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Supreme Court's case law on the Scottish Independence Referendum: substance and consequence

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Supreme Court's case law on the Scottish Independence Referendum: substance and consequence**

di Aurélien Antoine*

Abstract (Ita): Il referendum del 2014 sull'indipendenza scozzese avrebbe dovuto portare con sé la decisione a lungo termine di permanere nel Regno Unito, ma Brexit ha rimescolato le carte. Lo Scottish National Party ha fatto leva sulla forte opposizione del popolo scozzese all'uscita dall'UE per chiedere al governo centrale un nuovo voto sulla questione indipendentista. I Conservatori, fermamente contrari alla separazione, si sono costantemente rifiutati di avviare un processo simile a quello del 2014. In un contesto di relazioni tese tra governo centrale e governo devoluto, nel corso dei negoziati relativi a Brexit, i nazionalisti hanno lanciato unilateralmente un'iniziativa legislativa per consultare nuovamente il popolo scozzese. Tuttavia, questa è stata bloccata dall'intervento della Corte Suprema, che nel 2022 ha stabilito che un disegno di legge che prevedeva un referendum consultivo esulava dalle competenze delle autorità devolute. Da allora, lo SNP è entrato in un periodo di crisi, che coincide con il ritorno di un governo laburista, notoriamente più favorevole alla devolution che all'indipendenza.

Abstract (Eng): Whereas the 2014 referendum on Scottish independence would have resulted in a long-term decision to remain within the United Kingdom, Brexit reshuffled the deck. The Scottish National Party seized on the Scottish people's strong opposition to leaving the European Union to demand a new vote from London by the end of the 2010s. The Conservatives, firmly opposed to independence, consistently refused to initiate a process similar to 2014. Amid tense relations between the two governments during Brexit negotiations, the nationalists unilaterally launched a legislative initiative to consult the Scottish people once again. However, this was thwarted by the intervention of the UK Supreme Court, which ruled in 2022 that a bill providing for an advisory referendum was outside the competence of the devolved authorities. Since then, the SNP has entered a period of crisis, one that coincides with the return of a Labour government far more supportive of devolution.

Parole chiave: Devolution; Scozia; Corte Suprema del Regno Unito; Referendum sull'indipendenza

Keywords: Devolution; Scotland; UK Supreme court; Independence Referendum. TABLE OF CONTENTS: 1. Introduction; 2. The Turning Point of the Indyref2 case; 2.1 References to the UKSC by Law Officers: an understanding approach; 2.2 The incompetence of the Scottish Parliament to unilaterally legislate for a consultative referendum on Scottish independence; 3. Towards a pacification of relations between Edinburgh and London: legal and political dimensions; 3.1 The Weakening of the SNP; 3.1.1. A new legal battle; 3.1.2. Evolution of political landscape; 3.2. Restoring the dialogue between the UK and Scottish Governments

1. Introduction

Among the recurring issues of political and constitutional life in the United Kingdom, the relationship between London and Edinburgh ranks among the most significant[1]. One need only recall the historically tumultuous ties between Scotland and England to be convinced of this. The 2010s and early 2020s were marked by major tensions and a direct challenge to the union, centred around two key actors: the Scottish National Party (SNP), advocating for Scottish independence, and the Conservative Party – whose full name (is worth remembering) is "The Conservative and Unionist Party".

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[1] W. L. Miller, *Modified Rapture All Round: The First Elections to the Scottish Parliament*, in *Government and Opposition*, 1999, vol. 34/3, p. 299.

Yet it was a Tory Prime Minister, David Cameron, who gave way to a politically ascendant SNP in the early 2010s, allowing the Scottish people to be consulted on their future. This concession resulted from the rapidly evolving Scottish political landscape. In 1999, during the first elections to the Holyrood Parliament, the independence party won 35 of the 129 seats. While a solid performance – unsurprising in light of the localist momentum of devolution – the SNP failed to assert itself as the dominant political force in Scotland. Labour, in fact, managed to retain its leading position[2]. Due to the lack of an outright majority, Labour had to form a coalition government with the Liberal Democrats. It was not until the third Scottish elections that the SNP emerged as the leading party in the Parliament. Alex Salmond became First Minister, but led a minority government, which prevented any immediate ambition for a referendum.

Four years later, in 2011, the Holy Grail was reached: the SNP secured an outright majority with 69 seats, largely due to the steady but significant erosion of Labour's electorate over successive elections. The nationalist party was in a strong position to negotiate with London for an independence referendum. Successive British governments had failed to sufficiently advance the process of transfer of powers – potentially even in a federal mode – to push the issue of independence into the background. In 2009, the Calman Report had made 63 recommendations aimed at deepening devolution in Scotland, summed up under the concept of *Devolution Plus*[3]. While some Scottish think tanks quickly deemed it interesting[4], the SNP considered it inadequate, as it made no recommendations concerning the economy, employment, or foreign affairs[5]. *Devolution Max* thus emerged as a possible alternative solution[6].

At the start of the 2010s, although independence was increasingly embraced and placed at the centre of public debate by Alex Salmond, it was still far from enjoying clear majority support[7]. The First Minister therefore sharpened his arguments[8]. First, he argued that, legally, the Edinburgh Parliament had the competence to decide whether to hold a referendum. Second, he remained convinced that the "threat" of Scottish independence was an effective way to secure further powers from London. Short of independence, the referendum would also be an opportunity to test the *Devolution Max* hypothesis. In 2011, the

[2] W. L. Miller, *Modified Rapture All Round: The First Elections to the Scottish Parliament*, in *Government and Opposition*, 1999, vol. 34/3, p. 299.
[3] Commission on Scottish Devolution, *Serving Scotland Better: Scotland and the United Kingdom in the 21st century*, June 2009, 265 p.
[4] See Reform Scotland, *Devolution Reform Scotland's evidence to the Scottish Parliament's Scotland Bill Committee outlining a new tax and spending framework for Scotland*, September 2011, 29 p.
[5] The SNP's reactions were at times strong. For Alex Salmond: "The Calman Commission seems to have spent a lot of time making no conclusions at all about anything."
[6] On these options, see the British Academy and Royal Society of Edinburgh report, *Scotland and the United Kingdom*, January 2012, 42 p.
[7] According to an Ipsos-MORI poll, opposition to independence rose from 50% in January 2012 to 55% in June 2012, and then to 58% in October 2012. Support for independence was backed by only about a third of voters (http://www.ipsosmori.com/offices/scotland/scottishpublicopinionmonitor/keytrends/Independence.aspx).
[8] Scottish Government, *Your Scotland, Your referendum*, January 2012, 81 p.

Scottish Government was considering not one but two questions: one on *Devolution Max*, the other on independence.

Third, the voting arrangements favoured by the independence movement were designed in such a way as to give them an advantage. Alex Salmond quickly settled in 2014 – a highly symbolic year. It marked the 700th anniversary of the Scots' victory over the English at Bannockburn, and Glasgow was to host the Commonwealth Games. These events stoked nationalist sentiment and allowed Scottish citizens to vote on their nation's destiny, to believe their country had little to envy from its English neighbour.

A subtler demand concerned the franchise. The Scottish Government wanted 16- and 17-year-olds to participate in the vote. This generation had grown up entirely within the framework of devolution and the rise of the SNP. These two factors could legitimately suggest that a favourable vote for independence was not impossible.

