

Scotland's Right to Choose

Putting Scotland's Future in Scotland's Hands





.....

What if that other voice we all know so well responds by saying, 'We say no, and we are the state'? Well we say yes - and we are the people.

.....

Canon Kenyon Wright

Introduction by the First Minister of Scotland



A handwritten signature of Nicola Sturgeon in black ink, written over a horizontal line.

Nicola Sturgeon
First Minister
of Scotland

The Scottish Government believes the best future for Scotland is to be an independent country in order to build a fairer, more prosperous society.

It is a fundamental democratic principle that the decision on whether or not Scotland becomes independent should rest with the people who live in Scotland.

There has been a significant and material change in circumstances since the 2014 referendum and therefore, in line with the mandate received in the 2016 Holyrood election, and reinforced in subsequent UK general elections—most recently in December 2019—the Scottish Government believes people in Scotland have the right to consider their future once again.

The decision on whether a new referendum should be held, and when, is for the Scottish Parliament to make – not a Westminster government which has been rejected by the people of Scotland.

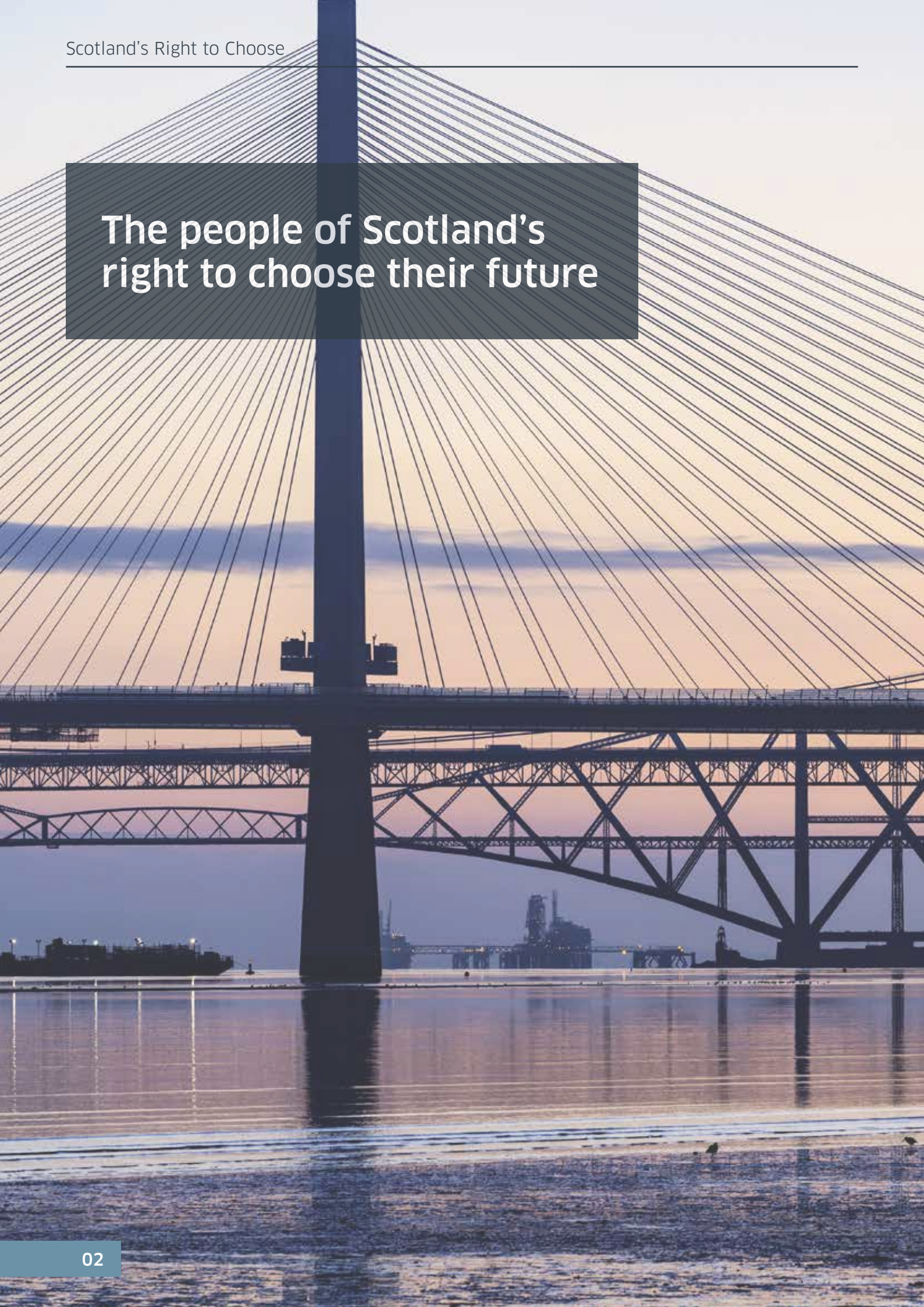
We are today therefore calling on the UK Government to ensure a transfer of power is made—from Westminster to Holyrood—so that a fresh independence referendum is put beyond legal challenge. The case for that transfer of power is set out in detail in this document.

It is our position that a referendum should be held before the end of 2020 but the precise timing will be a matter for the Scottish Parliament to decide.

The Scottish Government is a strong advocate of the values of human dignity, freedom, democracy, equality, the rule of law, and respect for human rights.

We are therefore committed to an agreed, legal process which adheres to and celebrates those values, and which will be accepted as legitimate in Scotland, the UK as a whole, and by the international community.

Scotland is not a region questioning its place in a larger unitary state; we are a country in a voluntary union of nations. Our friends in the rest of the UK will always be our closest allies and neighbours but in line with the principle of self-determination, people in Scotland have the right to determine whether the time has come for a new, better relationship, in which we can thrive as a genuine partnership of equals.



The people of Scotland's
right to choose their future

Summary

Scotland is a nation.

Following the political union of 1707, that nationhood has been demonstrated in many ways, including through separate political and legal structures, through devolution, through the 2014 independence referendum, and through a distinct Scottish constitutional tradition.

The right of the people of Scotland to determine the form of government best suited to their needs has been consistently accepted for decades across the political spectrum, and is powerfully demonstrated by Scotland's recent history.

The United Kingdom is best understood as a voluntary association of nations, in keeping with the principles of democracy and self-determination.

For the place of Scotland in the United Kingdom to be based on the people of Scotland's consent, Scotland must be able to choose whether and when it should make a decision about its future.

The decision whether the time is right for the people who live in Scotland again to make a choice about their constitutional future is for the Scottish Parliament, as the democratic voice of Scotland, to make.

Scotland as a nation

Scotland is one of Europe's oldest nations. Following the integration of the Parliament of England and Wales and the Parliament of Scotland in 1707, Scotland remained a nation within the new Union state. The nationhood of Scotland and the multi-national character of the United Kingdom have been widely recognised, including by the UK Government, by parties across the political spectrum and by civic society in Scotland.¹ Annex A contains a brief summary of the constitutional history of the nation of Scotland.

Scottish nationhood is more than just a matter of history or a set of national institutions, however. It is also about shared values and aspirations, and follows from the idea of the people of Scotland as a distinct political community, with a right to choose their own future.

Before the independence referendum, the leaders of the parties in Scotland campaigning against independence made a joint statement supporting Scotland's right to choose—

“”
Power lies with the Scottish people and we believe it is for the Scottish people to decide how we are governed.²
.....

This understanding of the constitutional position of the people of Scotland within the United Kingdom is not seriously disputed. It has long been accepted by successive UK Governments, and by the wider political community, that the people of Scotland have the right to determine Scotland's continued place in the UK.³ The Claim of Right for Scotland, signed in 1989 by a range of leading figures and organisations from across political and civic life in Scotland, begins by acknowledging—

“”
the sovereign right of the Scottish people to determine the form of Government best suited to their needs.⁴
.....

