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What lies between: the Scottish Independence Referendum 2023

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WHAT LIES BETWEEN: THE SCOTTISH INDEPENDENCE REFERENDUM 2023*

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ABSTRACT (ITA): I dibattiti sul caso politico e giuridico del referendum sull'indipendenza scozzese del settembre 2014 e sul mancato referendum dell'ottobre 2023 si sono concentrati sulla persistenza e la risoluzione di ambiguità riguardanti i mandati politici e le competenze giuridiche. In questo articolo intendo portare alla luce tali ambiguità, esaminando come la certezza politica (ossia il fatto che l'SNP avesse ottenuto un chiaro mandato politico per indire un referendum nel 2011) e l'ambiguità costruttiva (relativa alla necessità di un ordine ai sensi della sezione 30 per permettere tale referendum) siano state utilizzate per realizzare un referendum equo, legale e decisivo. Analizzerò inoltre come il radicamento politico (per il governo del Regno Unito, l'affermazione che "non è questo il momento" per tornare sulla questione referendaria; per il governo scozzese, l'idea che la Brexit rappresentasse un "cambiamento sostanziale delle circostanze" rispetto a quelle del 2014) e il raggiungimento di una certezza giuridica abbiano impedito la realizzazione di un secondo referendum nel 2023. Infine, mostrerò come proprio il raggiungimento di tale certezza giuridica da parte della Corte Suprema abbia aperto nuove ambiguità politiche e giuridiche riguardo alle condizioni che potrebbero, in futuro, giustificare un secondo referendum sull'indipendenza.

ABSTRACT (ENG): Debates about the political and legal case for the Scottish independence referendum in September 2014 and the non-referendum of October 2023 have centred around the retention and resolution of ambiguities about political mandates and legal powers. In this article I want to put those ambiguities in the spotlight looking at how political certainty (that the SNP had won a political mandate to hold a referendum in 2011) and constructive ambiguity (about the necessity of a section 30 order to facilitate that referendum) were deployed to produce a fair, legal and decisive referendum; at how political entrenchment (for the UK Government, that "*now is not the time*" to revisit the referendum question; for the Scottish Government that Breit was a "*material change of circumstances*" from those which prevailed in 2014) and the achievement of legal certainty put paid to a second referendum in 2023; and, finally, how the achievement of legal certainty at the Supreme Court opened new political and legal ambiguities about the political and legal circumstances that might yet trigger a second independence referendum.

PAROLE CHIAVE: indipendenza scozzese, devolution, referendum.

KEYWORDS: Scottish independence, devolution, referendum.

1. Introduction.

In June 2022 the then First Minister of Scotland, Nicola Sturgeon, made a statement to the Scottish Parliament in which she set out a route map to a second Scottish independence referendum to be held on 19 October 2023[1]. The vote never took place. On 23 November 2022, on a novel pre-introduction reference made by the Lord Advocate, the Supreme

* This contribution has undergone a *double blind peer review* process.

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[1] N. STURGEON, *Independence Referendum: First Minister's Statement*, 28 June 2022, available at: Independence referendum: First Minister's statement – 28 June 2022 - gov.scot.

Court held that a proposed Scottish Independence Referendum Bill that included the question "should Scotland be an independent country" would relate both to (i) the Union between the Kingdoms of Scotland and England and (ii) the Parliament of the United Kingdom – both maters reserved to the UK Parliament and therefore outside the legislative competence of the Scottish Parliament[2]. The Supreme Court's reasoning has been subject to much academic analysis, including in these pages[3]. Here, I want to focus on the spaces in between the SNP coming to power for the first time in 2007 and the 2014 Scottish independence referendum and in between the 2014 referendum and the date of the proposed second referendum. I will argue that the existence, constructive use and resolution of political and legal ambiguities has been an important theme at each of the key stages of 2014 referendum and of the 2023 non-referendum debates. In particular, I will conclude with the argument that – far from putting the matter to rest – the certainty achieved by the Supreme Court about legislative competence has thrown us back onto new political and legal ambiguities: this time about the political and legal conditions that might trigger a fair, legal and decisive second referendum.

2. Politics, law and the 2014 Scottish independence referendum.

2.1 Obstacles erected, political and legal.

For a number of reasons, it was remarkable that the 2014 Scottish independence referendum was held at all. First, because the Labour Government elected in 1997 was committed to devolution in no small part to "ward off the…threat of secession"[4]. Whilst for the Labour Party under John Smith's leadership – and for the Scottish Office under Donald Dewar – devolution was a "cornerstone of [Labour's plans for] democratic renewal," the delivery of which was the "settled will of the Scottish people"[5], Smith's successor, Tony Blair, was "never a passionate devolutionist"[6]. However, Blair thought it both inevitable and "necessary politically"[7]. Inevitable, because it had become the established position of the Labour Party: "basically the right thing to do", and anyway "hard to change…even if I had wanted to"[8]. Necessary politically because, in Blair's view, without it "*support for independence would be unstoppable*"[9]. Or, as it was put at the time by the then Labour Shadow

[2] Reference by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998 [2022] UKSC 31.
[3] See, for example, R.N. FASEL, *How (Not) to Break Up: Constituent Power and Alternative Pathways to Scottish Independence*, in OJLS, n.1, 2024, pp. 1-27; G. DAVIES, *The UK Supreme Court and devolution: guardian of the passive revolution*, in Public Law, Jan, 2025, pp. 58-80; J M TIRAPU-SANUY, *Devolution, National Pluralism and the Role of the UK Supreme Court*, in OJLS, 2025, online first available at Devolution, National Pluralism and the Role of the UK Supreme Court.
[4] T. BLAIR, *Devolution, Brexit and the future of the* Union, for the Institute for Government, 24 April 2019, p. 3.
[5] For discussion see J. MITCHELL, *Devolution in the UK*, Manchester, Manchester University Press, 2009, ch. 6.
[6] INSTITUTE FOR GOVERNMENT, *Tony Blair: Devolution, Brexit and the future of the Union*, 29 April 2019, available at Tony Blair: Devolution, Brexit and the future of the Union. Institute for Government.
[7] T. BLAIR for Institute for Government, p. 3.
[8] Ibid.
[9] Ibid.

Secretary of State for Scotland, George Robertson, devolution would "kill nationalism stone dead"[10].

Second, because in the creation of the Scottish Parliament the Labour Party was willing to concede on the adoption of the First Past the Post (FPTP) electoral system, and likely political domination in Scotland (at least in the short term), and to adopt the more proportionate Additional Member System (AMS)[11], with independence in mind. As James Mitchell and Ailsa Henderson put it, even if other factors where in play – the legitimacy of the new parliament required greater pluralism than could be produced a *winner takes all* electoral system; the Scottish Constitutional Convention itself had rejected First Past the Post; and, the Scottish Parliament was seen as *sui generis* and distinct from Westminster - at this time "[t]he prospect of an SNP overall majority with a minority of Scottish votes demanding independence could not have been far from Labour minds"[12].

Third, because even if a pro-independence majority could build momentum towards independence and could win a majority of seats in the chamber, it was at best unclear whether the Scottish Parliament would have the legislative competence to legislate for independence. Amongst the matters reserved to the UK Parliament in the Scotland Act 1998 is "the Union of the Kingdoms of Scotland and England"[13]. Any legislation passed by the Scottish Parliament that "*relates to*", inter alia, the reserved matter of the Union would "not [be] law" and therefore would be invalid[14]. Section 29(3) of the Scotland Act 1998 tells us that whether a provision of an Act of the Scottish Parliament (ASP) "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». Early devolution jurisprudence began to clarify the meaning of 29(3): whether a provision "*relates to*" a reserved matter means that «the provision has more than a loose or consequential connection» to the reserved matter;[15] its purpose could be indicated in «a report that gave rise to the legislation or in a report from one of the committees of the Parliament» or otherwise «from its context»[16].

