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# Autonomy and sovereignty in tension: Scottish constitutionalism and the challenges of independence a decade on from the referendum

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# Autonomy and sovereignty in tension: Scottish constitutionalism and the challenges of independence a decade on from the referendum**

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**Abstract (Ita):** Il presente contributo mira ad analizzare l'evoluzione dell'indipendentismo scozzese, con particolare attenzione al periodo post-Brexit. A tal fine, l'analisi rintraccia le criticità caratterizzanti i rapporti fra Regno Unito e Scozia, oltre che le inconciliabilità giuridico-culturali che favoriscono l'intensificarsi delle tensioni reciproche. Si prendono in considerazione la contrapposizione fra il principio della sovranità parlamentare, alla base del costituzionalismo inglese e quello della sovranità popolare, caposaldo della tradizione giuridica scozzese, per poi contestualizzarli nell'ambito delle pietre miliari nell'evoluzione delle tendenze indipendentiste: il referendum del 2014, lo sviluppo di numerosi progetti di costituzione in vista di una potenziale indipendenza e, infine, il recesso del Regno Unito dall'UE con le conseguenti reazioni sorte in Scozia. Dalla ricerca emerge la presenza di limiti legali che formalisticamente impediscono il raggiungimento di una secessione scozzese, in contrapposizione ai quali si pongono delle dinamiche politiche che non cessano di favorire l'indipendenza, generando così una tensione il cui andamento è destinato ad intensificarsi e sedarsi periodicamente.

**Abstract (Eng):** This paper aims to analyze the evolution of the Scottish independence movement, with particular attention to the post-Brexit period. The analysis identifies the key challenges in the relationship between the United Kingdom and Scotland, as well as the legal and cultural incompatibilities that have contributed to growing tensions. It explores the contrast between the principle of parliamentary sovereignty, which underpins English constitutionalism, and the principle of popular sovereignty, a cornerstone of the Scottish legal tradition. These concepts are then contextualized through key milestones in the development of the independence movement: the 2014 referendum, the drafting of various proposed constitutions in anticipation of a potential independence, and, finally, the UK's withdrawal from the European Union and the subsequent reactions in Scotland. The research highlights the existence of legal constraints that formally hinder Scottish secession, set against ongoing political dynamics that continue to fuel the push for independence, thus generating a recurring tension likely to intensify and ease over time.

**Parole chiave:** Indipendenza Scozzese; Devoluzione Scozzese; Referendum

**Keywords:** Scottish Independence; Scottish Devolution; Referendum. TABLE OF CONTENTS: 1. Introduction and Methodological Approach; 2. Parliamentary Sovereignty and Scotland's Role in the British Devolved Framework; 3. Tracing the Path to Scottish Independence; 4. The 2014 Referendum and the Constitutional Proposals: The Seeds of Independence; 5. The Brexit Effect: Catalyzing Independence?; 6. Building a New Scotland: Yousaf's Proposal; 7. Conclusions

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## 1. Introduction and Methodological Approach

Approximately ten years ago, on 18th September 2014, the epochal referendum on Scotland's independence, later defined as a *«once in a generation opportunity»*, took place, marking a crucial step in the history of the United Kingdom and bringing the question of

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Scotland's constitutional future to the forefront of political discourse. If the original aim of *Indyref* was to put an end, or at least stabilize the debate around Scotland's independence, the last decade has shown that such topic remains as alive as ever.

This paper aims to identify the core of Scottish independentism, both on a historical and political level and retrace its development, focusing on the post-devolution and post-Brexit scenario. The stark cultural contrast between Scotland's and England's legal traditions, based respectively on popular and parliamentary sovereignty, will be analyzed to highlight the Scottish struggle to affirm a national identity and evaluate the nucleus at the base of independentism. Furthermore, key events in the fluctuating path towards independence will be examined. This will provide an extensive understanding on how the Scottish longing for more autonomy has evolved, especially in the context of the UK's withdrawal from the EU. In this sense, the 2014 referendum, the constitutional proposals which have been characterizing Scottish constitutionalism since the late 1900s, as well as Brexit and its catalyzing effect, will be critically assessed.

The analysis will be pursued adopting a methodology which combines legal and political approaches, with historical hints to provide a contextualized evaluation.

From a legal perspective, constitutional texts, legislative acts and relevant judicial decisions, as well as secondary sources, will be examined with an eye to defining the framework of devolution and the relationship between Scotland and the UK.

Politically, the paper will draw on qualitative analysis of party manifestos and policy documents with a focus on the rhetoric and strategies employed by the Scottish National Party (SNP).

This dual approach will allow to gain a comprehensive understanding of both the legal constraints on independence and the political dynamics that have led to its evolution. Furthermore, it will offer insights into how likely it is to conceive Scotland's secession in the near future and what are the potential constitutional premises and consequences of such scenario.

## 2. Parliamentary Sovereignty and Scotland's role in the British devolved framework

The United Kingdom's constitutional order is known to be enrooted in three main cornerstones: parliamentary sovereignty, the rule of law and constitutional conventions.

The first of these finds its fundamental and most authoritative theorization in A.V. Dicey "orthodox doctrine". Despite the doubts regarding the theory's applicability in the modern constitutional scenario and the intense discussions around it, the *diceyan* perspective still represents the conceptual and academic foundation of new law school students in relation to the matter of parliamentary sovereignty.

For the sake of completeness, it is essential to make a brief reference to the definition of this principle. According to the British jurist, such principle *«means neither more nor less than this, namely, that Parliament thus defined has, under the English Constitution, the right to make or unmake any law whatever; and further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament»*[1].

[1] A.V. Dicey, *An Introduction to the Study of the Law of the Constitution*, London, Macmillan, 1959, pp. 39-40.

Consequently, parliamentary sovereignty would be composed of a positive and a negative limb, thus making the UK Parliament axiomatically sovereign and omnicompetent in the British legal and constitutional system.