The Claim of Right has since been recognised and endorsed by both the Scottish Parliament and the UK Parliament.⁵ Scotland's continuing participation in the Union is based on the ongoing agreement and consent of the people that live in Scotland.⁶

This is because the United Kingdom is not a unitary nation-state; it is a Union state. It is a multi-national country whose constituent parts enjoy different constitutional settlements and rights.⁷

It is compatible with being a Union state for constituent parts of that state to have a recognised right to become independent, in line with the wishes of the people. The United Kingdom recognises, as a matter of both international⁸ and domestic law,⁹ the right of the people of Northern Ireland in certain circumstances to hold a referendum on Irish reunification; and the UK is legally obliged—again under international and domestic law—to implement unification if that is the will of the people of Northern Ireland.¹⁰

Even those that support Scotland's continuing place in the Union recognise Scotland's right to choose. Following the independence referendum in 2014, the Smith Commission brought together the political parties represented in the Scottish Parliament to agree proposals for further devolution. The Smith Commission took place in the context both of all participants accepting the outcome of the independence referendum, and of three of the five parties represented having campaigned for Scotland to stay part of the United Kingdom. Nevertheless, under its heads of agreement, the Commission concluded—



It is agreed that nothing in this report prevents Scotland becoming an independent country in the future should the people of Scotland so choose.¹¹

In 2018, the Constitution Reform Group, a cross-party association of parliamentarians, introduced into the House of Lords an Act of Union Bill intended to give effect to the principle that “each of England, Scotland, Wales and Northern Ireland is a unit that both can and should determine its own affairs to the extent that it considers it should”.¹² Their Bill would have placed in law the principle that each part of the UK—



remains a constituent nation or part of the United Kingdom unless and until a majority of the people of that nation or part vote to leave in a referendum.¹³

The constitutional history of the UK and its nations has been exemplified by change as much as it has continuity. The UK's constitution is said to be based on the idea of parliamentary sovereignty: that the UK Parliament is the sole source of sovereignty, and that the Crown-in-Parliament can make or unmake any law whatever. This theory of the constitution is the product of Victorian legal thinking, and it has been questioned whether it remains an accurate or sensible description of the constitutional reality in the UK.¹⁴

Scotland has a historic constitutional tradition different from that described by the doctrine of parliamentary sovereignty. In Scotland, sovereignty is traditionally said to lie with the people, and to favour a limited rather than absolute form of authority, with the right to rule being subject to the consent of the people.¹⁵ The question has been asked why the constitution of a Union state should reflect only one of the constitutional traditions of its constituent nations.¹⁶

More recent developments also require to be accommodated within a correct understanding of the constitution of the UK and its nations. Devolved governments and parliaments in Scotland gained their democratic legitimacy from referendums and maintain them through regular elections.¹⁷ It has been accepted that parliamentary sovereignty alone would not justify their abolition. Following the recommendations of the Smith Commission, provision respecting their permanence was included in the Scotland Act 2016, promoted in the UK Parliament by the UK Government.¹⁸

The principle of the sovereignty of Parliament needs to take account not only of the devolution settlements, but also of UK membership of the European Union, of international obligations and international human rights regimes, and of recent case law, which suggests other principles that require to be taken into account when assessing what the constitution requires of governments and parliaments in the 21st Century.¹⁹

Despite this, the UK Government has recently sought to secure recognition in statute that parliamentary sovereignty is a permanent legal principle in the UK's legal systems.²⁰ But just as the principle of parliamentary sovereignty emerged when it was understood to be an accurate description of the UK's constitution, enshrining it in law would prevent it changing or being replaced or adjusted where it is no longer an accurate description of the modern constitution.

It is the Scottish Government's view that parliamentary sovereignty, whatever its historical origins or traditional content, is no longer an accurate description of the constitution in Scotland or the UK. As the Welsh Government argues—

“”

.....
If ... it is accepted that sovereignty (some of which should be shared) lies with each part of the UK, the traditional doctrine of the sovereignty of Parliament no longer provides a firm foundation for the constitution of the UK.²¹
.....

The people of Scotland (and of the other parts of the UK) have the right to determine the form of government that best suits their needs, and the constitution of the Union state must recognise that.

A voluntary association of nations

The Welsh Government has set out its understanding of the relationship between the nations of the United Kingdom and the Union state. If the UK is truly a voluntary association of nations, it argues that—

“”

it must be open to any of its parts democratically to choose to withdraw from the Union. If this were not so, a nation could conceivably be bound into the UK against its will, a situation both undemocratic and inconsistent with the idea of a Union based on shared values and interests.²²

.....

The Scottish Government agrees with this analysis.

Scotland has already demonstrated its right to choose its constitutional future, in the independence referendum in 2014. Every vote in that referendum, whether for Scotland to become independent or not, was part of an act of self-determination by the people of Scotland. The Scottish Government never suggested that it could secure independence for Scotland without a decision of its people, and the UK Government accepted that Scotland's continued place within the United Kingdom required the consent of its people.

Scotland's current place in the United Kingdom therefore rests on the principle that it is for the people of Scotland to decide on their constitutional future, and on the outcome of the independence referendum in 2014. The outcome of the 2014 referendum was accepted by both governments, and by the people of Scotland and the UK; but Scotland's ability to decide its constitutional future cannot be permanently foreclosed by it. Either the people of Scotland continue

to have the right to choose—and to decide to make that choice again—or they do not have an effective right to determine their future. Without such a right, Scotland would be bound indefinitely to the Union without any possibility of the people who live here to express their approval, or otherwise.

The Scottish Government believes that it is for the people of Scotland alone to make a judgment about when they should again make a decision about their future; and believes that the people express their judgment on this matter through elections and through their democratic representatives.

The alternative is that such decisions could only be made by the UK Government alone, or by Westminster. This would leave no mechanism for the people who live in Scotland, as a distinct political unit, to express their desire for a future referendum on independence or on any other constitutional reform. The decision would not be theirs to take.

It has never—until now—been suggested that these decisions are for anyone other than the people of Scotland. It has been said of the principle of self-government that—

“”

the people cannot decide until someone decides who are the people.²³

.....

For questions of Scotland's constitutional future, who the people are has been conclusively decided. In 1979, 1997 and 2014 the electorate for referendums about Scotland's place in the UK was the people living in Scotland alone. The decision was for them, not the UK as a whole or any other part of it, to take.

This is what it means for the people of Scotland to have the right to decide on their future. It is not enough that they can and have made choices in the past. Their right to make those choices in the future and at a time of their choosing must be respected.²⁴

Given that the people of Scotland have voted on manifestos containing pledges on an independence referendum, and have elected a Scottish Parliament where a majority of the MSPs support such a referendum, it risks substantial damage to democracy in Scotland, and the UK as a whole, if the UK Government continues to refuse to acknowledge that mandate, by refusing to enter into discussions with the Scottish Government.

To their credit, in 1997 and 2014 UK Governments acknowledged and accepted mandates delivered by the people of Scotland through elections, and enabled constitutional referendums to take place. The current UK Government's commitment to Scotland's right to choose will be tested by its willingness to acknowledge the Scottish Government's current mandate, reinforced in the recent General Election, and enter into discussions about it.

The Scottish Government does not believe that it is for the UK Government to decide whether to respect a mandate given by the people of Scotland to their government, endorsed by their Parliament.

The Scottish Government believes that both the UK Government and the law should now recognise the constitutional and political reality: that decisions about whether to hold a referendum on Scotland's constitutional future are for the Scottish Parliament, as the democratic voice of Scotland, to make.

This does not mean that the current Scottish Government proposes, or any Scottish Government would propose, that such referendums should become a regular part of the governance of Scotland. No political party or Scottish Government could expect to receive a mandate from people living in Scotland if it proposed an unwarranted referendum. If one did, it would be a matter to be resolved between the Scottish people and their Parliament. A Scottish Parliament which insisted on a referendum without the circumstances to justify it could expect to receive the verdict of the Scottish people on their judgment at parliamentary elections, as well as in any referendum itself. That is the nature of democratic accountability, and there is no reason that it should apply any differently to the question of whether a referendum should be held.

To make real this relationship between the people of Scotland and their decisions about their constitutional future, three things need to be enshrined in law—

- the right of the people of Scotland to choose the form of government best suited to their needs,
- the ability of the Scottish Parliament to choose whether and when to hold a referendum on Scotland's constitutional future, and
- the right of Scotland to become an independent country, should the people of Scotland vote for it to become one.