For the Labour Party passing the Scotland Bill in 1998 it was axiomatic that an independence referendum Bill would not be within the legislative competence of the Scottish Parliament. Illustrating the effect of (what would become) section 101 of the Scotland Act 1998, the then Lord Advocate, Lord Hardie, said that the section's interpretative obligation – that courts must interpret provisions of an ASP «as narrowly as

[10] B. TAYLOR, How is the 'Killing the SNP stone dead' project going, BBC News, 4 February 2015, available at How is the 'killing the SNP stone dead' project going? - BBC News.
[11] In which 73 constituency members are elected on the basis of the First Past the Post system and a further 56 regional members are elected on a party list system.
[12] J. MITCHELL and A. HENDERSON, *Elections and Electoral Systems,* in M. KEATING (ed), *The Oxford Handbook of Scottish Politics*, Oxford, Oxford University Press, 2020, ch. 11, p. 213.
[13] Scotland Act 1998, Sch. 5 Pt. I 1(b).
[14] Scotland Act 1998, ss. 29(1) and (2)(b).
[15] *Martin v Most* [2010] UKSC 10 at para. 49 per Lord Walker; *Imperial Tobacco v Lord Advocate* [2012] UKSC 61 at para. 16 per Lord Hope.
[16] *Imperial Tobacco*, *op. cit.* at para. 16 per Lord Hope.

is required for it to be within competence, if such a reading is possible»[17] - could not save an independence referendum held under the authority of a framework referendums act because such a reading «can clearly only be read as making provision outwith competence»[18]. However, for others the matter was not so clear cut: an independence referendum Bill might not "relate to" the reserved matter of the Union because the referendum itself would have no direct legal effect: «it would not involve a change in the law»[19]*;* its purpose merely to consult the people in Scotland about, or to advise the Scottish Government to open negotiations towards, independence but not itself to deliver that outcome[20].

Fourth, in order to put the legal validity of an independence referendum Bill passed by the Scottish Parliament beyond doubt it would be necessary to persuade the UK Government that it should support in good faith legislation that would put at risk the territorial integrity of the Union itself. Despite these challenges, in 2014 the conditions were ripe for the Scottish and UK Governments to agree to put the question to the people in Scotland: «should Scotland be an independent country».

The conditions for the 2014 referendum can be traced as far back as 2007 when the SNP won power for the first time, forming a minority government (with 47 of 129 seats) and replacing the Labour-Liberal Democrat coalition majority that had governed Scotland since the opening of the parliament in 1999. For the SNP in 2007 it was strategically important to be perceived as a competent and responsible party of government better able to stand up for Scotland's interests than its predecessors. The case for independence, they reckoned, would not be won by governing irresponsibly; by seeking deliberately and egregiously to legislate beyond their powers in order to provoke the UK Government or the courts to block the democratic will of the Scottish Parliament. Rather, the then First Minister, Alex Salmond, called for "patience, maturity and leadership" and appealed for "support policy by policy" across the parliament. So, for example, manifesto commitments to hold an independence referendum and to reform council tax[21] were dropped for lack of majority support across the parliament but support was won for legislation to abolish the graduate endowment (a fixed fee paid by most graduates at the end of their degree) and to abolish bridge tolls. At the same time, the retention by the SNP of Labour's Lord Advocate, Eilish Angioli, rather than a law officer in their own constitutional image, was seen as a practical and symbolic step towards competent and responsible government. In the end,

[17] On the operation of section 101 see C. MCCORKINDALE, *Statutory interpretation and legislative competence: section 101 of the Scotland Act 1998,* in C. HUNT et. al. (eds), *Legislating Statutory Interpretation: Perspectives from the Common Law* World, Toronto, Carswell, 2018, ch. 7.
[18] HL Deb., 21 July 1995, vol. 592, cols. 818-20.
[19] C.M.G. HIMSWORTH and C.R. MUNRO, *The Scotland Act 1998* (2nd ed.), Edinbugh, W. Green, 2000, p. 40.
[20] N. MACCORMICK, *Is there a constitutional path to Scottish Independence?*, in *Parliamentary Affairs*, vol. 53, n. 4, 2000, pp. 721-736.
[21] *SNP Manifesto 2007*, p. 20.

and contrary to what many (including within the SNP) expected in 2007, the minority government saw out its full four year term in a condition of relative stability[22].

Between 2007 and 2011 the SNP largely succeeded in presenting itself as a competent and responsible party of government and one that was capable of standing up for Scotland's interests within the Union. Devolution had not killed small-n nationalism stone dead; quite the opposite. But nor had the SNP's success during this period persuaded the people in Scotland to support Scottish independence – at least not in the abstract. By 2011 neither support for, nor the salience of, independence were particularly strong[23]. Yet, that period of minority government was an important building block towards the 2014 referendum in at least two ways. First, because - having dropped its commitment to legislate for an independence referendum during the 2007-11 session - the SNP nevertheless set out to present independence not as an abstract concept but as a plausible constitutional near-future. They did this by launching the National Conversation: a public consultation exercise on Scotland's constitutional future that, unlike the Scottish Constitutional Convention (1989-1995), included the possibility of Scottish independence. The National Conversation culminated with the publication of a White Paper for a proposed Referendum (Scotland) Bill 2010. In this Bill a two proposals would be put to the electorate: (1) that «*[t]he Scottish Parliament should have its financial powers and responsibilities extended as recommended by the Commission on Scottish Devolution [the Calman Commission]*»; (2) that in addition to those powers «the Parliament's powers should also be extended to enable independence to be achieved»[24]. Second, because in 2011 the SNP was able to build on its success in minority government by winning – against the odds – the very single party, pro-independence, that it was thought AMS would mitigate against. The irony of this historic election win, still the only single party majority returned to the Scottish Parliament, was that the electorate had at once returned – for the first time – a pro-independence majority to the parliament (and therefore the votes needed to pass an independence referendum Bill) at a moment when the public's support for independence itself (and therefore the probability of the SNP winning that referendum) was relatively low. It wasn't until the campaign period proper – when independence became not only a plausible but an imminently possible constitutional future - that support began to increase towards the 44.7% achieved at the referendum.

2.1 Obstacles overcome, political and legal.

Perhaps surprisingly, the UK Government was quick to acknowledge the SNP's «significant victory"[25] in 2011 and the political mandate it carried to «bring forward [a] Referendum

[22] On the relative stability of this period see P. CAIRNEY, *Coalition and Minority Government in Scotland: Lessons for the United Kingdom?*, in *Political Quarterly*, vol. 82, n. 2, 2011, pp. 261-269.

[23] See C. CARMEN et al., *More Scottish that British: The 2011 Scottish Parliament Election*, Basingstoke, Palgrave Macmillan, 2014.

[24] See M. HARVEY and P. LYNCH, *Inside the National Conversation: The SNP Government and the Politics of Independence 2007-2010*, in *Scottish Affairs*, vol. 80, n. 1, 2010, pp. 91-116.

[25] *Scotland's constitutional future: A consultation on facilitating a legal, fair and decisive referendum on whether Scotland should leave the United Kingdom*, cm. 8203, January 2012, available at Microsoft Word - Final consultation paper.doc, p. 5.

Bill in [the 2011-2016] Parliament»[26]. Immediately following the election the then Prime Minister, David Cameron, said that «if [the Scottish Government] want to hold a referendum, I will campaign to keep our United Kingdom together, with every fibre that I have»[27]. By January 2012 he had offered the Scottish Government a "fair, legal and decisive" independence referendum. In *Scotland's Constitutional Future* – a consultation on how to facilitate such a referendum – the UK Government put flesh on the bones of that offer. The referendum would be fair because the rules about, and oversight of, the referendum would be «manifestly and overtly above board»; its conduct overseen by actors with «demonstrable neutrality and proven expertise»[28]. And, the referendum would be decisive because, in "uncertain times" both in Scotland and globally, «the question of Scotland's constitutional future is increasing that uncertainty» with a cost to investment and jobs in Scotland[29]. This combination of the SNP's unprecedented (and hitherto assumed implausible) 2011 election win – and the political mandate that it was perceived to carry – alongside the uncertainty that would be caused by allowing the independence question to hang in the air and alongside the stubbornly low support for independence itself created a unique set of political factors that persuaded the UK Government to engage in good faith with legislation that would put at risk the territorial integrity of the Union. However, on making the referendum *legal* the UK and Scottish Governments started from (and indeed maintained) different positions.

