order has been made by the Secretary of State for

[180] A Member's Bill introduced by an MSP rather than a Scottish Government minister would not need to be signed off by law officers. The case of *Whaley v Watson* [2000] SC 125 left open the possibility that individual MSPs could be prevented in the courts from presenting a Bill to the Scottish Parliament.

[181] To date, the Presiding Officer has issued five negative certificates, four in respect of Members' Bills (none of which became law) and only one in respect of a Scottish Government Bill, the Scottish Continuity Bill introduced in February 2018 (which did become law).

[182] See Commons Library Briefing Paper CBP8441, Devolution in Scotland: "The settled will"?, pp10-11

Scotland under s35 of the 1998 Act, within four weeks of the Bill completing its final stage.

5. A Bill cannot be submitted for Royal Assent until such a reference has been "decided or otherwise disposed of by the Supreme Court". And once it has, the Presiding Officer cannot submit a Bill for Royal Assent unless it has been reconsidered and amended by the Scottish Parliament (if the Supreme Court decides a provision is not within legislative competence), again after a four-week "holding" period.

There is no limit to the number of times a Bill can be approved or subsequently challenged in this way.[183] Acts of the Scottish Parliament can also be challenged on competence grounds after receiving Royal Assent.[184]

7.1 Role of law officers

According to research conducted by the legal academics Christopher McCorkindale and Janet L. Hiebert, vetting of Scottish Parliament Bills for legislative competence primarily rests with the Scottish Government Legal Department (SGLD) and the Legal Secretariat to the Lord Advocate (LSLA). The Parliamentary Counsel's Office (PCO) may also be involved informally. McCorkindale and Hiebert write that:

> In order for the Law Officers to advise Scottish Ministers on competence issues, a draft Bill and a detailed note on legislative competence will be sent [by the Scottish Government] to the Legal Secretariat to the Lord Advocate (LSLA) (as well as to [Office of the Solicitor to the Scottish Parliament] and to [the Office of the Advocate General for Scotland]) three weeks prior to introduction. This note will assert SGLD's view that a Bill is within the competence of the Parliament, and will form the basis of the LSLA's own assessment.

During that three-week "pre-introduction period", the Office of the Advocate General for Scotland "will engage informally with Scottish Government counterparts as well as with relevant UK departments at that time".

Scottish officials emphasised "two important considerations" to McCorkindale and Hiebert:

> First, in relation to the specific boundaries set out in the Scotland Act, a Bill is assessed in light of its consistency with principles derived from relevant Supreme Court jurisprudence. Second, based on a civil (balance of probabilities) standard, an assessment is made of how the Supreme Court would be likely to rule on the Bill in the event of a legal challenge.

McCorkindale and Hiebert were also told that the Lord Advocate "would see it as a resigning matter where Ministers were knowingly to introduce legislation that is outwith competence"; indeed, the "damaging political impact that

[183] Alan Page, p217

[184] As occurred with the Children and Young People (Scotland) Act 2014

would follow any such resignation" acted as "a significant internal check on the introduction of an ultra vires Bill".[185]

7.2 Reference to the Supreme Court

There are broadly three routes under which a "devolution issue" can reach the Supreme Court:

- Through reference of a Bill that is before the Scottish Parliament by Scottish or UK law officers.
- Via a statutory reference or appeal of a "devolution issue" to the Court as set out in Schedule 6 of the 1998 Act.
- Through the normal judicial process, with cases arriving at the Court on appeal from lower courts.

Although the third route is less common, a number of important cases on devolution have reached the Supreme Court and, prior to 2009, the Appellate Committee of the House of Lords via this route.[186]

The UK government has not said whether it would refer the Scottish Government's intended Bill to the Supreme Court, but statements from Scottish ministers suggest they anticipate a challenge to be made by the Advocate General for Scotland under the first route.[187] If not, the Lord Advocate could also refer the Bill on grounds of clarification.

7.3 Possible approaches

If a Bill was referred, the job of the Supreme Court would be to test the scope of the relevant reservation in the Scotland Act 1998. It would examine – drawing on relevant statute, case law and supporting documents – whether the purpose and effect of referendum legislation related to "the Union". As Lord Hope observed of another competence challenge in *Martin v Most*:

> It must be decided according to particular rules that the Scotland Act 1998 has laid down. But those rules, just like any other rules, have to be interpreted. That is the court's function. It is for the court to say what the rules mean and

185 Christopher McCorkindale and Janet L. Hiebert, "Vetting Bills in the Scottish Parliament for Legislative Competence", Edinburgh Law Review 21:3, September 2017, pp319-51

186 See Commons Library Briefing Paper CBP7670, The Supreme Court on Devolution

187 Asked in March 2021 if the UK government would take legal action against a "wildcat" referendum, Scottish Secretary Alister Jack reportedly replied: "Yes. There are many reserved matters and the constitution is one of them. It's entirely a matter for the UK Government."

> how, in a case such as this, they must be applied in order to resolve the issue whether the measure in question was within competence.[188]

Although in her November 2020 lecture, Joanna Cherry MP QC anticipated that any court would deploy "a process of statutory interpretation", she also expected:

> the UK Supreme Court and indeed Scotland's Supreme Courts, to look to the wider constitutional context and to have some comments to make about a Government which does not allow a 2nd indyref when there is a clear electoral mandate in favour of one.

This was the approach of the Supreme Court of Canada when, in 1998, it was asked to rule on the possible secession of Quebec. The Canadian government hoped the Court would confine itself to the wording of the Canadian Constitution, which does not contain a secession clause. Instead, the Court concluded that:

> The federalism principle, in conjunction with the democratic principle, dictates that the clear repudiation of the existing constitutional order and the clear expression of the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire.[189]

Two constitutional academics, however, have argued that a mandate alone, though politically important, is not legally relevant in a UK context. Chris McCorkindale and Aileen McHarg have observed that the "doctrine of the mandate" plays:

> at best, a marginal role in UK constitutional law and practice, and in any case what constitutes a mandate is highly ambiguous: how clear does a manifesto promise have to be; is a majority of seats or of votes required (and can these be aggregated from more than one party); and which elections are relevant – to the UK Parliament, which holds the legal competence to dissolve the Union, or the Scottish Parliament, from which the Scottish Government's authority derives?

Professor Michael Keating has argued that in the context of debates about competing sources of sovereignty, "an independence referendum could be illegal under the 1998 Act but, in another way, constitutional". But he added that it is "not likely that the Supreme Court would see it that way, as it has consistently upheld the Westminster doctrine".[190]

More broadly, other constitutional academics have argued that issues such as Scottish independence "are too constitutionally fundamental and politically contentious to be left to the courts". Writing in 2017, Professor Stephen Tierney suggested that a reference would "throw judges into a vexed

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188 *Martin v Most* [2010] UKSC 10

189 *Reference re Secession of Quebec* [1998] 2 SCR 217

190 Michael Keating, "Indy Ref 2: Legal or Constitutional?", Scottish Centre on European Relations, 9 March 2021

and deeply political dispute" comparable to the legal disputes arising from Brexit:

> Whichever way such a case was decided the Court would come under scrutiny like never before. There is also no guarantee that the result would be treated with respect. If it declared the holding of a consultative referendum to be a reserved matter, some Scottish nationalists could well accuse the court of being a biased arm of the UK state.
>
> [...] On the other hand, if the Court declared that a referendum could go ahead on a consultative basis there would still be a risk of a boycott by those who would refuse to engage with a referendum that was not treated as binding (situations such as Northern Ireland in 1973 and Bosnia in 1992 have shown how disastrous for democracy a referendum can be when one side decides not even to participate) [...]

Similarly, writing in January 2020, Chris McCorkindale and Aileen McHarg suggested that the referral of referendum legislation could cause "significant difficulties":

> within the Scottish Government, possibly including resignation of the Scottish Law Officers; and might also provoke retaliatory legislation from Westminster to make clear that such legislation is not within Holyrood's competence, similar to the fate of the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill. Moreover, even if such a Bill were to survive, a unilateral approach to authorising a second referendum might again lead to a unionist boycott and could not be certain of co-operation from the UK Government in implementing a vote for independence.

Clause 48 of the Internal Market Bill, introduced to the House of Commons in September 2020, later provided an example of Westminster making clear that certain functions were not within Holyrood's competence, in this case the "ability to legislate for a subsidy control regime once the UK ceases to follow EU state aid rules". The UK government had long stated its belief that this matter was already reserved. The Scottish Government argued that legal competence rested with Scottish Ministers and the Scottish Parliament given that state aid had not formed part of Schedule 5 of the 1998 Act.[191]

7.4 Court of Session declarator

In December 2019, Aidan O'Neill QC provided an opinion to the pro-independence group Forward as One on the Scottish Parliament's competence.

Mr O'Neill concluded that there were "good arguments" that it had such competence, but as the matter had "never been the subject of authoritative legal decision, he suggested seeking "a declarator from the Court of

[191] See Commons Library Briefing Paper CBP9003, The United Kingdom Internal Market Bill 2019-21, pp22-23

Session".[192] His opinion drew on arguments first set out on the UK Constitutional Law Group blog in January 2012:

> 4.27 Applying the approach mandated by Section 29(3) [of the Scotland Act 1998], a perfectly coherent case could be made out to the effect that the purpose of any independence referendum legislation is one of consulting the people of Scotland [...] about the possibility of future constitutional change in the UK, to be effected constitutionally.
>
> 4.28 Such formal consultation by the legislature of the people of Scotland maybe said to be fully in accordance with the constitutional principle of democratic accountability to which the Scottish Parliament (as much as the Union [United Kingdom] Parliament) is subject.
>
> 4.29 A case may even be made out that – at a time of fundamental constitutional change caused by the UK's departure from the European Union – such consultation may even be said to be required of the legislature in its duty to maintain the trust and confidence of the people to which it is answerable, from which trust it derives its legitimacy [...]
>
> 4.34 In sum, for the Scottish Parliament to legislate for a referendum on the question of whether Scotland should be an independent country does not then, logically or politically, involve any claim that the Scottish Parliament has the competence, or indeed the intention to dissolve the Union.[193]

The Outer House of the Court of Session considered a declarator sought by Martin James Keatings in January 2021. His counsel argued that a potential independence referendum did not in itself relate to a reserved matter, and that Mr Keatings had sufficient standing to seek this. The Advocate General for Scotland invited the court to dismiss the action on the basis the pursuer lacked standing, and that it was an abstract question of law, no referendum Bill having been introduced to the Scottish Parliament. Those acting for the Lord Advocate made similar arguments.

Lady Carmichael published her 72-page opinion on 5 February 2021. She said Mr Keatings lacked the standing to bring the case to the Court of Session and that the question was, in any case, "hypothetical, academic and premature":

> It is, however, important, that matters which may properly be the subject of political debate and campaigning in the democratic process are permitted to unfold and be worked out in the political process, and that the courts intervene only when they need to do so to fulfil their function as guardians of the rule of law.