However, a segment of the academic community holds the view that, to define the concept of parliamentary sovereignty, the doctrinal source represented by the *diceyan* perspective should stand alongside with an additional political source: specifically, the political events that shaped the seventeenth century and led to the 1688 revolution. These played a pivotal role into structuring parliamentary sovereignty[2], as well as put an end to the power conflict between the House of Lords, the House of Commons and the Monarch. Following the revolution and civil war, a new "political contract" was struck and materialized in the Bill of Rights: the Parliament gains a superior constitutional status to the Monarch, whose powers are limited. This meant that *«the Monarch and Ministers would govern the country according to Laws defined by Parliament. And if Parliament changed the law, the Monarch's government would have to respond accordingly»*[3].

Having outlined the classical concept of parliamentary sovereignty, it is natural, within the scope of this paper, to question how this relates to the British devolved system, especially in regards to Scotland, and what challenges it had to face throughout the years and centuries.

The answer to the first doubt lays on the premise that the concept of parliamentary sovereignty is not strictly Scottish, as it was born in England, not in Great Britain[4]. In actual fact, Scotland possesses a distinct constitutional tradition, which challenges absolute parliamentary sovereignty by prioritizing the idea that the people of Scotland are sovereign[5], idea which is deeply embedded in the Claim of Right 1989[6]. As a consequence, it has been noted that prior to the glorious revolution of 1688, given the different constitutional foundations and the existence of two separate parliaments, the main commonality between the two regions was the mere fact that they "shared" a King (James VI of Scotland became James I of England)[7].

The Treaty of Union brought a substantial shift in this scenario by affirming the predominance of parliamentary sovereignty over the non-English constitutional traditions.

There are several theories which attempt to explain how this historical principle developed and adapted to the new legal and political context emerged after the Treaty of

[2] I. Loveland, *Constitutional Law, Administrative Law and Human Rights: A critical introduction*, Oxford, Oxford University Press, pp. 21-24.
[3] I. Loveland, *op. cit.*
[4] This will come to life only in 1707, with the Treaty of Union.
[5] The factual significance of Scots' sovereignty emerges later in Scottish history as this conception will be used as the base of the Muirhead constitutional proposal whose opening line is: «*Scotland is a free, independent, democratic nation, the power to rule being vested in the Scottish people and exercised by them through a National Assembly appointed by a free vote of its citizens*».
[6] Scottish Government, *Building a New Scotland: Creating a modern Constitution for an independent Scotland*, Constitution Directorate, Edinburgh, June 2023 in https://www.gov.scot/publications/building-new-scotland-creating-modern-constitution-independent-scotland/pages/5/.
[7] I. Loveland, *op. cit.* pp. 22-24; C.R. Munro, *Scottish Devolution: Accommodating a Restless Nation*, in *International Journal on Minority and Group Rights*, 1998/99, Vol. 6, No. 1/2, pp. 97-119.

Union, with supporters of the orthodox theory claiming that the Scottish Parliament was taken over by the English one.

According to another view, what happened should be seen as a "merger" rather than a takeover.

A third perspective sees the Treaty of Union not as a merger of two states, but the creation of a new country[8]. Nevertheless, as the union between the two countries was based on consent, it is generally unclear why English parliamentary sovereignty should prevail[9].

As Bulpitt notes *«the Unions of 1707 and 1801 came too late to absorb the peripheries but too early for coherent doctrines of either federalism or a unitary state»*[10]; meaning that the union's historical circumstances did not allow the absolute dominance of the English constitutional foundations, nor the clear maintenance and guarantee of the non-English one, creating a situation characterized by tension and constitutional overlapping.

The matter regarding the challenges this principle had to face throughout its evolution is strictly interwoven with the devolved system and the circumstance that parliamentary sovereignty was not *«designed for a modern, democratic society»*[11].

It is well-established that among the events which weakened the historical cornerstone, at least in its absolute nature[12], are the European Communities Act 1972 (ECA 1972) and the Human Rights Act 1998 (HRA 1998), which blatantly limit Westminster's powers[13] owing to the legal implications stemming from the EU membership[14] and incorporation of the European Convention on Human Rights[15].

Finally, and more relevantly to the matter explored in this analysis, it is necessary to mention the three 1998 Acts devolving measures of power to Scotland, Wales and Northern Ireland, which represent the culmination of decades of political debates and gained legitimacy through popular referendums.

Specifically, the Scotland Act 1998 fostered a fundamental shift into Scottish «sovereignty». In fact, previously Scotland did not possess its own Parliament and based on a centralized parliamentary system, Westminster held exclusive power over all policy

[8] I. Loveland, *op. cit*. pp. 38.

[9] S. Douglas-Scott, *Brexit, Union and Disunion, The Evolution of British Constitutional Unsettlement*, Cambridge, Cambridge University Press, 2023.

[10] J. Bulpitt, *Territory and Power in the United Kingdom: An Interpretation,* Manchester, Manchester University Press, 1983, as cited by M. Keating, *State and Nation in the United Kingdom: The Fractured Union*, Oxford, Oxford University Press, 2021, pp. 24.

[11] J. Bulpitt, *op. cit.*, pp. 42.

[12] For a thorough examination of the causes which undermine parliamentary sovereignty see A. Torre, *Il fantasma della sovranità parlamentare nel Regno Unito*, in *Diritto Pubblico ed Europeo Comparato*, special issue/2019.

[13] Those who reject the view that Parliament's sovereignty is being progressively eroded, argue that without the will of the legislative, these Acts would have not been passed. If this view is formally flawless, substantially it is difficult to hypothesize that Westminster would not adjust to international trends in order to safeguard its absolute sovereignty. It is in this kind of matters that the almost anachronistic character of parliamentary sovereignty emerges.

[14] Prof. Douglas-Scott highlights that the EU membership, according to a post-sovereigntist view, led to a situation in which sovereignty is shared with supra-State, sub-State, and trans-State systems. See S. Douglas-Scott, *op. cit*.

[15] M. Elliott, *Legislative supremacy in a multidimensional constitution* in Id., D. Feldman (eds.), *The Cambridge Companion to Public Law*, Cambridge, Cambridge University Press, 2015.

y used to be exercised through a member of the UK cabinet, the Secretary of State for Scotland, who managed the Scottish Office, which was responsible for implementing UK policies in Scotland.