In *Scotland's Constitutional Future* the UK Government set out its position that «any Bill introduced in the Scottish Parliament providing for a referendum on independence would be outside the powers the Scottish Parliament» because such legislation would "plainly" relate to the Union of the Kingdoms[30]. If challenged – either in post-enactment proceedings raised in the Scottish courts by any petitioner with *sufficient interest* or in a pre-enactment reference to the Supreme Court made by the Scottish or UK Government law officers[31] - it would be struck down by the courts[32]. In their analysis of Scottish Government papers and consultation exercises related to independence it was clear that even an advisory referendum (i.e. a referendum with no direct legal effects) would have the "underlying purpose" of furthering the Scottish Government's aim of achieving independence[33]. Accordingly, the UK Government set out a number of ways in which an independence referendum could be put on a sound legal basis by:

- Introducing a Bill in the UK Parliament to make the necessary amendments to the Scotland Act 1998;

[26] *SNP Manifesto 2011*, p. 28.
[27] Quoted in the excellent overview, D. TORRANCE, *Scottish independence referendum: legal issues*, House of Commons Library, 18 September, 2024, p. 39.
[28] *Scotland's constitutional future*, p. 7.
[29] Ibid.
[30] Ibid.
[31] Scotland Act 1998, s. 33.
[32] *Scotland's constitutional future*, p. 11.
[33] Ibid.

- Making an order under section 30 of the Scotland Act 1998 to modify the legislative competence of the Scottish Parliament;
- Legislating directly in the UK Parliament for an independence referendum;
- Amending the Scotland Bill already in Parliament as a consequence of the Calman Commission recommendations to enable the Scottish Parliament to pass a referendum Bill[34].

It was that second option – a section 30 order agreed between the UK and devolved authorities – that the UK Government proposed to be the most elegant solution to the achieving a referendum that was not only fair and decisive but legal[35].

In its own consultation, *Your Scotland, Your Referendum*, the Scottish Government set out its position that «the Scottish Parliament has the power to legislate for a[n independence] referendum so long as that would not change any reserved law»[36]. However, recognising that there is a «wide range of opinion» about whether or not that is the case, the Scottish Government expressed its preference also for a section 30 order that would "*remove doubts*" about legislative competence and «put the referendum effectively beyond legal challenge by the UK Government or any other party»[37]. Where the UK Government had proposed a number of conditions upon the making of an order – relating to the role of the Electoral Commission, the franchise and on the number of questions to be asked – the Scottish Government flatly rejected these «as a matter of democratic principle», they said, «it is for the Scottish Parliament» whose «mandate to hold a referendum is clear» to «decide on the timing and terms of the referendum and the rules under which it is to be conducted»[38].

In this period, then, with the constitutional, political and personal stakes of the PM and FM so high, we see a high degree of alignment between the UK and Scottish Governments: political alignment about the Scottish Government's mandate to legislate for an independence referendum, drawn down from its 2011 election win; high level policy alignment that the referendum should be fair, legal and decisive and agreed between the UK and Scottish Governments (even if the details remained subject to negotiation); and, constitutional alignment that the power of the Scottish Parliament to legislate for an independence referendum should be grounded in a section 30 order, even if there was no legal alignment on whether the section 30 order that was eventually made was born of necessary or of strategic convenience.

It was in this spirit of co-ordination that the UK and Scottish Governments – at least as seen from the outside looking in – negotiated remarkably smoothly the terms of agreement to hold a referendum. In the *Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland* (the Edinburgh Agreement) and its attached memorandum it was established that the referendum: should have a clear legal

[34] *Scotland's constitutional future,* pp. 11-14.
[35] Ibid, p. 12.
[36] *Your Scotland, Your Referendum*, 11 May 2012, available here Your Scotland, Your Referendum - Scottish Government consultations - Citizen Space, p. 9.
[37] Ibid.
[38] Ibid. pp. 9-10.

base, established by a time-limited section 30 order; should be legislated for by the Scottish Parliament; should be conducted so as to command the confidence of parliaments, government and people; and, should deliver a fair test and a decisive expression of the views of the people in Scotland and a result that everyone will respect. For the UK Government the major *win* was the agreement that it should be a single-question referendum (i.e. that there would be no third option such as so-called *devo max* on the ballot). For this, the UK Government was willing to concede to the Scottish Government and Scottish Parliament the date of the referendum (before the end of 2014), the franchise (including the possibility that this be extended to 16-17 years old), the wording of the question (subject to review by the Electoral Commission) and rules on the conduct of the referendum including on campaign finance.

On the basis of that agreement, the Scottish Parliament enacted two key pieces of independence referendum legislation. The Scottish Independence Referendum At 2013, which set the date for the referendum: 18 September 2014[39]; which set the question, "should Scotland be an independent country"[40] and the form of answer, a single vote for either YES or NO[41]; and, inter alia, which set out how the referendum would be conducted, including the supervisory role of the Electoral Commission[42] and the regulation of campaign expenditure.[43] The Scottish Independence Referendum (Franchise) Act 2013 established that the franchise would be those already entitled to vote in Scottish Parliament and local elections[44] – tying the franchise to residence in Scotland and neither to non-resident Scots nor to British citizens resident in other parts of the UK – with the addition of 16 and 17 year olds[45]. Prisoners would not be permitted to vote in the election[46] – a disappointing start for those who hoped that the independence referendum might signal a more enlightened approach to an issue that had blighted UK politics at least since the European Court of Human Rights ruled against the UK in *Hirst*[47].

Despite the significant potential for legal and political controversy, the co-operative approach taken by the Scottish and UK Governments, and the constructive ambiguity that allowed both parties to agree *to* a section 30 order even if they disagreed *about* its necessity, meant that neither the Referendum Act nor the conduct of the referendum campaign nor the referendum result were subject to any meaningful legal or political challenge. Only the Franchise Act's blanket ban on prisoner votes was challenged in Supreme Court. There, however, it was held that the right to vote interpreted into Article 3 Protocol 1 of the European Convention on Human Rights – and therefore the implications of *Hirst* – applied only to elections to the legislature and not to referendums and therefore that the Franchise

[39] Section 1(4).
[40] Section 1(2).
[41] Section 1(3) and Sch 1.
[42] Section 12.
[43] Section 35 and Sch 8.
[44] Section 2.
[45] Section 2(1)(a).
[46] Section 3.
[47] *Hirst v United Kingdom (No 2)* (2005) ECHR 681.

Act was not incompatible with Convention rights and not outside the Scottish Parliament's legislative competence[48].

Whatever else might be said about the campaign and its aftermath, when the people in Scotland voted on 18 September 2014, there was no doubt that the result – 55% to 45% in favour of Scotland remaining in the UK – was fair and legal; but decisive[49]?