Mr Keatings indicated his intention to appeal. This was heard at the Inner House on 6 April 2021. Mr O'Neill argued that as the Scottish Government had now published a Bill, the court should reach a decision before the Scottish Parliament election on 6 May 2021. On 30 April, three judges, including the Lord President, Lord Carloway, also refused to issue a declaration. However,

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192 "Top Scottish lawyer says IndyRef2 can be legally held without Westminster approval", Daily Record, 16 January 2020. This had not been Mr O'Neill's view in 2012 (see **Section 5.4**).

193 Forward as One, Re the constitutionality of a further Scottish independence referendum legislated for by the Scottish Parliament, Advice of Senior Counsel, January 2020

the Inner House made clear that its approach to the Scotland Act 1998 would have been one of ordinary statutory interpretation rather than "how similar issues were handled in other jurisdictions". Lord Carloway stated in his judgment that:

> [38] A referendum on Scottish independence would affect two reserved matters, viz the Union of the Kingdoms of Scotland and England, and the Parliament of the United Kingdom. The sovereignty of the UK Parliament was reserved (*UK Withdrawal from the EU (Legal Continuity) (S) Bill* at paras [61]-[63]). Secession involved a reduction in its powers (*Moohan* at paras [17], [71], [91] and [102]). The central aim of the reservations was "that matters in which the United Kingdom as a whole has an interest should continue to be the responsibility of the United Kingdom Parliament" (*Christian Institute v Lord Advocate* 2017 SC (UKSC) 29 at para [65]; White Paper, *Scotland's Parliament*, Cmnd 3658; *Wilson v First County 16 Trust (No. 2)* [2004] 1 AC 816 at para 56). The people of the UK had an interest in whether the UK was divided. Statements made during the passage of the 1998 Act (*Pepper v Hart* [1993] AC 593 at 640) rebutted any intention to give the Scottish Parliament the powers contended for. These included those of Lord Sewel (Hansard HL Vol 592 cols 854-855) and the Lord Advocate (Hansard HL Vol 593 col 1953).
>
> [39] Legislation which provided for a referendum would have more than a loose connection with reserved matters (UK Withdrawal from the EU (*Legal Continuity) (S) Bill* at para [27]). The legal effect would require resources for a ballot on whether the Union of the Kingdoms of Scotland and England should end and whether the Parliament of the United Kingdom should cease to be sovereign in Scotland. The purpose would be to seek to build momentum towards both of these outcomes. That purpose could be discerned from an objective consideration of the effect of its terms, for which the background materials, headings and side-notes would assist (*Martin v Most* at para [25]; *Imperial Tobacco* at paras [16]-[17]).

The Lord President concluded that:

> [55] At present, there is no Bill before the Parliament, although there is a draft Bill. A draft Bill has no legal status. The result of the election is not yet known. A Bill may or may not be introduced, depending upon the Government formed as a consequence of the election [...] If the Bill were passed without such [a s30] Order, it is highly probable that the UK Government's law officers would refer the Bill for scrutiny by the UK Supreme Court. All of these eventualities render the current remedies sought premature, hypothetical and academic. A decision by this court on the matters litigated would serve no practical purpose.
>
> [66] The question would have been whether an Act to hold a referendum on Scottish Independence "relates to" (s 29(2)(b)) "the Union of the Kingdoms of Scotland and England" or "the Parliament of the United Kingdom" (sch 5 part I para 1(b) and (c)) having regard to its effect in all the circumstances (s 29(3)). The Act would relate to these reserved matters if it had "more than a loose or consequential connection with them" (*UK Withdrawal from the EU (Legal Continuity (Scotland) Bill* 2019 SC (UKSC) at para [27], quoting *Martin v Most* 2010 SC (UKSC) 40, Lord Walker at para [49]). **Viewed in this way, it may not**

> **be too difficult to arrive at a conclusion**, but that is a matter, perhaps, for another day.[194]

Professor Stephen Tierney, a constitutional academic, believes this suggests that the Court of Session "would be very sceptical of the legality of such a bill". He also notes that Lord Carloway was applying the competence test repeatedly used by the Supreme Court:

> A provision will be considered to be outside competence if it has more than a 'loose or consequential connection' to a reserved matter. The key question for the Supreme Court would be whether a referendum on Scottish independence would have more than such a loose or consequential connection to the Union of the Kingdoms of Scotland and England. It seems probable that it would find such a connection to exist.[195]

6 United Nations and self-determination

On 14 December 1960 the United Nations General Assembly adopted a "Declaration on the Granting of Independence to Colonial Countries and Peoples". In doing so, the Assembly proclaimed, among other things, that it was convinced:

> that all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory.

It is clear from the language of the Declaration that it was not intended to apply to developed, democratic member states, but rather to states with colonial territories, such as France and the United Kingdom. Article 5, for example, referred to "immediate steps" being taken in "Trust and Non-Self-Governing Territories" to transfer powers. The preamble also welcomed "the emergence in recent years of a large number of dependent territories into freedom and independence".

Article 74 of the UN Charter uses the term "metropolitan" in contradistinction to non-self-governing territories to refer to the administering state. As Professors James Crawford and Alan Boyle observed in 2012:

> Colonial peoples have a right to self-determination that is distinct from any right of the people of the metropolitan state. Partly for this reason, states have generally been less reluctant to recognise secession by colonial territories. Since Scotland is part of the metropolitan UK, state practice that depends on the colonial status of territories is of little or no relevance.[196]

194 *Keatings v Advocate General* [2021] CSIH 25

195 Stephen Tierney, "The Scottish Parliamentary Elections and the 'Second Referendum' Debate"

196 James Crawford and Alan Boyle, Annex A Opinion: Referendum on the Independence of Scotland – International Law Aspects, London: HM Government, 10 December 2012, para 22.3

8 2021 Scottish Parliament election

The SNP's manifesto for the 2021 Holyrood elections stated that:

> As the Scottish Government, we will discuss with the UK Government the necessary transfer of power to put a referendum beyond legal challenge and in the hands of the Scottish Parliament. For the UK government to refuse to do so would be both undemocratic and unsustainable.
>
> If the democratically elected Scottish Parliament passes the referendum bill and the UK Government then attempts to block it by taking legal action we will vigorously defend the Parliament's will in order to protect the democratic rights of the Scottish people.[197]

The Scottish Conservative manifesto for the 2021 election expressed its opposition to another independence referendum:

> The SNP have also committed to hold that referendum regardless of whether it is agreed by the UK Government or not. If the SNP win control of our Parliament, they will hold that referendum at the earliest opportunity [...]
>
> At the Scottish Parliament Election, voters have the chance to say no to a second independence referendum by denying the SNP a majority. Without a majority they will not be able to pursue a referendum and will need to focus instead on rebuilding our country.[198]

The Scottish Green Party manifesto stated that:

> The Scottish Greens will campaign and vote for a referendum within the next Parliamentary term and under the terms of the Referendums Act (2020). We believe that the UK Government's refusal to respect a pro-independence majority in the Scottish Parliament would not be politically sustainable and could be subject to legal challenge.[199]

At the Scottish Parliament election on 6 May 2021, the SNP emerged as the largest party with 64 MSPs, one more than in 2016. The Scottish Greens won 8, 2 more than at the last election. The Scottish Conservatives remained steady on 31.

Interviewed on Sky News, Michael Gove MP, the Minister for the Cabinet Office, was asked if the UK government would, in future, refer Holyrood referendum legislation to the Supreme Court. He replied:

197 SNP Manifesto 2021, Scotland's Future, Edinburgh: Scottish National Party, 2021, p12

198 Rebuild Scotland: The Scottish Conservative and Unionist Party Manifesto 2021, Edinburgh: Scottish Conservative & Unionist, 2021, p5

199 Our Common Future: Scottish Greens Manifesto 2021, Edinburgh: Scottish Green Party, 2021, p51

> No, we're not even going there at the moment. What we're concentrating on is making sure we work on recovery. We're not going to go there. To go down this route, to start speculating about this type of legislation, or that type of court hearing and all the rest of it, is just a massive distraction.[200]

Asked about Schedule 5 of the Scotland Act 1998, First Minister Nicola Sturgeon said there were a "range of views" as to whether that prevented a referendum. She also said she did not believe the issue would "get anywhere near" the Supreme Court.[201]

Upon being re-nominated as First Minister by the Scottish Parliament, Ms Sturgeon stated that:

> By any measure of parliamentary democracy, there is a clear mandate for a referendum within this session of Parliament. It is important, in the interests of democracy, that that is acknowledged and respected. However, it is also important that I exercise that mandate with responsibility and humility, and only when the crisis of Covid has passed. I give that commitment today.[202]

In her speech to the 2021 SNP conference, Nicola Sturgeon said that "Covid permitting", in the "course of next year" she would "initiate the process necessary to enable a referendum before the end of 2023".[203]

Interviewed by the BBC on 23 January 2022, the First Minister said the "preparatory work" of holding a second referendum was "under way right now. We haven't decided on the date we would seek to introduce the bill; we'll decide that in the coming weeks."[204]

Speaking as co-leader of the Scottish Greens (rather than as a Scottish Government minister), Patrick Harvie stated on 11 March 2022 that he believed there to be "a strong legal argument that says Scotland does have the right to put this question".[205]

Asked when legislation would be laid before MSPs, Mr Harvie said:

> I think there will be an announcement on that before too long. I don't think a date has absolutely been fixed. There are one or two hoops the Scottish Government has to jump through before formally laying a bill like submitting it to the Presiding Officer [...] you will hear before very long what the timescale is for that but it will be fully in line with the intention to hold an independence referendum in the timescale that we promised.[206]

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200 "Michael Gove dodges questions on possibility of blocking Scottish independence referendum legislation in courts", Independent, 9 May 2021

201 Andrew Marr Show, BBC1, 9 May 2021

202 Scottish Parliament Official Report, 18 May 2021

203 SNP website, "Nicola Sturgeon's full speech to #2021 Conference", 29 November 2021

204 "Sturgeon plans to introduce independence bill in 'the coming weeks'", STV News website, 23 January 2022

205 PA Newswire: Scotland, 11 March 2022. Mr Harvie did not say what the legal argument was.

206 "Plans to hold Indyref2 in 2023 to be set out imminently, says Patrick Harvie", Herald, 11 March 2022

8.1 Referendum commentary

The legality of an independence referendum continued to be discussed following the 2021 Scottish Parliament election.

