The Independence Referendum and debates on Scotland’s Constitutional Future

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1. Introduction

In 2007, the Scottish National Party (SNP) was elected in a minority to the Scottish Parliament with a manifesto that contained a commitment to publish a White Paper on independence. It followed up on its commitment and further developed its proposals, producing a further paper and a draft referendum bill in 2009.1 When it gained an outright majority in the subsequent 2011 elections, led by First Minister Alex Salmond, it announced its intention to hold the referendum in autumn 2014. In response, the United Kingdom Prime Minister, David Cameron, acknowledging the SNP’s significant victory, accepted that the future of Scotland within the United Kingdom was for the Scottish people to decide on. After a period of negotiations, both governments signed the ‘Edinburgh Agreement’ on the 15th October 2012, paving the way for the holding of a referendum on the independence of Scotland in September 2014.2 This paper will analyse the main legal and constitutional issues arising from this process and the current debates on Scotland’s constitutional future.3

2. Background and context

The Scottish model of ‘Devolution’ was established by an Act of the UK Parliament, the Scotland Act 1998, which created a new Scottish Parliament and Executive (now ‘Government’), with an ample set of devolved legislative and executive powers.4 This can be seen as the most recent step in the progressive decentralisation of powers to Scotland since the Treaty of Union with England in 1707, and it must be noted that even before 1998 the United Kingdom was always considered a ‘union’ rather than a ‘unitary’ state.5 The Scotland Act 1998 also includes a list of powers reserved to the UK Parliament and provides that it is ultra vires for

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2 UK Government and Scottish Government 2012.
4 Himsworth and O’Neill 2011.
the Scottish Parliament to legislate in a way which is incompatible with EU law and ECHR rights. To ensure that the Scottish Parliament does not act outside its powers, the Scotland Act 1998 provides a variety of (pre and post enactment) mechanisms to block and also review its legislation, which in final instance can be struck down by the courts.6 This is an important distinction from the position of the (sovereign) UK Parliament, whose legislation is not subject to this constitutional *ultra vires* review by the courts, and is free to legislate on all matters of the UK constitution.7 However, it has developed a convention (‘Sewel Convention’) for when it wants to legislate in an area devolved to the Scottish Parliament or which affects the Scotland Act 1998 itself, which is that it must consult the Scottish Parliament and obtain its consent.8 Any reform of the devolution settlement would therefore, at least politically, require the collaboration and consent of both Parliaments.

The SNP’s 2011 victory was especially significant as it happened at the same time as an overall review and reform of the devolution settlement for Scotland. The ‘Calman Commission’ (‘Commission on Scottish Devolution’) was the unionist parties’ (Labour, Conservatives and Liberal Democrats) response to the SNP’s proposals, and its recommendations, designed to reform the existing provisions of Scotland Act 1998 and extend the powers of the Scottish Parliament in some specific areas, became the new Scotland Act 2012.9 The SNP’s outright majority in 2011 seemed to indicate that these reforms were insufficient, and, in effect, recent polls consistently show that the people of Scotland’s preferences for Scotland’s Constitutional future are spread across three options: maintaining the status quo, and intermediate option of more devolution but short of independence, and independence itself.10 While stating their clear preference for independence, the SNP’s proposals acknowledged the strong public support for an intermediate option, giving consideration also to a model of ‘full devolution’ and to the possibility of a multi-option referendum. The SNP’s outright majority in 2011 therefore opened up a wide and interesting debate on the variety of options for Scotland’s constitutional future.11

3. Initial debates, the ‘legality issue’, and the Edinburgh Agreement

Although the UK Government accepted that the future of Scotland within the United Kingdom was for the Scottish people to decide on, from the beginning it contested the Scottish Parliament competence to legislate for the referendum, thus ensuring a role for itself and the UK Parliament in

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6 Bradley and Ewing 2011.
7 Himsworth and O’Neill 2011.
8 Cairney and Keating 2004.
9 McLean et. al. 2013, p. 48-70.
10 Scotcen 2013.
11 Casanas-Adam 2013 forthcoming.
its design. The Scotland Act 1998 is notably silent on the issue of referendums, thus allowing the Scottish Parliament to legislate in this field and hold referendums on devolved matters. It must also be noted that the general regulation of referendums included in the Political Parties, Elections and Referendum Act (PPERA) 2000 only applies to referendums organised by the Westminster Parliament, and therefore didn’t apply in this case. However, the contested matter became if the Scottish Parliament could legislate for a referendum on ‘independence’. In a consultation document published in January 2012, where it forward its views on how the referendum should be designed, the UK Government stated that it was not within the Scottish Parliament’s powers to legislate for a referendum on independence because it would relate to the ‘Union of the Kingdoms of Scotland and England’, which is a reserved matter under Part 1 of Schedule 5 of the Scotland Act. Its line of argument was based on sec. 29 of the same Act, which establishes that ‘whether a provision relates to reserved matters is to be determined by reference to its purpose, and in determining its purpose its necessary to have regard to a range of factors, including the effect of the provision in question’. The UK Government argued that the purpose of the legislation would be to obtain independence for Scotland, as this would be the effect of the ‘yes’ vote, and therefore would relate to ‘the Union’ (and thus be ‘ultra vires’). This view was also supported by respected legal scholars, highlighting the strong possibility that any legislation in this sense would be challenged in the court.

