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The Referendum Challenge to Constitutional Sovereignty: The Case of Scotland

Historically, the question of the legality of self-determination through referendums has, as Philip Goodhart noted "almost invariably followed national lines"[1]. As he continued,

> For almost 25 years after the Franco-Preussian War the leading French international lawyers, Montluc, Ott, Cabouat, Renan and Audinet steadily argued that the doctrine of self-determination had been established by natural right and international usage. Meanwhile the German lawyers Hotzendorf, Geffker, Stoerk and Francis Liever argued variously that plebiscites were wrong; that they subjected the minority to the rule of simple majority without protection[2].

Perhaps, very little has changed. One of the most persistent and controversial questions regarding national self-determination and the referendums, is who is allowed to initiate a vote. Yet for all the justified cynicism, legal issues often constrain the political logic and force actors to take decisions that may not be in their political interest. Scotland is a case in point. In 2011 the *Scottish National Party* (SNP) won the election to the Scottish Parliament on a manifesto commitment to hold a referendum on independence[3]. But although the SNP won a majority of the vote the party was – as a leading constitutional lawyer noted - "clearly aware that it would be democratically perverse, as well as politically and legally impossible, to try to override the legal legitimacy of the [Scotland] Act [1997] by way of an extra-constitutional referendum"[4]

This situation is not different from the similar situation in Catalonia where the separatist party *Convergencia i Unió* won an election to the *Parlament de*

[1] Goodhart, Philip (1971) *The Referendum*, London: Stacey, p.107.
[2] Goodhart, Philip (1971) *The Referendum*, pp.111-112.
[3] Tierney, Stephen (2012) *Constitutional Referendums*: *The Theory and Practice of Republican Deliberation*, Oxford: Oxford University Press, 147
[4] Tierney, Stephen (2012) *Constitutional Referendums*, p.147

Catalunya on a similar pledge in November 2012[5]. Though, the Spanish Courts are yet to comment on this proposal.

To understand how the courts are likely to react it, is illustrative to look at case study of Scotland to gauge the factors that the courts may take into considerations when ruling on the legality – or otherwise – of a decision to hold a referendum. As all courts – of necessity– are bound by the law of their countries, this analysis is illustrative only and does not provide a guide for how the court in Canada[6] or Belgium[7] might rule on a similar matter, but for all its limitations a case study may – through 'thick description' provide perspectives which may be relevant and pertinent beyond the single case study[8].

Court Interventions and Votes on National Self-Determination: A Comparative Overview

It is a key part of constitutional politics judiciary polices the boundaries of competencies allocated to different actors[9]. In the context of referendums on national self-determination, this has led to several rulings regarding the constitutionality – or otherwise – of decisions by secessionist governments or sub-units decisions to hold votes on independence[10].

As a general rule, such referendums have resulted in rejections of the decisions to hold referendums on self-determination. For example Spain, the *El Tribunal Constitucional de España* in *Judgement No. 103/2008* it held that the Basque Parliament had acted ultra vires and declared "the unconstitutionality and subsequent invalidity of the *Basque Parliament Law 9/2008 of 27 June"* (a law on a referendum on de facto independence) . The situation is similar in the United

[5] Guibernau, M. (2000). 'Spain: Catalonia and the Basque Country'. *Parliamentary Affairs*, *53*(1), 55-68.
[6] Webber, J. (1996). Legality of a Unilateral Declaration of Independence under Canadian Law, The. *McGill Law Journal*, Vol. *42*, p.281.
[7] De Winter, L., & Dumont, P. (1999). 'Belgium: Party System (s) on the Eve of Disintegration?' *Changing Party Systems in Western Europe. London, Pinter*, 183-206.
[8] Geertz, Clifford (1973) 'Thick Description: Toward an Interpretive Theory of Culture'. In *The Interpretation of Cultures: Selected Essays*. New York: Basic Books, pp. 3-30
[9] Tarr, A.G. (1997)'New Judicial Federalism in perspective', 72, *Notra Dame Law Review* 1996-1997, p.1097
[10] Oklopcic, Z. (2012). 'Independence Referendums and Democratic Theory in Quebec and Montenegro'. *Nationalism and Ethnic Politics*, *18*(1), 22-42.

States and in Canada.

In the United States, the *Supreme Court of Alaska* ruled in 2006 that a referendum on whether Alaska could seek a legal path to independence was ultra vires – and could not be held[11]. In reaching this decision, the judges cited the earlier – and much celebrated - case of *White v Texas*[12] from 1869, in which the Supreme Court held that a unilateral secession would be illegal under US Constitutional Law[13].