The journalist James Forsyth suggested that the UK government was concerned about the precedent set by the Supreme Court's ruling on the 2017 Miller case. This:

> emphasised that referendums in this country have political but not legal effect. This gives the Scottish government the opportunity to say that it should be allowed to hold a second independence referendum because it would have no direct legal effect and so doesn't impinge on Westminster's responsibility for the constitution.[207]

Adam Tomkins, a constitutional academic and former Scottish Conservative MSP, agreed:

> If the Scottish Government presents an independence referendum bill as if its purpose is to seek the opinion of the Scottish people, knowing that its effect in law is zero, then because of the Supreme Court's judgements since Brexit, it is going to be quite difficult I think to convince the Supreme Court that this a measure that relates to a reserved matter.[208]

A year later, Mr Tomkins developed this argument further in a column for the Herald newspaper:

> Absent Westminster's consent, which is sure to be withheld, Holyrood legislation paving the way for a repeat referendum on independence will be lawful only if the Scottish Ministers are prepared to concede (1) that its purpose is merely to consult the people rather than to make any decision about independence and (2) that its effect is zero, i.e. that no legal or constitutional consequences would attach to any Yes vote. It would just be an opinion poll, like any other opinion poll.[209]

Another legal expert, Scott Styles at the University of Aberdeen, suggested that the Scottish Government take a different approach should an independence referendum Bill be referred to the Supreme Court:

> The Scots [sic] Government should in the court action challenge the very existence of the legal power of Westminster to say no to indyref2, by plainly asserting that the democratic legitimacy of Holyrood trumps that of the Westminster Parliament over Scots affairs, giving it Holyrood the legal authority to hold an independence referendum [...] If the Supreme Court were to rule against the lawfulness of the IndyRef2 Bill it would be sending Scotland

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207 "What's next for the Union", Spectator, 8 May 2021

208 "Scottish independence referendum organised by Holyrood could be legal, warns former Tory MSP", Daily Record, 21 May 2021. In a 2012 article for the UK Constitutional Law Association, "The Scottish Parliament and the Independence Referendum" (written before the *Miller* judgements), Tomkins had been quite clear that a referendum would relate to a reserved matter and therefore be ultra vires.

209 Adam Tomkins, "Here's the legal strategy Scottish Ministers will use to fight Supreme Court indyref2 battle", Herald (£), 1 June 2022

> the message that the Union is a prison based on legal coercion, a prison which no democratic key can unlock.[210]

Professor Matt Qvortrup at Coventry University, meanwhile, focussed on the political consequences if the Supreme Court ruled that a referendum was a reserved matter:

> This will be a gift for [Nicola] Sturgeon. Imagine, a bunch of posh, mainly English lawyers blocking the will of the Scottish people in the unelected Supreme Court in London [...] Let the courts block the will of the people and resentment against the "English" Tories will grow. This will lead to more support for independence and more political capital will be useful later on. But, paradoxically, this will suit Johnson. Angry Scots demanding separation and a robust defence of the Union will be popular in England.[211]

In February 2022, The Economist commissioned an opinion poll in which voters in Scotland were asked to what extent they believed it "would be right or wrong" for the UK Supreme Court "to decide on whether another independence referendum can take place":[212]

> [A] third of Scots, and 45% of nationalists, told Savanta ComRes it would be wrong for the Supreme Court to decide whether a referendum can go ahead. A similar share think the British government should not have a veto on a referendum.[213]

In April 2022 the Herald newspaper reported that Alba leader Alex Salmond believed it was "ridiculous" for the Scottish Government to commit "to a section 30 referendum as a gold standard with nothing behind it", as all such a referendum would be was "an agreed legitimacy of a democratic test". Mr Salmond was also reported as saying that the path to independence had to involve "peaceful but direct action, civil demonstration, and preparing a legal case".[214]

At the same event, the SNP MP Douglas Chapman was reported as saying that if no referendum took place by 31 December 2023, then pro-independence candidates at the next UK general election ought to stand on a manifesto which stated that winning a majority of (Scottish) seats would "trigger our path to independence":

> The main thing is that [if] the Scottish Government put forward for a referendum then it will immediately be taken to court by the English [sic] government. And you know, we'll be in a stalemate position for years arguing

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210 "Legal expert explains why the refusal of a Section 30 order wouldn't end indy", The National, 23 May 202

211 "An 'English' referendum ban would be a gift for Nicola Sturgeon", The Times (£), 7 July 2021

212 Savanta ComRes, Scotland Poll – The Economist – 3rd March

213 "Peak Nat", The Economist (£), 5 March 2022

214 "Salmond: Separate independence campaign from 'incompetent' Scottish Government", Herald (£), 10 April 2022. A few months later Mr Salmond argued that the s 30 Order agreed in 2012 was "a compromise and the UK Government agreed to it because the Scottish Government made David Cameron and George Osborne think that other options such as a plebiscite would be progressed if they did not agree to the 2014 independence referendum" ("Nicola Sturgeon warned not to launch 'pretend referendum'", Herald (£), 26 June 2022).

> the toss in the courts the length and breadth of the country. I think the other thing as well, if it does go to court, then we're not sure of getting an unbiased view from a set of judges.[215]

The Scottish Sovereignty Research Group "think tank" believes it has "identified at least six routes to achieving" Scotland becoming "an independent sovereign state". These are via the 1689 Claim of Right, a "Plebiscitory Election" in 2024, pro-independence MPs withdrawing from Westminster, utilizing the United Nations' stance on decolonisation, a section 30 Order-authorised referendum (as in 2014) or, finally, an "unauthorised referendum" if a s 30 Order is refused.

8.2 Legal advice

In response to a Freedom of Information (FoI) request from the Scotsman newspaper which asked for any legal advice provided to Scottish Ministers on the topic of a second independence referendum during 2020, the Scottish Government published some material on 7 June 2022.

Although this did not include the question of whether the Scottish Parliament has the authority to legislate for a second referendum, counsel given to the Scottish Government stated that ministers could "lawfully undertake policy development work preparing proposals for independence, and in calling for a transfer of power" (i.e. a section 30 Order under the Scotland Act 1998).[216]

In response to the FoI request the Scottish Information Commissioner Daren Fitzhenry had earlier stated that the Scottish Government disclosing some of its advice regarding a potential second referendum would "significantly enhance public debate on this issue".[217]

While in this case the Scottish Government chose not to appeal the Scottish Information Commissioner's decision, it stated that "publication of the material [...] does not set any precedent for its position on releasing any other information that is subject to legal professional privilege, including in response to any other Freedom of Information request".[218]

The material released by the Scottish Government referred to a "Law Officers' Opinion of 6 December 2019".[219]

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215 "Pro-indy Westminster majority could see Scotland split from Union, SNP MP claims", Herald (£), 10 April 2022

216 Scottish Government, "Legal advice to Ministers or provided by the Civil Service on the topic of a second independence referendum in 2020: FoI Appeal", 7 June 2022

217 Scottish Information Commissioner, "Legal advice on second independence referendum in 2020", Decision Notice 048/2022, 26 April 2022

218 Scottish Government, "Scottish Information Commissioner decision on independence referendum legal advice: response", 7 June 2022

219 Scottish Government, "Legal advice to Ministers or provided by the Civil Service on the topic of a second independence referendum in 2020: FoI Appeal"

8.3 Referendum developments, 2022

In the Scottish Government Resource Spending Review published on 31 May 2022, £20 million was allocated to support delivery "of a referendum on independence".[220] First Minister Nicola Sturgeon told MSPs that spending:

> £20 million—0.05 per cent, or one half of one tenth of 1 per cent, of the entire Scottish Government budget—to give the people of this country the opportunity to choose a better future is, and will be, a really good investment.[221]

In the House of Lords on 8 June, Lord Foulkes of Cumnock asked if the UK Government could:

> consider monitoring the expenditure of the devolved authorities to ensure that they are not spending money on reserved areas, as the Scottish Government are? They are spending £20 million on the constitution, including employing civil servants to prepare for a referendum and for breaking up the United Kingdom.[222]

Lord Greenhalgh replied that: "Scottish Ministers are accountable to their own legislature and electorate for their actions, including their expenditure decisions."[223]

Launching a summary paper on Independence in the modern world on 14 June 2022, First Minister Nicola Sturgeon stated that:

> If this UK Government had any respect at all for democracy, the issue of legality would be put beyond doubt, as in 2014, through a section 30 Order. I make clear to the Prime Minister again today that I stand ready to discuss the terms of such an Order at any time. But my duty as a democratically elected First Minister is to the people of Scotland; it is not to Boris Johnson or any Tory Prime Minister. This is a UK Government which has no respect for democracy, and as we saw yesterday it has no regard for the rule of law either. That means **if we are to uphold democracy here in Scotland we must forge a way forward, if necessary, without a section 30 Order**.

Reactions to Scottish Government announcement

Responding to the First Minister's comments, the Prime Minister's official spokesman said the UK Government's position was:

> that now is not the time to be talking about another referendum. We're confident that the people of Scotland want and expect their governments to be

220 Scottish Government, Investing in Scotland's Future: Resource Spending Review, Edinburgh: Scottish Government, 31 May 2022, pp52-53

221 Scottish Parliament Official Report, 1 June 2022

222 HL Deb 8 June 2022 Vol 822 c1143

223 HL Deb 8 June 2022 Vol 822 c1143

> working together to focus on issues like the global cost of living challenge, like war in Europe, and the issues that matter to their families.

On 20 June 2022 Pete Wishart MP, the SNP chair of the Scottish Affairs Committee, asked the Secretary of State for Scotland what he "would you do to stop this [an independence referendum] taking place?" Alister Jack replied:

> Well, we'll cross that bridge when we come to it; that is entirely a matter for the law officers, as I've said in the past. Our position as a UK Government is we want to carry on delivering on the priorities – levelling up, saving livelihoods, the things that the people of Scotland care about.[224]

The pro-independence Herald commentator Neil Mackay was critical of the First Minister's pledge to deliver a referendum without a section 30 Order:

> It's evidently an affront to democracy that [Boris] Johnson refuses to accept the parliamentary mandate for another referendum, but that's no reason for the First Minister to toy with the same contempt for norms that defines the Prime Minister [...] Unless she was able to provide immediate and legal answers, Sturgeon should never have said she may hold a referendum 'without a Section 30 order'. Clearly, she also insisted any referendum would be 'lawful', but the spectre still hangs of a Scottish First Minister threatening illegality. Given Johnson's record, we know politicians can swear blind they're acting legally when they're clearly not.