The Scotland Act 1998 recognises that the devolution settlement can be changed to transfer competences to the Scottish Parliament. There has been a consistent practice since devolution of the Scottish and UK Governments working together to consider and negotiate proposed adjustments to the devolution settlement. There is a well-established process for jointly producing and considering Scotland Act Orders and provisions in Bills for adjusting the devolution settlement. The Scotland Act 1998 makes clear that both the Scottish and UK Governments and Parliaments have a role in, and responsibility, for this process.

Powers to hold a referendum on independence can be transferred by Order under section 30 of that Act, as they were in 2013, or by an Act of the UK Parliament.

Annex B sets out draft provisions which would achieve this in a way that reflects the principles outlined in this paper.

These measures would enshrine in law the United Kingdom as a voluntary association of nations, and bring to life the promise that the people of Scotland—as has been repeatedly asserted—enjoy the right to choose their future.

The Scottish Government's mandate to hold a referendum

Summary

Following the 2011 Scottish Parliament elections, the Scottish Government's mandate to hold a referendum on independence was respected by the UK Government and Westminster.

A process was agreed which meant that the 2014 referendum was legislated for in Scotland, that the franchise was extended to those aged 16 and over, including EU citizens living in Scotland. That process was accepted by all participants as legal, decisive and fair.

But there has been a material change of circumstances since 2014, and the Scottish Government has a new electoral mandate to hold a referendum on independence.

This material change of circumstance is based on:

- the prospect of Scotland leaving the EU against its will, and
- what EU exit has revealed about Scotland's position within the UK.

Commitments were made during the independence referendum that the nations of the UK would be treated as a 'partnership of equals'; and commitments were made in response to the EU referendum that Scotland's views would be respected in the process of EU exit.

But the decisions of the people, parliament and government of Scotland have been ignored.

Following the precedent of 2011, the UK Government has a democratic duty to recognise the Scottish Government's mandate and take steps to ensure that a referendum legislated for in Scotland can take place.

The Scottish Government is committed to delivering a referendum on independence that is beyond legal challenge and held to the highest international standards, including through the Referendums (Scotland) Bill.

The EU referendum and the Scottish Government's mandate

Scotland's place in Europe was a major issue during the 2014 referendum campaign. The Scottish Government's policy was that an independent Scotland should continue as a member of the EU.²⁵ The Scottish Government argued that one of the benefits of independence was a stronger guarantee of continued participation in the European Union—

“”
The advantage of independence is that the people of Scotland will have the sole and final say. We will not be taken out of the EU against our wishes as may turn out to be the case if we are not independent.²⁶

.....
By contrast, those against independence argued that there was no threat to Scotland's place in Europe from a vote to stay in the United Kingdom, and that it was a vote for independence that represented the threat to Scotland's continuing EU membership.²⁷ The UK Government argued in support of Scotland staying part of the UK so that “Scotland benefits from the UK's status within the EU and terms of membership”.²⁸

Following a commitment in the 2015 Conservative party manifesto to hold a referendum on EU membership,²⁹ and the formation of a Conservative UK Government following that general election, the UK Parliament legislated for a referendum to be held.³⁰

At the time, the Conservative party had only one MP from Scotland, and 53 of the 59 MPs representing Scottish constituencies voted against the legislation. A proposal to give effect to commitments made during the independence referendum, by requiring majorities in all of the UK's nations before EU exit could take place, was rejected.³¹ Such arrangements are commonly required for significant constitutional changes in federal and quasi-federal states.

In advance of the referendum vote, the Scottish Parliament voted on an all-party basis in favour of remaining in the EU.³²

The Scottish National Party's manifesto for the 2016 Scottish parliamentary election, which took place shortly before the EU referendum, contained a commitment to give the people of Scotland a choice if certain conditions were met—

“”
We believe that the Scottish Parliament should have the right to hold another referendum if there is clear and sustained evidence that independence has become the preferred option of a majority of the Scottish people – or if there is a significant and material change in the circumstances that prevailed in 2014, such as Scotland being taken out of the EU against our will.³³

The SNP formed the government of Scotland after this election, based on that manifesto.

The EU referendum was held on 23 June 2016. In Scotland 62% of voters supported remaining in the EU, with a majority for remain in every Scottish council area; while in England and Wales only 47% of voters supported remain. Overall, across the UK, 17,410,742 people voted to leave and 16,141,241 voted to remain. This meant that Scotland, despite its vote to remain in the EU, faced EU exit against its will.

The Scottish Government accepted the result of the EU referendum, though the First Minister committed to exploring options to give effect to the votes of the people of Scotland, and to giving the people of Scotland a choice over their future.³⁴ The Scottish Parliament endorsed this approach,³⁵ and in March 2017 it mandated the Scottish Government to seek an agreement with the UK Government for an independence referendum at a time to be determined by the Scottish Parliament.³⁶

A mandate reinforced by the people of Scotland

The Scottish Government believes that events since 2016 have reinforced the mandate it has from the people of Scotland.

A majority of MSPs in the Scottish Parliament have voted to endorse that mandate.

The people of Scotland express their democratic will through elections. Their votes since the EU referendum demonstrate the continued force and relevance of the mandate the Scottish Government received in the 2016 Scottish Parliament elections.

In the 2017 UK general election, held after the EU referendum, a majority of Scottish MPs were returned on a manifesto that explicitly referenced the mandate from 2016–

“Last year’s Holyrood election delivered the democratic mandate for an independence referendum. The recent vote of Scotland’s national Parliament has underlined that mandate. If the SNP wins a majority of Scottish seats in this election, that would complete a triple lock, further reinforcing the democratic mandate which already exists.”

In the 2019 UK general election, held after the conclusion of UK-EU negotiations on a withdrawal agreement, a majority of Scottish MPs were returned on a manifesto that noted the Scottish Government’s mandate and asserted that–

- “the people of Scotland have the right to choose their own future in a new referendum on becoming an independent country,
- it must be for the Scottish Parliament, not Westminster, to decide when an independence referendum should be held—and the SNP intends that it will be in 2020.”

The material change of circumstances

There are two aspects of events since 2014 that amount to the material change in circumstances that justifies the people of Scotland again considering their place in the UK–

- Scotland is set to leave the EU against the wishes of the people of Scotland. Leaving the EU represents a fundamental change in the constitutional arrangements of the country, which will be particularly damaging to Scottish interests and which will take place without the support of the people of Scotland.
- The approach of the UK Government to the process of leaving the EU has demonstrated that the views and interests of Scotland can and will be set aside, despite claims that the UK is a partnership of equals.

The people of Scotland voted 'No' to independence in 2014 following a campaign in which commitments were made that such a vote would secure Scotland's place in Europe, and that the nations of the United Kingdom would, following the referendum, operate as a partnership of equals. But the United Kingdom, as a member of the EU, that Scotland voted to stay part of in 2014 no longer exists; and promises that were made about Scotland's place in it have not been lived up to.

No accommodation of Scotland's overwhelming vote to remain in the EU has been attempted by the UK Government. Instead, the UK Government has approached EU exit without regard to either the views of the devolved institutions or to the variation in the referendum results across the UK. Leaving the EU is a fundamental change to what the United Kingdom is and how it is governed. It is a change that will have a particular and profound impact on Scotland.

The EU's values are widely shared and respected in Scotland: respect for human rights and the rule of law, democracy, equality and solidarity. The EU's objectives, secured by common policies and by the European Single Market and Customs Union, are deliberated on and delivered by independent states co-operating for the common good within a rules-based framework of institutions and governance.

There is clear evidence and broad consensus that, in the medium- to long-term, any form of EU exit will have an enduring negative impact on UK and Scottish competitiveness and economic performance.³⁷ Moreover, the Scottish Government's analysis suggests that Scotland's rural areas will be amongst the most exposed to a no-deal shock.³⁸ Together, this suggests that not only will leaving the EU damage the UK and Scottish economies, but doing so is also likely to increase inequality across and between the areas of the UK.