The Conservative-Liberal Democrat coalition, although opposed to independence, had to take into account the SNP's success. It supported further devolution and adopted a number of the Calman Report's proposals on *Devolution Plus* through the Scotland Act 2012[9]. However, the deepening of Scottish devolution did not dampen nationalist ambitions. The British Government gave in to Alex Salmond's demands. As he would do a few years later concerning the European Union, David Cameron (aware of the growing disconnect between political leaders and citizens) wrongly believed that a referendum was the best way to settle a recurring issue once and for all.

The two governments had to agree on the conditions of the referendum based on the framework set by Alex Salmond. Although David Cameron accepted most of the First Minister's requests, he ruled out any unilateral power for the Edinburgh Government to hold the referendum – a legal issue that will re-emerge ten years later. British institutions had to act pre-emptively to grant Holyrood the authority to consult Scottish citizens on a constitutional matter concerning the future of the Union. Three options were available: the adoption of a specific statute by Westminster temporarily authorising the Scottish Parliament to organise a referendum; an amendment to the Scotland Act 1998 to confer a new competence on the Scottish authorities; or using Section 30 of the Scotland Act 1998, which allows the Privy Council to make an order authorising the holding of a referendum before the end of 2014[10]. The third option, deemed more flexible and quicker, was chosen[11]. Once the draft order was prepared, it only needed to be approved by

[9] See A. Torre, *Scozia: devolution, quasi-federalismo, indipendenza?*, in *Rivista AIC*, 2013, n° 2.

[10] UK Government and The Scottish Government, *Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland*, October 2012.

[11] In a report, the House of Lords expressed serious doubts about the legal guarantees mentioned in the agreement between the UK and Scottish governments. The refusal to follow the procedure for adopting a statute law created tensions over a matter so fundamental to the future of the United Kingdom. (Select Committee on the Constitution of the House of Lords, *The Agreement on a referendum on independence for Scotland*, 7th Report of Session 2012–2013, HL Paper 62).

both the Westminster and Holyrood parliaments[12]. The Privy Council formally enacted the order in February 2013.

On 18 September 2014, after a high-quality campaign and a growing sense of suspense over the preceding weeks, the independence bid was rejected by a clear margin (over 55% of the vote[13]). David Cameron expressed relief and believed the issue had been definitively settled for the foreseeable future, especially since his government had agreed to transfer further powers to Holyrood through the Scotland Act 2016. This Act also reinforced the constitutional and fundamental nature of devolution within the UK legal order. It was then agreed that a second vote on independence should not be considered for at least a generation (around 25 years) or unless circumstances changed significantly[14].

The referendum weapon would, however, turn against David Cameron when he used it again in 2016 to consult citizens on the United Kingdom's membership in the European Union. Not only did the Brexit victory force the Prime Minister's resignation, but it also led to a significant deterioration in relations between London and Edinburgh, because Scotland had voted overwhelmingly in favour of remaining (62%). Largely excluded from negotiations, rarely consulted, and forced to accept a recentralisation of certain powers, the Scottish authorities, still led by the SNP, vehemently criticised the Brexit process. Nicola Sturgeon, who succeeded Alex Salmond as First Minister in 2014, adopted a clear stance of opposition toward the successive Prime Ministers who occupied 10 Downing Street between 2016 and 2022.

These political tensions were mirrored in the judicial arena, with a surge in cases brought before the Supreme Court. While the UK's highest court had only been consulted four times between 2009 and 2016 to resolve disputes between London and Edinburgh – mostly in a relatively serene context – six major rulings marked the years 2017–2025[15]. These judgments covered three areas related to the scope of Holyrood's powers: the European

[12] P. Bowers, *Referendum on independence for Scotland*, Londres, House of Commons Library, Standard note n° SN/PC/06478, 2013.

[13] R. McInnes, *Scottish Independence Referendum 2014. Analysis of Results*, Londres, House of Commons Library, Research paper n° 14/40, 2014, p. 16; A. Torre, *Una costituzione sotto stress. Riflessioni sul referendum scozzese del 18 settembre 2014*, in *Rivista AIC*, 2017, n° 2.

[14] See J. Frosini, *C'è chi dice no: la Scozia non abbandona l'Unione*, in *Quaderni costituzionali*, 2014, p. 922; A. Torre (cur.), *Il Regno è ancora Unito? Saggi e commenti sul referendum scozzese del 18 settembre 2014*, Maggioli, 2016.

[15] *Martin v Her Majesty's Advocate* [2010] UKSC 10; *AXA General Insurance Ltd v The Lord Advocate* [2011] UKSC 46; *Imperial Tobacco Limited v The Lord Advocate (Scotland)* [2011] UKSC 44; *The Christian Institute and others v The Lord Advocate (Scotland)* [2016] UKSC 51.

Union[16], fundamental rights and freedoms[17], and the organisation of a second referendum. To these must be added the *Miller I* case, which clarified the limited legal scope of the Sewel Convention[18]. The ruling concerning the organisation of a new referendum (*Reference by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998* – commonly known as the *Indyref2* case[19]) was arguably the most significant, as it had major political repercussions for the SNP.

The prospect of a second referendum became more concrete in the spring of 2021. The Scottish National Party had secured another electoral victory. Falling just two seats short of an outright majority in the Holyrood Parliament, the SNP was nonetheless able to rely on the Greens to pursue its campaign promise to leave the United Kingdom. Once a coalition agreement was reached with the Greens[20], Nicola Sturgeon initiated the process for consulting Scottish citizens.

On 14 June 2022, the first part of a series of official documents entitled *Building a New Scotland* was published. The aim of the Scottish Government was to demonstrate the viability of an independent Scotland, in response to the concerns that had largely contributed to the failure of the 2014 referendum. Two weeks later, the Scottish Independence Referendum Bill (SIRB) was published. The following question was retained: 'Should Scotland be an independent country?' (Section 2(2)). The vote was scheduled for 19 October 2023 (section 2(4)). Under the Referendums (Scotland) Act 2020, which the bill references in section 3, the voting age was set at 16, as in 2014. At no point did the SIRB specify whether the result would be legally binding on the Scottish public authorities, but Nicola Sturgeon quickly reiterated, as part of a now well-established strategy, that the result would be merely advisory.

The unilateral approach taken by the Scottish Government was not presented as final or definitive. The First Minister was fully aware of the legal risks associated with her initiative. Although drafted and made public, the bill was not immediately introduced in the Scottish Parliament. First, Nicola Sturgeon asked Lord Advocate Dorothy Bain to refer the matter to the UK Supreme Court under paragraph 34 of Schedule 6 of the Scotland

[16] *Scotch Whisky Association & Ors v The Lord Advocate & Anor (Scotland)* [2017] UKSC 76; *A Reference by the Attorney General and the Advocate General for Scotland's "Scottish Continuity Bill"* [2018] UKSC 64 (in this case, of the most important dealing with devolution issues, see an analysis by M. Elliott and N. Kilford, *Devolution in the Supreme Court: Legislative Supremacy, Parliament's 'Unqualified' Power, and 'Modifying' the Scotland Act*, U.K. Const. L. Blog, 15 October 2021, https://ukconstitutionallaw.org/2021/10/15/mark-elliott-and-nicholas-kilford-devolution-in-the-supreme-court-legislative-supremacy-parliaments-unqualified-power-and-modifying-the-scotland-act/ : « The Court's broad reading of section 28(7) confirms (if the *Continuity Bill* case left any room for doubt) that devolved legislatures are constrained not merely by the sovereignty of the UK Parliament but by the more far-reaching, and the imprecise notion that it retains 'unqualified' power»).