The Scottish Government responded with its own consultation on how the referendum should be designed. In it, they argued that the Scottish Parliament was competent to legislate for the referendum and highlighted that much independent legal opinion supported its view. Arguments in this sense stressed that the purpose of the referendum would be simply to consult the Scottish citizens on their preferred option for Scotland’s constitutional future, and not independence itself (and this was not ‘ultra vires’). It was also argued that considering its purpose to be attaining independence would be to confuse the intention of the Scottish Parliament, enacting the legislation, with the intention of the Scottish Government. While the Government was clearly in favour of independence as its first option, there may be different reasons why different members of parliament would endorse the act (for example, to further democracy, or, foreseeing a ‘no’ vote, to put an end to the debate).

Other differences between the UK and Scottish Governments’ proposals regarding the design of the referendum included aspects of the overview of the process, its timing, the number of questions it should have, and on the possibility of extending the franchise to 16-17 year olds. Despite the

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12 UK Government 2012.
13 Tomkins 2012.
14 Anderson et. al. 2012.
above, both government were in agreement on avoiding having to take the issue to the courts, and also on using the mechanism of a Section 30 Order (of the Scotland Act 1998) to provide the Scottish Parliament with new powers to legislate for the referendum. Section 30 orders allow for modifications to be made to the list of matters reserved to the UK Parliament, including removing certain matters from the list so that they may be devolved to the Scottish Parliament. This would require the agreement of both the UK and Scottish Governments and also the approval of the Scottish Parliament and of the Houses of the UK Parliament.

After a period of negotiations, the United Kingdom and Scottish Governments signed the Edinburgh Agreement on 15 October 2012, agreeing "to work together so that a referendum on Scottish independence can take place, and that this should: i) have a clear legal basis; ii) be legislated for by the Scottish Parliament; iii) be conducted so as to command the confidence of parliaments, governments and people, and; iv) deliver a fair test and a decisive expression of the views of people in Scotland and a result that everyone will respect". The specific details of the agreement were laid out in a Memorandum of Understanding and then given effect in a Section 30 Order.15 In brief, the Order enables the Scottish Parliament to legislate for a referendum that takes place before the end of 2014, with one question on independence, and that all those entitled to vote in Scottish Parliamentary and local elections (this includes British, Irish and qualifying Commonwealth citizens and European Union citizens resident in Scotland) should be able to vote, allowing also for the possibility of the Scottish Government setting a proposal to extend the franchise to 16 and 17 year olds. The Electoral Commission should fulfil its general functions, with the exceptional arrangements for local and parliamentary elections in Scotland and the referendum rules will be based on those set out in the PPRA. Finally, both Governments express their commitment to working together on matters of mutual interest and to the principles of good communication and respect; and also 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 the rest of the United Kingdom.

4. The Process so far: the Electoral Commission’s Advice, the Franchise Act and the Referendum Bill

The Edinburgh Agreement has allowed for a fast and smooth development of the process so far. As accorded, on the 8th of November 2012 the Scottish Government submitted its proposed referendum question, ‘Do you agree that Scotland should be an independent country?’, to the

Electoral Commission for its advice. The Commission published its report in January 2013, recommending changing the way the question was asked, to make it more neutral. Their proposed version was ‘Should Scotland be and independent country? yes/no’, as they considered that the initial formulation could favour the ‘yes’ vote. This was accepted by the Scottish Government. The Commission also recommended that the UK and Scottish Governments should clarify what process will follow the referendum in sufficient detail to inform people what will happen if most voters vote ‘Yes’ and what will happen if most voters vote ‘No’. Finally, the Electoral Commission stated that it intended to review the state of preparations for the delivery of the referendum and make a public statement to the Scottish Parliament by autumn 2013, which will also be an opportunity to report on whether both Governments have been able to agree on a joint position.