The demographic impact of leaving the EU also has a particular and serious effect on Scotland. Any reduction in EU migration will have an acute effect on Scotland's population growth and demographic composition. A loss of EU workers in sectors such as healthcare or childcare will adversely affect areas already struggling to fill such jobs (such as deprived regions, and remote or rural communities). Scotland's working population could start to fall, hitting tax revenues as well as staffing levels in the NHS, social care and other public services.

In December 2016, the Scottish Government set out its position on what the votes in the EU referendum should mean for Scotland and how Scotland might be protected from the worst effects of EU exit.³⁹ *Scotland's Place in Europe* made proposals for giving effect to the result of the referendum falling

short of its preference of independence in the EU. The Scottish Government proposed the UK remaining in the European Single Market and Customs Union, or the option of a differentiated deal for Scotland to reflect its vote in the referendum. In her foreword, the First Minister said—



the way in which the Westminster Government responds to proposals put forward by the devolved administrations will tell us much about whether or not the UK is indeed a partnership of equals.

...

If the real and substantial risks that Brexit poses to Scotland's interests cannot be mitigated within the UK, the option of choosing a better future through independence should be open to the Scottish people.

The UK Government did not formally respond to the Scottish Government's proposals. Instead, in January 2017, and without any consultation with the devolved administrations, the then Prime Minister set out her ambition for a "hard Brexit". The UK Government dismissed the option of the UK remaining in the European Single Market and Customs Union, and dismissed the possibility of a differentiated deal for Scotland. The Article 50 letter, beginning the formal process of EU withdrawal, was then sent by the Prime Minister in March 2017 without having been shared with the devolved administrations and without any advance consultation on either content or timing.

This lack of consultation took place only a few months after commitments were given by the UK Government in October 2016 to "full engagement" with the devolved administrations over EU exit and to ensuring

that "the interests of all parts of the United Kingdom are protected and advanced". A new Joint Ministerial Committee on EU Negotiations (the JMC EN) was set up with terms of reference which gave it the role of seeking "to agree a UK approach to, and objectives for, Article 50 negotiations".⁴⁰

The JMC EN was never used to discuss or agree an approach to EU exit which took account of the interests of the different nations of the UK. Instead, the UK Government pursued a form of withdrawal which did not have the support of the Scottish Government, Scottish Parliament or the people who live in Scotland. The JMC EN did not even meet between 9 February and 16 October 2017, a key period for the negotiations of the initial withdrawal agreement, during which the UK Government published several documents setting out its approach to EU negotiations.⁴¹

Promises of a negotiating position that took account of the interests of the nations of the UK were unfulfilled.

Throughout the negotiation of the Withdrawal Agreement and Political Declaration, at all key moments, the Scottish Government were consistently informed of the substance of the UK Government's position only at the time of publication.⁴² Beyond the lack of sharing of information to enable the JMC EN to exercise its functions effectively, at no stage were the devolved administrations involved as equal partners in shaping either the withdrawal agreement or the framework for the future relationship.

In July 2018, the UK Government published a White Paper on the Future Relationship with the European Union, having shared only four short sections of that paper for comment in advance and providing an embargoed copy at

1am ahead of publication the same morning. Neither the JMC EN nor bilateral engagement with the devolved administrations were involved in developing and agreeing that paper or the approach to the future relationship with the EU it proposed.

Under the current UK Government, meaningful engagement with the Scottish Government over prospective EU exit has deteriorated even further.

The Scottish Parliament has consistently voted against the UK Government's proposals for EU withdrawal.⁴³ In September 2016, it voted on a cross-party basis in favour of Scotland remaining in the European Single Market, and for the Scottish Government to participate fully in the UK-EU withdrawal negotiations.⁴⁴ In line with the vote of the Scottish people, the Scottish Parliament has voted repeatedly against both a no-deal exit from the EU and against the withdrawal agreements concluded by the UK Government.⁴⁵

Even devolution, itself overwhelmingly endorsed in a referendum in 1997, has been compromised by the UK Government's approach to EU exit. The European Union (Withdrawal) Bill, as introduced, sought to prevent powers over devolved matters returning to the devolved legislatures in the event of EU exit.⁴⁶ When the Scottish Parliament withheld its consent to that Bill its decision was overruled.⁴⁷ And when the Scottish Parliament sought to prepare itself for the devolved consequences of EU withdrawal, the UK Government changed the law to prevent it from doing so,⁴⁸ undermining a fundamental principle of the devolution settlement. The UK Supreme Court held that the Scottish Parliament did, contrary to the arguments of the UK Government, have the competence to prepare devolved law for the effects of EU exit.⁴⁹

The Scottish Government has therefore concluded that there has been a material change in circumstances since 2014. This material change arises from both the prospect of leaving the EU without popular support in Scotland, and from what events since 2016 have demonstrated about Scotland's position in the UK and the ability of devolved institutions within the UK to protect Scotland's interests. In summary–

- Scotland voted by a significant margin to remain in the EU but is now faced with the prospect of leaving.
- Scotland's vote to remain has not been recognised in any aspect of the UK Government's approach to EU exit or its negotiation of withdrawal agreements.
- Commitments to involve the devolved administrations in setting UK negotiating objectives have been ignored. The Scottish Government's proposals for compromise were dismissed.
- Leaving the EU will have a particular and damaging effect on Scotland and Scotland's interests.
- All-party and cross-party votes of the Scottish Parliament have been ignored, and the Scottish Parliament's powers reduced without its consent.

The people living in Scotland should therefore be asked to reconsider the future of their country, in line with the manifesto commitments in the 2016 Scottish elections and the 2017 and, most recently, 2019 Westminster elections. These votes provide a clear mandate to the current Scottish Government.

Scotland's democratic deficit and the EU referendum

The EU referendum was held in June 2016 by a Conservative Government, which at that time had just one MP in Scotland. The decision to hold the referendum was therefore taken against the wishes of the clear majority of people in Scotland. While having particularly important consequences, the Brexit process is just one example of what has been called "the democratic deficit": the situation in which Scotland is governed from Westminster by governments that have failed to win most seats in Scotland and are often in office with only a small proportion of the vote in Scotland. For 40 of the 74 years since 1945, more than half of the post-war period, Scotland has been ruled by governments elected by fewer than half of Scottish constituencies.

The main advantage of independence is that Scotland's choices will determine Scotland's future. The experience of EU exit demonstrates this. The votes of the people of Scotland and of its democratic representatives in both Parliaments have had no effect on Scotland's place in Europe, or on the UK's approach to EU negotiations.



2015:

53 of Scotland's **59** MPs vote **against** holding the **EU referendum**.



2016:

the people of Scotland vote by **62%** to **38%** to stay in the EU.



2016:

Only one of Scotland's **59** MPs votes **to trigger** notification of **EU exit** under Article 50.



2017:

69 of Scotland's **129** MSPs vote to mandate the Scottish Government to **agree a referendum** on independence with the UK Government.



2017:

in the General Election, **35** of Scotland's **59** MPs are elected on a manifesto commitment that "when the final terms of the deal are known, it is right that **Scotland should have a real choice about our future.**"



2018:

46 of Scotland's **59** MPs voted **against** the passage of the EU (Withdrawal) Bill



2018:

93 of Scotland's **129** MSPs vote **not to consent** to the EU (Withdrawal) Bill. The Bill passes regardless, and **restricts the powers of the Scottish Parliament** to prepare for EU exit.



2019:

in the General Election, **53** of Scotland's newly elected **59** MPs **are committed** to a further referendum on EU membership. **47** of **59** are elected on an SNP manifesto commitment referencing and reinforcing the Scottish Government's mandate in respect of an independence referendum.

A process for agreeing the terms of this referendum should therefore now begin. The Scottish Government considers that the mandate it received in the 2011 Scottish parliamentary elections, and the negotiation and agreement that followed, represents a precedent for the way in which governments in these islands should acknowledge and respect the principle of self-determination.

The precedent of 2011 and the road to the 2014 referendum

In 2011, the Scottish National Party's manifesto contained a commitment for a referendum on independence to be held in the following session of the Scottish Parliament.⁵⁰ Following that election, the SNP formed a government with a mandate to hold a referendum.