[17] *United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill* [2021] UKSC 42; *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16.

[18] *Miller & Anor v Secretary of State for Exiting the European Union* (Rev 3) [2017] UKSC 5, para. 136.

[19] [2022] UKSC 31.

[20] Inspired by the agreement between Labour and the Greens in New Zealand, the *Bute House Agreement* of 31 August 2021 is not a coalition agreement but primarily ensures the allocation of ministerial posts to members of the Scottish Green Party and recognises common policies.

Act 1998. This procedure is rarely used[21] and ultimately did not favour the independence movement.

The Supreme Court's ruling of 23 November 2022, which followed several years of open conflict between the Scottish and British governments, marked a turning point that brought a halt to the SNP's ambitions – especially as the party was also struggling with the wear and tear of long-term power and mounting scandals. On the Conservative side, the situation was equally bleak. The inability to make Brexit a success, the outbreak of the Covid-19 pandemic and the war in Ukraine, combined with Boris Johnson's excesses, significantly weakened the Tory party.

The Labour Party's return to power following the general election of 4 July 2024 (with notable victories in Scottish constituencies) coincided with a marked electoral decline for both nationalists and Conservatives. A period of calmer relations seemed inevitable, especially since Labour had proposed a revival of devolution in its manifesto. After highlighting how the UK Supreme Court's careful and measured judgment represents a constitutional and legal turning point, this paper aims to examine its legal and political aftermath, which centres on the pacification of relations between London and Edinburgh.

2. **The Turning Point of the *Indyref2* case**

Although substantively disapproving of the Scottish Government, the Supreme Court displayed considerable openness in the way it handled the case. Typically, devolution-related competence challenges pit the Scottish Government (represented by the Lord Advocate) against the UK Government (represented by the Advocate General for Scotland). In this instance, however, the Court accepted that the SNP made a written submission, in addition to those of the Lord Advocate, who – despite being a cabinet member – is expected to express a fairly independent point of view.

The Supreme Court's decision to hear the SNP's arguments represented a second setback for the UK Government, which had asked the Justices to declare themselves incompetent to hear the case. The Court rejected that request. Hearings took place over two days before a panel of five Justices[22] – a standard formation that suggests the issues, while significant, were not deemed constitutionally complex. For comparison, the *Miller I and Miller II cases* convened the full bench ('en banc')[23], while other constitutional disputes have required panels of seven Justices.

By granting the Lord Advocate's application, the Supreme Court further broadened the access of devolved authorities to its courtroom. Nothing in the 1998 *Scotland Act* clearly indicated that a Law Officer could refer a matter to the Court at the stage of a bill's mere

[21] *Northern Ireland Act 1998, para.34 of Schedule 10: Reference by the Attorney General of Northern Ireland* [2020] UKSC 2; [2020] *NI 820 and Reference by the Attorney General of Northern Ireland (No. 2)* [2019] UKSC 1; [2020] NI 793). See B. Guastaferro, *Principio autonomistico e rivendicazioni indipendentiste in Italia, Spagna e Regno Unito: il ruolo della giurisprudenza costituzionale*, in *Diritto pubblico comparato ed europeo*, 2022, p. 413.

[22] Lord Reed, Lady Rose, Lord Lloyd-Jones, Lord Sales and Lord Stephens.

[23] *R (Miller & others) v Secretary of State for Exiting the European Union* [2017] UKSC 5 *(Miller 1)*; *R (Miller & others) v The Prime Minister*; *Cherry and others v Advocate General for Scotland* [2019] UKSC 41 *(Miller 2)*.

publication[24]. The unanimous ruling, delivered by a panel presided over by Lord Reed (himself of Scottish origin), thus represents an opening of the courtroom that contributes to the development of constitutional law concerning devolution. However, on substance, the Court's position was strict: devolved authorities were held to lack the power to legislate unilaterally on any process relating to independence – even one that is merely consultative[25].

2.1 References to the UKSC by Law Officers: an understanding approach

The ruling addressed a novel issue concerning the competence of the Court when seized under paragraph 34 of Schedule 6 of the *Scotland Act* (SA) 1998, which provides that «The Lord Advocate, the Attorney General, the Advocate General or the Advocate General for Northern Ireland may refer to the Supreme Court any devolution issue which is not the subject of proceedings». It is worth recalling that this procedure, initiated by the Scottish devolved authorities, is very rarely used and, prior to 2022, had only concerned Northern Ireland[26].

Dorothy Bain argued that the other provisions of the SA – particularly section 33, which states that «The Lord Advocate, the Advocate General, the Attorney General or the Advocate General for Northern Ireland may require any court or tribunal to refer to the Supreme Court any devolution issue which has arisen in proceedings before it to which he is a party» – were dismissed in this case. However, as the legal adviser to the Scottish Government, the Lord Advocate was expected to provide a clear opinion on the proposed bill. Considering that she could not issue such advice and in the absence of any explicit provision in the SA authorising her to refer the matter to the Court at the stage of a bill's publication[27], the wording of section 34 of Schedule 6 seemed to her sufficiently broad to justify such a reference.

The five Justices sided with the Lord Advocate. First, they determined whether the issue fell within one of the legal categories related to devolution, as defined in paragraph 1 of section 6 of the SA. Dorothy Bain invoked subsection (f), which states that a devolution issue may include «any other question about whether a function is exercisable within devolved competence or in or as regards Scotland and any other question arising by virtue of this Act about reserved matters». For Dorothy Bain, the proposed advisory referendum on Scottish independence clearly raised a devolution issue, as it would necessarily lead to

[24] See K. A. Armstrong, *A Matter for Another Day? Will the Supreme Court Accept the Lord Advocate's Independence Referendum Reference?*; *Will the Supreme Court Clear the Way to a Scottish Independence Referendum?*, in *U.K. Const. L. Blog*, 29 June 2022 and 21 November 2022.

[25] The following analysis in this first part is largely based on points made in one of a paper published in French on the academic website *JP Blog*, while also expanding upon them. (A. Antoine, *Projet de référendum consultatif sur l'indépendance de l'Écosse : fin de partie contentieuse*, *JP Blog*, 28 November 2022).

[26] *Northern Ireland Act 1998, para. 34 of Schedule 10: Reference by the Attorney General of Northern Ireland* [2020] UKSC 2; [2020] *NI 820 and Reference by the Attorney General of Northern Ireland (No. 2)* [2019] UKSC 1; [2020] NI 793).