In Canada, in a much cited case, the *Royal Supreme Court of Canada* (RSSC) held in Re Quebec in 1998 that "any attempt to effect the secession of a province from Canada must be undertaken pursuant to the *Constitution of Canada*, or else violate the Canadian legal order"[14]. From the perspective of Canadian constitutional law, a referendum on the independence would not be permitted due to the absence of a constitutional amendment[15].

Based on these cases, it is hardly surprising that opponents of Scottish independence have argued that the vote on independence in 2014 is illegal[16]. Needless to say, the rulings were not as unambiguous as some political practitioners would like to argue. *Re Quebec* was "complex opinion that was far from the unequivocal statement sought by the federal government"[17]. And in any case, the issue has now been politically by-passed by the British government, which prudently avoided a legal showdown by granting the Scottish government the right to hold a referendum[18]. But, from a theoretical point of view, the issue remains important and raises several questions of interests to other groups seeking to hold referendums on independence.

[11] *Kohlhaas v Alaska* 147 P 3d 714 (2006).
[12] *Texas v White* 74 US 700 (1868).
[13] Radan, P. (2006). 'Indestructible Union... of Indestructible States: The Supreme Court of the United States and Secession', L*egal Hist.* Vol.10, 187.
[14] *Reference re: Secession of Quebec* (1998) 161 DLR (4th) 385, p. 430
[15] *Reference re: Secession of Quebec* (1998) 161 DLR (4th) 385, p. 424
[16] House of Lords Select Committee on the Constitution (2012) *Referendum on Scottish Independence*, HL 263, 2010-12.
[17] Tierney, Stephen (2012) *Constitutional Referendums*, p.143
[18] BBC News (2012) 'Cameron and Salmon Strike Referendum Deal', http://www.bbc.co.uk/news/uk-scotland-scotland-politics-19942638, Accessed 23 November 2012

Would a referendum on Scottish Independence be illegal?

At the risk of oversimplifying, Hans Kelsen held that the legal system was pure and the decisions, in principle, could be reached without reference to extra-legal circumstances, such as public opinion or the will or a transient majority[19].

Politically speaking, it seems self-evident that a manifesto commitment by the *Scottish National Party* (which won the election in 2011) should be sufficient to hold a referendum on independence. But from a 'pure' legal point of view, would the Scottish government have this right?

Like in the aforementioned cases of Spain, United Kingdom is a unitary state. Under the *Act of Union 1707* all power that hitherto resided in the Scottish Parliament (which existed prior to that unification of the two countries) was transferred to the United Kingdom Parliament at Westminster. Subsequent to the Act of Union 1707, legislation – even legislation that only pertained to Scotland – was enacted by the Westminster Parliament. This arrangement was subject to the fundamental "bedrock of the British Constitution"[20] that Parliament is supreme and that what 'Parliament doth, no authority upon earth can undo"[21].

In the late 1990s this position was slightly changed. *The Act of Union 1707* was modified by the *Scotland Act 1998*, which transferred a number of powers to the *Scottish Parliament* at *Holyrood*. The exceptions were the 'reserved matters' listed in S.29 and further elaborated in Schedule 5, Paragraph 1 of Part I of the Act. The fundamental question from a legal and constitutional point of view is if these reserved matters prohibit a referendum on independence.

Adjudication of Devolution in the Courts

To understand the legal issue it is necessary to look at the wider principles and the relevant case law that may be used to decide the question of the legality of a referendum. Given the wording of the Scotland Act 1998 (See below), there is

[19] Hans Kelsen (1941) 'The Pure Theory of Law and Analytical Jurisprudence', *Harvard Law Review*, Vol.55, No.1, pp.44-70
[20] *R (Jackson and Other) v Attorney General* [2005] UKHL 56, at 9, per Lord Bingham
[21] Blackstone *Commentaries* quoted in A.V. Dicey (1915) *An Introduction to the Study of the Law of the Constitution*, 8th Edition, Indianapolis, Liberty Press, 5

some ambiguity as to how it might relate to the rights of Scotland to hold a referendum to gauge the public's views on independence.

Most legal proceedings relating to the constitutionality of enactments by the Scottish Parliament have been by way of judicial review in the *Scottish Court of Session*. Until 2005, the *Scotland Act 1998* granted that certain issues could be heard by the Privy Council[22]. But since the enactment of the *Constitutional Reform Act 2005* the judiciary function has passed to the *Supreme Court*.