The Scotland Act 1998 established the (new) Scottish Parliament, whose members are separately elected, devolving legislative power over numerous domestic matters. In addition to this, it set up a Scottish executive[16].

Practically, the devolved system stemming from the aforementioned legal framework allows the Scottish Parliament to make decisions on certain *devolved matters*[17] without needing Westminster's approval, while the UK Parliament still makes decisions for the whole Kingdom in the so-called *reserved matters*.

While representing a weakening factor for parliamentary sovereignty, it is clear that the institution of the devolved system attempted to accommodate both the political demands for regional autonomy and give value to growing national identities.

Nevertheless, it has been contested that, despite the noble intentions, no significant autonomy has been accorded, in practice, to the devolved countries. The consequence would be an even more problematic tension between parliamentary sovereignty and regional autonomy.

Two points have been made in support of this thesis.

Firstly, it has been argued that devolution was structured in a way to preserve parliamentary sovereignty. If, on the one hand the distinction between reserved and devolved matters has been made, on the other hand, the Parliament has still, theoretically, the power to legislate on any matter, even those devolved. The Sewel Convention represents a practical limitation to this theoretical circumstance, as it establishes that the UK Parliament will not normally legislate with regard to the devolved matters without the consent of the devolved parliaments[18]. However, it must be noted that, although being translated into legislation through the Scotland Act 2016 and the Wales Act 2017, it was considered to be, by the UK Supreme Court within the Miller case[19], a mere constitutional convention, therefore not legally enforceable.

Secondly, it has been highlighted that despite the referendum's results in Scotland and Northern Ireland[20], the devolved nations had no role in the withdrawal proceeding defined by art. 50 TEU, meaning that these regions' constitutional interests were not safeguarded[21].

Another important challenge to parliamentary sovereignty is exemplified by *«the best-known Scottish case on constitutional law»*[22]: MacCormick v Lord Advocate[23].

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[16] C.R. Munro, *op. cit.*

[17] Scottish Parliament, https://www.parliament.scot/about/how-parliament-works/powers-of-the-scottish-parliament.

[18] S. Douglas-Scott, *op. cit.*, pp. 17-18.

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

[20] The UK as a whole, voted to leave. However, 62% of Scotland's voting electorate voted to stay, as well as 52% of Northern Irish voters.

[21] S. Douglas-Scott, *op. cit.*

[22] G. Little, *A flag in the wind, MacCormick v Lord Advocate*, in J.P. Grant, E.E. Sutherland (*eds.*), *Scots Law Tales*, Dundee, Dundee University Press, 2010.

[23] MacCormick v Lord Advocate 1953 SC 396.

This case revolves around the title adopted by the late Queen Elizabeth II on the occasion of her accession to the throne. The name choice was perceived as offensive by many Scots for the following reasons. There had never been an Elizabeth the First of Scotland, nor of the United Kingdom owing to the fact that, as mentioned, the Union of Scotland and England took place only in 1707. Given that the only Elizabeth the First ever existed was Elizabeth the First of England, the chosen title suggested that the union of 1707 had provoked the assimilation of Scotland into England. Based on these premises, Scottish Nationalist John MacCormick used the Parliament's assent to the Queen's title as the instrument to argue that A.V. Dicey's doctrine of parliamentary sovereignty, while being an English historical and constitutional element, did not belong to Scotland's legal tradition[24].

MacCormick's reasoning in support of his argument was consistent: for Dicey, it was indubitable that the orthodox doctrine that applied to the UK Parliament, found its roots into the pre-union English Parliament, which had been abolished along with the Scottish one, following the Treaty of Union. As a contextual detail, it shall be noted that in the 1950's, Dicey's doctrine was widely accepted as a quintessential element of the UK Constitution, implicitly meaning, in MacCormick's view, that the pre-union English Constitution was applied in Scotland in spite of its totally distinct constitutional history and legal system[25].

MacCormick claimed that given its pre-union nature, the doctrine should not apply in Scotland and that the UK Parliament would find the source of its power not in Dicey's theory, but in the Treaty of Union.

These arguments were heard on appeal by the Court of Session and despite being rejected, Lord Cooper's *obiter* statement was crucial. He pointed out that the concept of parliamentary sovereignty is distinctively English, rather than Scottish and accepted the Treaty and Acts of Union as «fundamental law»[26].

The challenges parliamentary sovereignty had to face, both on a domestic and international level and the difficulties in finding a balance with the devolved regions' need to develop their national identities and autonomy, highlight the weakening of this historical constitutional cornerstone and its progressively anachronistic connotation. After all, despite the efforts to depict it as essential and immutable in the British constitutional framework, it cannot be expected that a principle that dates back to centuries ago can perpetually work without any alteration, especially in an evolving constitutional scenario which has already seen and will deal with challenges that could have never been predicted at the time in which parliamentary sovereignty was born.

With regard to Scotland's role in this context, it is clear that the tension between the UK Parliament's sovereignty and Scottish autonomy has characterized the political debates since the very beginning of the British Union. Until now, despite a definitive resolution has not been found, compromises have shown to subdue potential contrasts between Scotland and the UK government/ Parliament. A Scottish Parliament and government

[24] G. Little, *op. cit.*
[25] *Ibidem*.
[26] *Ibidem*.

have been established, the Sewel Convention, apart from the recent controversies, seems to work fairly well and an independence referendum has been called in 2014. However, the conflicts between Westminster and Scotland following Brexit, such as the limitation of Scotland to legislate in certain fields[27] and the debate around the rejection of a new Scottish independence referendum, raise the doubt as to which previous agreements represent just unilateral decisions from Westminster masked as compromises[28]. What is certain is that there is no way to predict the seesawing evolution of the relationship between parliamentary sovereignty and Scottish autonomy: there is not a more legitimate or valid principle than the other, especially given the distinct constitutional traditions which compose the United Kingdom. Maybe what should be questioned is: what should prevail and why?

## 3. **Tracing the Path to Scottish Independence**

Once the problematic relationship between parliamentary sovereignty and Scottish autonomy has been outlined, it is possible to analyze the Caledonian attempts at affirming Scotland's constitutional identity and independence.