3. Going for gold.

3.1 Fair, legal and decisively indecisive?

From today's vantage point, with the Scottish Government adamant that independence will be "*central*" to its 2026 Scottish Parliament election campaign[50] and support for independence fluctuating at around 2014 levels, occasionally creeping beyond 50%[51], it is easy to forget that that the 2014 referendum result was, in fact, decisive – if only for a moment. Unlike the 2016 Brexit referendum, which was subject to hyper-litigation attacking, inter alia, the Article 50 process, the conduct of the referendum, government-parliament relations, the devolution impacts and the impact on citizens' rights from both remain and leave positions[52], there was (*Moohan* aside) no attempt made to delegitimise the referendum in the courts. The result was accepted. The then First Minister, Alex Salmond, accepted that the YES campaign had lost the referendum in a concession speech that included notice of his intention to resign from office, and – now easily forgotten – independence was put on the back burner. Launching the 2015 UK General Election manifesto, *Strogner for Scotland*, Salmond's immediate successor, Nicola Sturgeon, said that the election was "*not about independence*" and promised instead to prioritise holding Westminster to account for delivering on the promise of more, and more deeply entrenched devolution, following the referendum, to oppose efforts from the centre to undermine devolution and to prioritise the devolution of key powers around employment policy[53]. In its 2016 Scottish Parliament election manifesto, asserted the right of the Scottish Parliament to hold another independence referendum but accepted that this would only come if there was "*clear and sustained evidence*" that independence had become the preference of a majority of people in Scotland or there was a "*significant and material*" change in circumstances from those which prevailed in 2014 – such as Scotland being taken out of the EU against its will.

[48] *Moohan v Lord Advocate* [2014] UKSC 676.

[49] S. TIERNEY, *And the Winner is… the Referendum: Scottish Independence and the Deliberative Participation of Citizens*, Centre on Constitutional Change blog, 29 September 204, available at "And the Winner is… the Referendum': Scottish Independence and the Deliberative Participation of Citizens. Centre on Constitutional Change".

[50] H. BROWN, *Swinney: Independence will be "central" to SNP 2026 election campaign*, in *The Herald*, 11 May 2025.

[51] N. POORAN, *Yes vote for Scottish independence hits 4-year high in new poll as SNP enjoys resurgence*, in *The Scotsman* 8 December 2024.

[52] On which, see C. MCCORKINDALE and A. MCHARG, *Litigating Brexit,* in O. DOYLE et al. (eds.), *The Brexit Challenge for Ireland and the United Kingdom: Constitutions Under Pressure,* Cambridge, Cambridge University Press, 2021, ch. 12.

[53] *"This election is not about independence": Nicola Sturgeon pledges to represent UK interests as she launches SNP manifesto*, in *Daily Record*, 20 April 2015.

In two successive elections, then, the SNP government had shown the decisiveness of the result in 2014 by parking the independence question and the promise of a second referendum behind the devolution of further powers to Scotland and the manifestation of a new context which justified the question to be put back to the people in Scotland.

For its part, the UK Government acted quickly to make good on a campaign referendum "*vow*" made by the Prime Minister, Deputy Prime Minister and Leader of the Opposition (those being David Cameron, Nick Clegg and Ed Miliband, respectively the leaders of the Conservative Party, the Liberal Democrats and Labour) that, in the event of a NO vote, they would "*deliver change for Scotland*".[54] Spooked by tightening opinion polls in the lead up to the vote, including one that indicated majority support for YES,[55] the triumvirate declared their agreement:

- That the Scottish Parliament is permanent;
- That "*extensive new powers*" would be delivered according to a process and timetable agreed by the parties, beginning on 19 September 2014;
- That each party would work to improve the way the UK is governed;
- That "*the UK exists to ensure opportunity and security for all, by sharing resources equitably to secure the defence, prosperity and welfare of every citizen*";
- That the final say on how much money is spent on the NHS in Scotland is a matter for the Scottish Parliament.

Scotland's NO vote was decisive – but indecisively so. The condition of constructive legal ambiguity remained undisturbed for so long as (the very real and good faith) political consensus about the meaning and significance of the result held. However, underneath the referendum campaign and result were fault lines that always threatened to shift. The percentage (45%) and number (1.6 million) of Scots who voted YES on a high (and highly engaged)[56] turnout (85%) meant that the question was answered but never settled by the referendum and, the late-in-the-day commitment by the three largest UK parties to make a new constitutional offer to the people in Scotland meant that Scotland's constitutional status would remain up for grabs well beyond the referendum date.

On the same day, 19 September 2014, that Alex Salmond announced his intention to resign as First Minister of Scotland and leader of the SNP, the then Prime Minister, David Cameron, invited Lord Smith of Kelvin – a business man with vast experience in public life – to take forward the campaign commitments made by Cameron, Clegg and Miliband to broaden devolution's scope and deepen its entrenchment. Lord Smith's task was:

> «To convene cross-party talks and facilitate an inclusive engagement process across Scotland to produce, by 30 November 2014, Heads of Agreement with

[54] D. CAMERON, N. CLEGG AND E. MILLIBAND, *The Vow*, in *Daily Record*, 16 September 2014.
[55] P. KELLENER, *Scotland: "Yes" bitzkreig wipes out "No" lead,* YouGov, 7 September 2014, available at Scotland: 'Yes' blitzkrieg wipes out 'No' lead | YouGov.
[56] For deeper analyses of voter engagement and behaviour during, and beyond, the independence referendum see A. HENDERSON et al. (eds.), *The Referendum that Changed a Nation: Scottish Voting Behaviour 2014-2019,* London, Palgrave Macmillan, 2022.

> recommendations for further devolution of powers to the Scottish Parliament… The recommendations will deliver more financial, welfare and taxation powers, strengthening the Scottish Parliament within the United Kingdom»[57].

The Smith Commission process came in for significant criticisms that were both practical and principled in nature. Practical criticisms included the tight time frame that was imposed upon the Commission to report its recommendations (and the tight time frame that was then self-imposed by the UK Government to draft legislation). This, it was said, «runs counter to both the due diligence that is surely needed before any decision is taken to restructure the UK tax [and welfare] systems so radically» as well as the «due process which ought to accompany such a seminal constitutional development»[58]. The direction to report and to draft legislation months before a UK General Election also had the potential to undermine the Commission's recommendations. Principled criticisms concerned the legitimacy deficit of an exercise that lacked the «full participation of all of the governments, legislatures, and peoples of the United Kingdom in a genuinely democratic process»;[59] a lack of clarity about the "price" of more powers for Scotland – not only in economic terms but in terms of any wider constitutional restructure that might marginalise Scotland's influence at the centre;[60] and the trend (think Calman and Silk) of doing devolution reform by commission, reducing legislatures to bit part players or rubber stamps.

More significant, in the end, was the political context in which the Smith Commission met. On the one hand, in the same speech that Cameron announced the Commission's work, he committed to provide «a decisive answer» to the West Lothian Question. In an astonishingly tone deaf passage, Cameron said «[w]e have heard the voice of Scotland – and now the millions of voices of England must also be heard».[61] That problem, he said, must be solved «in tandem with, and at the same pace as, the settlement for Scotland»[62]. As it was put by Chris Himsworth and Christine O'Neill, although the West Lothian Question is a serious question worthy of serious consideration, delivered in the immediate aftermath of the independence referendum «it was also seen as a mischievous», and some UK Government officials might have said unhelpful, «contribution by the Prime Minister, concerned as much by the placating his own party's right wing and providing a response to

[57] SCOTTISH AFFAIRS COMMITTEE, *The Implentation of the Smith Commission*, fourth report 2015, 10 March 2015, para. 3.
[58] S. TIERNEY, *Solomon Grundy Does Constitutional Change: The Smith Commission Timetable to Transform the Scottish Parliament*, UK Constitutional Law Association blog, 31 October 2014, available at *Stephen Tierney: Solomon Grundy Does Constitutional Change: The Smith Commission Timetable to Transform the Scottish Parliament – UK Constitutional Law Association.*
[59] N. ARONEY, *Devolutionary Federalism Within a Westminster-derived Context,* in A. MCHARG et al. (eds.), *The Scottish Independence Referendum: Constitutional and Political Implications*, Oxford, Oxford University Press, 2016, ch. 13, p. 322.
[60] S. TIERNEY, *Solomon Grundy*.
[61] D. CAMERON, *Scottish Independence Referendum: statement by the Prime Minister*, 19 September 2014, available at Scottish Independence Referendum: statement by the Prime Minister - GOV.UK.
[62] Ibid.

the threat from UKIP»[63]. On the other hand, and here UKIP loomed large too, the Conservative Party was moving towards the position that it eventually adopted in its 2015 UK General Election manifesto: to negotiate changes to the terms of the UK's membership of the European Union and then to «put these changes to the British people in a straight in-out referendum on our membership of the European Union by the end of 2017»[64]. Put differently, David Cameron – by turning so quickly from Scotland's referendum to English MPs' votes; by his marginalisation of EU membership's devolution impacts – was himself keeping the territorial constitution on the table in ways that were problematic for a government seeking to settle, "perhaps for a lifetime"[65], the question of Scotland's constitutional future.