Mr Mackay quoted referendums expert Professor Matt Qvortrup saying that Ms Sturgeon was:

> playing with fire when she says that a referendum can be held without a Section 30 order. It cannot. You cannot criticise Boris Johnson for breaking the law over Northern Ireland, and then break the law yourself. A referendum without the consent of Westminster is unconstitutional and illegal; the Scottish Parliament does not have jurisdiction over this matter. I personally think that Scotland should be allowed to hold a referendum but it must be granted by Westminster. That plainly is the law.[225]

Dr Nick McKerrell, a law lecturer at Glasgow Caledonian University, observed there was "no procedure in court that would force a Section 30 order" and highlighted the "potential stumbling block" that any Bill "will have to have the legal approval" of Scotland's Lord Advocate, Dorothy Bain QC:

> That might be a factor in why the bill hasn't been put through parliament yet – without that it couldn't be presented. Perhaps they are negotiating with the Lord Advocate to say if we don't have a Section 30 order what can we do to get the bill through. This idea of saying we are not going for the Section 30 route is part of the process of maybe coming up with a form of words or a type of bill that the Lord Advocate would sign off and allow it to be debated in Parliament.[226]

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224 Scottish Affairs Committee, Oral evidence: Secretary of State for Scotland, HC 363, 20 June 2022

225 "What's really behind the launch of Nicola Sturgeon's 'indyref2' campaign?", Herald (£), 16 June 2022

226 "Scottish independence: Legal expert explains the paths to indyref2", The National (£), 15 June 2022

Aileen McHarg, professor of public law and human rights at Durham University, agreed, saying: "I think we can assume that there are some difficulties in getting law officer sign-off." She added that in 2012 she thought:

> that the case was arguable that they [Supreme Court Justices] might uphold the validity of a bill. I didn't think it was by any means certain, but I thought it was arguable. Since then [2012], we've had quite a lot more jurisprudence, a lot more case law from the Supreme Court on devolution. We're also in a period where the Supreme Court has become quite conservative in its constitutional jurisprudence.[227]

Scott Crichton Styles, a lecturer in law at the University of Aberdeen, agreed that the "tenor" of opinion in recent constitutional cases from both the Supreme Court and Court of Session seem to "indicate that they are both likely to rule that a referendum on that question is outwith the powers of Holyrood and so is unlawful".

> However, if there was authorisation for a different referendum bill, one merely requesting permission to hold indyref2 from Westminster, then I believe that might be more likely to be ruled lawful by the courts. Such a referendum could ask: 'Should the British Parliament grant legal permission to the Scottish Parliament to hold a referendum on Scottish independence? Yes or No?'
>
> A referendum in these terms is in law (but not politics) merely a grand petition to Westminster and so should be found lawful by the courts under the Scotland Act.
>
> All citizens have the right to petition Parliament! If this petitionary referendum was legally authorised and held and subsequently a Yes vote achieved, then I believe it would then become politically impossible for Westminster to deny Scotland a second referendum.
>
> Because in effect instead of rejecting a Section 30 request from the Scottish Parliament they would be rejecting a request from the Scottish people.[228]

Andrew Tickell, a law lecturer at Glasgow Caledonian University, wrote that:

> Until a court decides otherwise, my view is that it is arguably within Holyrood's competence to legislate for a referendum about Scotland's constitutional future without Westminster's consent, but it is nowhere near a sure thing.[229]

Elsewhere, Tickell elaborated on his argument:

> Take the purpose of an independence referendum bill first. What is it for? Given the Scottish Government's political commitments, unionists tend to present the legal purpose of any independence bill as the destruction of Britain, and credibly so. But why look at it this way? For example, before the 2014 poll, every SP in Holyrood supported the legislation setting up the legal framework for the referendum, whether they intended to campaign Yes or No. Would it make sense to say that Ruth Davidson's 'object and purpose' in voting for these

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227 "Chances of Scottish Government winning referendum court battle 'quite slim', says expert", Scotsman (£), 19 June 2022

228 "How Scotland might force the UK's hand over a Section 30 order", The National (£), 22 June 2022

229 "Legal routes to blocking indyref2 and other known unknowns", Sunday National (£), 19 June 2022

> referendum bills was to deliver Scottish independence? Do you really think Johann Lamont was endorsing separatist principles by agreeing that a referendum on our constitutional future should take place?
>
> Similar observations obtain in considering the legal effect of a referendum bill. The case against Holyrood having the power to ask the question largely assumes that such a referendum would result in a Yes vote and, therefore, break up Britain. But why should this be assumed at all? Go back to 2014 again – what was the legal effect of the 2014 referendum? The public were consulted, a majority view was expressed, and a few campaigners found themselves fined for breaching campaign finance rules. But beyond this, what did the first referendum actually change? What rights did it create or eliminate? What rules of law did it rewrite? Like Brexit, the first independence referendum was not binding in any legal sense, though both had profound political effects.
>
> Even if 2014 had produced a pro-independence majority, additional Westminster legislation would have been required to bring the union to an end and free Holyrood from the constraints of the Scotland Act. Looked at this way, the legal effect of legislation enabling a referendum is extremely limited. These are the kind of arguments we can expect to be aired in any legal challenge to a referendum bill that is passed by the Scottish Parliament without the UK government's agreement. Whether you hold your brief for the UK government or the Scottish Government, both have a stateable case.[230]

Robert Kilgour, the founder and chairman of Scottish Business UK, said he and other business leaders would fund a challenge if the Scottish Government held a referendum without agreement from Westminster:

> If [the First Minister] tries to go for an illegal referendum or uses taxpayers' money for an advisory one, we are certainly prepared to respond. This is the time to focus on economic recovery and recovery of education and health. For us in business, we are focussed on creating jobs and attracting investment.[231]

[230] Andrew Tickell, "No Magic Bullets: Legal Issues in Achieving Independence and a Referendum" In Gerry Hassan and Simon Barrow (eds), A Better Nation: The Challenges of Scottish Independence, Edinburgh: Luath, 2022, pp79-80

[231] "We'll take SNP to court over referendum", Scottish Daily Mail, 16 June 2022

9 First Minister's 28 June 2022 statement

In a statement to the Scottish Parliament on 28 June 2022, Nicola Sturgeon, the First Minister of Scotland, set out her "route map" to a second independence referendum. [232]

Introducing the issue of legal clarity, the First Minister said:

> We know that the legislative competence of the Scottish Parliament to pass the bill in the absence of a section 30 order is contested. We know that legislative competence can be determined only judicially. We know that, for as long as there is no judicial determination, opinions will differ and doubt will continue to be cast on the lawful basis for the referendum.

Ms Sturgeon then set out the legal challenges that would likely exist "if the issue of legislative competence remains unresolved at the point of formal introduction of the [independence referendum] bill". She added that "the UK Government will almost certainly use section 33 of the Scotland Act 1998 to refer the matter to the Supreme Court after the legislation has passed." Similarly, a challenge could be brought by private individuals in the form of judicial review. The First Minister stated that:

> Either way, at the point of Parliament passing the bill, there would be no certainty about when or even if the legislation could be implemented. A court challenge would still lie ahead and the timetable that I have set out today would quickly become difficult to deliver.

Ms Sturgeon therefore announced that the Lord Advocate (the principal legal adviser to the Scottish Government) had that day referred – and on her request – the question of whether the Scottish Government's republished draft Independence Referendum Bill would "relate to" reserved matters to the Supreme Court (see **Section 9.2**). [233]

In a letter to UK Prime Minister Boris Johnson, Nicola Sturgeon said that despite this reference, she stood "ready to negotiate the terms of a section 30 order" with the UK Government (although she did not make a direct request, as in 2017 and 2019). [234]

The Prime Minister said:

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[232] Scottish Government, "Independence referendum: First Minister's statement", 28 June 2022

[233] According to The Times, Conservative and Labour MSPs attempted to compel the Lord Advocate to appear at Holyrood before its summer recess (see "General election will give no mandate for independence referendum, SNP told", The Times (£), 30 June 2022)

[234] Scottish Government, "Letter from the First Minister to the Prime Minister on Independence Referendum", 28 June 2022

> We will look carefully at what [Nicola Sturgeon] says. Don't forget that the longstanding position is that we don't think this is the right time to be doing a constitutional change. I think our economy is all the stronger for being together. This is a time really now to focus on things which the union can deliver for the economic benefit of everybody.[235]

Later, in a call with the Prime Minister, Nicola Sturgeon "again made clear" that the Scottish Government was "ready and willing to negotiate a section 30 order to secure a referendum on independence but reiterated that the absence of a section 30 order will not mean Scotland is refused the democratic right to choose".[236]

Boris Johnson replied to the First Minister's letter on 6 July 2022:

> I have carefully considered the arguments you set out for a transfer of power from the UK Parliament to the Scottish Parliament to hold another referendum on independence. As our country faces unprecedented challenges at home and abroad, I cannot agree that now is the time to return to a question, which was clearly answered by the people of Scotland in 2014.[237]

Launching the Scottish Government's second "Building a New Scotland" paper, Renewing democracy through independence, on 14 July, the First Minister said that "if the new prime minister" of the UK was "open" then she would "be open to sitting down and in a spirit of compromise seeking to come to an agreement" on the terms of a second independence referendum.[238]

9.1 A "consultative" referendum

In her statement to the Scottish Parliament, the First Minister was clear that her proposed referendum would be "consultative, not self-executing".

As a briefing by the Scottish Parliament Information Centre explains:

> Consultative referendums are sometimes referred to as pre-legislative referendums, meaning that those eligible to vote are asked to vote on a principle rather than a set proposal. Further legislation is usually required to give effect to the outcome of the referendum.[239]

Ms Sturgeon observed that previous Scottish and UK referendums had also been pre-legislative:

> In common with the 2014 referendum – indeed, in common with the Brexit referendum and the referendum to establish this Parliament – the

235 "Election win should trigger Scottish independence, says Sturgeon", BBC News online, 29 June 2022
236 Scottish Government, "Statement on First Minister's call with the Prime Minister", 4 July 2022
237 Letter from the Prime Minister to the First Minister, 6 July 2022
238 "New prime minister must grab Nicola Sturgeon's compromise", The Times (£), 20 July 2022
239 SPICe Spotlight blog, "A second independence referendum", 29 June 2022

> independence referendum proposed in the Bill will be consultative, not self-executing.

But as Kenneth A. Armstrong, Professor of European Law at the University of Cambridge, observed in the Guardian newspaper:

> Every referendum in our constitutional setup is consultative rather than self-executing, unless the legislation mandates what has to happen if a vote goes a particular way.[240]

Previous UK referendums have been "determinative" rather than consultative, in which the result automatically produces legal consequences. For example, there was a statutory obligation for the relevant minister to bring into effect provisions for the Alternative Vote (AV) had the 2011 UK-wide referendum produced a majority in favour of that voting system.

Similarly, the Scotland Act 1978 included a provision to implement the outcome (ie establish a devolved Scottish Assembly in Edinburgh or repeal the Act).[241] Even then, it was not strictly binding, for as Pravar Petkar has observed, Parliament "could simply repeal" any statutory duty following such a referendum.[242]

Binding referendums are also held in other countries. In Denmark, for example, these must be conducted on any proposal to change the Constitutional Act or to change the age at which people can vote.

A blog by The Constitution Unit, "Referendums in UK democracy", looks at different types of referendums in more detail.

9.2 Supreme Court reference

The reference to the Supreme Court is possible under Schedule 6 of the Scotland Act 1998 ("the 1998 Act") (see **Section 7.2**). Paragraph 34 states that the Lord Advocate "may refer to the Supreme Court any devolution issue which is not the subject of proceedings". Para 1 defines a "devolution issue" as about an Act of (rather than a Bill before) the Scottish Parliament, although 1(f) also leaves scope for a referral on:

> any other question about whether a function is exercisable within devolved competence or in or as regards Scotland and any other question arising by virtue of this Act about reserved matters.