Nonetheless, it shall be noted that these efforts became serious only by the end of the twentieth century[29]. In fact, *«although Scottish culture did feature a consistent wistful romantic criticism of the Union as a bargain orchestrated by England using economic and diplomatic coercion, the hegemonic view of the Union as a beneficial contractual arrangement was not placed under serious pressure until the late twentieth century»*[30].

The most significant milestones in the fluctuating path towards autonomy and potential independence include: the 2014 referendum, the development of various constitutional proposals, the advent of Brexit and Scotland's response to it, and the proposal for a written Constitution for an independent Scotland presented by Scotland's First Minister Humza Yousaf in the Summer of 2023.

A pivotal role in this scenario was undoubtedly played by the Scottish National Party (SNP), founded in 1934 and characterized by the purpose of establishing progressively stronger forms of Scottish self-government[31]. Its popularity did not rise until the 1970s, when the crisis which struck the Labour and Conservative governments due to the economic challenges emerged in those years, led voters to manifest their dissatisfaction through the voting of this third party. In 1974 the SNP, with its objective to solve Scotland's economic crisis through a decentralization-based model of government, gained 30 per cent of the Scottish vote in the general election with 11 MPs. Nevertheless, it was

[27] The UK Internal Market Act 2020 has limited Scotland's power to legislate in certain fields, such as those related to agriculture and the environment.

[28] B. Jackson, *The Irresistible Rise of Scottish Independence? A Brief History of Scotland's Constitutional Debate*, *Discover Society: New Series*, n. 1 vol. 2, 2021, pp. 5.

[29] Before this moment, the Treaty of Union managed to keep its reputation as an agreement which allowed Scotland to preserve its national religious, legal and educational institutions in exchange of merging its Parliament with that of England and Wales. B. Jackson, *op. cit.*

[30] B. Jackson, *op. cit.*, p. 2.

[31] As claimed by B. Jackson, the SNP has always been known to have adopted a "gradualist" strategy for Scottish Independence. Within this strategy, the creation of a Scottish parliament and devolution, represented necessary steps aimed at Independence.

only in 2011 that the SNP obtained the majority in the Scottish parliament elections, followed by the clear mandate to hold a referendum on the independence of Scotland[32], essential part of the SNP's manifesto and core pledge. The 2014 referendum undoubtedly represents the peak of Scottish Independentism, as well as the nearly complete realization of the SNP's goal and guiding principle.

## 4. The 2014 referendum and the constitutional proposals: the seeds of Independence

Not only is the abovementioned referendum the result of increasing demands for independence, but it also reflects *par excellence* the problematic relation between the UK and Scottish governments. The SNP's "Yes Scotland" campaign reveals this aspect, as it was based on the aim of gaining economic control, social policies tailored to Scotland and finally achieve full autonomy from Westminster's governance. To the referendum question "should Scotland be an independent country?", 55.3% of voters answered "No" against 44.7% of "Yes". This epochal event, which will be later defined as a "once in a generation opportunity", registered the record-high 84.6% voter turnout and, despite the "failure" of the SNP's manifesto promise, it represents, in any case, an historical step towards more autonomy.

Among the referendum's consequences there is not only the obvious fact that Scotland would stay part of the UK, but also the giving of extra powers to Scotland in the Scotland Act 2012 and 2016. These acts were the result of the so-called "vow", namely the promise by the leaders of the three main UK political parties, prior to the referendum vote, to give additional powers to Holyrood, should Scotland vote to remain part of the UK[33].

In addition to this milestone event, another relevant factor to consider is the development of constitutional proposals, which has characterized the Scottish constitutional and political debate since the 1960, still representing a central point of discussion nowadays. A brief analysis of these constitutional projects is essential to trace the evolution of Scotland's path to autonomy and independence, as they accurately depict the call for autonomy throughout the years up until to this day.

In a constitutional framework whose identifying feature is an unwritten, flexible and stratified Constitution, the Scottish constitutional proposals, always considered an essential step to gain independence, and the consequent attempt to adopt a civil law model, highlight the will to distinguish from the British constitutional archetype not only on a substantial level (through a potential independence) but also on a mere formal level[34]. Given these scopes, it is easily comprehensible why the SNP, since the beginning of its activity has developed constitutional proposals for Scotland. The first project, elaborated by the Scottish

[32] B. Jackson, *op. cit.*, p. 4.

[33] *Democracy in Scotland, 2014 Scottish independence referendum*, BBC, available at https://www.bbc.co.uk/bitesize/guides/zxc6fg8/revision/3 retrieved 22 February 2025.

[34] M. Dicosola, *I progetti scozzesi di Costituzione scritta, tra continuità e innovazione*, in A. Torre (*ed.*), *Il Regno è ancora unito? Saggi e commenti sul referendum scozzese del 18 settembre 2014*, Sant'Arcangelo di Romagna, Maggioli, 2016, p. 118.

Provisional Constituent Assembly[35], under the direction of Russel Muirhead was published in 1964. The focal point of this proposed Constitution was, as previously mentioned, the idea that sovereignty had to belong to Scottish people, both in regards to the decision of adopting a constitution and to the chosen ways to develop the constitutional document's content. However, the conservative centralization policy which characterized the 1960s and 1970s temporarily blurred the purpose of Scottish autonomy and independence[36].

In 1997 the same proposal was updated by MacCormick, founder of the SNP along with Muirhead, in order to participate to the new debate around devolution. In the same year, the referendum on devolution shaped a new decentralized scenario which led, in 2002, to the development by the SNP of a "Constitution for a Free Scotland".

In 2005, the Scottish Constitutional Commission[37] was founded and put in charge of developing a constitutional proposal.

This ambitious goal laid on *«three theoretical axioms and four objectives»*[38] as expressly stated on the Commission's website.

The theoretical basis is clear: once again, the principle of people's sovereignty is stressed, in stark contrast with the English concept of *Queen-in-Parliament.* The necessity of a written Constitution which both guarantees rights and limits the state institutions' powers, duties and responsibilities is highlighted. Additionally, it is emphasized that democracy needed to be based not only on procedures but also on civil, human and democratic values[39].