The UK Government accepted the Scottish Government's mandate, and accepted that it was based on the SNP manifesto pledge for a referendum on independence.

In January 2012, in a consultation on an independence referendum in Scotland, the then Prime Minister and Deputy Prime Minister said—

“”

The Scottish National Party entered the May 2011 election with a manifesto pledge for a referendum on independence. They have campaigned consistently for independence, and while the UK Government does not believe this is in the interests of Scotland, or the rest of the United Kingdom, we will not stand in the way of a referendum on independence: the future of Scotland's place within the United Kingdom is for people in Scotland to vote on.⁵¹

In January 2012, the Scottish Government published a consultation on its proposals for organising, running and regulating the referendum.⁵² It set out plans for a referendum legislated for in the Scottish Parliament, and conducted to the highest international standards.⁵³ That consultation paper also committed the Scottish Government to working with the UK Government to agree a legal basis for the referendum that would put it beyond challenge.⁵⁴

The UK Government acknowledged that it would not be appropriate to seek to prevent a referendum from taking place. Instead, it accepted that it had a duty to facilitate one,⁵⁵ and acknowledged that such a referendum should be “made in Scotland”.⁵⁶

The Scottish Government and UK Government then entered into constructive discussions. These discussions were not about whether the Scottish Government had a mandate to hold a referendum, nor whether such a referendum should be legislated for in Scotland. They were concerned with how the question over the competence of the Scottish Parliament to legislate for a referendum could best be put beyond doubt, and about certain matters relating to the conduct of the referendum that both governments wished to see addressed.

Agreement was reached in October 2012. Known as the ‘Edinburgh Agreement’, this expressed both governments’ intention that the referendum should—

“”

- have a clear legal base;
- be legislated for by the Scottish Parliament;
- be conducted so as to command the confidence of parliaments, governments and people; and
- deliver a fair test and a decisive expression of the views of people in Scotland and a result that everyone will respect.⁵⁷

The Edinburgh Agreement also committed both governments to working together constructively following the referendum result.⁵⁸

Following the Edinburgh Agreement, the UK Government and Scottish Government promoted an Order in Council under section 30 of the Scotland Act 1998 to allow a referendum to be held before the end of 2014.⁵⁹ This Section 30 Order was approved in the Scottish Parliament⁶⁰ and in both Houses of the UK Parliament.⁶¹ It became law on 13 February 2013. It clarified that a referendum on independence would be within the powers of the Scottish Parliament provided that it was held before the end of 2014 and gave voters a single choice between two alternatives.

Two Bills were passed in the Scottish Parliament to allow the referendum to take place–

- The Scottish Independence Referendum (Franchise) Bill set out who was entitled to vote, on a franchise including 16 and 17-year-olds and EU citizens.
- The Scottish Independence Referendum Bill set out the question that would be asked in the referendum, provided rules for the conduct of the referendum and the counting of votes, and set out the referendum campaign rules, including the role of the Electoral Commission.

On 18 September 2014, the people of Scotland were asked 'Should Scotland become an independent country?' 2,001,926 votes were cast for 'No', and 1,617,989 votes were cast for 'Yes'. The result of the referendum was accepted by the Scottish Government.

The Electoral Commission concluded that the 2014 independence referendum was "well run".⁶²

A referendum made in Scotland

The Scottish Government is committed to the rule of law.

In 2014, the independence referendum was held on an agreed basis. Both the UK and Scottish Governments agreed that the referendum should be held, agreed its timing and its franchise, and agreed to respect the result.

The Scottish Government is committed to agreeing a process for giving effect to its mandate for a further independence referendum. When they make a decision about their future, the people of Scotland must do so in the knowledge that their decision will be heard and respected and given effect to: not just by the government in Scotland, but also by the UK Government, by the European Union and by the international community.

For a referendum to have this legitimacy, it must have the confidence of all of those that it would effect. This means not just the UK Government acknowledging and respecting the Scottish Government's mandate, but the Scottish Government and UK Government seeking to agree the proper lawful basis for the referendum to take place.

Ultimately, this will mean that in the event of a vote for independence, the decision of the people of Scotland to become independent will be recognised and respected in these islands, in Europe, and internationally. Scotland will have become an independent state, constitutionally and lawfully.

A model for recognising a mandate

The Scottish and UK Governments may not have agreed in 2012 about whether Scotland should become an independent country, but they agreed that such a decision was for the people of Scotland alone to take. They agreed that the Scottish Government had a mandate to hold a referendum following the 2011 elections, given the support of a majority of members of the Scottish Parliament for such a referendum. They agreed that the Scottish Parliament should be responsible for delivering the referendum. And they agreed that both governments had a duty, despite their different perspectives on the question, to respect the democratic principle that the question of Scotland's future should be decided in Scotland and to agree a lawful process for allowing the people of Scotland to decide.

That level of agreement was in accordance with well-established principles of good government, and with the democratic reality that the views of the people of Scotland on matters of national importance are expressed through elections. And it was in accordance with the principle—accepted by the Scottish and UK Parliaments and Governments—that the people of Scotland have the right to determine the form of government best suited to their needs.

The UK Government accepted in 2011 that a mandate to hold a referendum could be communicated by the people of Scotland through elections to the Scottish Parliament, and through the formation of a Scottish Government. As the then-Secretary of State for Scotland said—

“”

This process began with the Scottish National Party's victory in the May 2011 Scottish parliamentary elections and its manifesto pledge to hold an independence referendum. From the very beginning, we recognised the political mandate that the SNP had secured for a referendum.⁶³

Following the experience of 2011, governments in Scotland, political parties in Scotland and, most importantly, the people voting in Scottish parliamentary elections will have made decisions about their policies, their manifestos and their votes in the expectation that electoral mandates would be respected.

The Scottish Government is clear that its preference is for a referendum to be held in 2020. This would allow, in the event of a vote for independence, the smoothest transition to an independent Scotland taking its place as a member state of the European Union. There would be clear advantages in Scotland being able to make a decision about its future as an independent country in Europe before any process of divergence between UK and EU law has begun. Other parties have expressed their views about the appropriate timing of a future referendum.⁶⁴ These are contributions to a debate that, in the Scottish Government's view, is one for the Scottish Parliament to have and ultimately to decide on.

The Scottish Government is already taking steps to ensure that a referendum could be delivered to its preferred timetable through the Referendums (Scotland) Bill, which provides a framework for holding referendums in Scotland. The precedent

of 2011 provides a basis for the Scottish and UK Governments to come to swift agreement over the legislation required to put beyond doubt the Scottish Parliament's power to use the Referendums Bill to hold an independence referendum.

The decision whether and when that referendum should be held ought to be for the Scottish Parliament, empowered to make such decisions by the people who live here. The Parliament is the democratic voice of the people of Scotland, and the inheritor of Scottish constitutional tradition.

We call on the UK Government to enter discussions about the Scottish Government's mandate for giving the people of Scotland a choice, and to agree legislation with the Scottish Government that would put beyond doubt the Scottish Parliament's right to legislate for a referendum on independence.