3.2A new constitutional unsettlement.

As in so many other ways, the UK's exit from the European Union was a game changer. On 23 June 2016 the people of the UK (and Gibraltar) voted 52% to 48% in favour of leaving the EU on a turnout of 72%. However, in Scotland there had been a 62% majority for remain. Earlier attempts to recognise the complexity of the territorial constitution and how that maps on to EU membership – such as Alex Salmond's proposed *four nation lock* where majorities would be needed overall and in each of Scotland, Wales, Northern Ireland and England in order to authorise Brexit - had failed and so one of the SNP's declared triggers to reopen the independence question had come to pass. Scotland would indeed be taken out of the EU against its will. It soon became clear too that devolved interests and input would be sidelined as successive Prime Ministers, Theresa May and Boris Johnson, increasingly took a unilateral UK Government approach to EU exit negotiations and adopted a highly centralised approach to reform of the UK's territorial constitution outside of the EU. On 13 March 2017, the then First Minister, Nicola Sturgeon, cited these two factors as justifying a second independence referendum by spring 2019, when, she said «the terms of Brexit [would be] known…but before it is too late [for Scotland] to choose our own course» and announced her intention to seek the Scottish Parliament's approval to agree with the UK Government the details of a section 30 order to make that referendum happen[66]. The response by the UK Government was swift and firm. The then Prime Minister, Theresa May, was emphatic that her government's priority was to «[fight] for every person, every family, every business across the whole of the United Kingdom» as her government «embark[s] on the process of negotiating a new relationship with the European Union» while her Secretary of State for Scotland doubted the «public or political support for a such a referendum» and said that the UK Government «[would] not be entering into

[63] C.M.G. HIMSWORTH and C. O'NEILL, *Scotland's Constitution: Law and Practice* (4th ed.), Edinburgh, Bloomsbury Professional, 2021, p. 87.
[64] *The Conservative Party Manifesto 2015*, p. 30.
[65] D. CAMERON, *Scottish Independence Referendum statement.*
[66] N. STURGEON, *Second independence referendum: First Minister speech*, 13 March 2017, available at *Second independence referendum: First Minister speech - gov.scot.*

discussions or negotiations about a section 30 agreement», and that, «any request [to do so] at this time [would] be declined»[67].

Undeterred, the SNP went into the 2019 UK General Election reinforcing the "clear mandate" for a second independence referendum drawn down from the 2016 Scottish Parliament election; claiming that an SNP majority of Scottish Westminster MPs would be a «clear instruction by the people of Scotland that a new referendum on independence should be held»; and projecting, on the back of such an election victory, that the referendum should take place in 2020[68]. On 19 December 2019, a week after the SNP won 48 out of 59 Scottish Westminster seats, the Scottish Government published *Scotland's Right to Choose: Putting Scotland's Future in Scotland's Hands*[69]. Here, the Scottish Government made the *democratic* case to put the question of independence back to the people of Scotland and made the *political* case why it this should be done on a consensual and co-operative basis with the UK Government underpinned by express amendments made to the Scotland Act 1998.

The democratic case for a second independence referendum was based on three overlapping claims. First, an appeal to popular sovereignty: that the people of Scotland, as members of a multi-national Union based on consent, retain the right to determine their own constitutional future[70]. Second, an appeal to context: the "material change of circumstances" caused not only by Scotland leaving the EU against its will but also by what the process of leaving the EU had revealed about Scotland's status and voice in the UK.[71] Third, an appeal to democracy: a three-fold mandate drawn down from pro-independence majority of MSPs returned at the 2016 Scottish Parliament election; by the pro-independence majority of Scottish MPs returned at the 2017 and 2019 UK General Elections; and the majority vote in the Scottish Parliament on 28 March 2017 in favour of seeking a section 30 order and a second independence referendum[72]. Taken together these appeals underpinned the Scottish Government's central constitutional case for independence itself: the persistent democratic deficit in the governance of Scotland post-devolution[73]. Indeed, since 2019 the impacts of Brexit on devolution – with UK legislation in devolved areas or amending devolved competence repeatedly being enacted without the consent of the Scottish Parliament; with UK ministers repeatedly taking powers to act in devolved areas without consent; with the imposition from of UK internal market principles that undermine the effectiveness of validly enacted ASPs – have only strengthened the Scottish Government's resolve that «here cannot be true self-government under a

[67] D. STAUNTON, *Theresa May firmly says no to vote on Scottish independence*, in *The Irish Times*, 16 March 2017, available at *Theresa May firmly says no to vote on Scottish independence – The Irish Times*.
[68] *SNP Manifesto 2019*, p. 10.
[69] For analysis see C. MCCORKINDALE and A. MCHARG, *Constitutional pathways to a second independence referendum*, in *Scotland's New Choice: Independence after Brexit*, Edinburgh, Centre for Constitutional Change, 2021, ch. 1.
[70] SCOTTISH GOVERNMENT, *Scotland's Right to Choose: Putting Scotland's Future in Scotland's Hands*, 19 December 2019, available at *Scotland's Right to Choose: Putting Scotland's Future in Scotland's Hands*, pp. 7-9.
[71] *Scotland's Right to Choose*, pp. 14-18.
[72] *Scotland's Right to Choose*, pp. 12-13.
[73] *Scotland's Right to Choose*, p. 17.

devolution settlement that retains Westminster's supremacy over the democratic will of the Scottish Parliament»[74].

More interesting still was the political case made to place any second independence referendum on a sound legal footing. Given the UK Government's withering dismissal of the Scottish Government's requests to do so, and despite their view that a unilateral independence referendum Bill would already be within the Scottish Parliament's legislative competence, certainty about legality has been – to the chagrin of some in the independence movement - of paramount importance to the Scottish Government's independence strategy. This is so for at least three reasons. First, because a second independence referendum held on an unambiguously lawful basis is the most likely route to secure losers' consent. The threat made by pro-Union parties to undermine, by boycotting, any second independence referendum would immediately lose its bite if that referendum was authorised by the UK Government or UK Parliament or by the UK Supreme Court. Second, because, as a matter of UK constitutional law, Scotland can only become independent with the agreement of the UK Parliament and following good faith negotiations with the UK Government about the fact and form of independence[75]. It would be much easier for the UK Government and the UK Parliament to ignore the results of a referendum to which they did not consent and the legality of which was contested. Third, it would be essential for a newly independent Scotland to achieve state recognition from the international community of states (including recognition by the UK) and from key international institutions such as the EU. This could only be achieved where the process of becoming independent was in accordance with domestic constitutional requirements. Independence would be dead on arrival on the international plane where there was significant doubt about the legality of that process. Legality matters, in other words, because it is the bridge between the expression of a desire for independence made at the ballot box and the birth of a new state built on solid foundations at home and ready to take its place in the wider international community. The Scottish Government's consistent concern for legality during this period, in other words, communicated its firm commitment to achieve effective statehood – even at the cost of time and control. It is no coincidence, surely, that the end of Nicola Sturgeon's mostly sure-footed period as First Minister coincided with her turn from the referendum to a direct mandate for independence negotiations derived from Scottish or UK Parliament elections as a Plan B that never would overcome these conditions of effective independence[76].

4. From constructive ambiguity to legal certainty.

[74] SCOTTISH GOVERNMENT, *Devolution since the Brexit referendum*, 14 June 2023, available at *Supporting documents - Devolution since the Brexit Referendum - gov.scot*, p. 16.