The four objectives which the Constitutional Commission aimed to formalize in a written text are coherent with the abovementioned theoretical axioms.

The development of a written Constitution allowed to permanently abandon Westminster model as well as legitimized a new Scottish State. Thirdly, a written constitutional document, distinct from ordinary laws, represented the natural foundation for popular sovereignty and finally, it allowed to adjust to the constitutional standard of all other European countries.

Taking into consideration the previous constitutional proposals, the Scottish Constitutional Commission's *Model Constitution* was put forward in 2011[40].

One of the latest proposed Constitutions was developed in the abovementioned tense scenario of *Indyref*, where the proposal was attached to the Scottish Independence Bill 2014[41].

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[35] The Assembly was launched by the Scottish National Congress, a Scottish nationalist campaign group, which was founded in 1950 and dissolved shortly after the development of the proposed Constitution.

[36] M. Dicosola, *op. cit.*

[37] The Scottish Constitutional Commission replaced the Scottish Constitutional Convention, which was originally created with the purpose of elaborating and proposing areas of competence for the Scottish Parliament.

[38] *Ibidem.*, p. 120.

[39] *Ibidem.*

[40] For a thorough analysis of the 2011 Model Constitution see W. Elliot Bullmer in association with Constitutional Commission, *A Model Constitution for Scotland: Making Democracy Work in an Independent State*, Edinburgh, Luath Press, 2011.

[41] The Scottish Independence Bill is available at https://consult.gov.scot/elections-and-constitutional-development-division/scottish-independence-bill/consult_view/ retrieved on 5 March 2025.

The Bill was a draft piece of legislation prepared by the Scottish Government in anticipation of Scotland voting for independence; it provided an interim Constitution and provisions for the drafting of a permanent one.

The abovementioned proposed Constitutions were developed over a span of roughly 50-years and align closely with Scotland's constitutional tradition. In fact, while each proposal is distinct and the most recent ones are undoubtedly more structured and complete, their core constitutional principles have remained consistent.

In each proposal the concept of popular sovereignty represents the focal point.

The 1964 constitutional proposal clearly states that *«Scotland is a free, independent, democratic nation, the power to rule being vested in the Scottish people and exercised by them through a Nation Assembly appointed by a free vote of its citizens»*[42]. The Constitution for a free Scotland underscores popular sovereignty in its opening article, expressly pointing out that *«the sovereignty of the Scottish people is hereby declared»*[43].

In the 2011 Model Constitution first article Scotland is defined as *«a free sovereign and independent Commonwealth. Its form of government is a parliamentary democracy based upon the sovereignty of people, social justice, solidarity and respect for human rights»*[44]. Finally, the Scottish independence Bill 2014 explicitly declared that *«in Scotland the people are sovereign»*[45].

The intrinsic and deep will to affirm Scottish popular sovereignty and abandon Westminster's model is incontrovertible in these documents, which once again show the critical relation between a compromised autonomy and the UK Parliament's sovereignty.

This unresolved tension raises doubts in regards to Scotland's right to self-determination, (especially due to an unclear constitutional framework for secession) a possible democratic deficit[46] and future scenarios in regards to the matter: what does the future of Scotland have in store? Further legal battles over a referendum, political negotiations, deeper forms of devolution?

Therefore, if on the one hand, the era in which *«for most constitutional lawyers, the United Kingdom was a unitary state, based on an uninterrupted parliamentary tradition, with the peripheral territories tacked on over time»*[47] is progressively coming to an end, on the other hand, the matter of internal self-determination and democratic representation have become more and more current and ambivalent topics.

The significance of the democratic issue emerges in the longing for a democratic governance, additional factor which all the proposed Scottish constitutions share. Despite all

[42] A draft Constitution for an Independent Scotland, prepared by the Scottish Provisional Constituent Assembly, art. 1, as cited in M. Dicosola, *op. cit.*

[43] SNP Policy Paper "*A Constitution for a Free Scotland*" dated September 2002. This publication is publicly available free of charge from the SNP website, www.snp.org.

[44] A Model Constitution for Scotland, art. 1, available at https://dissentingradical.wordpress.com/wp-content/uploads/2013/04/scotland_2011.pdf, retrieved on 5 March 2025.

[45] Scottish Independence Bill 2014, art. 1 available at https://consult.gov.scot/elections-and-constitutional-development-division/scottish-independence-bill/consult_view/, retrieved on 5 March 2025.

[46] England represents 84% of the UK population. As a consequence, electoral outcomes in Scotland seldom influence the overall results of UK general elections. This has led to feelings of underrepresentation among Scots, especially when the preferences of the two nations diverge. For a complete overview on the matter of democratic deficit in Scotland see A. Mcharg, *The Constitutional case for Independence* in *The Scottish Independence Referendum: Constitutional and Political Implications*, Id., T. Mullen, A. Page, N. Walker (*eds.*), pp. 104-111.

[47] M. Keating, *State and Nation in the United Kingdom: The Fractured Union*, cit., p. 22.

versions retain the constitutional monarchy as the form of state, with the Queen/King as head of state[48], the monarch is assigned extremely limited and ceremonial functions. In fact, all versions delineate Scotland as a parliamentary democracy, with an elected legislature responsible for lawmaking and a government accountable to it. The 1997 and 2014 drafts, more specifically define a unicameral Parliament, mirroring the modern Scottish Parliament established in 1999.

It is crucial to highlight that, while there is an attempt to maintain a certain degree of continuity with the British Constitution, primarily through the conservation of the monarchy, this is strongly counterbalanced by the clear desire to abandon Westminster model. This contrast is especially evident in the relations between legislative and executive[49]. While in the Westminster model, the executive has a strong control on the Parliament, in the Scottish constitutional proposals, there is a tendency to delineate a clear separation of powers with more autonomy given to the Parliament. That is why, since the 2002 proposed Constitution, the term of the legislature is set at 4 years, with the possibility to interrupt, or extend it only in exceptional cases, namely the legislature's duration can be interrupted when a loss of confidence between the government and the Parliament occurs[50], leading to the dissolving of the Parliament and early elections. The extension of the legislature is possible, according to the 2011 proposal, only in the case of war and public emergency for a period no longer than 12 months, based on resolution adopted with the majority of 2/3 of the Parliament.