Annex A: Scotland as a nation – its constitutional story so far

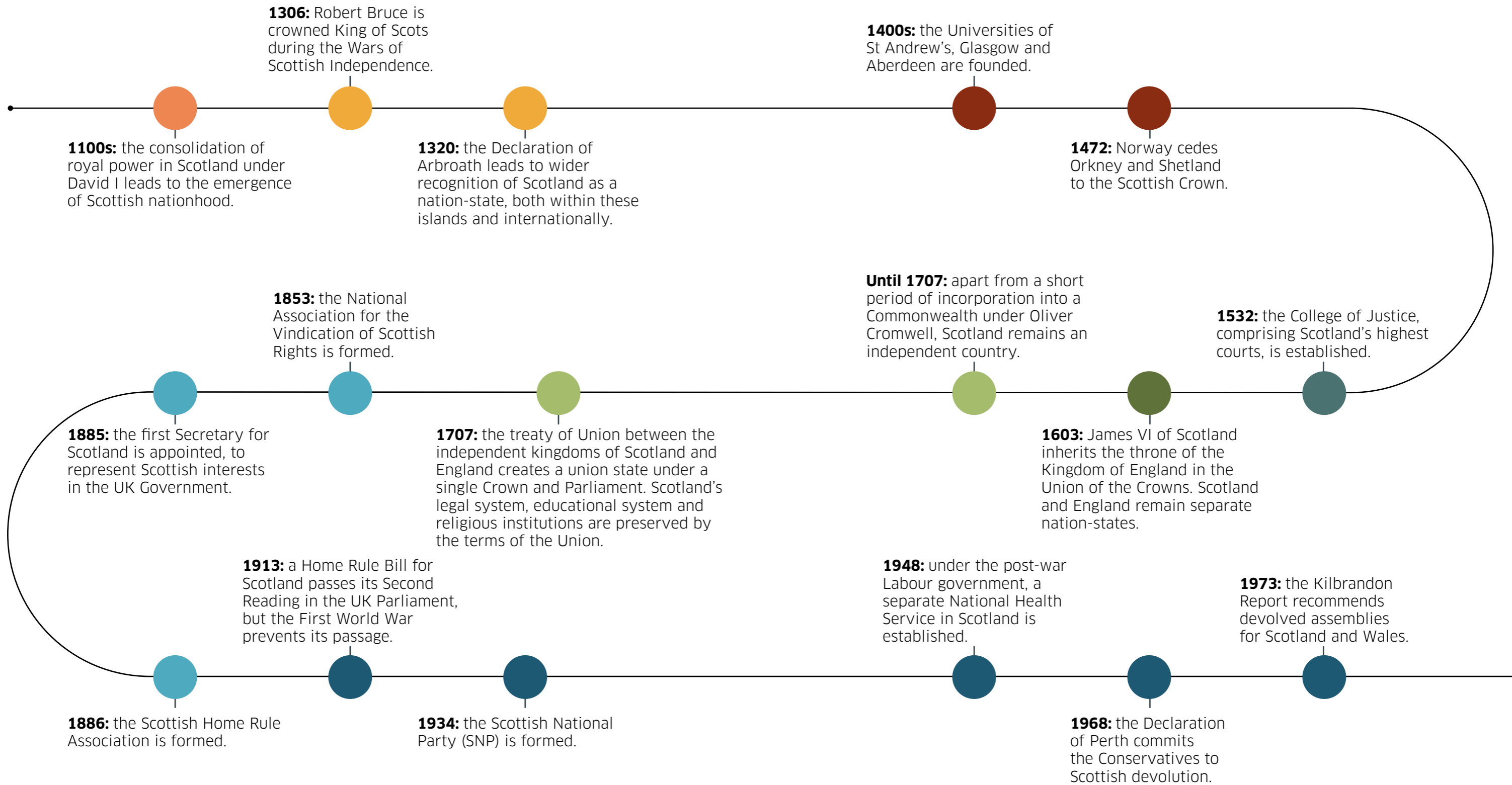
Scotland is a nation, with the institutions of a nation. Following the political union of the two Kingdoms and Parliaments, distinct legal and national institutions were retained in Scotland: the separate Scottish legal system and courts system, separate local government in Scotland, a distinctive tradition in university and school governance, and the independence of the Scottish church. The Lord Advocate and Solicitor General for Scotland were retained as ministerial offices in respect of Scotland. Nationhood persisted.⁶⁵

Administrative devolution—the separate ministerial and official discharging of domestic responsibilities in Scotland—developed in 1885, with the appointment of the Secretary for Scotland. From 1892, this minister sat in Cabinet, and from 1926 was renamed the Secretary of State for Scotland, with full Cabinet rank. Administrative devolution recognised the different needs of Scotland and the different institutional architecture of the state in Scotland.

At various points in the 20th century all major political parties supported an assembly or parliament in Scotland. In 1997, following a pledge in the Labour manifesto, a referendum was held in Scotland on the establishment of a Scottish Parliament. The Scottish people voted by a large margin for the Scottish Parliament and for tax-varying powers, and it was opened in July 1999.

Through the 20th and 21st centuries, both before and after devolution, Scotland developed its national institutions: a Scottish NHS was established after the Second World War, and further devolution since 2012 has led to the establishment of national Scottish bodies for the collection of tax and for the administration of social security. The Scottish judiciary, courts and prosecution services already operate in a number of international forums, with the Crown Office, the Scottish courts and Police Scotland independently participating in structures for European judicial and prosecutorial cooperation. The Scottish Government's international offices and programmes of international development represent and promote Scotland internationally.

Timeline



Annex B: draft legislation

The people of Scotland have the right to determine the form of government best suited to their needs. The Scottish Government believes that the law should reflect this.

The Scottish Government also believes that when the people of Scotland are invited to make a choice about their future, they should do so understanding what the consequences of their vote would be; and with a guarantee that any vote to become independent would be respected and acted upon by the UK Government.

The experience of the EU referendum has demonstrated some of the risks involved in inviting a vote on a significant constitutional proposition without setting out in advance the consequences of a vote for change. The Scottish Government has therefore prepared the legal provisions that, in its view, would best give effect to both the principle that it is for the Scottish Parliament to determine whether and when any vote on Scottish independence is held, and give effect to the principle that should the people of Scotland vote in a referendum for independence, Scotland would have the right to prepare itself for independence.

Recognising Scotland's right to choose

1 Scotland's right to self-determination

- (1) The Scotland Act 1998 is modified as follows.
- (2) After section 63A insert—

“63B Scotland's right to self-determination

- (1) It is recognised that the people of Scotland have the right to determine the form of government best suited to their needs.
 - (2) The purpose of this section is to signify the commitment of the Parliament and Government of the United Kingdom to the people of Scotland's right to self-determination.”
- (3) The title of Part 2A becomes “The people of Scotland's right to decide their constitutional future”.

This provision would place in statute a recognition of the principle set out in the Claim of Right 1989: that it is for the people of Scotland to decide the form of government best suited to their needs.

This provision would be amended into the Scotland Act 1998, alongside other constitutional provision relating to Scotland. It would, as a result, sit alongside the provision respecting the permanence of the Scottish Parliament and Government. Part 2A of the Scotland Act would then provide that the Scottish Parliament and Government cannot be abolished without a referendum being held, and contain an affirmation of the people of Scotland's right to self-determination. Both statements would complement each other, as expressions of the right of the people of Scotland to determine their constitutional future.

The power to hold an independence referendum

2 Scottish Parliament's competence to legislate for an independence referendum

In Part 1 of schedule 5 of the Scotland Act 1998 (general reservations), after paragraph 5 insert—

“5A Paragraph 1 does not reserve a referendum on the independence of Scotland from the rest of the United Kingdom.”.

These provisions would put beyond doubt that the Scottish Parliament has the competence to legislate for a referendum on the subject of Scottish independence.

Schedule 5 of the Scotland Act 1998 sets out the matters reserved to the UK Parliament, and therefore outwith the competence of the Scottish Parliament. This includes certain aspects of the constitution. This amendment to Schedule 5 of the Scotland Act would clarify that this reservation does not include the holding of a referendum on Scottish independence.

This amendment could be made in either an Order in Council under section 30 of the Scotland Act, as was done for the 2014 referendum, or by an Act of the UK Parliament. The section 30 Order passed for the 2014 referendum contained conditions as to its conduct and timing. Any conditions which the governments agreed for the transfer of power over the holding of a referendum could be included in either a Section 30 Order or an Act, as required.

Further reserved provision relating to the conduct of the referendum would be required, as it was for the referendum held in 2014, such as providing for referendum campaign broadcasts.

Recognising the UK as a voluntary association of nations

3 Duty of both Governments to cooperate following a vote for Scottish independence

After section 63B of the Scotland Act 1998 (inserted by section 1 of this Act) insert—

“PART 2B

PREPARATIONS FOLLOWING A VOTE FOR SCOTTISH INDEPENDENCE

63C Duty of both Governments to cooperate

The Scottish Government and the Government of the United Kingdom must work together in the interests of the people of Scotland and the people of the rest of the United Kingdom respectively with a view to securing that the decision of the people of Scotland that Scotland should become an independent State is given effect to as quickly, fairly and effectively as possible.”.