While the question of the legality of decisions by the Scottish Parliament was dealt with in relation to compatibility with the *Human Rights Act 1998* in *Anderson, Reid and Doherty v Scottish Ministers* (2001)[23] by the *Privy Council*, the issues of reserved powers were first considered in *Martin v HM Advocate* in 2010[24].

In *Martin and HM Advocate* [2010], the *Supreme Court* was asked to determine if the Scottish Parliament could make changes to criminal law. In that case the Supreme Court established the principle that the legality of Acts of the Scottish Parliaments had to "be determined by reference to the purpose of the provision, applying the rule set out in section 29(3)"[25].

In determining if a decision made by the *Scottish Executive* or an Act passed by the Scottish Parliament was *ultra vires*, the Courts should look at the *purpose* of the Scottish Act. If this purpose touched upon a "Reserved Matter", the Act of the Scottish Parliament was acting beyond its constitutionally prescribed powers. In reaching this conclusion the Supreme Court affirmed Lord Bingham's *obiter* in *Robinson v Secretary of State for Northern Ireland* [2002], according to which decisions by devolved parliaments or executives must be interpreted "generously and purposively"[26].

Martin v HM Advocate also established, that in determining the purpose of the Act of the Scottish Parliament, the Courts should look at "reports to and papers issued by the Scottish Ministers prior to the introduction of the Bill, [and that] explanatory notes to the Bill, the policy memorandum that accompanied it and statements by Ministers during the proceedings in the Scottish Parliament may all be taken into account in this assessment"[27].

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[22] For example, in *Anderson, Reid and Doherty v Scottish Ministers [2001]* patients unsuccessfully challenged the *Mental Health (Public Safety and Appeals) (Scotland) Act 1999*

[23] *Anderson, Reid and Doherty v Scottish Ministers [2001] UKPC D5 HRLR 6*

[24] *Martin v HM Advocate* [2010] UKSC 10

[25] *Martin v HM Advocate* [2010] UKSC 10, para 18, per Lord Hope

[26] *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32), per Lord Bingham

[27] *Martin and Miller v HM Advocate* [2010] UKSC 10, at Para 25, per Lord Hope

Martin and HM Advocate was followed by *AXA General Insurance Ltd v The Lord Advocate* [2011], in which it was held that while the

> [Scottish Parliament's] democratic mandate to make laws for the people of Scotland is beyond question... Sovereignty remains with the United Kingdom Parliament. The Scottish Parliament's power to legislate is not unconstrained. It cannot make or unmake any law it wishes[28].

The Supreme Court held that they did *not* "need to resolve the question how …conflicting views about the relationship between the rule of law and the sovereignty of the United Kingdom Parliament may be reconciled" as they were dealing with a "legislature that is not sovereign"[29]. In other words, decisions by the Scottish Parliament – even if they have been supported by a majority at the ballot box – could overrule statutes enacted by the Westminster Parliament as sovereignty resided with the latter.

Interpretation of the Right to Hold a Referendum

How does this relate to the question of the referendum on independence? Not surprisingly the views have tended to reflect party-lines and the preferences of the commentators. One of the foremost commentators, the legal scholar, philosopher and former member of the European Parliament for the Scottish National Party, Neil MacCormick the fundamental position is that under the British Constitution all referendums – as a result of the sovereignty of parliament[30] – are advisory[31]. Accordingly,

> [T]he Constitution is a reserved matter under the Scotland Act, so how could a Parliament which has no power over the Constitution pose a question about the Constitution and put it to the people? ...The Scottish Executive has unlimited powers to

[28] *AXA General Insurance Ltd v The Lord Advocate* [2011] 3 WLR 871 para 46, per Lord Hope
[29] *AXA General Insurance Ltd v The Lord Advocate* [2011] 3 WLR 871 para 51, per Lord Hope
30A.V. Dicey (1981) [1915] *An Introduction to the Study of the Law of the Constitution*, Indianapolis, Liberty Fund, p.cix.
31 V. Bogdanor (1981), *The People and the Party System: The Referendum and Electoral Reform in British Politics*, Cambridge, Cambridge University Press, p.16

> negotiate with the Westminster government about any issues which could be the subject of a discussion between them, therefore it could seek an advisory referendum[32].

The rationale for this argument is that neither the enactment of the Bill, nor the holding of the referendum or even a vote for independence, would end or change the Union settlement. In terms of legal effects, therefore, independence would, be a contingent rather than an automatic effect of a referendum Bill even if we assume that the vote will be for independence.