Aileen McHarg, a constitutional academic at Durham University, viewed this as "a clever move in three respects":

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240 "Sturgeon faces tough hurdles on road to Scottish independence vote", Guardian, 28 June 2022

241 See **Section 2.5.** See Scotland Act 1978 (Repeal) Order 1979.

242 Pravar Petkar, "Consultative Referendums and Constituent Power in the UK", UK Constitutional Law Association blog, 5 July 2022

> First, it seeks to accelerate the resolution of the long-running legal dispute about whether Holyrood can legislate unilaterally for a referendum. In so doing, the First Minister hopes both to make it more likely to that her preferred referendum timetable will not be derailed, and to move the independence debate on from issues of process to questions of substance. Secondly, it wrong-foots opponents of a second referendum. Since a Bill will only be introduced into the Parliament if the Supreme Court has held that it is within competence, allegations that it is an illegal, or unofficial, or "pretendy" referendum will be less credible. Unionists may still choose to boycott it of course (as nationalists in Northern Ireland did in relation to the unimpeachably lawful 1973 Border Poll), but the political risks of doing so will be higher. Thirdly, a pre-introduction reference avoids the need for the Lord Advocate to commit to a statement that a Bill is within competence until such times as its lawfulness has been established. In referring the Bill at this stage, she is only recognising that there is a legal issue to be resolved, not committing personally to the view that it would be within competence.[243]

According to The Times, the idea to use the "largely unnoticed" Schedule 6 reference route "originated with [Nicola] Sturgeon herself".[244]

In a statement, the Supreme Court confirmed receipt of the Reference and said the "first step" would be for the court's President, Lord Reed of Allermuir, to address any "preliminary matters", decide when the case would be "listed" (heard) and how many Justices would consider the reference and sit on the bench.[245] The absence of a "permission stage" does not mean the Supreme Court is bound to act on a reference.[246]

Lord Advocate's Reference

The Scottish Government published the text of the Lord Advocate's Reference on 5 July 2022.[247]

This made clear that in "the present case, the Lord Advocate does not have the necessary degree of confidence" that the draft Scottish Independence Referendum Bill would be within the legislative competence of the Scottish Parliament.[248]

But in making the Reference the Lord Advocate argued that:

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243 Aileen McHarg, "Securing Scotland's independence: Moving beyond process?", Centre on Constitutional Change website, 1 July 2022

244 "How Nicola Sturgeon came up with her Scottish independence battle plan", The Times (£), 2 July 2022

245 Supreme Court website, "Reference by the Lord Advocate to the Supreme Court", 28 June 2022. Both Lord Reed and the Court's Deputy President, Lord Hodge, are Scottish Justices.

246 See, for example, *A Reference by the Attorney General for Northern Ireland of devolution issues to the Supreme Court pursuant to Paragraph 34 of Schedule 10 to the Northern Ireland Act 1998 (Northern Ireland)* [2020] UKSC 2, para 12

247 Scottish Government, "Reference to Supreme Court: whether the question for a referendum on Scottish Independence contained in the proposed referendum Bill relates to reserved matters", 5 July 2022

248 Reference, para 4

> (1) There is a genuine issue of law that is unresolved;
>
> (2) That issue of law is of exceptional public importance to the people of Scotland and the United Kingdom; and
>
> (3) It is directly relevant to a central [SNP] manifesto pledge that the Scottish electorate has endorsed.

The Lord Advocate observed that the "answer to the question referred will determine whether the Scottish Parliament can debate and vote upon the Bill which is the subject of a manifesto commitment".[249] The Reference further noted that it was "the first time this power has been exercised by the Lord Advocate", which was "a measure of the fundamental importance of the issue and its exceptional nature".[250]

Referring to the *Keatings* case (see **Section 7.4**), the Lord Advocate said she "agrees" with the Lord President's view (to "the extent that they apply to those such as the pursuer in Keatings") that the Court of Session "could not be called upon to consider the competence of a Bill before it had passed through the parliamentary process".[251] However in the context of this Reference the Lord Advocate was seeking a decision from the Supreme Court on the scope of two specific reservations "to enable her to fulfil her role in enabling the Scottish Government to meet the requirements of s.31 SA" (that is, certifying a Bill as within competence).[252]

The two reservations are paragraphs 1(b) and 1(c) of Schedule 5 to the 1998 Act which state that, respectively, "the Union of the Kingdoms of Scotland and England" and "the Parliament of the United Kingdom" are reserved matters. Whether the proposed referendum legislation relates to either or both reservations depended upon:

> (a) the scope of each reservation;
>
> (b) the purpose of the Bill; and
>
> (c) what the effect of the Bill would be in all the circumstances.[253]

While the Scottish Government accepted that an Act to dissolve the Union was not within the legislative competence of the Scottish Parliament, it "does not necessarily follow [...] that the proposed Bill, providing for an advisory referendum on independence, relates to reserved matters".[254]

In respect of the reservation of the Parliament of the United Kingdom, which the Supreme Court has held to "embrace" the sovereignty of the UK

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249 Reference, para 5
250 Reference, para 7
251 *Keatings v Advocate General* [2021] CSIH 25, paras 60-61
252 Reference, para 13
253 Reference, para 15
254 Reference, para 16

Parliament,[255] the Lord Advocate cited *Moohan v Lord Advocate*,[256] that Scotland becoming independent would involve a reduction in the scope of the UK Parliament's powers. She argued, however, that given "the advisory nature of the proposed referendum, it is questionable whether the proposed question (or the answering of it) purports to alter the fundamental principle of parliamentary sovereignty nor would it have this effect".[257]

The Lord Advocate went on to observe that the proposed referendum question "is itself neutral on the question of independence":

> Whilst the Scottish Government itself clearly wishes to persuade the people of Scotland to vote in favour of independence, such a Bill might be introduced or supported by a party that had the opposite political position.[258]

Finally, the Reference argued that the draft Scottish Independence Referendum Bill "does not stipulate what should happen in response to the result". Unlike the Parliamentary Voting System and Constituencies Act 2011, the draft Bill "provides only that the referendum should be held". Consequently, and as made clear by Clause 1, "as a matter of law, the legal effect of a referendum held pursuant to the Bill would be nil".[259]

UK Government's response

The UK Government lodged its initial response with the Supreme Court on 12 July 2022. This confirmed that the Advocate General for Scotland would become a formal party to the case and made several "background points" in a press statement:

> 1. On the substantive question of legislative competence, the UK Government's clear view remains that a Bill legislating for a referendum on independence would be outside the legislative competence of the Scottish Parliament.
>
> 2. The Lord Advocate's referral raises important legal questions, which cut across the statutory process for establishing the competence of devolved legislation. Because of this, we are asking the Supreme Court to consider whether it should accept the referral.
>
> 3. The Scotland Act 1998 sets out a statutory process to test whether legislation is within the competence of the Scottish Parliament. That process starts after a Bill has completed its Parliamentary passage (which would include consideration of any amendments made in Parliament). In this case, the legislation has not been passed by the Scottish Parliament, nor even yet introduced. Therefore, we are asking the Court to consider whether its examination on competence grounds is premature.[260]

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255 *UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64; 2019 SC (UKSC) 13 at para 61

256 UKSC 67; 2015 SC (UKSC) 1 at paras 17, 71, 91 and 102

257 Reference, para 17

258 Reference, para 18

259 Reference, para 19

260 "Supreme Court – UK Government statement", 12 July 2022

A spokesman for the First Minister of Scotland said:

> The UK government's repeated attempts to block democracy – which now seem to extend to an unwillingness to even make a substantive argument before the Supreme Court – serve only to demonstrate how little confidence it has in its case for the union.[261]

Supreme Court update

On Tuesday 19 July 2022 the Supreme Court published an update on the Lord Advocate's Reference.

This stated that on Friday 15 July the Supreme Court had issued an order refusing the Advocate General for Scotland's application for directions requiring the Advocate General and the Lord Advocate to file written cases only on the question of whether the Court can or should accept the Reference. The order further stated that:

> Since the issues of (a) whether the Court should accept the reference and (b) how the Court should answer the question referred will both require consideration of the circumstances giving rise to the reference and the substance of the question referred, it is in the interests of justice and the efficient disposal of the proceedings that the Court should hear argument on both issues at a single hearing.[262]

Aileen McHarg tweeted that this raised "the intriguing prospect that they [the Supreme Court] might decide the substantive issue, but also decide that the reference was not competent".

According to press reports, the Scottish and UK Governments have been told to submit legal papers setting out their respective cases by 9 August 2022.[263]

In another update on 21 July 2022, the Supreme Court said a date for the hearing had been provisionally set for 11-12 October 2022. It said the panel would be announced at the end of September.[264]

Lord Advocate's Written Case

The Scottish Government published the Lord Advocate's Written Case on 22 July 2022.[265]

Part 2 deals with jurisdiction, ie the Reference itself. Paragraph 22 states that:

261 "UK government asks Supreme Court to dismiss indyref2 case", BBC News online, 12 July 2022
262 Supreme Court website, "Update on the reference by the Lord Advocate", 19 July 2022
263 See "Supreme Court refuses to throw out Nicola Sturgeon's request for IndyRef2 ruling", Daily Telegraph (£), 18 July 2022
264 Supreme Court website, "Hearing date for the reference by the Lord Advocate", 21 July 2022
265 Scottish Government, "Lord Advocate's Written Case: whether the question for a referendum on Scottish Independence contained in the proposed referendum Bill relates to reserved matters", 22 July 2022

> The issue would be unlikely to reach the courts because although clearance by the Law Officers has not yet formally been sought, the Lord Advocate considers that she would be unlikely to have the necessary degree of confidence that the Bill does not relate to a reserved matter to "clear" the Bill. If the Bill is not introduced, there could be no pre-Royal Assent reference to this Court pursuant to s.33 SA. There is no other means by which the issue of legislative competence can be determined by the Court.[266]

Part 3 of the Written Case provides historical and constitutional context, including the observation that:

> Given the intervention of the Acts of Union of 1800 to create the United Kingdom of Great Britain and Ireland, and the secession of the Irish Free State in 1922, (resulting in the nomenclature of the United Kingdom of Great Britain and Northern Ireland) on one level it may be argued that the Union of the Kingdoms of Scotland and England has been superseded as a matter of law and exists only as an historical fact. The [Scotland Act] would therefore reserve something that no longer exists.[267]

Part 4 is carefully balanced, setting out the arguments both for **and** against the proposition that section 2 of the draft Scottish Independence Referendum Bill relates to reserved matters. Paras 114-27 deal with the "case that the referred provisions do not relate to the Union" and are summarised as follows:

> (1) The words and provisions of the Bill indicate that the legally relevant purpose is to ascertain the wishes of the people of Scotland on their future.
>
> (2) The wider motivations and aspirations of the Scottish Government and other political parties are not legally relevant.
>
> (3) The legal consequences of the Bill are, relevantly, nil.
>
> (4) Any practical effects beyond ascertaining the views of the people of Scotland are speculative, consequential and indirect and should not properly be taken into account.[268]