- (1) The Scotland Act 1998 is modified as follows.
- (2) In section 29 (legislative competence) after subsection (5) insert—
 - “(6) Subsection (2) is subject to section 63D.”.
- (3) After section 63C (inserted by section 3 of this Act) insert—

“63D Extension of legislative competence

- (1) A provision of an Act of the Scottish Parliament is not outside the legislative competence of the Parliament if—
 - (a) the provision would be outside that competence (but for this section) by virtue of paragraph (b) or (c) of subsection (2) of section 29,
 - (b) the provision is not outside that competence by virtue of paragraph (a), (d) or (e) of that subsection, and
 - (c) the Act provides that the provision does not come into force, and may not be brought into force, before independence day.
- (2) A provision of an Act of the Scottish Parliament is not outside the legislative competence of the Parliament if it specifies, or confers the function of specifying, the day on which Scotland becomes an independent State.
- (3) In subsection (1), “independence day” means the day specified by virtue of an Act of the Scottish Parliament as the day on which Scotland becomes an independent State.”.

5 Extension of executive competence

- (1) The Scotland Act 1998 is modified as follows.
- (2) In section 53 (general transfer of functions), after subsection (1) insert—
 - “(1A) The reference in subsection (1) to a function being exercisable within devolved competence does not include a function so far as it is exercisable within devolved competence by virtue of section 63E.”.
- (3) In section 54 (devolved competence)—
 - (a) in subsection (1) after “this section” insert “and section 63E”,
 - (b) after subsection (3) insert—
 - “(4) The following questions are to be determined, for the purposes of this section, without regard to section 63D—
 - (a) whether a provision would be outside the legislative competence of the Parliament if it were included in an Act of the Scottish Parliament, and
 - (b) whether a provision of an Act of the Scottish Parliament conferring a function (or, as the case may be, conferring a function so as to be exercisable in a particular way) would be outside the legislative competence of the Parliament.”.
- (4) After section 63D (inserted by section 4 of this Act) insert—

“63E Scottish Ministers’ powers to prepare for independence

- (1) Despite section 54(2) and (3), it is within devolved competence to exercise a function for the purpose of preparing for Scotland becoming an independent State.
- (2) The functions mentioned in subsection (3) are, so far as they are—

- (a) exercisable within devolved competence by virtue of subsection (1), and
 - (b) not otherwise exercisable within devolved competence,
- exercisable by the Scottish Ministers as well as by a Minister of the Crown.
- (3) Those functions are—
 - (a) those of Her Majesty's prerogative and other executive functions which are exercisable on behalf of Her Majesty by a Minister of the Crown,
 - (b) other functions conferred on a Minister of the Crown by a prerogative instrument,
 - (c) functions conferred on a Minister of the Crown by any enactment (whenever passed or made).
 - (4) Subordinate legislation made by virtue of subsection (2) may not be made so as to come into force before independence day (as defined in section 63D(3)).
 - (5) In relation a function that is exercisable within devolved competence by virtue of this section, references to a pre-commencement enactment in sections 117 to 122 are to be read as references to any enactment (whenever passed or made)."

6 Further powers to prepare ahead of independence day

After section 63E of the Scotland Act 1998 (inserted by section 5 of this Act) insert—

“63F Power to prepare for enactments coming into force after independence day

- (1) A public authority may take any step that the authority considers necessary or expedient in anticipation of the coming into force of—
 - (a) a provision of an Act of the Scottish Parliament that is within the legislative competence of the Parliament by virtue of section 63D, or
 - (b) a provision contained in subordinate legislation made—
 - (i) by virtue of such an Act, or
 - (ii) by virtue of section 63E.
- (2) Such steps include—
 - (a) making, confirming or approving subordinate legislation,
 - (b) establishing bodies corporate,
 - (b) making appointments,
 - (c) giving notices or documents,
 - (d) prescribing forms.
- (3) Nothing in this section permits subordinate legislation to be brought into force before the provision conferring the power to make it comes into force.
- (4) In subsection (1), “public authority” means any public body, public office or holder of such an office.”

7 Restriction on commencing certain enactments before independence day

After section 63F of the Scotland Act 1998 (inserted by section 6 of this Act) insert—

“63G Restriction on commencing certain enactments before independence day

An enactment that purports to bring any of the following into force before independence day (as defined in section 63D(3)) is of no effect—

- (a) a provision of an Act of the Scottish Parliament that is within the legislative competence of the Parliament by virtue of section 63D,
- (b) a provision contained in subordinate legislation made—
 - (i) by virtue of such an Act, or
 - (ii) by virtue of section 63E.”.

8 Commencement

- (1) This following come into force on the day after Royal Assent: sections 1 and 2 and this section.
- (2) The other sections come into force only in the event that a majority of the people of Scotland vote for Scotland to become an independent State in a referendum held under, or by virtue of, an Act of the Scottish Parliament.
- (3) In that event, the other sections come into force—
 - (a) on the day after the period for legally challenging the result of the referendum expires without such a challenge being brought, or
 - (b) if, before the period expired, such a challenge has been brought and it has not been finally concluded when the period expired, on the day after the challenge is finally concluded.
- (4) For the purposes of subsection (3)—
 - (a) references to a legal challenge to the result of the referendum are to proceedings questioning the number of ballot papers counted or votes cast in the referendum,
 - (b) a legal challenge is finally concluded when—
 - (i) the proceedings before the Outer House of the Court of Session have been withdrawn, dismissed or otherwise discontinued and (ignoring any power of the Inner House of the Court to grant permission to take a step out of time) no further step can be taken,
 - (ii) an appeal to the Inner House of the Court of Session against the final decision of the Outer House in the proceedings has been withdrawn, dismissed or otherwise discontinued and (ignoring any power of the Supreme Court to grant permission to take a step out of time) no further step can be taken, or
 - (iii) an appeal to the Supreme Court against the final decision of the Inner House of the Court of Session has been withdrawn, dismissed or otherwise discontinued.

These provisions are designed to only become legally effective should there be a vote in a referendum by the people of Scotland for Scotland to become independent, and the period for challenging the referendum result had expired. They would therefore provide, in advance, for the immediate legal consequences of any vote for independence.

These provisions would require the Scottish Government and the UK Government to work together in the interests of the people of Scotland and the rest of the UK respectively, to ensure that any vote by the people of Scotland to become independent is given effect to. It would be in the interests of Scotland and the rest of the UK that the responsibilities of each government in the event of a vote for Scottish independence are clear and understood.

These provisions would also, in the event of the people of Scotland voting for Scotland to become independent, transfer competence to make preparations for independence to the Scottish Parliament and Government and to public authorities more widely. This would enable the bulk of the preparations required for Scotland to become independent to take place in Scotland. It would also enable the debate about how best to approach these preparations to take place in Scotland and to begin shortly after any vote to become independent.

Much of the legislative preparation for independence required would not have to come into effect until independence, but these provisions allow for some preparations to take effect earlier where this would be appropriate.

The UK Parliament would retain the ability to legislate for Scotland and the UK Government would retain the ability to act in Scotland during the transition to independence.

Some legislative preparation for independence would be necessary in the UK Parliament. The removal of Westminster's ability to legislate for Scotland, for example, would not occur until the point of independence itself, and would require Westminster legislation.