[27] G. Cowie, *What happens when a devolved bill is referred to the UK Supreme Court?*, House of Commons Library, 4 July 2022, https://commonslibrary.parliament.uk/what-happens-when-a-devolved-bill-is-referred-to-the-uk-supreme-court/.

questions about the division of powers between the UK and Scottish Parliaments. The UK Government's legal counsel raised four objections to the Lord Advocate's reasoning.
Firstly, the legal basis invoked by Dorothy Bain would be inadequate: it would not stem from the Scotland Act ("by virtue of this Act" according to § 1(f) of Schedule 6), but rather from obligations incumbent upon her under the Scottish Ministerial Code (and not explicitly from section 31(1) and (2), which require the promoter of a bill to ensure that it falls within the legislative competence of the Scottish Parliament, under the oversight of the Presiding Officer of the Scottish Parliament[28]). The Court rightly rejected this line of reasoning, as it would ultimately serve to restrict the very function of a Law Officer as legal adviser to the government and would contradict the logic of the Scotland Act[29].
Secondly**,** the Advocate General for the UK Government emphasised the risk of confusion and interference with the procedural legal actions framework, as set out in the Scotland Act. In essence, sections 31 to 33 would be of little value if section 34 of Schedule 6 were interpreted too broadly. This is a strong argument – referred to as the "bifurcation point" in the judgment – that can be persuasive. Indeed, the Court identified it as one of the most compelling aspects of the Advocate General's submissions. The Court adopted a flexible and expansive interpretation of section 34 of Schedule 6, which may be subject to criticism. The Justices themselves acknowledged that the provision in question has its limits. One of the pitfalls of Dorothy Bain's purposive interpretation was that permitting a reference to the Court prior to the formal introduction of a bill before Parliament would raise the question whether that same bill could subsequently be referred again to the Supreme Court under section 33 once it had been introduced. The risk of a dual reference (both before and after the bill's introduction) thus became possible. Furthermore, seeking the Court's opinion prior to the bill being introduced in Parliament would render the role of the Presiding Officer, as outlined in section 31(2) of the Scotland Act, almost redundant.
However, a literal reading of section 34 of Schedule 6 did not explicitly exclude an early reference to the Court within the legislative process[30]. Nor were the five Justices convinced by the argument that the draft at that stage was not a definitive version (on the basis that it had neither been introduced nor examined by Parliament)[31]. The Court did not elaborate further on this point, which is unfortunate. A broad interpretation of the statute favouring an extension of the Court's jurisdiction ultimately prevailed – a fairly classic judicial approach, though it does not preclude the view that the opposite position could also have been tenable.

[28] "(1) A person] in charge of a Bill shall, on or before introduction of the Bill in the Parliament, state that in his view the provisions of the Bill would be within the legislative competence of the Parliament. (2) The Presiding Officer shall, on or before the introduction of a Bill in the Parliament, decide whether or not in his view the provisions of the Bill would be within the legislative competence of the Parliament and state his decision".
[29] Para. 16.
[30] Para. 23 et 24.
[31] Para. 24.

The Advocate General's third objection was more obscure. According to him, the term 'other' used in paragraph 1(f) of Schedule 6 («In this Schedule "devolution issue" means (…) any *other* question about whether a function is exercisable within devolved competence or in or as regards Scotland and any other question arising by virtue of this Act about reserved matters») created ambiguity that could only be resolved by interpreting it as referring to all other 'devolution issues' not explicitly listed from (a) to (e) within this part of the SA. However, the scope of the Scottish Parliament's competence in relation to Westminster's reserved matters is the subject of specific provisions throughout the Scotland Act. Consequently, the term "other" must necessarily refer to issues beyond that scope, making paragraph 1(f) inapplicable in this case (a position supported by several official documents interpreting the Scotland Act). Yet once again, the Supreme Court adopted an expansive reading of (f): the legislature intended to ensure the highest possible degree of legal certainty when a question deals with reserved matters, through a deliberately broad provision that could encompass all potential complexities related to reserved matters – even those not expressly addressed by the Scotland Act (a 'sweeping-up provision')[32].
The Advocate General argued that such a conception was not necessarily justified, as it would serve only to expand the scope of (f) with respect to reserved matters, but not to other aspects of the Scottish Parliament's legislative competence. Paragraph 41 of the decision addressed this concern by concluding that «the lack of tidiness in legislation is not unknown, and the fact that a particular interpretation would have an untidy outcome is not a fatal objection if that construction is nevertheless the most persuasive»[33]. In paragraph 42, the Court added: «all incline us to construe paragraph 1(f) in accordance with the ordinary meaning of the words used, rather than as being concerned only with the non-legislative powers of the Scottish Parliament and with the functions of United Kingdom ministers and cross-border public authorities».
Lastly**,** the Advocate General argued that the Lord Advocate could provide a relevant opinion without needing to refer the matter to the Court, as that is precisely her role. Nothing would have prevented her from concluding, upon the bill's publication, that it encroached upon the competence of the Westminster Parliament. As the Court's judgment demonstrates, this issue was, in the end, not particularly hard to resolve. Nonetheless, it would have been difficult for the Justices to deny jurisdiction, given that they hold the exclusive authority for the authentic interpretation of UK law. This point is not entirely convincing. On the contrary, allowing Law Officers easy access to the Supreme Court raises questions about their very function: why not, then, rely systematically on a mechanism akin to a preliminary reference to the UK's highest court? The risk of overly easy access to the Court, at the expense of the role of Law Officers, was clearly understood by the five Justices, who observed that they are key components of government to ensure compliance with the law, "but they are not infallible[34]". Because of the rule of law, one cannot

[32] Para. 37 et 38.
[33] Para. 41.
[34] Para. 44.

reproach a legal adviser for deferring to the authority of the Supreme Court – something which the Scotland Act expressly provides for in multiple provisions.

Having established its jurisdiction, the Court concluded this crucial part of its decision by stating that such references must remain exceptional, and be reserved to Law Officers who bear the responsibility of determining whether a referral to the Court is appropriate in light of the public interest[35]. The Court then held that it should not decline to examine the substance of the reference by exercising its discretionary power, particularly because it rejected the Advocate General's claim that the question was 'hypothetical, premature, or academic'. According to the Advocate General, the danger lay in the Supreme Court ruling on a bill that was still incomplete (i.e. unexamined by Parliament and not yet subject to any amendments that might arise from parliamentary debate). While the Justices acknowledged that the Inner House of the Court of Session in Scotland might reasonably have reached a contrary conclusion[36], they stressed that the case at hand could not be fully assimilated to the legal scheme applicable to ordinary legislation. In support of this conclusion, the Court advanced six reasons:

- the Lord Advocate was indeed going to give the government a concrete opinion, which made it possible to assert that the question was not purely abstract and academic;
- the most contentious provisions of the bill could be submitted as they stood to the Scottish Parliament if the Court upheld the petition on the merits;
- these provisions were clear enough without needing to refer to the explanatory notes usually attached to any bill;
- the bill was unlikely to be amended during parliamentary debates given its clarity and brevity;
- A later referral based on the legal foundation of Section 33 of the Scotland Act seemed unlikely after the Court's prior intervention;
- The Lord Advocate had acted within the scope of her duties and in the public interest.

Regarding these criteria, the Supreme Court's position appears partially fragile. In a sort of extension of the clear act theory, it drew unequivocal conclusions from a text that had yet to be debated or adopted. This raises the question of whether it is truly within a judge's remit to so easily limit (or even disregard) the potential consequences of parliamentary debate on the text. Moreover, the decision struggles to convincingly demonstrate the absence of a 'frustrating' effect stemming from the Court's admission of the petition, namely the resulting difficulty of resorting to Section 33, given that the Court intervened prior to the bill's formal introduction.