[75] On this, see S. DOUGLAS-SCOTT, *Scottish Independence and the UK Government's Unreasonable Refusal to Negotiate*, Centre on Constitutional Change blog, 31 October 2022, available at *Scottish Independence And The UK Government's Unreasonable Refusal To Negotiate. Centre on Constitutional Change.*

[76] For a critique of Plan B see C. MCCORKINDALE AND A. MCHARG, *Constitutional Pathways*, pp. 41-42.

4.1 The limits of constructive ambiguity.

In its 2021 Scottish Parliament election manifesto the SNP asserted the right of the people in Scotland – and «not [the then Prime Minister] Boris Johnson or any Westminster government» – to «decide what sort of country [Scotland] should become after the pandemic»[77]. Citing the threat to the NHS, Brexit and austerity cuts caused by successive Conservative UK governments, the SNP appealed to «a Scotland based on compassion, equality and love», that could be «an equal partner in a new and better relationship with our friends in the rest of the UK» and that – with powers accrued by achieving independence – could «control [its] own economic policy, provide security and take advantage of [its] vast economic potential to create high quality sustainable jobs»[78]. In order to achieve this, the Scottish Government published a draft Bill for an independence referendum with a pledge to introduce that Bill if the SNP was returned to government and if there was a simple majority in the parliament for independence[79]. At the election the SNP was returned to government, falling just short of a single party majority with 64. However, with the Scottish Greens committed to «campaign and vote for a referendum within the next Parliamentary term»[80] – and with the 8 seats won at the election – there was unambiguous majority support in the parliament to introduce an independence referendum Bill. A commitment to do so was formalised in the so-called Bute House Agreement – the Cooperation Agreement between the Scottish Government and the Scottish Green Party Group – that, inter alia, outlined how the Scottish Government and Scottish Green Party group of MSPs would work together during the session, the appointment of Green ministers, the policy areas that would be excluded from the agreement, the resolution of disputes between the parties and confidence and supply[81]. This included, in their shared policy programme, a commitment to «secure a referendum on Scottish independence…within the [first half of the] current parliamentary session»[82]. For the SNP, it would be "undemocratic and unsustainable" to ignore the will of the Scottish Parliament and either to refuse to put the legality of a second independence referendum beyond doubt by making a section 30 order or to let a Bill pass and to attempt to block its enactment by making a pre-enactment reference to the UK Supreme Court[83]. The Scottish Greens went one further: not only did they echo the SNP view that it would be "politically unsustainable" for the UK government to refuse to respect the will of a pro-independence majority in the

[77] *SNP Manifesto 2021,* p. 12
[78] Ibid.
[79] Scottish Independence Referendum Bill 2022, available at *Scottish Independence Referendum Bill*.
[80] *Scottish Greens Manifesto 2021*, p. 51.
[81] *Draft Cooperation Agreement between the Scottish Government and the Scottish Green Party Parliamentary Group*, 20 August 2021, available at *SG+SGP+-+Draft+Cooperation+Agreement+-+FINAL+-+OFFSEN.pdf*.
[82] SCOTTISH GOVERNMENT AND SCOTTISH GREEN PARTY, *Draft Shared Policy Programme: Working Together to Build a Greener, Fairer, Independent Scotland*, 20 August 2021, available at *SG+SGP+Talks+-+Draft+Policy+Programme+-+version+7+-+FINAL+-+OFFSEN.pdf*, p. 6.
[83] *SNP Manifesto 2021*, p. 12.

Scottish Parliament but, and without further elucidation, they added that such a refusal could itself be subject to a legal challenge[84].

On 14 June 2022, and in the face of a continued refusal by the UK government to engage with the Scottish Government on the question of a second independence referendum[85], the then First Minister, Nicola Sturgeon, made a statement to the Scottish Parliament that confirmed the Scottish Government's intention to introduce an Independence Referendum Bill in the Scottish Parliament that would make provision for a referendum to take place on 19 October 2023. Invoking the late Canon Kenyon Wright's powerful invocation of the sovereignty of the Scottish people at the Scottish Constitutional Convention – «What if that other voice we all know so well [Thatcher's] responds [to the Convention] by saying, 'we say no [to devolution] and we are the state'? Well we say 'yes – and we are the people'»[86] – Sturgeon was emphatic that, in the 2021 election, «the democratic decision was clear": "the people of Scotland said yes to an independence referendum»[87]. As had been the case at least since 2010, the political case for independence was a progressive, social democratic, one: budget cuts, austerity, anti-trade union laws, the dilution of human rights and the end of freedom of movement within the European Union – all imposed on Scotland from the centre.[88] And, as had been the case at least since 2007, the SNP government's position was clear the legality of any independence referendum legislation must be beyond doubt. This was a matter of principle: «respect for the rule of law [and respect for democracy]," she said, "means that a referendum must be lawful»[89]. And, consistent with the position set out in 2019, it was a matter of practical reality: «an unlawful referendum would not be deliverable»; it would «lack effect»; it would «not be recognised by the international community»; and, so, «it would not lead to Scotland becoming independent»[90].

For Sturgeon, constructive ambiguity about the Scottish Parliament's legislative competence to enact an independence referendum Bill had run its course. To establish the legitimacy of any future referendum – to encourage good faith engagement even by those who opposed a referendum or who opposed independence – its legality «must be established as a matter of fact, not just opinion»[91]. To this end she committed, first, to write to the Prime Minister making clear that the Scottish Government stood ready to negotiate the terms of a new section 30 order. «[T]hat, she said, would be the democratic way to proceed [and would be] based on [the 2014] precedent»[92]. However, if (as proved to be the case) the Prime Minister was not willing to entertain a second independence referendum, the First Minister also set out the steps that the Scottish Government and the Lord Advocate

[84] Ibid.
[85] T. GORDON, *Cabinet Office minister Michael Gove refuses to rule out legal action over Indyref2*, in *The Herald*, 10 May 2021.
[86] Quoted in N. STURGEON, *2022 independence statement.*
[87] N. STURGEON, 2022 independence statement.
[88] Ibid.
[89] Ibid.
[90] Ibid.
[91] Ibid.
[92] Ibid.

would take to ensure the lawfulness of its proposed Scottish Independence Referendum Bill. In order to achieve certainty about whether the Bill would "relate to" the reserved matters of "the Union of the Kingdoms of Scotland and England; and/or the Parliament of the United Kingdom", the key action would be the first pre-introduction reference of a proposed Bill to the Supreme Court made by the Lord Advocate under paragraph 34 of Schedule 6 to the Scotland Act 1998.

4.2 Towards clarity.

Certainty about the Scottish Parliament's legislative competence to enact its proposed Scottish Independence Referendum Bill was not only important for the outcome of that legislation: about whether a lack of certainty would undermine the legislation and therefore the conduct, result and effect of a second independence referendum. A degree of certainty was also necessary because the minister responsible for introducing a Bill in the Scottish Parliament must, on or before the Bill's introduction, make a statement of legislative competence; that is, must «state that in [their] view the provisions of the Bill would be within the legislative competence of the Parliament»[93]. It would be *ultra vires* the Scotland Act 1998 for the responsible minister to introduce a Bill where they could not, in good faith, make such a statement. The Scottish Ministerial Code tells us that this statement «will have been cleared with the Law Officers» (the Lord Advocate and the Solicitor General for Scotland).[94] In practice, empirical interview-based research that I have conducted with Janet Hiebert has shown that ministers will defer to the judgment of the Law Officers[95]: that, in the absence of a Supreme Court ruling on the matter, the Law Officers' view is accorded a similar weight.