Paragraph 129 further argues that the "purpose" of an advisory referendum such as that set out in the draft legislation:

> has "at best an indirect, … or consequential connection" (Welsh Asbestos case at para.27) to the Union; and it does not have the "direct" (ibid.) or "short term" (Imperial Tobacco v Lord Advocate 2012 SC 297 (IH) at para.133)) connection, involving some practical impediment or other effect, necessary for it to be outside competence. Even if the criteria are limited to whether the purpose has a "loose" or "consequential" connection to the Union, ascertaining the wishes of the Scottish people, with its purely indirect, contingent and speculative consequences for the Union, would be insufficient to satisfy the test.[269]

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266 Lord Advocate's Written Case, para 22
267 Lord Advocate's Written Case, para 101
268 Lord Advocate's Written Case, para 128
269 Lord Advocate's Written Case, para 129

Part 5 of the Lord Advocate's Written Case makes some concluding observations of a more political (rather than legal) nature:

> Since 2007, at four successive Scottish parliamentary elections, the Scottish electorate has returned governments committed to giving the people of Scotland the choice of Scottish independence. Separately, at each UK General Election since 2015, a majority of MPs from Scottish constituencies have been elected on the same manifesto commitment. Against that background, and long-standing consensus that Scotland has the right to self-determination, to what extent, if at all, the holding of a referendum relates to a "reserved matter" is a question of fundamental constitutional and public importance. Despite the highly charged political context, it is a question of law. It is therefore a question that can only be authoritatively determined by this Court. The Lord Advocate believes it is in the public interest that clarity be brought to the scope of the Scottish Parliament's powers in respect of the issue. Accordingly, the Lord Advocate has invoked, for the first time, her right under the SA to refer to this Court a devolution issue which is not currently the subject of litigation. She does so for the benefit of the Scottish Parliament, the Scottish Government and the people of Scotland (indeed, people throughout the United Kingdom).[270]

Interventions

A day after the Lord Advocate's Written Case was published online, the SNP's National Executive Committee unanimously agreed "on the recommendation of the party leader" to "make an application to intervene in the Lord Advocate's reference". They can do so under Supreme Court Rules 26 and 41.[271]

SNP business convener Kirsten Oswald MP said that as the "largest independence supporting party" the SNP had the "legal standing" to represent the interests of the "very significant proportion of the population who support Scotland becoming an independent country":

> We also have an important perspective on the legal issues that the court will consider and, in particular, the importance of these matters being decided in a way that upholds the right of the people of Scotland to have their say and express their democratic will.[272]

The former Supreme Court Justice Lord Sumption told the Scottish Daily Express that the Court would "hate" any attempt to turn the case "into a political debate":

> I suspect the SNP is concerned that the Lord Advocate may be a bit too neutral for their tastes and they want something a bit more rabble rousing. The intervention suggests that the SNP are not satisfied with the approach of the Lord Advocate.

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270 Lord Advocate's Written Case, para 147

271 See The Supreme Court Rules 2009

272 "Nicola Sturgeon 'undermines' own government as SNP announce plans to intervene in legal bid", Scottish Sun, 24 July 2022

Roddy Dunlop, QC, the Dean of the Faculty of Advocates, said that if the SNP was allowed to intervene then it could undermine the Lord Advocate's argument:

> Given the apolitical nature of the Lord Advocate's reference, which is completely balanced and seeking to divorce the legal consequences from political consequences [the SNP] feel perhaps that she is being straight down the line and completely independent, saying, "I am an honest broker coming to the court for an answer here", and the SNP have decided that is all very interesting but that doesn't fully meet [their] objectives, so [they] want [their] own say.[273]

The Welsh Government and Northern Ireland Executive's respective law officers may also wish to intervene in the Supreme Court hearing.[274]

SNP application to intervene

On 2 August 2022 the Scottish National Party ("the applicant") published the text of its application to intervene in the Lord Advocate's Reference on an independence referendum.[275] SNP business convener Kirsten Oswald MP said it was intended to "support and complement" the arguments for the Bill being within Holyrood's competence as set out in the Lord Advocate's Written Case.

This stated that the applicant's position remained that a section 30 Order was "legally unnecessary" or "at the very least, that its necessity had not been established" but in 2013 it had been "politically expedient" as it "removed the threat of legal challenge from the process" carried out in September 2014.[276] The applicant's three main arguments are as follows:

1) The applicant's duty to implement its manifesto commitment;

2) Self-determination; and

3) The constitutional tradition of Scotland.

Citing the Salisbury Convention (or Doctrine) in support of 1), the applicant's position is that "it is at least constitutionally improper for any part of the UK Government to seek to prevent a devolved administration from implementing a clear manifesto commitment on which its demos has elected it to govern".[277]

Regarding 2), the application states that self-determination is "a central pillar of modern international law" and, further, that there is a "strong presumption that domestic law should be read consistently with international

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273 "Supreme Court judges will 'hate' SNP's meddling in the independence case", Scottish Daily Express, 24 July 2022

274 They are, respectively, the Counsel General for Wales and the Attorney General for Northern Ireland. They could intervene in this case under Practice direction 10: Devolution jurisdiction.

275 SNP, "Application for permission to intervene", 2 August 2022

276 Para 14

277 Para 30. See also House of Lords Library Note LLN 2006/006, The Salisbury Doctrine.

law".[278] Therefore, the phrase "relates to reserved matters" should be "be given a narrow and restricted interpretation [...] so as not to infringe upon nor render otiose the right of the Scottish people to exercise their right to self-determination".[279]

Finally, in support of 3), the applicant states that Scotland "is a nation with a distinct and discrete history, culture and legal background".[280] Rejecting arguments based on "the sovereignty of parliament" as alien to the Scottish constitutional tradition, the applicant states that:

> The UK Parliament may well have supreme legislative competence, in that it can legislate in relation to anything, but it is not the case that, consistent with the rule of law, it is able to override, remove, or otherwise interfere with fundamental rights (such as the right to self-determination) without clear and unambiguous statutory authority and without a clear, rational and evidenced basis for doing so.[281]

The applicant also addresses the arguments in favour of a draft Scottish Independence Referendum Bill being within Holyrood's competence. It repeats the Lord Advocate's argument that such a Bill would have no direct legal effect:

> The referendum itself is not an act of secession; it is not a unilateral declaration of independence. A process of negotiation and subsequent legislation would be required to give effect to a referendum outcome in favour of independence.[282]

On Wednesday 7 September 2022, the Supreme Court granted the SNP's application to intervene. The applicant was given until 21 September to file a written submission ("avoiding repetition of the Lord Advocate's arguments"). The other parties (the Lord Advocate and Advocate General for Scotland) can produce written responses within 14 days of service of the SNP's written submission.[283]

The SNP's written submission was published on 26 September 2022. The intervener submitted that:

> 1. The people of Scotland are 'a people' for the purposes of the right to self-determination;
>
> 2. The Scottish people are therefore entitled as a matter of law to protection of their right to determine 'their political status and freely pursue their economic, social and cultural development';
>
> 3. That right is inalienable and cannot be taken away from the Scottish people; and

278 Paras 35 & 40
279 Para 41
280 Para 43
281 Para 49
282 Para 57
283 Supreme Court website, "Update on Reference by the Lord Advocate", 7 September 2022

> 4. When reaching a determination on the interpretation of the 1998 Act in the circumstances of this reference, there is a strong presumption that an interpretation must be given to the 1998 Act which does not prevent the exercise by the Scottish people of their right nor render it disproportionately difficult for them to do so by, for example, making their right of self-determination conditional or subject to the approval of another 'people'. The leaders of the Conservative and Labour parties at Westminster have made clear they will not countenance a referendum on Scottish independence under any circumstances. Regardless of the outcome of any subsequent general election to the UK Parliament, the people of Scotland's right to self-determination cannot be advanced through that legislature.[284]

Advocate General for Scotland's Written Case

The UK Government published the Advocate General for Scotland's Written Case on 9 August 2022.[285]

Part I addresses the jurisdiction of the Supreme Court to consider the Lord Advocate's Reference. This rejects the basis of the Reference under Schedule 6 of the Scotland Act 1998. It states that:

> The scope of the apparently broad wording of §34 of Schedule 6, read with §1(f), must be read in the context of the 1998 Act as a whole, and with the specific and careful provision made by Parliament in the context of references of Bills under s.33. It would be surprising if Parliament had set up such a carefully calibrated scheme in s.33 and the surrounding provisions, and yet simultaneously intended that the scheme be rendered unnecessary by the discretion afforded to the same Law Officers to refer a Bill outside it.[286]

The Advocate General further argues that the "terms of the relevant Explanatory Notes, and Notes on Clauses" accompanying the 1998 Act "do not support the Lord Advocate's analysis", those in relation to paragraph 34 clearly indicating "a lack of intention on the part of Parliament to include questions about Bills outside of the s.33 process".[287]

> The Lord Advocate's approach gives rise to surprising consequences. In particular, given the power in §34 of Schedule 6 is afforded to the Law Officers of the UK Government too, the effect would be that on any occasion in which the AGS (for example) understands the Scottish Government to be formulating a legislative proposal which he considers to be outside legislative competence, a pre-emptive reference can be made of the issue, rather than waiting for the appropriate moment under s.33, if it arises. It would be surprising if Parliament had intended not only the Lord Advocate to be able to circumvent s.33, but the UK Law Officers too.[288]

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284 SNP, "The SNP's Supreme Court submission on the independence referendum", 26 September 2022, para 8.1

285 UK Government, "Written Case on behalf of Her Majesty's Advocate General for Scotland", 9 August 2022

286 Para 24

287 Para 25(3)

288 Para 25(8)

The Advocate General states that the issues upon which the Reference rest "are decisions of policy rather than of law and they are not mandated, or even indicated, by the terms of the 1998 Act".[289]

> Taken at its highest, the effect is that a Bill cannot be introduced into the Scottish Parliament by a Minister of the Scottish Government which the Lord Advocate considers to be outside legislative competence. It is hard to see why this should be a matter of legal concern.[290]

Part I of the Advocate General's Written Case concludes by arguing that even if the Court has jurisdiction it:

> [S]hould nonetheless refuse the Reference in its inherent discretion to decline to determine abstract and premature issues in connection with a draft of a Bill which has yet to be introduced into and yet to be passed by the Scottish Parliament.[291]

Part II of the Written Case addresses the substantive issue, the competence of the Scottish Parliament to legislate for an independence referendum. The Advocate General submits that:

> [T]he Scottish Parliament plainly does not have the competence to legislate for an advisory referendum on the independence of Scotland from the United Kingdom, including in the form adopted in the Draft Bill. To do so impermissibly relates to both §1(b) and §1(c) of Schedule 5 to the 1998 Act.[292]

The Advocate General goes on to observe that the "scope of the reservation is self-evident: it is the Union":

> It is not the dissolution of the Union: whether a referendum were to support or reject independence, it would equally relate to the Union. The way in which the question on the referendum is framed, neutral or otherwise, does not affect the connection to the reserved matter. Nor is this surprising: the Union of Scotland and England and matters connected to it are not of interest only to the people of Scotland.[293]