On 11 March 2013, the Scottish Government introduced the ‘Scottish Independence Referendum (Franchise) Bill’ into the Scottish Parliament, to make provision for those who are entitled to vote in a referendum on the independence of Scotland, including provision for the establishment of a register of 16-17 years, to enable them to vote. This bill was passed quickly and was largely uncontroversial, with the exception of the fact it excluded all convicted prisoners from voting in the referendum. As is well known, the UK has been declared in violation of the right to vote protected by Article 3 of Protocol 1, ECHR, by the European Court of Human Rights on various occasions for its blanket ban on prisoner voting, and this is therefore also a high profile issue in Scotland. In this case, the decision to exclude all convicted prisoners was taken exclusively by the Scottish Government and they refused to change their position although various amendments were put forward in this sense, noting that ‘The ECtHR ruling (and human rights case law on the right to vote in elections) does not relate to referendums’. It is notable that there are some very well respected legal scholars who support this view, and therefore that the ban is not incompatible with the ECHR. On the hand other, however, arguments have been put forward that this distinction between elections and referendums is largely arbitrary, and that, if the matter reached the Strasbourg court in these particular circumstances, it might adopt a different verdict. Some scholars have also suggested that, even if the ban is compatible with the convention as interpreted by the ECtHR, this only sets a minimum standard for the protection of voting rights, and that the Scottish courts might decide that it is legitimate for them to offer more extensive protection. The Act was finally passed, and was immediately challenged in the courts by three prisoners on the grounds that the blanket ban on prisoner voting was in violation of their ECHR rights and

16 Electoral Commission 2013.
18 Section 3 of the Bill (now Act) provides that ‘A convicted person is legally incapable of voting in an independence referendum for the period during which the person is detained in a penal institution in pursuance of the sentence imposed on the person.’
19 Hirst v UK (No. 2), appl.nr. 74025/01 (2005); Greens & M.T. v UK, appl.nr. 60041/08 & 60054/08 (2010).
20 Scottish Government 2013a, par. 11.
21 Tierney 2013a.
22 Reid 2013.
23 Green 2013.
of EU law. Their challenge was rejected by the court of first instance, but they are very likely to appeal.

Following the above, the Scottish Government introduced the ‘Scottish Independence Referendum Bill’ into the Scottish Parliament on the 21st March 2013, which is currently under consideration. This bill provides the specific regulation for the referendum, including provisions on the question, the role of the Electoral Commission, the campaign, the moratorium period, and funding and spending rules, and is expected to be passed in November. On the same date, the First Minister also announced that the referendum would be held on the 18th September 2014.

5. In the case of a majority ‘yes’ vote, what would happen next?

In response to the Electoral Commission’s request for some information on what will happen if most voters vote ‘Yes’, the Scottish Government published ‘Scotland’s Future: from the Referendum to Independence and a Written Constitution’, which sets out a two-stage process. The first stage would be a ‘transition stage’, which would extend from the day of the referendum to March 2016, when the next elections to the Scottish Parliament are due to be held. During this stage, they would negotiate the final settlement with the UK Government and also create a ‘constitutional platform’ to enable the transfer of sovereignty to the people of Scotland, including all the necessary arrangements that would then enable the newly elected Parliament and Government to exercise their authority until the drafting of the constitution. These arrangements (legal, financial, institutional and other) would be largely made in Scotland, but would also involve Westminster passing legislation, most notably to repeal the Treaty of Union 1707 and to acknowledge that it would no longer have the power to legislate for Scotland. The paper also foresees similar negotiations being held with the EU to negotiate accession at this time (we will come back to this point below). After independence in 2016, the paper sets out a second stage of ‘constitution-building’ for the new state, which should engage all the people of Scotland. While it acknowledges that the design of this process and the substantive content of the constitution are to be decided after independence, it sets out a series of proposals regarding what it could look like. In particular, it is worth noting that it proposes drafting a written constitution for Scotland, providing for a Supreme Court with powers to strike down legislation, and a strong constitutional protection of socio-economic rights. It is therefore a notable break for the constitutional tradition of the UK. To build on the above, the Scottish