To allow for the section 31 statement to be cleared by the Law Officers, the responsible minister will share a draft Bill and a detailed note on legislative competence prepared by the Scottish Government Legal Directorate (SGLD) three weeks prior to introduction. This note will explain SGLD's view that a Bill would be within the legislative competence of the Scottish Parliament and will be the starting point of the Law Officers' own assessment. This will generally require iteration between the Law Officers and SGLD, typically where more explanation or clarity about SGLD's view is needed. On occasion, action might be required to amend the Bill before the Law Officers are prepared to clear the ministerial statement on legislative competence. Our research showed that when the Law Officers have spoken that is the end of the matter; that even when a minister is noticeably unhappy about the Law Officers' view, and/or where any necessary amendment to a Bill leaves a hole in an important policy, ministers will take that "on the chin"[96].

[93] Scotland Act 1998, section 31(1).
[94] Scottish Ministerial Code (2024 edition), available at *Scottish Ministerial Code: 2023 Edition*, para. 10.5 (n.b. this link is to 2024 edition despite the reference to 2023 in the link itself).
[95] On this, see C. MCCORKINDALE AND J. HIEBERT, *Vetting Bills in the Scottish Parliament for Legislative Competence*, in *Edinburgh Law Review*, vol. 21, n. 3, 2017, pp.319-351, p. 332.
[96] Ibid.

The Law Officers make their assessment of legislative competence based on their reading of the tests set out in the Scotland Act 1998 as interpreted (where relevant) by the Supreme Court applying a civil law (*balance of probabilities*) standard[97]. There are at least three factors that strengthen the Law Officers' positions during this iterative process. First, and as reiterated by the First Minister in her June 2022 statement, the Scottish Government is committed to the rule of law and will not govern irresponsibly in that regard by knowingly introducing legislation that would not be within the legislative competence of the Scottish Parliament. Second, our research showed that, were the Scottish Government to knowingly introduce legislation that would be outside of the Scottish Parliament's legislative competence, the Law Officers would see that as a resigning matter. This, amongst other things, would be hugely damaging to the Scottish Government's reputation and to the legislation itself.[98] Third, as well as the role afforded to the Law Officers by the Scottish Ministerial Code at the start of the a Bill's legislative journey, the Lord Advocate has a statutory power – exercisable during the four week period that begins with the passing of the Bill – to refer the question of whether a Bill would be within the legislative competence of the Scottish Parliament to the Supreme Court.[99] It would therefore be open to a Lord Advocate to make such a reference if a minister was to proceed to introduction without clearance by the Law Officers[100].

Set against this context, the experience of the Scottish Independence Referendum Bill makes for an interesting case study. First, because this was an extremely rare (likely, the only) occasion in which the Scottish Ministers and the Lord Advocate took opposite views as to whether a Bill would be within the legislative competence of the Scottish Parliament. As she made clear in her submissions to the Supreme Court, the Lord Advocate did not have the "necessary degree of confidence" that the Bill would not relate to a reserved matter to clear a ministerial statement of legislative competence[101]. Second, because this was an extremely rare (likely, the only) occasion when the Lord Advocate's was not the final word on the matter. Discussions continued between the First Minister and the Lord Advocate about whether Lord Advocate could be otherwise persuaded – but with no success. Third, because the Lord Advocate was persuaded by the First Minister to exercise her hitherto unused power to refer the question of legislative competence to the Supreme Court *prior to* the Bill's introduction as a devolution issue under paragraph 34 Schedule 6 to the Scotland Act 1998. She was so persuaded because of: the Scottish Government's democratic mandate drawn down from the 2021 Scottish Parliament election; the constitutional significance of the issue; the fact that the Bill raised a genuine issue of law that is unresolved; and, the importance of ensuring that the Scottish Government and the Scottish Parliament act according to law at all times[102]. For the First Minister, the risk that the Supreme Court

97 Ibid.
98 Ibid., pp. 332-333.
99 Scotland Act 1998, section 33.
100 C. McCorkindale and J. Hiebert, *Vetting Bills*, p. 332.
101 Lord Advocate's reference, para. 10.
102 N. Sturgeon, 2022 independence statement.

would rule against the Scottish Parliament's legislative competence to enact the Bill was one that was worth taking: «if, she said, that what the law establishing [the Scottish] Parliament really means, it is better to have that clarity sooner rather than later»[103].

4.3 Achieving certainty.

The first step to achieving legal certainty was to persuade the Supreme Court to take the reference in the first place. So, the Lord Advocate asked the Supreme Court two preliminary questions (1) whether the substantive question referred is a devolution issue such as to fall within the scope of paragraph 34 Schedule 6; and, (2) even if so, whether the Court should decline to determine the reference as a matter of its inherent discretion on the basis that is academic, hypothetical or premature.

Paragraph 34 Schedule 6 enables the Lord Advocate (as well as the Attorney General, the Advocate General for Scotland and the Advocate General for Northern Ireland) to refer to the Supreme Court any "devolution issue" to the Supreme Court. Devolutions are defined in paragraph 1 as meaning a question:

- Whether an ASP or any provision of an ASP is within the legislative competence of the Parliament;
- Whether any function (which any person has purported or is proposing to exercise) is a function of the Scottish Ministers or Lord Advocate;
- Whether a purported or proposed exercise of a function by a member of the Scottish [Government] is, or would be, within devolved competence;
- Whether a failure to act by a member of the Scottish [Government] is incompatible with Convention rights;
- Or, and most relevant here, in paragraph 1(f), «any other question about whether a function is exercisable within devolved competence or in or as regards Scotland any other question arising by virtue of this Act about reserved matters [emphasis added]».

The court rejected a number of objections made by the Advocate General for Scotland – that the Lord Advocate's clearance does not «arise by virtue of this Act» but arises from the Scottish Ministerial Code[104]; that the section 31 (statements of competence on introduction) and 33 (law officers' references after a Bill's passage) would be undermined by allowing for a pre-introduction reference;[105] that an alternative and more narrow interpretation of paragraph 1 should be preferred;[106] and, that there should be no power to refer where the Law Officers are not themselves persuaded to clear a ministerial statement of competence[107] - and held that the substantive question did raise a devolution issue and therefore that the court could accept the reference. The court was persuaded that: the substantive question

[103] Ibid.
[104] Lord Advocate's reference, paras. 15-16.
[105] Ibid., paras. 17-27.
[106] Ibid., paras. 28-42.
[107] Ibid., paras. 43-47.

does arise by virtue of the Scotland Act (the section 31 requirement that the responsible minister must make a statement of legislative competence on the Bill's introduction);[108] the existence of a pre-introduction reference is not incompatible with the section 33 (post-enactment) reference power;[109] that the terms of paragraph 1(f) are wide and intended to sweep up any questions arising from the Scotland Act relating to reserved matters that are not covered elsewhere[110]; and, that it is consistent with the rule of law and with the intention of the Scotland Act 1998 that the Lord Advocate should be able to obtain an authoritative judicial decision about legislative competence in advance of the introduction of a Bill[111]. Elsewhere, and before this reference has been made, I had argued that - within reason - the Law Officers could take a more permissive approach to the ministerial statement: that the Scotland Act 1998 put the statement in the hands of the minister; that the Law Officers retained the statutory power to refer a Bill to the Supreme Court if they had not been persuaded about legislative competence during the passage of a Bill; and that the pre-reference position created a de facto veto on the introduction of Bills that existed outside the four corners of the 1998 Act[112]. Others, impatient with legal barriers to the introduction of an independence referendum Bill, argued that the Scottish Government should appoint a more political Lord Advocate who was aligned with the SNP view about the legality of independence referendum legislation and who would clear a ministerial statement of competence on introduction.[113] The novel recourse to paragraph 34 Schedule 6 offered an elegant way out of the unique impasse between the Scottish Ministers and the Law Officers here. However, it is (in my view) unlikely that it will become an ordinary route for constitutional litigation. First, because the *perfect storm* of factors in play here – a Bill with a clear legal mandate; ambiguity about legislative competence; and, impasse between ministers and Law Officers – is a vanishingly rare phenomenon. The Scottish Independence Referendum Bill has been the only such example in the first 25 years of devolution. Second, because devolved governments (especially those of a Scottish nationalist complexion) are unlikely to want to be seen asking for the permission of the Supreme Court – a UK institution – to enact its legislation. Third, pre-introduction and section 33 references offer one shot to make the case for legislative competence directly at the Supreme Court. Devolved governments are more likely to take their chances defending post-enactment challenges where they arise. There they have the opportunity to refine and finesse arguments on the way up the appellate chain and in local courts that might be more receptive and sensitive to local context and factors.