Addressing the Lord Advocate's argument that the outcome of the referendum provided for in the Draft Bill would have no legal effect, the Advocate General argues that:

> [N]or can it credibly be suggested that the outcome of the referendum will be 'advisory' in the sense of being treated as a matter of academic interest only: a referendum is not, and is not designed to be, an exercise in mere abstract opinion polling at considerable public expense. Were the outcome to favour independence, it would be used (and no doubt used by the SNP as the central plank) to seek to build momentum towards achieving that end: the termination

289 Para 31
290 Para 33
291 Para 46
292 Para 69
293 Para 71

> of the Union and the secession of Scotland. It is in precisely that hope that the Draft Bill is being proposed.[294]

The Advocate General makes a broader point in observing that:

> [T]here is an air of unrealistic casuistry about a contention which emphasises that the question of competence to legislate for a referendum on independence is of exceptional public importance [...] whilst also characterising the legal effects as nil and the practical effects as limited and speculative.[295]

Finally, the Advocate General argues that the Draft Bill would also be outside the legislative competence of the Scottish Parliament because it "relates to" paragraph 1(c) of Schedule 5 ("the Parliament of the United Kingdom") on the basis that that reservation "encompasses the sovereignty of Parliament":

> The secession of Scotland from the Union would necessarily bring that sovereignty in relation to Scotland to an end: Parliament would no longer be able to make laws for Scotland. The position encapsulated in s.28(7) of the 1998 Act would be reversed. A referendum on such independence has the purpose, in the context of s.29(3), of bringing that end about.[296]

Hypothetical or premature?

Precedents suggest courts dislike "hypothetical" or "premature" references. In this case, the Supreme Court is being asked to consider a Bill which has not yet been introduced to the Scottish Parliament, and which could be amended after it has. This is unprecedented. As Professor Armstrong has observed, the question for the Supreme Court will be "whether it is right to give an answer to the question posed at a pre-legislative stage as opposed to a subsequent pre-enactment stage".

Professor Armstrong suggested that when the President of the Supreme Court considers "preliminary matters", one such matter "may be whether the route chosen – a reference in advance of the introduction of the Bill – rather than a pre-enactment reference once the Bill is passed is the appropriate way to bring the matter to the Supreme Court":

> It would be open to the Supreme Court to conclude that the design of the Scotland Act 1998 assumes that judicial scrutiny of Bills is limited to either pre-enactment scrutiny or post-enactment scrutiny rather being something capable of being pursued at a pre-legislative stage. That would then delay giving an answer to the question raised by the Lord Advocate to a later date.[297]

As Aileen McHarg has observed, on the two previous occasions this sort of reference procedure has been used (under the Northern Ireland Act 1998), the

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294 Para 78

295 Para 79

296 Para 87

297 Kenneth A. Armstrong, "A Matter for Another Day? Will the Supreme Court Accept the Lord Advocate's Independence Referendum Reference?", UK Constitutional Law Association blog, 29 June 2022

Supreme Court refused one because there were alternative live proceedings in which the legal issues could be addressed,[298] and the other because it did not raise "devolution issues".[299] McHarg also observed that lower courts in Scotland and England & Wales have refused to decide what they regarded as "hypothetical" cases regarding the scope of devolved competences, "instead insisting that challenges be brought to particular pieces of legislation actually passed or enacted by the devolved legislatures using the statutory procedures specifically designed for that purpose".[300]

In the *Keatings* case (see **Section 7.4**), Lord Carloway, Lord President of the Court of Session, said a "draft Bill has no legal status. If a Bill is introduced, it may or may not be in the form which is contained in the draft. No matter what its initial form, it may be amended."[301]

In that case, Scottish Government lawyers also argued that the lawfulness of any referendum legislation "depended on its terms when introduced and when passed" by MSPs, as it could be amended during the parliamentary process.[302]

What happens if the Supreme Court rejects the reference?

If the Supreme Court **rejects** the reference as hypothetical or premature, then a Scottish Government minister could only introduce the proposed Independence Referendum Bill if the Lord Advocate states (under s 31 of the 1998 Act) that it is within the legislative competence of Holyrood.

As Alison L. Young, Professor of Public Law at the University of Cambridge, has observed, the Lord Advocate could "sign a statement that a Bill is within power, but then refer it to the Supreme Court later on", although that "would look as if the Lord Advocate were contradicting herself".[303]

If the Lord Advocate refused to do so, then the Scottish Government would have no obvious route to introduce legislation other than via a section 30 Order. As Aileen McHarg has written, "it may leave the devolved governments in a Catch-22. In other words, there may be such significant uncertainty about the lawfulness of legislating in particular ways that no Bill can ever be

298 *Reference by the Attorney General for Northern Ireland of devolution issues to the Supreme Court pursuant to Paragraph 34 of Schedule 10 to the Northern Ireland Act 1998 (No 2) (Northern Ireland)* [2019] UKSC 1

299 *A Reference by the Attorney General for Northern Ireland of devolution issues to the Supreme Court pursuant to Paragraph 34 of Schedule 10 to the Northern Ireland Act 1998 (Northern Ireland)* [2020] UKSC 2

300 Aileen McHarg, "Securing Scotland's independence: Moving beyond process?"

301 *Keatings v Advocate General* [2021] CSIH 25, para 55

302 "Nicola Sturgeon's Supreme Court bid on Indyref2 could be stymied by her own government's lawyers", Daily Telegraph (£), 1 July 2022

303 Alison L. Young, "Will Scotland hold an independence referendum in October 2023?", Constitutional Law Matters blog, 29 June 2022

introduced and hence the uncertainty can never be authoritatively resolved."[304]

The constitutional lawyer Chris McCorkindale has argued that the s 31 requirement "creates an unnecessary de facto veto on the introduction of legislation" and that "another, more permissive, approach is both possible and preferable". He has suggested:

> a reinterpretation – maybe a rewording – of section 3.4 of the Scottish Ministerial Code that strikes the balance differently between legal and political tolerance of risk [...] [to] ensure that the legislative function of the Scottish Parliament is not excluded by a process that plays out between executive and courts.[305]

9.3 Two possible outcomes

Supreme Court rules draft Bill to be within competence

If the Supreme Court decides that referendum legislation **would be** within the Scottish Parliament's powers, the First Minister told MSPs her government would "immediately introduce" the Independence Referendum Bill and ask Holyrood to pass it "on a timescale that allows the referendum to proceed on 19 October next year".[306]

Setting out her Programme for Government on Tuesday 6 September 2022, Nicola Sturgeon said it provided for a Scottish Independence Referendum Bill.

> If the outcome of the forthcoming Supreme Court referral confirms that a consultative vote is within the competence of this Parliament, I can confirm that we will legislate for a referendum on 19 October next year.[307]

But Professor Armstrong has argued that "a judgment by the end of the year [2022] at the earliest":

> would then leave very limited time to pass the legislation and then hold the referendum by October 2023. There would also be a risk that a further reference could be made either pre- or post-enactment. That possibility might itself incline the Court whether to accept a pre-legislative reference.[308]

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304 Aileen McHarg, "Securing Scotland's independence: Moving beyond process?"

305 Chris McCorkindale, "The Lord Advocate's role in vetting bills for legislation", UK Constitutional Law Association blog, 18 July 2022

306 Plaid Cymru leader Adam Price has suggested that a positive Supreme Court judgment could also pave the wave for an independence referendum in Wales (see "Supreme Court decision on Scottish independence referendum 'could open door to one in Wales'", Nation Cymru website, 29 June 2022)

307 Scottish Government website, "Programme for Government 2022-2023: First Minister's speech", 6 September 2022

308 Kenneth A. Armstrong, "A Matter for Another Day? Will the Supreme Court Accept the Lord Advocate's Independence Referendum Reference?", UK Constitutional Law Association blog, 29 June 2022

Aileen McHarg has also observed that even were the Supreme Court to rule the draft Bill to be within competence, "that would not necessarily be the end of the matter":

> It would still be open to the UK Parliament to amend the Scotland Act to reverse the Supreme Court's decision. That would, however, require primary legislation, and an open defiance of the Sewel Convention. The UK Government could also simply ignore the outcome of a unilateral referendum. But again, that would be more difficult politically if the referendum has the backing of a Supreme Court ruling.[309]

Supreme Court rules draft Bill to be outwith competence

The First Minister said in her statement that if the Supreme Court decided the draft Bill was not within Holyrood's powers (something Ms Sturgeon said would "be the fault of the Westminster legislation, not the court") – and in the absence of agreement on a s 30 Order – then the SNP would fight the next UK general election as a "de facto" referendum on the "single question" of whether Scotland should be independent.

There was initial confusion as to what would constitute a "yes" vote under this scenario. Media briefing suggested a majority of votes cast in Scotland, but on the morning of 29 June 2022 John Swinney, the Deputy First Minister, suggested a majority of Scottish seats would be a mandate to begin independence negotiations. He later corrected this in a tweet: "Referenda, including de facto referenda at a UK general election, are won with a majority of votes. Nothing else."[310]

Nicola Sturgeon said it would be "ridiculous" to describe this as a Unilateral Declaration of Independence,[311] and later told BBC that "Scotland can't become independent without a majority of people voting for it":

> I hope we can resolve these things in a referendum, that is the proper way of doing it. But if all routes to that are blocked then the general election will become the vehicle for people to express their view [...] The issue of practical reality is that when a majority vote for independence, I hope in a referendum, that will have to be followed by a negotiation with a UK government to implement that decision.[312]

As the journalist Conor Matchett observed, it "would require the SNP's most successful election result in its history".[313] At the 2015 UK general election, the

309 Aileen McHarg, "Securing Scotland's independence: Moving beyond process?"
310 "Election win should trigger Scottish independence, says Sturgeon", BBC News online, 29 June 2022
311 "Nicola Sturgeon seeks supreme court ruling on Scottish independence vote", Guardian, 28 June 2022
312 "Election win should trigger Scottish independence, says Sturgeon", BBC News online, 29 June 2022
313 "Analysis: Nicola Sturgeon's last roll of the dice risks her career and the independence movement", Scotsman, 28 June 2022

SNP won 49.97% of the vote in Scotland, 36.9% in 2017 and 45% in 2019.[314] Parties other than the SNP also support independence.

Joanna Cherry QC, an SNP MP, tweeted that she was pleased her suggested "strategy" of testing the legality of referendum legislation in court with a "fallback position" had been adopted by the Scottish Government (see **Section 6.5**). Chris McEleny, a former SNP councillor who defected to the Alba Party, also pointed out that his proposal to declare independence on the basis of a parliamentary majority had been rejected by the SNP's National Executive during the party's 2019 conference.[315]

The idea of a de facto referendum represents a partial return to pre-2000 SNP policy that winning a majority of seats (rather than votes) at a devolved or UK election in Scotland would constitute a "mandate" to begin independence negotiations with Westminster (see **Sections 2.4** and **4**).