25 Moohan, Gibson and Gillon, Petitioners 2013, CSOH 199.
27 Tierney 2013b.
28 Scottish Government 2013b and Tierney 2013c.
Government also announced it would publish a White Paper on its proposal for independence in autumn 2013. Again, it had already put forward some of its ideas, including plans for keeping the Queen as Head of State, a currency union and a possible social union with the rest of the UK, leading to its notion of independence being described as ‘independence-lite’.29 The UK Government also responded, announcing the beginning of its ‘Scotland Analysis’ publication programme, to inform the debate about Scotland’s constitutional future, analysing Scotland’s place in the UK and how it contributes to and benefits from being part of the UK. In its first paper, however, it made clear that with regard to any discussion on internal arrangements that would follow a majority ‘yes’ vote, ‘Unless people in Scotland choose otherwise, the UK Government will continue to be one of Scotland’s two governments and cannot enter into discussions that would require it to act solely in the interests of one part of the UK’ (p. 7).30 On the 26 November the Scottish Government published its 670 page White Paper, ‘Scotland’s Future. Your Guide to an Independent Scotland’, where its sets out its above proposals in more detail, and which is currently at the centre of the debate.31 Also of fundamental importance in relation to what would happen in the case of a yes vote, there has been an on-going discussion about what would happen with the UK’s membership of international organisations and agreements and, in particular, membership of the European Union. Regarding the purely international sphere, there has been discussion on if the UK would ‘dissolve’ (resulting in two new states) or if, on the contrary, Scotland would secede and the ‘rest of the UK’ would be considered a continuation of the previous UK. After a detailed analysis, Stephen Tierney recently concluded that it seems that the UK would be the continuing state and Scotland as the territory aspiring to statehood. However, he adds that, if this is done through a negotiated process, Scotland’s recognition and succession to international organisation would not be problematic, although they would need to apply for membership of international organisations.32 The legal issues surrounding an independent Scotland’s accession to the European Union are much more complicated and uncertain, as there are no clear legal provisions on this in the Treaties or any comparable precedents. Two prestigious international lawyers carried out a detailed report (which, must be noted, was for the UK Government and included as an annex to their first information paper) where they seem to suggest that Scotland would need to reapply under Art. 49 TEU; they do, however, also acknowledge the sui generis nature of the EU.33 The President of the European Commission sent a letter along similar lines to the House of Lords Economic Affairs Select Committee, stating that it would need to reapply.34 However, some commentators have argued that

29 Keating 2012.
31 Scottish Government 2013c.
32 Tierney 2013d.
33 Boyle and Crawford 2013.
34 House of Lords Economic Affairs Committee 2013.
Scotland would (and should) follow a special procedure that would avoid it having to remain outside of the EU for a transition period precisely because of this *sui generis* nature of the EU legal order, which creates rights and obligations for its Member States but also for its citizens, suggesting even that the CJEU might intervene to avoid Scots citizens temporarily losing their rights.35 Others have also highlighted that if Scotland had to temporarily leave the EU, the rights of EU citizens from other Member States living in Scotland would also be affected.36 Both David Edward, former judge of the CJEU, and, more recently, Stephen Tierney, conclude that ‘a more nuanced and plausible suggestion’ is the ‘dual succession’ account: Scotland would not automatically accede to membership, but the above (sui generis nature and the importance of citizenship) would lead to an obligation on the part of the EU institutional and the Member States to negotiate Scotland’s admission.37 This should happen before separation took effect and would not result in a new Accession Treaty, but rather in an amendment of those currently in existence.

It must be added here that further uncertainty on the EU accession issue is added by the fact that the UK itself is planning on having a referendum on remaining in the EU in 2015.38

6. And in the case of a majority ‘no’ vote?

There is also an on-going debate about what would happen in the case of a majority ‘no’ vote. The three main unionist parties in Scotland have promised that if a majority votes for remaining part of the UK, further devolution of powers to Scotland will follow. So far, the Scottish Conservatives have recently set up a working group on ‘Strengthening devolution’ (2013);39 the Scottish Lib-Dems have published a report on ‘Federalism as the best future for the UK’ (2012);40 and Scottish Labour has set up a ‘Devolution Commission’ (2013) to strengthen the present constitutional arrangements, although there is a small group supporting independence.41 However, these are three very different parties which have different understandings of what should be the future of the devolution settlement for Scotland, so they very well may end up defending different positions and options. Again, further uncertainty is added by the fact that there will be elections to the UK Parliament in 2015, and it is therefore unclear which party will then have the necessary majority to carry out any future reforms.42

36 Edward 2013, Tierney 2013b.
37 Edward 2013, Tierney 2013b.
38 Trench 2013.
39 Davidson 2013.
40 Scottish Liberal Democrats 2012.
42 Fixed term Parliaments Act, section 1(2).
7. Some final considerations

With just under a year to go until the referendum, the outcome is still very open.43 The Edinburgh Agreement has paved the way for the fast and smooth regulation of the required procedural framework, which is nearly completed and in place. The focus of the debate is now moving fully to the substantive issues and, although support for the ‘yes’ vote has not risen much higher than 35% in the polls, these still reflect a significant majority of the people in Scotland’s preference for further devolution of powers to the Scottish Parliament.44 It then seems that much still depends on the Scottish Government’s promotion of their recent White Paper and its proposed model of ‘independence-lite’, and on the unionist parties putting forward their proposals for Scotland’s future, thus providing voters with a clearer definition of what would be the outcome of a majority ‘yes’ or ‘no’ vote.

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43 Walker 2013.
44 Scotcen 2013 and Curtice 2013.
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