This system deeply differs from Westminster model, in which the Prime Minister can discretionally request the Parliament's dissolution before the fixed term of five years, subject to the Monarch's approval. Consequently, within this model, a government that hypothetically loses a vote of no confidence can still try to form a new administration rather than triggering an election. Generally, the mechanism of the Parliament's dissolution is employed when the Prime Minister believes that their party may gain a stronger majority in Parliament[51].

Additionally, in the constitutional projects[52], the prime minister is elected by the Parliament through a vote, instead of being the leader of the winning party, as it happens within the Westminster model. The clear implication of this system is a higher parliamentary legitimacy of the prime minister as well as a more straightforward relation between Parliament and government.

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[48] Only the 2002 draft specifies that the constitutional monarchy is just temporary, as there will be a referendum through which Scots will choose whether to retain the Monarchy or opt for a Republic.

[49] M. Dicosola, *op. cit.*

[50] The relation based on confidence between the Parliament and government is the base of every Scottish constitutional proposal.

[51] This system has recently encountered some modifications. The Fixed Term Parliaments Act 2011 has introduced a five-year fixed term and only allowed elections if a vote of no confidence passed or two thirds of MPs approved it. The Dissolution and Calling of Parliament Act 2022 restored the Prime Minister Discretion to request early dissolution, returning to a more flexible system. See F. Bromo, *Something old, something new? Votes of confidence, parliamentary dissolution, election timing, and judicial review under the Dissolution and Calling of Parliament Act 2022* in *Parliaments, Estates and Representation*, n. 43 vol. 2, pp. 194-211, available at https://doi.org/10.1080/02606755.2023.2213530.

[52] Specifically in the 2002 project and 2011 model Constitution.

Another mutual element which characterizes the proposed Scottish constitutions regards rights, showing a strong commitment, specifically, to human rights, social justice and democratic participation.

Every proposal contains a "Bill of Rights" or constitutional guarantees. In earlier drafts, like those dating back to 1964 and 1997, civil and political rights were prioritized, following the UK model. Later proposals (2002, 2011, 2014) broadened the catalogue of rights, incorporating social and economic rights, thus aligning with European constitutions rather than Westminster's system. Environmental rights are mentioned only in more recent proposals, the 2011 and 2014 ones, for instance.

Later drafts strengthened the legal enforcement of rights, allowing courts to strike down unconstitutional laws, taking a major shift from the UK's model based on parliamentary sovereignty[53].

On the whole, it is clear that the Scottish constitutional proposals reflect an enduring struggle for self-governance, democratic legitimacy and sovereignty. Whether this desire will culminate in full independence or a redefined union remains to be seen, but one thing is certain: Scotland's constitutional journey is still unfolding. While the 2014 referendum may have resulted in a vote to remain within the UK, the broader constitutional debate has not subsided. Instead, it has intensified, especially in light of subsequent political events such as Brexit, which significantly altered Scotland's position within the union. The fact that Scotland voted overwhelmingly to remain in the EU, while the UK as a whole voted to leave, has reignited discussion around self-determination, further complicating the already fraught relationship between Holyrood and Westminster.

## 5. **The Brexit effect: Catalyzing Scottish Independence?**

Brexit and the consequent attempt to call a second referendum on independence marked a climactic event for Scotland's constitutional history. As a matter of fact, despite the 2014 *Indyref* had been considered a *«once in a generation opportunity»*, after the triumph of the leave campaign, the independence topic became object of further discussions.

The 2019 *Scotland's Right to Choose*, published by the SNP-controlled government, represents a clear reaction to the UK's withdrawal and definitive prospect of leaving the EU. In the document, the case for a second referendum is argued based on three factors. Firstly, it is claimed that Scots had the sovereign right to determine their own constitutional future; secondly, it is highlighted that Brexit has provoked a material change of circumstances since the 2014 referendum and, finally, it is noted that there was a mandate for a referendum, stemming from the SNP's electoral victories at the 2016 Holyrood election, and 2017 and 2019 Westminster elections[54].

Furthermore, in this sense, according to *First Minister* Nicola Sturgeon, given that the majority of Scottish citizens had voted to remain, the British political and constitutional

[53] M. Dicosola, *op. cit.*
[54] S. Douglas-Scott, *A Scottish Referendum on Independence?*, in *Sage Journals*, vol. 13 n. 4, 2022.

framework had completely changed compared to that of 2014, thus making it reasonable to contemplate another independence referendum[55].

On these premises, in 2021, the Scottish *First Minister* announced that the process to *indyref2* would have been set in motion before 2023. On 28 June 2022, Sturgeon declared that the Scottish government intended to hold a referendum on independence on 19 October 2023. Shortly after on that day, a *Scottish Independence referendum Bill* has been published. Following the same procedure used in the 2014 referendum, Sturgeon informed the British head of government of her position on the referendum, receiving the rejection to transfer the powers from Westminster to Holyrood in order to hold a referendum: the path to the referendum took a different turn compared to the previous one, which had seen the agreement between the two parliaments in regards to the vote. Consequently, it needed to be defined whether, even without Westminster's *approval*, Holyrood had the power to call a referendum.

The controversial matter has been subject of a reference by the Lord Advocate to the UK Supreme Court, based on par. 34, Schedule 6 of the Scotland Act 1998. The Court was specifically asked whether the Scottish Parliament could legislate to allow a referendum under the Scotland Act, or this was considered to be a reserved matter.

Two are significant elements in regards to the reference procedure, which indisputably underline how crucial the extrication of the competence question was, both on a central and a decentralized level. In the first place, it has been highlighted that the Lord Advocate's choice finds its roots not only in the will to define whether the issue fell into the *reserved matters* category but also in the desire to keep the attention on the independence topic[56]. Secondly, the significance of the *referendum's future* emerges clearly in the Court's decision to provide a reference judgment on a bill before its introduction in Parliament. In actual fact, in these cases the Court is under no obligation to issue a judgement, and this had never happened previously, but given the *«public importance»* of the matter in question, it decided to clarify the situation[57].