Criticism of "de facto" referendum

Professor James Mitchell of Edinburgh University criticised this aspect of Nicola Sturgeon's strategy:

> There's no such thing as a de facto referendum, there are elections and there are referendums and they are quite distinct. In an election the voter is allowed to choose what she or he wishes to choose to determine their vote. It doesn't have to be about one issue – it rarely is about one issue, it's often about a range of issues – it's not for a political party to dictate the terms of an election. Now in a referendum the question is very clear, and that's the whole point of a referendum – it's focused. There isn't the same focus in an election. An election is simply not a referendum, a de facto referendum or any other sort of referendum.[316]

Professor Jim Gallagher, chairman of the Our Scottish Future think tank and a former Scottish Labour Party adviser, agreed that:

> General elections are not referendums, and the SNP doesn't get to make them so. The next one will decide the government of the UK, and whether to remove Boris Johnson as prime minister, if his coat hasn't fallen off its shoogly peg before then. Why would the other parties agree to make it about anything else? Whatever UK government emerges won't treat it as having been an independence referendum.
>
> Except maybe in one circumstance. If the SNP gets less than 50 per cent of the popular vote, it might suddenly discover it was after all a decision to stay in the UK.[317]

314 For a discussion, see Mark Shephard, "Implications of varying mandate definitions for Indyref2 legitimacy at Westminster-level elections", Centre on Constitutional Change blog, 6 July 2022

315 "Election pressure ploy on independence is idea once rejected by SNP", The Times (£), 29 June 2022

316 ITV Border, Representing Border, 29 June 2022

317 "Nicola Sturgeon's route map is flawed at every turn", The Times (£), 30 June 2022

Asked about this criticism, Nicola Sturgeon said the issue was a "matter of real politics, not abstract academic arguments".[318]

Jim Sillars, a former deputy leader of the SNP, cited the February 1974 general election, which the Conservatives fought on the issue of "who governs Britain?", and the 2019 contest, when the Conservatives campaigned to "get Brexit done", as examples of elections in which political parties had campaigned on a single issue.[319] Aileen McHarg agreed there were "historical precedents":

> for example, the January 1910 General Election on the Liberal Government's People's Budget [...] More pertinently perhaps, Sinn Féin fought the 1918 General Election on a manifesto commitment to establish an Irish republic and regarded its landslide victory in Irish seats as giving a mandate to establish a provisional Dáil Éireann and issue a Declaration of Independence.

But, added McHarg, "there is again no guarantee that the UK Government would agree to respect the SNP's mandate".[320]

Nikos Skoutaris has observed that a coalition of pro-independence parties fought the 2015 Catalan elections as a de facto referendum.[321]

Alternative path to independence?

Professor Ciaran Martin, a former senior UK civil servant who helped negotiate the 2012 Edinburgh Agreement, has drawn a distinction between the political argument for Scottish independence and its legal process. "The Supreme Court can absolutely say there's no mechanism to consult the Scottish people on independence without Westminster's consent," he told the BBC, but added that if Downing Street refused to describe another "path" for Scotland to secede from the UK, then "you have to give up the pretence that this is a voluntary union, that Scotland is allowed to leave".[322]

Professor Martin explored this argument more fully in an April 2021 paper entitled "Resist, reform or re-run: short- and long-term reflections on Scotland and independence referendums".[323]

318 "Sturgeon defends 'de facto referendum' as 'a matter of real politics'", ITV Border website, 30 June 2022

319 "Jim Sillars says Nicola Sturgeon strategy may lead to independence", Herald on Sunday (£), 3 July 2022

320 Aileen McHarg, "Securing Scotland's independence: Moving beyond process?"

321 Nikos Skoutaris, "Scottish Indyref 2: Towards another constitutional crisis", Centre on Constitutional Change blog, 4 July 2022

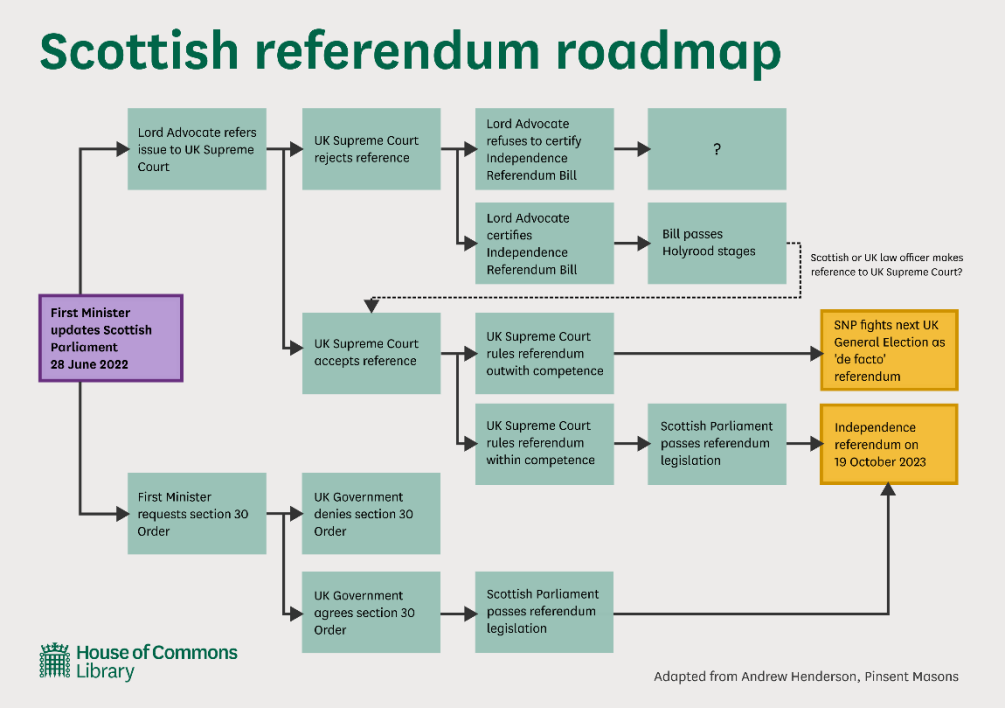
322 "Scottish independence: How will indyref2 compare to 2014?", BBC News online, 30 June 2022

323 See also Ciaran Martin, "Scotland's place in the Union will not be decided in the courts: only politicians can enable or prevent independence", Constitution Unit blog, 15 September 2021

9.4 Pre-Supreme Court hearing analysis

In a blog for the UK Constitutional Law Association (UKCLA), Shona Wilson Stark and Raffael Fasel (from the Law Faculty at the University of Cambridge) argued that the Supreme Court should rule that the Scottish Parliament has no legal power to pass referendum legislation. However, they also proposed that this did "not prevent the UKSC from attempting to break the deadlock by declaring that the UK Government is acting unconstitutionally in a political sense if it does not make a section 30 Order".[324]

In another blog for the UKCLA, Professor Stephen Tierney argued that while "vague language" in the Scotland Act 1998 left scope for various arguments regarding competence, if the referendum was placed in the context of established UK constitutional practice then "the practical effects [...] are arguably less speculative". He suggested that the Supreme Court could recognise the existence of "a constitutional obligation to give effect to a referendum outcome" in the UK which, under s29(3) of the 1998 Act, would mean that even a referendum without direct legal effect would "most likely be taken to 'relate to' the Union or to the Parliament of the United Kingdom and therefore to fall beyond the competence of the devolved institutions".[325]



[324] Shona Wilson Stark and Raffael Fasel, "Unconstitutionally Legal: How the UK Supreme Court Should Decide the Lord Advocate's Reference", UK Constitutional Law Association blog, 3 October 2022

[325] Stephen Tierney, "The Lord Advocate's Reference: Referendums and Constitutional Convention", UK Constitutional Law Association blog, 4 October 2022

10 Draft Independence Referendum Bill

The Scottish Government published a draft Independence Referendum Bill on 28 June 2022. This was a slightly altered version of that published on 22 March 2021. It has yet to be introduced to the Scottish Parliament.

The preamble describes it as an Act of the Scottish Parliament "to make provision for the holding of a referendum in Scotland on a question about the independence of Scotland".

Clause 1 states the "purpose" of the Act, which "is to make provision for ascertaining the views of the people of Scotland on whether Scotland should be an independent country".

Clause 2(1) provides that a "referendum is to be held in Scotland on a question about the independence of Scotland". **Clause 2(2)** states that the question will be: "Should Scotland be an independent country?" **Clause 2(4)** provides that the "date on which the poll at the referendum is to be held is 19 October 2023" unless, under **Clause 2(6)**, Scottish Ministers by regulations appoint "a later date as the date on which the poll at the referendum is to be held".

Clause 3 of the Draft Bill provides for the franchise. **2(1)** states that "determining entitlement to vote at the referendum" is as provided for in the Referendums (Scotland) Act 2020 (see **Section 6.5** of this briefing paper), subject to the substitution of "qualifying foreign national" for "relevant citizen of the European Union".[326]

Clause 3(1) states that the 2020 Act "applies for the purposes of the referendum", subject to exceptions and modifications inserted upon the Bill's introduction to the Scottish Parliament.

Clause 4 states that the Referendums (Scotland) Act 2020 "applies for the purposes of the referendum".

Clause 5 deals with interpretation and **Clause 6** with ancillary provision. **Clause 7** provides that the Act will come into force the day after Royal Assent, while **Clause 8** gives the short title.

A Schedule to the draft Bill includes the form of ballot paper introduced under **Clause 2(3)**:

[326] Under Section 4(d) of the Referendums (Scotland) Act 2020

PART 1

FRONT OF BALLOT PAPER

BALLOT PAPER [*Official mark*]
VOTE (X) ONLY ONCE
Should Scotland be an independent country?
YES ☐
NO ☐

10.1 "Purpose clause"

The "purpose clause" (**Clause 1**) did not form part of the 2021 draft Bill,[327] nor was there a similar provision in Scottish legislation prior to the 2014 independence referendum.

According to Dr Andrew Tickell its addition is to make clear a referendum was "about getting a view from the public" not "about breaking up Britain unilaterally", thus "making a credible case for it falling within competence".[328] In other words, observes Aileen McHarg:

> this stresses that the intended effect of the referendum is advisory only; it will not, by itself, have any legal effect on the future of the Union. In so doing, the Scottish Government is seeking to reinforce its argument that a consultative referendum would not "relate to" the reserved matter of the Union, in the more than "loose or consequential" sense that the courts have hitherto required.[329]

But law lecturer Scott Wortley observed that a purpose clause "will not bring a bill into competence if its substantive effect is not within competence".

[327] For a full discussion, see Scott Wortley, "A brief overview of purpose and overview clauses", Edinburgh Law Review, forthcoming

[328] "Analysis: Nicola Sturgeon's last roll of the dice risks her career and the independence movement", Scotsman, 28 June 2022

[329] Aileen McHarg, "Securing Scotland's independence: Moving beyond process?"

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