The Justices were undoubtedly swayed by the Lord Advocate's thorough and compelling argument on all these points, presented in the context of a novel petition with little

[35] Para 46.
[36] *Keatings v Advocate General for Scotland* [2021] CSIH 25.

ent in earlier case law[37]. Additionally, rejecting the petition at the jurisdictional stage would have been particularly unsatisfying. The Scottish Government's effort to respect the law and to seek the Court's guidance was ultimately rewarded at the admissibility stage of proceedings.

More prosaically, the Court crafted a broadly accommodating rationale to accept jurisdiction – not only because it paved the way for a new legal route that further reinforces its role within the Scotland Act framework – but also because it likely felt confident about the decision it would ultimately deliver on the substantive issue of the case.

2.2 The incompetence of the Scottish Parliament to unilaterally legislate for a consultative referendum on Scottish independence

The Scotland Act (SA) seemingly provides a clear distribution of powers between the Scottish and UK Parliaments. As is typically the case in decentralised, autonomist, or federal systems, legislation distinguishes between powers explicitly devolved to substate institutions and those reserved exclusively to the state-level institutions. The Holyrood Parliament legislates and the national government adopts secondary legislation for Scotland in areas such as (devolved matters): agriculture, water and forestry management, education, environment, health and social services, housing, public order, organisation of local government, culture, sport, tourism, transport, and economic development. By contrast, it cannot legislate into reserved matters that remain under the authority of Westminster, which include the Civil Service, social security, immigration, defence, financial services and markets, foreign policy, employment, public broadcasting (BBC), fiscal and monetary policy, energy (nuclear, oil, coal, gas, and electricity), consumer law, data protection, the higher Scottish courts, and constitutional and European sources of law (such as the Scotland Act 1998 itself or the Act of Union 1707, for instance). If a matter is not explicitly attributed to either the Scottish or UK level by statute, it falls by default to the latter.

In this case, it must be acknowledged that the outcome of the dispute did not raise major interpretative difficulties with regard to the aforementioned elements[38]. Of the 34 pages of the judgment, only seven are devoted to the substantive issue (five, if one excludes the summary of the parties' arguments). The Justices did not deliver any surprises and, in fact, demonstrated clear consistency with the literal approach to interpreting the SA already evident in their reasoning on the admissibility of the Lord Advocate's petition.

The core question is now well known: does a bill organising a consultative referendum on Scottish independence fall within the scope of reserved matters, as defined in section 29 of the SA? The Supreme Court rejected the interpretative nuances drawn from its earlier case law, which the Lord Advocate relied upon to argue that the link between the referendum (which seeks only to obtain the advisory opinion of the Scottish people) and the reserved matter was too indirect. According to the Court, devolution-related case law cons-

[37] Which explains why earlier case law is scarcely invoked in the first part of the judgment.
[38] See also T. Ghazi, *Reference by the Lord Advocate of devolution issues under para 34, sch.6 of the Scotland Act 1998*, The Constitution Unit, 5 December 2022, https://consoc.org.uk/reference-by-the-lord-advocate/.

istently shows that a provision need not have a direct or immediate legal effect on a reserved matter to be deemed outside the competence of the Scottish Parliament. In the Court's view, there is no requirement for a test of directness between the content of a bill and a reserved matter. While the provision must have more than a tenuous or merely causal connection with a reserved matter to be considered as encroaching upon Westminster's authority, it does not follow that the link must be direct[39].

Regarding the purpose of the bill, the Court also distances itself from the restrictive analogies put forward by the Lord Advocate concerning section 29(3) of the Scotland Act, which provides that: «for the purposes of this section, the question whether a provision of an Act of the Scottish Parliament relates to a reserved matter is to be determined, subject to subsection (4), by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances».

The key issue in the legal debate is the assessment of the effect of legislation 'in all the circumstances' – essentially, regardless of the specific context[40]. According to the Lord Advocate, only a restrictive interpretation of this expression should prevail in order to avoid the conclusion that the referendum bill is unlawful. This allowed her to downplay the scope of the bill, notably by emphasising its purely consultative nature. While understandable, this interpretation was bold. The five Justices did not accept it and reaffirmed the proper method of statutory interpretation. In principle, 'in the context of statutory interpretation, the court is concerned only with the objective meaning of the language used. That requires an intense focus on the words used by the legislature, although other background materials can sometimes be used as an aid to their construction.'[41] Referring to previous cases[42], the Court explained that the purpose must be understood in relation to what motivated the adoption of the legislation, taking into account the context. The legality of a provision's purpose under section 29(3) must be assessed based on its actual effect and understood in a broader sense than that advanced by the Lord Advocate. Once again, the link between the purpose of the law and its consequences on a reserved matter need not be a close one[43].

Having clarified the meaning of section 29(3), the judges applied the analytical framework previously drawn on the *Imperial Tobacco* case[44], which consists of two logical steps. The first was to identify the relevant reserved matters. In the present case, this concerns the union between Scotland and England and the sovereignty of the Westminster Parliament to legislate on that matter. The next step was to determine whether the disputed legislation had, in any way, a link with the reserved matter in question. The core of the Court's

[39] Para. 71-72.
[40] « For the purposes of this section, the question whether a provision of an Act of the Scottish Parliament relates to a reserved matter is to be determined, subject to subsection (4), by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances».
[41] Para. 73.
[42] *Re Agricultural Sector (Wales) Bill* [2014] UKSC 43; [2014] 1 WLR 2622 ("Agricultural Bill"); *Martin v Her Majesty's Advocate* [2010] UKSC 10 ; *Imperial Tobacco Ltd v The Lord Advocate (Scotland)* [2012] UKSC 61.
[43] Para. 74.
[44] *Imperial Tobacco Ltd v The Lord Advocate (Scotland)* [2012] UKSC 61.

reasoning is found in paragraphs 78, 79, and 82. First, the Justices emphasised that the Scottish Government's proposal could not be reduced to the mere organisation of a consultation comparable to a public inquiry or an opinion poll. A referendum is indeed «a democratic process conducted in accordance with the law, resulting in the expression of the electorate's view on a specific issue of public policy»[45]. It is provided by statute law in order to define its framework – such as the question, date, electorate, campaign spending, and the official campaign period. From this specific legal framework, the Court then deduced that the proposed referendum would have a significant political impact, even if it did not have immediate legal consequences[46]. This reasoning follows the precedent set in *Miller (No. 1)*, in which the Supreme Court highlighted a parliamentary report noting the political difficulty for Parliament in ignoring the outcome of a referendum[47]. In this regard, the five judges pointed out a contradiction in the analysis put forward by the Scottish Government and the Lord Advocate: it is difficult to argue that the referendum reflects a matter of significant public interest for the entire United Kingdom while simultaneously claiming that it is, in essence, a large-scale opinion poll – thus justifying the dismissal of any direct connection with the reserved matter of the union between Scotland and England[48]. Ultimately, the Court held that the proposed referendum would have major political resonance, which could not be ignored – and was even intended by the Scottish Government. It concluded that the objectives pursued by the devolved authorities would have direct consequences on the union. The mere fact that the legal effect of the referendum result would not be immediate, were it to be held, is not sufficient to exclude such consequences. Whatever form an independence referendum may take – binding or consultative - its political significance determines its legal reach: it will inevitably have repercussions on the union, thereby falling within the exclusive competence of Westminster or requiring an agreement between the two governments in order to be lawfully held.