The positions of the Scottish government and Scottish National Party in regards to the possibility of calling an advisory referendum on Scotland's independence provide a contextualization to the will of pursuing a referendum regardless of Westminster's view on the matter.

The Lord Advocate's perspective laid on the question brought before the UKSC: *«Does the provision of the proposed Scottish Independence Referendum Bill that provides that the question to be asked in a referendum would be 'Should Scotland be an independent country?' relate to reserved matters? In particular, does it relate to: (i) the Union of the Kingdoms of Scotland and England (para.1(b) of Schedule 5); and/or (ii) the Parliament of the United Kingdom (para.1(c) of Schedule 5?»*.[58]

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[55] G. Caravale, *Il giudizio di reference della Corte Suprema sul referendum scozzese: una political question*, in *Federalismi*, n. 31/2022, p. 9.
[56] G. Caravale, *op. cit.*, p. 12.
[57] G. Caravale, *op. cit.*, p. 17.
[58] *REFERENCE by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998*, [2022] UKSC 31.

According to Lord Advocate Bain, the presence of reserved matters did not collide with the possibility of introducing an Act to call a referendum, as this would have had the goal of ascertaining the views of Scots on whether Scotland should be an independent country, rather than of independence in itself. Consequently, Her Majesty's Advocate highlighted that Holyrood could have called a public consultation to define the Scottish people's opinion on the matter: firstly, because the hypothetical victory of the "Yes" would have not led to an automatic independence; secondly, owing to the fact that, if on the one hand, referendums, notoriously, own a great political significance, on the other, this significance can become legal only if the result is implemented by an Act of the Parliament – a view based strictly on the *diceyan* orthodox doctrine is adopted[59].

The SNP's written submissions define different reasons which justified the potential referendum: the right to self-determination and its fundamental and inalienable nature are used in the attempt to anchor Holyrood's power to call an advisory referendum; a restrictive interpretation of the Scotland Act is provided in a way to allow the Scottish Parliament to proceed with the referendum without contrasting with Westminster's reserved matters; finally the Canadian case law is employed to exclude that the referendum's outcome could lead to immediate consequences[60].

The UKSC ruled unanimously that the object of the Bill, as it related to *«the Union of the Kingdoms of Scotland and England»* (para.1(b) of Schedule 5); and/or *«the Parliament of the United Kingdom»* (para.1(c) of Schedule 5), was to be considered a reserved matter.

After highlighting the obvious effect that an independence referendum would have had both on the *«union of Kingdoms»* and on the Parliament, the Court responded to the SNP and Scottish government's claims, by pinpointing that, according to a constitutional convention, the executive and Parliament have to implement referendums' outcomes, even if just advisory[61].

There are numerous interesting points that emerge from this case, which are significant to the analysis of Scotland's path towards independence and more autonomy. If on the one hand, the rapidity of the decision highlights the extreme facility of the legal matter, on the other hand, the attempt to find a loophole that could work around the legal limitation encountered reveals the flaws of a constitutional system which often cannot accommodate the need of self-determination and autonomy from the devolved governments. After all, the price of union must be paid in some way, and, in this case, it is clear that the mandate to call a referendum stemming from the victory of Scottish elections and the significant portion of Scottish people voting to stay in Europe are not enough to dismember a Kingdom, not only according to the British Prime minister who did not support the whole referendum process, but also according to the UKSC which, recognizing the political importance of such event, clarified the constitutional and legal boundaries of the situation.

In this sense, it is important to retrace the reasoning that led the Court to exclude the existence of Scotland's right to self-determination as it was *«not in play here»,* conceived *«as self-*

[59] G. Caravale, *op. cit.*
[60] *Ibidem.*
[61] For the sake of completeness, it must be noted that the SNP's viewpoints on self-determination and the restrictive interpretation on reserved matters have been rejected by the court.

*determination in the sense of unilateral secession applied only in relation to colonies, or analogous cases where a definable group is oppressed or denied political representation»*[62]. However, it has been noted that besides this type of self-determination, which implies a highly aggressive right in order to sever colonial ties, another category of self-determination should be taken into account: the doctrine of constitutional self-determination[63]. Such concept, differently from colonial self-determination, is not enrooted only in international law but is the result of the convergence of domestic law, constitutional and international law and it relates to the specific constitutional setting where the unit which seeks to withdraw is. More specifically, it has been argued that the Court's reasoning overlooks the concept of constitutional self-determination, which allows certain entities within a state to seek independence through constitutional processes which can be enshrined in constitutional provisions, peace agreements and implied constitutional self-determination. When it comes to the Scottish case, the UK has implicitly recognized Scotland's right to constitutional self-determination through the Edinburgh Agreement 2012, which allowed for the 2014 independence referendum.

Consequently, it has been claimed that the key issue is not whether Scotland qualifies for self-determination, since under this doctrine it clearly does. Rather, the central question is whether the UK government can unreasonably prevent Scotland from calling a new referendum.

In this scenario, the Supreme Court's decision does not deny Scotland's right to self-determination, but it just defines that Scotland does not have a *unilateral* right to secede, as it does not classify as a classical colony. Hence, Scotland does not benefit of the colonial right to self-determination, but if it enjoys constitutional self-determination, Scotland should be entitled to assess its population's will at reasonable intervals and, in the case of a clear majority in favour of independence, the UK government would be obligated to negotiate the *«divorce»*[64].

Therefore, this new doctrine would successfully frame the issue around the Scottish struggle for independence and would justify the Court's decision without denying *sine exceptione* the objective of secession, which has been long chased and finds its roots, namely, in the right of self-determination.