[108] Ibid., para. 16.
[109] Ibid., paras. 21-27.
[110] Ibid., paras. 37-42.
[111] Ibid., paras. 44-46.
[112] C. MCCORKINDALE, *The Lord Advocate's role in vetting bills for legislative competence*, UK Constitutional Law Association blog, 18 July 2022, available at *Chris McCorkindale: The Lord Advocate's role in vetting bills for legislation – UK Constitutional Law Association.*
[113] T. GORDON, *Kenny McAskill criticised for saying Lord Advocate an Indy "apostate"*, in *The Herald,* 5 August 2022.

Having persuaded the Supreme Court that the substantive question did engage a "devolution issue" such as to allow her to make a paragraph 34 Schedule 6 reference, the Lord Advocate also persuaded the Supreme Court that it should accept the reference; that it was neither hypothetical, academic nor premature.[114] Against the arguments made by the Advocate General for the UK Government - that any independence referendum Bill introduced in the Scottish Parliament might be different from the proposed Bill in front of the court, or might be amended during its passage; that without the policy memorandum and accompanying documents that accompany a Bill on introduction it might be practically difficult to identify the purpose and therefore the validity of this proposed Bill; and, that the Lord Advocate has the responsibility to make an assessment and not to "treat [the Supreme Court] like a legal advice centre[115]" (all of which the Supreme Court said might be "compelling" in ordinary circumstances) – the Supreme Court agreed with the Lord Advocate that the present circumstances were exceptional in nature. The reference was made in order to obtain an authoritative ruling on a question of law with practical importance: the requirement on the Lord Advocate to clear the ministerial statement on legislative competence; the answer to the reference would have practical consequences: whether the Bill would be introduced or not; the reference relates to a proposed Bill that would be introduced, in the same form as it appeared before the court, if held to be within legislative competence; the purpose and effect of the Bill are apparent without recourse to the policy memorandum and other accompanying documents; the clear and concise nature of the relevant provision gave confidence to the Court that it would not be amended during the Bill's passage; therefore it was unlikely that a section 33 reference would be needed in order to deal with materially different questions of legislative competence; by making the reference the Lord Advocate was acting responsibly and in the public interest. For these reasons, the court accepted the reference[116].

Such was the journey from the 2014 referendum to the 2023 non-referendum; from constructive legal ambiguity to legal certainty that the substantive provision of the proposed Scottish Independence Referendum Bill *would* relate to the reserved matters of (i) the Union of the Kingdoms of Scotland and England and (ii) of the Parliament of the United Kingdom.[117] There is no longer doubt – no longer room for debate – that the Scottish Parliament's legislative competence to pass an independence referendum Bill is contingent upon the further transfer of legal power from (and therefore renewed political will at) the centre.

5. Conclusion: ambiguity resolved, ambiguity returns.

We can usefully separate the political and legal conditions in which the independence referendum Bill debate has taken place into distinct stages. From 2007 to 2011, when the

[114] Lord Advocate's reference, para. 53.
[115] Ibid., para. 51.
[116] Ibid., paras. 53-54.
[117] Ibid., para. 92.

SNP formed a (minority) government for the first time, there were insurmountable political obstacles to the SNP introducing an independence referendum Bill (the absence of a pro-independence majority and of any appetite to test the question by the UK Government) and legal disagreement about whether any such Bill would be within the legislative competence of the Scottish Parliament. From 2011 to 2014 there was political agreement between the Scottish and UK Governments about the SNP majority government's mandate to hold an independence referendum and constructive legal ambiguity about whether the agreed section 30 order was necessary or convenient in order for that referendum to take place and to be fair, legal and decisive. From 2014-2022 there was political disagreement (on the part of the UK Government that the 2014 referendum was a "once in a generation" event and that – in the face of Brexit and Covid-19 challenges - "now [was] not the time" to revisit the independence question; on the part of the Scottish Government that Brexit amounted to a material change of circumstances since 2014 and that successive pro-independence majorities at Scottish Parliament and UK general elections (in Scotland) provided the democratic mandate for a second referendum) and legal debate about the Scottish Parliament's legislative competence to hold a referendum in the face of UK Government intransigence. In 2022-23 there was political entrenchment (on the part of the UK Government that the constitutional question had been settled in 2014; on the part of the Scottish Government that there would be a second referendum in October 2023) and – in the end – legal certainty about legislative competence.

With one pathway definitively closed, and another – via a section 30 order – unlikely to open, the First Minister initiated Plan C: to pursue independence directly at the ballot box, framing the next UK general election in Scotland as a 'de facto' referendum on Scottish independence[118].

The risks were obvious. Achieving an unprecedented 50%-plus of the (Scottish) vote at a UK general election was always going to be a tall order – even a near SNP whitewash in 2015 fell just short at 49.97% of Scottish votes. More fundamentally, it appeared to be a reckless move from a government that for so long had been sure-footed in its call for a negotiated referendum as the "gold standard": the surest way to secure losers' consent, good faith negotiations with the UK government and international recognition. As it was, the election was a setback for the SNP who won just 9 seats (down 39 from the previous election) and who won just 30% of the vote in Scotland (down 15%).

For the UK government's part, the former (Conservative) Secretary of State for Scotland, Alister Jack, had said in office that there remains a constitutional pathway to a second referendum. However, the test that he articulated – "the duck test": "if it looks like a duck and it sounds like a duck and it waddles like a duck, it's probably a duck" left much to the constitutional imagination. Whatever the test – majority support? by and for whom? to what level? for how long? expressed in what way? through which forum(s)?) – Jack said, «we

[118] A. LEARMOUTH, *Nicola Sturgeon to push ahead with plans for "de facto" referendum,* in *The Herald*, 23 November 2022.

don't believe we've reached it now».[119] The (Labour) Prime Minister, Keir Starmer, has been equivocal too, saying only that he «can't imagine» a referendum being authorised during his Premiership and that no one has raised independence with him as a priority instead stressing his discussions with the SNP First Minister, John Swinney, about «jobs, energy, security and dealing with the cost of living».[120]

As the political campaign for independence turns to the task of achieving a majority position in favour (and the pro-independence side might find some comfort in recent polling on the question), the constitutional question has shifted focus. If not the conditions set out by the Scottish Government between 2014 and 2022, what are the conditions that might trigger a second referendum[121]?

There will be no return to the courts here. The Court of Appeal in Northern Ireland has already rejected any requirement on the part of the Secretary of State for Northern Ireland to set out the circumstances that would trigger a border poll on the territory's constitutional future, citing the «constitutional value of flexibility» and the need to exercise «political judgment in the context of differing and unpredictable events». The Supreme Court might have provided legal certainty in 2022. However, we have been thrown back on a new set of ambiguities: political ambiguity about the conditions that might trigger a fair, legal and decisive referendum and legal ambiguity about whether and how those conditions might be agreed upon and established in law. After all, one government's duck is another government's rabbit.

[119] A. LEARMOUTH, *Alister Jack sets out "duck test" for second independence referendum*, in *The Herald* 28 November 2022.

[120] *Starmer says no independence referendum while he is PM*, BBC News, 3 June 2025, available at *Starmer says no independence referendum while he is prime minister - BBC News.*

[121] For a particularly constructive contribution see K. DUGDALE AND S. NOON, *Scotland and the Constitution: Agreeing a way forward*, Glasgow, Centre for Public Policy (University of Glasgow), 2024, available at *REPORT - Scotland and the Constitution: Agreeing a way forward.*