The Court's reasoning contained one final series of arguments, although these did not directly concern the submissions made by the Lord Advocate. More specifically, they related to the Scottish Government's invocation of the right of peoples to self-determination[49]. While not entirely ruling out the possibility of advancing such a right, the Court held that it "is simply not in play here". Drawing on the interpretation given by the Supreme Court of Canada in relation to the French-speaking province of Quebec[50], and supplemented by the UK's position during the International Court of Justice's advisory opinion on

[45] Para. 78.
[46] Para. 79.
[47] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, para. 125.
[48] Para 80.
[49] General Assembly Resolution 1514 of December 1960, para. 2; International Covenant on Economic, Social and Cultural Rights (1966); International Covenant on Civil and Political Rights (1966).
[50] *Reference re Secession of Quebec* [1998] 2 SCR 217.
[51] 22 July 2010, *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* (Request for Advisory Opinion).

tions that are fundamentally colonial or involve foreign occupation, which implied that a people is subject to subjugation by a state[52]. It cannot be used to undermine the territorial integrity of nation-states, which remains a foundational principle of interstate relations and is likewise recognised under international law.

The Court concluded unequivocally that the Scottish people cannot claim to be in a situation comparable to that of oppressed peoples within the meaning of international law. Referring to the criteria established in Canadian jurisprudence, the Court held that «the relevant point is (…) the absence of recognition of any such right outside the contexts described by the Supreme Court of Canada, none of which applies to Scotland»[53]. That said, the Court arguably dismissed a little too swiftly the issue of compatibility between international law and constitutional law, especially given that the right to self-determination is not as clear-cut in interpretation as the judgment might suggest. Relying solely on the jurisprudence of a foreign supreme court and a British submission to an ICJ hearing seems relatively terse in light of the stakes involved and the subjective dimension of perceived oppression. The Scottish people, for example, could very well have felt that Brexit, and the way negotiations were handled in disregard of the Sewel Convention or the principle of subsidiarity (cited by the Court as one of the underlying logics of devolution law), amounted to a form of oppression. The very act of a central government opposing a non-binding consultation of a population on its future could itself be seen as an indicator of oppression. Each of these considerations may not be fully persuasive, as they would open the door to extensive secessionist claims, but they nonetheless suggest that a deeper examination by the Court would not have been superfluous. It might have helped to clarify, beyond Canadian jurisprudence rendered in a different context, a legal analysis specific to the historically shaped relationship between Scotland and the Union – one further characterised by distinct legal traditions[54]. This aspect of the ruling ultimately stands out as a regrettable missed opportunity[55].

The judgment was undoubtedly a difficult moment for Nicola Sturgeon. Welcoming in tone but uncompromising in substance, it left little room for challenge under the prevailing legal framework[56], which remains dominated by a unionist logic[57], the ambiguity sur-

[52] Para. 89.
[53] *Ibid.* Finally, the Court adds that "*nothing in the allocation of powers, however widely or narrowly interpreted, infringes any principle of self-determination*" (para. 90).
[54] See A. Sanger, A. L. Young, *An involuntary union? Supreme Court rejects Scotland's claim for unilateral referendum on independence*, in *Cambridge Law Journal*, 2023, n° 82(1), p. 1.
[55] L. Raible, *Self-determination at the UK Supreme Court and the failure of international law*, in *Edin. L.R.*, 2023, n° 27(2), p. 219.
[56] Lord Hope, *Politicians may not like it, but the ruling is right*, in *The Times*, 24 November 2022; D. A. Green, *Ruling against Scottish independence vote throws ball back in political arena*, in *Financial Times*, 23 November 2022. For a selected legal reactions, see D. Torrence, *Scottish Referendum: Legal issues*, House of Commons Library, Research briefing n° CBP9104, p. 110.
[57] By making the Union a matter reserved to Westminster, the Scotland Act indirectly denies the Scottish people the freedom to choose, independently of the consent of the UK authorities (see G. Davies, *The UK Supreme Court and devolution: guardian of the passive revolution?*, in *Public Law*, 2025, p. 68).

entary sovereignty, which pays scant regard to the Scottish people's attachment to popular sovereignty[58].

Nicola Sturgeon stated that she respected the Court's decision and understood that a new referendum could only be held through strong political pressure, forcing the central government to replicate the process followed in 2012–2014. She thus promised that the next UK general election would, from the Scottish side, be entirely focused on the issue of independence[59]. However, this ambition was soon undermined by a series of unfavourable events for the SNP. Combined with the troubles facing the British Conservatives, an easing of tensions in the relationship between London and Edinburgh has emerged.

3. Towards a pacification of relations between Edinburgh and London: legal and political dimensions

Following the Supreme Court's decision, a series of setbacks struck the Scottish side. Just weeks after this resounding legal defeat, Nicola Sturgeon's government faced a veto from the UK Government under Section 35 of the *Scotland Act*, blocking the implementation of a gender recognition reform bill. This veto triggered a new legal dispute, once again unfavourable to the devolved authorities. The legal blow coincided with a period of significant political turbulence for the SNP. Caught in several scandals and worn down by years in power, Nicola Sturgeon resigned from her position as First Minister in March 2023. Her departure ushered in a difficult succession process, marked by several electoral setbacks – most notably in the 2024 general election. The weakening of the nationalist party was not the only major political development to alter the dynamic between London and Edinburgh. The Conservative Party's electoral collapse in the general election paved the way for a return to power for the Labour Party, heralding a more conciliatory and open approach towards the devolved administrations.

1. The Weakening of the SNP.

3.1.1. A new legal battle.

The Scottish National Party's political ideology is not limited to its ambition of achieving Scottish independence. On economic and social issues, the party tends to position itself on the centre-left. It maintains a progressive agenda, particularly committed to minority rights. This is especially evident in its approach to LGBTQ+ issues, an area that has historically given rise to landmark legal disputes in the United Kingdom. Following the *Goodwin* judgment of the European Court of Human Rights in 2002 (which found the UK in violation of Articles 8 and 12 of the Convention)[60], the UK Parliament enacted the Gender Recognition Act 2004 (GRA). Over time, however, this legislation came under criticism, most notably from the European Commission, which deemed the GRA excess-

[58] N. Gillibrand, S. Banerjee, E. Carolan, *Cracks in the foundations? Exploring the tension between constitutional tradition and constitutional culture in the UK on Referendums and Scottish Independence*, in *Public Law*, 2023, p. 587.
[59] L. Brooks, B. Quinn, *Supreme court rules against Scottish parliament holding new independence referendum*, in *The Guardian*, 23 November 2022.
[60] Christine Goodwin v United Kingdom, n° 28957/95.

ively bureaucratic and intrusive[61]. Despite these critics, the Conservative government announced in 2020 that it would not amend the legislation. Meanwhile, invoking devolved competence and fulfilling a 2016 electoral promise, the Scottish Government initiated a process to reform the legal framework governing transgender individuals in Scotland. Following the 2022 elections, the SNP-Greens coalition agreed to introduce a Gender Recognition Reform Bill.