But this still leaves the question of the purpose of the referendum. While it is possible that it may not have any *legal* effect, Section 29 of the Scotland Act 1998 also states that whether a provision 'relates to' a reserved matter "is to be determined.....by reference to the *purpose* of the provision" (Italics added).

As we have seen from case from *Martin and HM Advocate*[33] and before that – in the context of Northern Ireland –in *Robinson v Secretary of State for Northern Ireland* [2002] - decisions by devolved parliament or executives must be interpreted "purposively"[34]. That a decision by the Scottish Parliament to hold a referendum may not have any legal effects, is not, therefore, the end of the matter. We must also be able to show that the 'purpose' of the Act does not 'relate to' a Reserved Matter. But how are we to determine the purpose of the Referendum Bill?

Those who claim that a referendum would be illegal, argue that the "purpose" of any referendum Bill would be to further the current Scottish Government's aim of achieving independence for Scotland[35]. According to this view, the intended consequence – or purpose - of a referendum is to secure a mandate for negotiating independence for Scotland. The "purpose", therefore, relates directly to a Reserved Matter, the Union of Scotland and England, and is consequently beyond the powers of the Scottish parliament, according to this argument.

But there is a potential flaw with this argument, namely that it conflates the intention of the Scottish Government with the intention of the Scottish Parliament. While the *Scottish National Party* currently enjoys a majority in the Scottish Parliament, it is perfectly possible that members from other parties may support a referendum for tactical reasons (perhaps, because they expect that the vote will be lost and believe that the issue of independence will thereby be removed from the political agenda for a generation). Indeed, this was the explicit position of the

32 Neil MacCormick (2000) 'Is There a Constitutional Path to Scottish Independence?' *Parliamentary Affairs* Vol.53, pp. 725-726

33 Martin v HM Advocate [2010] UKSC 10, para 18, per Lord Hope

34 *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32), per Lord Bingham

former Labour leader Wendy Alexander and the view has also been supported by the former Conservative Secretary of State for Scotland Michael Forsyth[36]. Given that this is a possibility, it would simply not be possible to claim that the majority had a single unitary purpose, namely to end the Union. As a result, it cannot be argued, that the 'purpose' of the legislation relates to a Reserved Matter[37].

But the question is if this interpretation is consistent with the position of the Courts. In its judgments to date the Supreme Court has *not* looked at the broader intention of a majority in the Scottish Parliament. Rather they have – as we noted above in connection with *Martin v HM Advocate*– looked at "reports to and papers issued by the Scottish Ministers prior to the introduction of the Bill"[38]. Based on *Martin v HM Advocate* it is, therefore, unlikely that the Courts would depart from this principle in the event that they have to rule on the legality of a referendum.

In the present circumstances the purpose of the referendum, according to the Scottish Government's consultation paper *Your Scotland, Your Referendum*, is to hold a referendum to determine "whether there should be additional transfer of power to enable Scotland to become an independent country"[39]. This "purpose" would clearly "relate to" a reserved matter under *Schedule 5*, namely "[T]he Union of the Kingdoms of Scotland and England", and hence it would be 'illegal' or 'unconstitutional'.

In other words, while 'the effect' of the referendum may not have legal consequences, the 'purpose' of the referendum would relate to a reserved matter, and hence be outside the bounds of the Scottish parliament's constitutional competence.

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35 Lord Wallace of Tankerness, QC Glasgow University 11 January 2012
36 http://news.bbc.co.uk/1/hi/scotland/7383035.stm, accessed 15th April 2012.
37 This view has been taken by Dr Aileen McHarg and Professor Tom Mullen, See Robbie Dinwoodie (2012), 'Holyrood has authority over the Referendum', in the Herald, http://www.heraldscotland.com/politics/political-news/holyrood-has-authority-over-referendum.1328929454, Accessed 15 April 2012.
38 *Martin and Miller v HM Advocate* [2010] UKSC 10, para. 25, per Lord Hope
39 *The Scottish Government, Your Scotland, Your Referendum*, Consultation, January 2012, The Scottish Government, Edinburgh, 2012, p.28

Democratic legitimacy or Parliamentary Sovereignty?

But it might be argued that a decision to rule a referendum unconstitutional would run counter to the principles of democratic legitimacy stated in *AXA* and in other previous cases. Indeed, in *R (Countryside Alliance) v A-G*, it was held that "the democratic process is liable to be subverted if… opponents of an Act achieve through the courts what they could not achieve through Parliament"[40].