Another point that needs to be mentioned regards the foundation of the Court's decision. The rejection of a referendum was based on a constitutional convention which clashes with the landmark principle of parliamentary sovereignty. This contradiction turns the *diceyan* doctrine on its head and raises doubts about the relationship between parliamentary sovereignty and popular sovereignty[65]. Reinforcing the idea that sovereignty is centralized, the Court clearly stated that Holyrood cannot legislate on a second referendum

[62] M. Weller, *The UK Supreme Court Reference on a Referendum for Scotland and the Right to Constitutional Self-determination: Part II*, in *EJIL: Talk! Blog of the European Journal of International Law*, 13 December 2022 available at https://www.ejiltalk.org/the-uk-supreme-court-reference-on-a-referendum-for-scotland-and-the-right-to-constitutional-self-determination-part-ii/ retrieved on 2nd April 2025.
[63] *Ibidem.*
[64] *Ibidem.*
[65] M. Elliott, *The Supreme Court's Judgement in Miller: In search of Constitutional Principle*, in *Cambridge Law Journal*, July 2017, University of Cambridge Faculty of Law Legal Research Paper, n. 23/2017.

without Westminster's approval. Nevertheless, the decision suggests that a referendum would have binding consequences, meaning that once held, its result would carry a political obligation to implement. Hence, the paradox: if the Parliament is bound to implement the result of a referendum, it arguably loses part of its sovereignty.
This factor is particularly significant in the context of Scottish independence, as parliamentary sovereignty has long been used to limit Scotland's autonomy, particularly in the independence debate, while popular sovereignty has been the main justification for Scotland's push for independence. The UK Supreme Court's ruling appears to invert the *usual hierarchy*, raising serious constitutional doubts.

## 6. **Building a New Scotland: Yousaf's Proposal**

The most recent step towards independence is represented by the paper called "Creating a modern constitution for an independent Scotland"[66], the fourth in the series "Building a New Scotland".
This constitutional proposal shows a strong level of continuity with the previous ones analyzed and marks a strategic step in the SNP's long-term independence campaign.
The paper clearly revolves around the principle of popular sovereignty: after all, Mr. Yousaf made it clear that a Constitution would *«put power in the hands of the people»*. As a matter of fact, after having listed all the reasons why Scotland need a written Constitution, it sets out an actual plan to create a constitutional document: it defines an interim Constitution which would take effect on the day of independence; it specifies that this would be followed by a permanent one, which should be created by a legally mandated Constitutional Convention in a way to have, though indirectly, a popular participation to the writing of the Constitution. Finally, it defines the necessity of a referendum to allow Scottish people to decide on the permanent constitution. The significance of popular sovereignty is evident since the beginning of the proposal, which promotes it as a strong alternative to parliamentary sovereignty[67].
Additionally, the proposal aims to enshrine human rights, environmental protection, the right to strike and a ban on nuclear weapons in the Scottish territory and frames independence as a progressive and democratic option to Westminster's rule. While SNP's supporters saw it as a step in making a case for independence more concrete, critics said it was more of a political stunt that did not tackle day-to-day issues. Nevertheless, the proposal reflects a continuing effort to present a concrete values-based case for independence in a post-Brexit political landscape[68].

## 7. **Conclusions**

[66] Scottish Government, *Creating a modern constitution for an independent Scotland*, Building a New Scotland, paper 4, June 2023, available at https://www.gov.scot/binaries/content/documents/govscot/publications/research-and-analysis/2023/06/building-new-scotland-creating-modern-constitution-independent-scotland/documents/creating-modern-constitution-independent-scotland/creating-modern-constitution-independent-scotland/govscot%3Adocument/creating-modern-constitution-independent-scotland.pdf retrieved on 5th April 2025.
[67] *Ibidem.*
[68] Bbc, *At a glance: Constitution plan for an independent Scotland*, 19 June 2023, available at https://www.bbc.com/news/uk-scotland-65951500 retrieved on 5th April 2025.

The succession of the aforementioned constitutional milestones in Scotland indisputably reveals a critical and ongoing relationship between the central and devolved levels of governance.

This tension primarily arises from a constitutional system that seeks to balance the need for regional autonomy and national identity with a centralized decision-making structure. As it has been previously noted, while devolution was intended to provide greater autonomy and decisive power, what emerges is a system built in a way to ultimately preserve Westminster's will, especially in crucial and decisive matters[69]. The Brexit phenomenon exemplifies this imbalance: the controversy regarding the Sewel Convention, considered by the UKSC not legally enforceable and the almost total non-involvement of the devolved countries in the withdrawal process raise questions in regards to how safeguarded their interests are[70].

In this context, parliamentary sovereignty and its foundational nature for Westminster's decisional power, emerges as a "constraint" to the will of autonomies, raising an important question: is this principle a substantial constitutional safeguard, or does it function more as a formal mechanism preserving a structure which is less and less equipped to meet the demands of modern decentralization, both on a domestic and international level?

In contrast to these formal constraints, Scotland's political drive for independence remains resilient. The push for a second referendum is illustrative: despite the lack of approval from the Prime Minister, the Scottish government persevered with its objective, and only the intervention of the UK Supreme Court clarifies the constitutional limitations of such move.

The stark opposition between these legal constraints and Scottish political dynamics, combined with the ambiguity surrounding Scotland's right to self-determination, unrecognized under international law, but still persistently claimed, further complicates the precarious relationship between Scotland and the UK. As a result, periods of intense political tension, such as those preceding the 2014 referendum and post-Brexit, often coincide with heightened demands for autonomy and a strong sense of underrepresentation. Conversely, phases characterized by a relative political balance[71] tend to follow Westminster's "concessions" or extensions of devolved powers, as seen after the original devolution agreements and the "post-vow" period.

What emerges is a seesawing trend in Scottish independentism, which is likely to remain a defining feature of British political dynamics in the near future. If it is not possible to rule out categorically the possibility of independence, especially in the peculiar post Brexit context, the current British constitutional framework presents significant obstacles to any immediate prospect of secession.

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[69] S. Douglas-Scott, *op. cit.*

[70] *Ibidem.*

[71] The relative political stability does not imply that the longing for independence temporarily "disappears". As a matter of fact, this aspect is aprioristically and intrinsically embedded in Scotland's history and national identity. It might be argued that, especially in recent times, the longing for independence characterizes, to some extent, Scotland's identity in itself.

What is certain is that the fraught relation between Scotland and the UK has yet to reach a stable compromise. Secession may continue to linger as a question, but its answer might never fully take shape within the bounds of prediction.