During parliamentary debates, the bill encountered opposition, particularly from a few women's rights organisations. These groups expressed concern that the simplified legal procedure for gender recognition could be exploited by men seeking to harm women. In other words, the new Scottish legislative framework was seen as potentially threatening to women's safety, especially in light of the disturbing case of Isla Bryson, a transgender woman convicted of rape prior to completing her transition (a case that appeared to validate those fears)[62]. For their part, the Conservative Party remained firmly opposed to what they saw as an overly fluid approach to gender identity, one they associated with so-called woke ideologies, which they openly criticised. Despite the controversy, the bill was passed by the Scottish Parliament with a comfortable majority at the end of December 2022.

3.1.2. Evolution of political landscape

The UK Government made unprecedented use of section 35(b) of the SA, which states: 'If a Bill contains provisions which make modifications of the law as it applies to reserved matters and which the Secretary of State has reasonable grounds to believe would have an adverse effect on the operation of the law as it applies to reserved matters, he may make an order prohibiting the Presiding Officer from submitting the Bill for Royal Assent.'[63] For the Secretary of State for Scotland, Alister Jack, the Scottish legislation was incompatible with the Equality Act 2010. Matters related to the treatment of individuals under the principle of equality fall within Westminster's reserved powers, ensuring uniform application of the principle throughout the UK. This marked the first time the central government's veto had ever been exercised.

The devolved Scottish Government's Cabinet Secretary for Social Justice brought a judicial review against the order issued by the Secretary of State for Scotland. The Scottish Government challenged the lawfulness of the veto on the grounds of legal error, irrationality, irrelevant considerations, and insufficient reasoning. The Outer House of the Court of Session rejected the petition at the end of 2023[64]. Lord Haldane's conclusions

[61] Directorate-General for Justice and Consumers, *Legal gender recognition in the EU The journeys of trans people towards full equality*, European Commission, June 2020, 263 p.
[62] L. Bews, *Isla Bryson: Transgender rapist jailed for eight years*, *BBC News*, 28 February 2023.
[63] See D. Torrence, « Section 35 of the Scotland Act and vetoing devolved legislation », House of Commons Library, Insight, 16 January 2023.
[64] *Gender Recognition Reform (Scotland) Bill - Re Scottish Minister's Petition* [2023] CSOH 89.

were widely discussed, suggesting an appeal might have been justified[65]. Nevertheless, the Scottish Government chose not to appeal, preferring to wait for a potentially more conciliatory and tolerant government in London. The bill was not formally withdrawn at first, but as the issue stagnated, John Swinney, who succeeded Humza Yousaf as First Minister, formally withdrew the text in May 2024. He claimed that the courts, including the UK Supreme Court (though it never ruled directly on this case), had opposed Holyrood's competence to legislate in this area. The departure of the Conservatives from government changed little. The Labour Party had announced that it would not reverse the use of section 35(b) of the SA. As for the Supreme Court, even though it did not rule on the legality of the veto itself, it added another judicial defeat to the SNP's record by ruling in favour of a biological definition of 'woman' under the Equality Act 2010[66], contrary to what Scottish legislation had envisaged[67].

The UK Government's unprecedented veto against a key piece of legislation tied to the SNP-Green *Bute House Agreement* destabilised Nicola Sturgeon. At the same time, the SNP's finances were under criminal investigation (Operation Branchform), which soon implicated the First Minister in her capacity as party leader and due to her close ties to Peter Murrell, her ex-husband and the main suspect. This affair came a few years after the sexual harassment scandal involving former SNP leader Alex Salmond and, indirectly, Nicola Sturgeon, who was at times accused of not having done enough to hold him accountable[68]. Weakened by rumours about her private life, worn down by legal defeats, politically diminished, and under threat of legal proceedings, Nicola Sturgeon announced her resignation on 15 February 2023.

Her resignation triggered unprecedented political instability within the SNP. The leadership campaign saw some candidates questioning the *Bute House Agreement*. In the end, Humza Yousaf, a close ally of Nicola Sturgeon and then Health Secretary, won the con-

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[65] See P. Daly, *The Section 35 Order was Lawful After All: Re Scottish Ministers' Petition 2023 CSOH 89*, in *Administrative Law Matters*, 8 December 2023; M. Foran, *Section 35 and the Separation of Powers: On the Role of Unwritten Constitutional Principles in the Interpretation of the Scotland Act*, in *U.K. Const. L. Blog*, 13 December 2023; P. Sandro, *Devolution and the Phantom Menace: An alternative view on the appropriate intensity of judicial scrutiny of the s. 35 Scotland Act 1998 order*, in *U.K. Const. L. Blog*, 20 December 2023; A. Deb, *Ouroboric devolution: In Re Scottish Ministers' Petition*, in *Northern Ireland Legal Quarterly*, 2024, n° 75(4), p. 790.

[66] *For Women Scotland Ltd v The Scottish Ministers*, préc.

[67] The Gender Representation on Public Boards (Scotland) Act 2018 introduced provisions for positive action in favour of women in the composition of public authority boards in Scotland. Section 2 of the Act included individuals who were born male but identify as female, live as women, and have undergone, are undergoing, or are about to undergo gender reassignment surgery. This provision was challenged in the Scottish Court of Session in *For Women Scotland Ltd v Lord Advocate* [2022] SC 150, where the court ruled that it exceeded the devolved powers of the Scottish authorities. In response to that decision, the Scottish Government issued statutory guidance allowing for the possibility of obtaining an administrative certificate attesting to a person's gender on the basis of the Gender Recognition Act 2004, including for individuals in transition. The government argued that, since the Equality Act 2010 does not define the term "woman," it retained a degree of discretion in applying the 2004 Act. This guidance became the subject of the legal challenge that was ultimately resolved by the UK Supreme Court.

[68] J. Phillips, *The SNP mess has left me flabbergasted. What kind of message does it send?*, in *The Independent*, 6 March 2021.

ration with the Greens, he ended the partnership following several disputes over environmental policy. A no-confidence motion was subsequently filed, which the Greens supported. The outcome hinged on the vote of an MSP from the Alba Party, but Yousaf's indecisiveness prevented him from securing the necessary assurances. He announced his resignation on 29 April 2024. The no-confidence vote ultimately went in favour of the government, likely because of Yousaf's early resignation. John Swinney, a former SNP leader and long-serving Deputy First Minister, took over both the party and government leadership. His primary objective was to de-escalate political tensions by defusing sensitive issues (such as the *Gender Recognition Reform Bill*) and taking a cautious approach to the potential organisation of a second independence referendum.

Repeated scandals, legal defeats, and leadership resignations have seriously weakened the SNP. Despite decent results in the 2022 local elections, the 4 July 2024 general election resulted in a significant decline in popular support for the party. It marked a sharp halt to the string of successes enjoyed by the SNP since 2007. With the loss of 39 out of 48 seats, the SNP was overtaken by Labour as Scotland's leading party and is now only the fourth-largest political force in the Westminster Parliament. Since the political crisis of 2023 and the electoral collapse of 2024, the promise of an independence referendum has lost the centrality it once had under Alex Salmond and Nicola Sturgeon. Support for an independent Scotland has rarely reached majority levels in recent months, although public opinion polls have fluctuated considerably depending on the popularity of decisions taken by the UK Government[69]. The devolved parliamentary elections set for spring 2026 are expected to be highly uncertain, especially as the far-right Reform UK party may benefit from both the SNP's decline and public dissatisfaction with Labour. Nevertheless, Labour has re-established strong channels of dialogue with the devolved administrations.