Given that the *Scottish National Party* won a majority of the seats in the Scottish Parliament on a manifesto commitment to hold a vote on a referendum on independence, it could be argued that a legal challenge would be exactly this, namely, 'achieving through the courts what they could not achieve' through the ballot box.

This argument might be politically persuasive. But it is not legally convincing. From a legal point of view, an "Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament" S.29(1). Whether a majority of the members of the Scottish Parliament or even a majority of the Scottish people, support a particular Act, is *legally* speaking irrelevant. What matters is whether the Act in question has any 'effect' on the reserved matters or if the 'purpose' of the legislation was to have effect on the Reserved Matters' listed in Schedule 5. If so, the legislation, however, popular is void from a legal point of view.

Alternatively, it might be argued, that the *Scotland Act 1998* does not expressly prohibit a referendum on independence as it was held in *Imperial Tobacco* that "what is not specifically identified as being outside competence is devolved"[41].

It is undoubtedly the case that the Scottish parliament could hold a referendum on any matter within its competence, for example, on criminal policy, health or education. However, the question here is not the right to submit issues to the voters on any matter. The question is if the Scottish Parliament is allowed to hold a referendum on a matter that relates to a Reserved Matter.

40 *R (Countryside Alliance) v A-G* [2007] 1 AC 719, para 45, per Lord Bingham
41 *AXA General Insurance Ltd v The Lord Advocate* [2011] 3 WLR 871 per Lord Hope at para 46

How to Interpret Ambiguous Legislation?

The Scotland Act is, arguably, ambiguous. Given this ambiguity, how are we to interpret the Reserved Matters? Do they prohibit referendums on independence related matters? There is a large and varied literature on statutory interpretation, but the British rules are relatively firm and well established[42] Under accepted rules of statutory interpretation of Acts of Parliament in the United Kingdom, the courts may – under the principle established in a case called *Pepper v Hart[1994]* - use statements by the promoter of legislation if the Act is "ambiguous, or obscure or the literal meaning [would lead] to of which leads to an absurdity"[43].

While it is debatable whether a literal reading would lead to 'absurdity', it certainly leads to a rather large degree of ambiguity. Hence, we are, arguably, permitted to look at the statement by the minister who promoted the Scotland Act 1998. And, doing so resolves the matter. Indeed, in a debate on the *Scotland Bill* in 1997, the Secretary of State – and promoter of the Bill, Donald Dewar said (in a response to Mr Salmond): "A referendum that purported to pave the way for something that was ultra vires is itself ultra vires …..[M]atters relating to reserved matters are also reserved. It would not be competent for the Scottish Parliament to spend money on such a matter in those circumstances"[44].

If the meaning of an ambiguous Act is to be determined by statements by the promoter of the Bill, then it follows that the Westminster Parliament intended that any referendum on independence would be "ultra vires". And, as it is a fundamental principle under the British Constitution that Parliament is sovereign, it follows that a decision to hold a referendum that has a purpose that is contrary to the intention of an Act of Parliament would be ultra vires; would be 'illegal' and 'unconstitutional'.

[42] Garrett, E. (2008). Legislation and Statutory Interpretation. *The Oxford Handbook of Law and Politics, Oxford: Oxford University Press*
[43] *Pepper (Inspector of Taxes) v Hart* [1992] 3 WLR 1032
44 H.C. Debs 5 December 1998, Col. 257.

Conclusion

"Legal practice", as Ronald Dworkin once wrote, "is an application of interpretation"[45]. This essay is an "interpretation", but one based on existing case law. Needless to say, it does not purport to be the final word on the subject. Would a referendum on Scottish independence be legal under the *Scotland Act 1998*? Legally speaking, the answer depends on whether such a referendum would have any 'effect' on, or have the 'purpose' of, altering a Reserved Matter under Schedule 5 of the Act.

While it could be argued – as Neil MacCormick has done - that an advisory referendum would have no direct legal effects, the Courts' interpretation of the word 'purpose' is likely to lead to a different outcome. Using the Courts' purposive interpretation of legislation -as laid down in *Robinson v Secretary of State for Northern Ireland* [2002] and in *Martin v HM Advocate [2010]* – a referendum would be contrary to Scotland Act 1998. Further, based on the statement by the promoter of the Scotland Act, Donald Dewar, it was clear that he regarded *any* referendum on *any* matter related to a referendum on independence to be ultra vires.

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45 R. Dworkin (1982) 'Law as Interpretation', *Texas Law Review*, Vol.60, 527