2. **Restoring the dialogue between the UK and Scottish Governments**

As with its position on the European Union, Labour called in its manifesto for a «reset [of] the UK government's relationship with devolved governments in Scotland, Wales, and Northern Ireland»[70]. Beyond these three nations, specific commitments were also made to decentralise power in England[71]. In the King's Speech on 17 July 2024, the new government reaffirmed its intention to «strengthen its work with the devolved governments in Scotland, Wales and Northern Ireland so that the best outcomes possible are delivered for citizens across the United Kingdom»[72].

Among the key proposals of the 2024 campaign was the creation of a 'new council of the nations and regions', bringing together the heads of the UK and devolved governments as well as combined authority mayors, a central element of Labour's devolution strategy. A

[69] https://en.wikipedia.org/wiki/Opinion_polling_on_Scottish_independence.
[70] Labour Party, *Change: Labour Party Manifesto 2024*, 13 June 2024, https://labour.org.uk/wp-content/uploads/2024/06/Labour-Party-manifesto-2024.pdf.
[71] UK Government, *English Devolution White Paper*, 16 December 2024, https://www.gov.uk/government/publications/english-devolution-white-paper-power-and-partnership-foundations-for-growth/english-devolution-white-paper.
[72] https://www.gov.uk/government/speeches/the-kings-speech-2024.

second major commitment concerned the Sewel Convention, which had frequently come under attack during the Conservative years. As a reminder, this political convention holds that, conventionally, the UK Parliament will not legislate on devolved matters without the consent of the relevant devolved legislature[73]. To reinforce this principle, Labour proposed replacing the current *Memorandum of Understanding (MoU)* with a new one. The intention to reboot devolution, particularly with Scotland, was clear after years of conflict fuelled by Brexit and judicial battles[74].

On the first point, concerning institutional reform, the Labour Government acted swiftly to strengthen the effectiveness of the *three-tier intergovernmental relations (IGR)* structure introduced in January 2022. The IGR was designed to provide «a positive basis for productive relations» and to support «ambitious and effective intergovernmental collaboration». Several IGR meetings were held, but many key issues remained outside its remit[75]. Notably, the dispute resolution process built into the IGR has never been activated[76]. This limited usefulness justified the need to go further[77].

The newly proposed Council is «designed to facilitate partnership working between the UK Government, Devolved Governments, the Mayor of London, and Mayors of Combined Authorities and Mayors of Combined County Authorities. It will be a central driving forum that brings together governments and authorities with devolved responsibilities to determine actions for tackling some of the biggest and most cross-cutting challenges the country faces, on a structured and sustained basis». According to the government's official website, the Council's objectives are to:

- Provide regular, sustained engagement to ensure that governments and authorities with devolved responsibilities work together to deliver on people's priorities across the UK, ensuring the voices of the nations and regions are brought to bear on national issues;
- Facilitate collaboration and consider shared opportunities for cross-cutting challenges, identifying barriers that can be unblocked;
- Share lessons and best practices on approaches being taken across the UK[78].

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[73] For an overview of the 2019-2024 Parliament, see B. Allen, G. Byrne, A. Paun, *The Sewel convention in practice. Five case studies from the 2019-2024 Parliament*, Institute for Government, 2024, 11 p.

[74] M. Russell, H. White, L. James, *Rebuilding and renewing the constitution: Options for reform*, in *Institute for Government and UCL Constitution Unit*, July 2023, https://www.ucl.ac.uk/constitution-unit/sites/constitution_unit/files/rebuilding-and-renewing-the-constitution_1.pdf; Institute for Government, *The precarious state of the state: Devolution*, 7 June 2024, https://www.instituteforgovernment.org.uk/publication/general-election-2024-precarious-state/devolution.

[75] A. Cooke, *Two years on, has the review of intergovernmental relations led to "ambitious and effective working"?*, Senedd Research, 1 February 2024, https://research.senedd.wales/research-articles/two-years-on-has-the-review-of-intergovernmental-relations-led-to-ambitious-and-effective-working/.

[76] N. Newson, *Intergovernmental relations within the UK*, House of Lords Library, 10 January 2024, https://lordslibrary.parliament.uk/intergovernmental-relations-within-the-uk/.

[77] D. Torrence, *Council of the Nations and Regions*, House of Commons Library, 12 September 2024, https://commonslibrary.parliament.uk/council-of-the-nations-and-regions/.

[78] https://www.gov.uk/government/publications/council-of-the-nations-and-regions-terms-of-reference/council-of-the-nations-and-regions-terms-of-reference.

The first meeting took place at the end of 2024 in a positive atmosphere. However, it has yet to yield concrete results. Its added value remains uncertain, and its interaction with the IGR structure is still unclear[79].

A similar conclusion applies to the government's clarifications regarding the Sewel Convention. More broadly, issues related to the distribution of powers have not led to any reflection on potential additional transfers to Edinburgh. As for the possibility of launching a new citizen consultation on Scottish independence, Keir Starmer has ruled it out[80].

Ultimately, the Labour Government's positioning appears primarily political, lacking real legal implementation. The role of devolved authorities within the central institutions remains limited, contrary to what might have been expected from the Brown Commission (which heavily influenced Labour's 2024 manifesto)[81]. That report had advocated for a sweeping reform of the House of Lords to ensure territorial representation. Although the Prime Minister reaffirmed his commitment to long-term reform of the second chamber, the first legislative step merely removed the remaining hereditary peers[82]. While this is unquestionably a democratic advance, the reform of the House of Lords into a possible assembly of the nations and regions remains a distant prospect. As a result, the SNP, despite its significant role within the British constitutional landscape, remains misrepresented in the House of Lords. The pragmatic approach to relations with devolved governments seems to be reaching its limits. A conclusion already drawn in the context of Northern Ireland may now equally apply to the future of Scotland and the union as a whole[83].

[79] See Hansard, vol. 844, 11 March 2025, col. 580-582.
[80] *Starmer rules out Scottish independence referendum and gender reform*, in *The Times*, 21 June 2024.
[81] Labour Party, *A New Britain: Renewing our Democracy and Rebuilding our Economy Report of the Commission on the UK's Future*, December 2022.
[82] House of Lords (Hereditary Peers) Act 2025.
[83] See M. Keating, *State and Nation in the United Kingdom. The Fractured Union*, Oxford, Oxford University Press, 2021; Di Cui in D. Wincott, C.R.G. Murray, G. Davies, *The Anglo-British Imaginary and the Rebuilding of the UK's Territorial Constitution after Brexit: Unitary State or Union State?*, in *Territory, Politics, Governance*, 2022, p. 696; P. Martino, *Sovranità e Territorial Constitution nel Regno Unito*, in *Costituzionalismo britannico e irlandese*, 2024, n° 1, p. 42.