Endnotes

- 1 For example, "And if the Union is to flourish in the future a more concerted recognition of Scotland's status as a nation will be necessary. It should be a mark of Scotland's self-confidence in her own status as a nation that she shares her sovereignty with the other parts of the United Kingdom. But the willingness to share that sovereignty must never be taken for granted." Scotland in the Union: a partnership for good. HMSO, 1993 (Cmnd. 2225); "Scotland is a proud historic nation in the United Kingdom and the plans we put forward in this White Paper will give it an exciting new role within the United Kingdom." Scotland's Parliament. HMSO, 1997 (Cmnd. 3658); "as a nation, [the Scots] have an undoubted right to national self-determination; thus far they have exercised that right by joining and remaining in the Union. Should they determine on independence no English party or politician would stand in their way." Thatcher, M., *The Downing Street Years*. 1993; "Scotland is not a region, but a member nation of the United Kingdom". Submission to the Kilbrandon Commission by the Labour Party. 1970.
- 2 Joint statement by the leaders of the Scottish Conservatives, Scottish Labour Party and Scottish Liberal Democrats. June 2014. Available at www.centreonconstitutionalchange.ac.uk/news_opinion/joint-statement-more-devolution-uk.
- 3 "successive UK Governments have said that, should a majority of people in any part of the multi-national UK express a clear desire to leave it through a fair and democratic process, the UK Government would not seek to prevent that happening." Scotland analysis: devolution and the implications of Scottish independence. HMSO, 2013 (Cmnd. 8554).
- 4 A Claim of Right for Scotland. The Campaign for a Scottish Assembly. 1989.
- 5 The Scottish Parliament on 26 January 2012, and the House of Commons on 4 July 2018.
- 6 "Our Union rests on and is defined by the support of its people ... it will endure as long as people want it to—for as long as it enjoys the popular support of the people of Scotland and Wales, England and Northern Ireland". Prime Minister Theresa May. Speech on the Union. 4 July 2019.
- 7 "Scotland is a nation and voluntarily entered into Union with England as a partner and not as a dependency". Report of the Royal Commission on Scottish Affairs. HMSO, 1954 (Cmnd. 9212); "The Acts of Union of 1707 [...] marked the beginning of a single multi-nation state." Scotland analysis: devolution and the implications of Scottish independence. HMSO, 2013 (Cmnd. 8554); McCormick, N., Is There a Constitutional Path to Independence? *Parliamentary Affairs*, Vol. 53(4), 2000, pp.721-736; Brazier, R., The Constitution of the United Kingdom (1999) *Cambridge Law Journal*, Vol. 58, 1999, pp. 96-128; Walker, N., Beyond the Unitary Conception of the United Kingdom? *Public Law*, Autumn 2000, pp. 384-404; Feldman, D., One, None or Several? Perspectives on the UK's Constitution(s), *Cambridge Law Journal*, 2005, Vol. 64 (2), pp. 329-351; Walker, N., Out of Place and Out of Time: Law's Fading Co-ordinates, *Edinburgh Law Review*, 2010, vol. 14 (1), pp.13-46.
- 8 The UK Government and Irish Government agreed to "(i) recognise the legitimacy of whatever choice is freely exercised by a majority of the people of Northern Ireland with regard to its status, whether they prefer to continue to support the Union with Great Britain or a sovereign united Ireland; (ii) recognise that it is for the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right of self-determination on the basis of consent, freely and concurrently given, North and South, to bring about a united Ireland, if that is their wish, accepting that this right must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland". Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (known as the 'Good Friday Agreement'). April 1998.
- 9 The Northern Ireland Act 1998, ch. 47, Schedule 1: "1. The Secretary of State may by order direct the holding of a poll for the purposes of section 1 on a date specified in the order. 2. ... the Secretary of State shall exercise the power under paragraph 1 if at any time it appears likely to him that a majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland." The Constitution Unit has expressed the view that this condition could be satisfied by the Northern Ireland Assembly calling for a poll: A Northern Ireland Border Poll. The Constitution Unit. University College London, 2019, p. 7.
- 10 "[The parties] affirm that if in the future the people of the island of Ireland exercise their right of self-determination on the basis set out in sections (i) and (ii) above to bring about a united Ireland, it will be a binding obligation on both Governments to introduce and support in their respective Parliaments legislation to give effect to that wish." Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (known as the 'Good Friday Agreement'). April 1998.
- 11 The Smith Commission, Report of the Smith Commission for further devolution of powers to the Scottish Parliament. 2014. p.12.
- 12 Explanatory Notes to the Act of Union Bill. Constitution Reform Group. 2018.
- 13 Act of Union Bill, clause 1 'status of United Kingdom'. The Bill received its first reading in the House of Lords on 9 October 2018.
- 14 See, for example, Green, D.A., Escaping the shadow of AV Dicey and putting parliament in its place, *Prospect*, Nov 2019.

- 15 "The Union between Scotland and the other nations of the UK did not remove from the people of Scotland their fundamental political right to determine their constitutional future [...] The people of Scotland remain sovereign and have the same right to choose the form of their own Government as the people of other nations that have secured independence after periods of union with, or in, other states." Scottish Government. Choosing Scotland's future—a national conversation: independence and responsibility in the modern world. 2007. See also, for example, Buchanan, G., *De jure Regni Apud Scotos*. Saltire Society, 2006; or MacCormick, N., *Questioning Sovereignty*. Oxford University Press, 1999. For a critical analysis of the historic claim of popular sovereignty, see Kidd, C. *Sovereignty and the Scottish Constitution Before 1707*, *Juridical Review*, 2004, pp. 225-236.
- 16 Most famously by Lord President Cooper in the case of *MacCormick v Lord Advocate*, 1953 SC 396, where he said "The principle of the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constitutional law. It derives its origin from Coke and Blackstone, and was widely popularised during the nineteenth century by Bagehot and Dicey, the latter having stated the doctrine in its classic form in his *Law of the Constitution*. Considering that the Union legislation extinguished the Parliaments of Scotland and England and replaced them by a new Parliament, I have difficulty in seeing why it should have been supposed that the new Parliament of Great Britain must inherit all the peculiar characteristics of the English Parliament but none of the Scottish Parliament, as if all that happened in 1707 was that Scottish representatives were admitted to the Parliament of England. That is not what was done."
- 17 See, for example, the comments of Lord Hope of Craighead in *Axa General Insurance v. Lord Advocate* [2011] UKSC 46, para. 46: "The Scottish Parliament takes its place under our constitutional arrangements as a self-standing democratically elected legislature. Its democratic mandate to make laws for the people of Scotland is beyond question". The primary responsibility of the Scottish Parliament in relation to matters within its competence is acknowledged, as a matter of constitutional convention, by the legislative consent convention (known as the 'Sewel Convention'), and by the arrangements for the Scottish Government's accountability to the Scottish Parliament for matters within its competence.
- 18 "(1)The Scottish Parliament and the Scottish Government are a permanent part of the United Kingdom's constitutional arrangements. (2)The purpose of this section is, with due regard to the other provisions of this Act, to signify the commitment of the Parliament and Government of the United Kingdom to the Scottish Parliament and the Scottish Government. (3)In view of that commitment it is declared that the Scottish Parliament and the Scottish Government are not to be abolished except on the basis of a decision of the people of Scotland voting in a referendum." The Scotland Act 1998. c. 46, section 63A.
- 19 For example, see the cases of *R (Jackson) v Attorney General* [2005] UKHL 56; *AXA General Insurance Limited and others v The Lord Advocate and others* [2011] UKSC 46; *Imperial Tobacco Limited v the Lord Advocate*, [2012] UKSC 61; *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; and *R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland* [2019] UKSC 41.
- 20 The European Union (Withdrawal Agreement) Bill 2019, clause 36. See also the Legislative Consent Memorandum for the European Union (Withdrawal Agreement) Bill 2019, Scottish Government.
- 21 *Reforming our Union: shared governance in the UK*. Welsh Government. 2019.
- 22 *Reforming our Union: shared governance in the UK*. Welsh Government. 2019.
- 23 Jennings, I., *The approach to self-government*. Cambridge University Press. 1956.
- 24 "no nation could be held irrevocably in a Union against its will". Prime Minister John Major. *Scotland in the Union: a partnership for good*. HMSO, 1993 (Cmnd. 2225)
- 25 "Following a vote for independence the Scottish Government will immediately seek discussions with the Westminster Government, with member states and with the institutions of the EU to agree the process whereby a smooth transition to independent EU membership can take place on the day Scotland becomes an independent country." *Scotland's future: your guide to an independent Scotland*. Scottish Government. 2013.
- 26 *Scotland's future: your guide to an independent Scotland*. Scottish Government. 2013.
- 27 For example, "It's disingenuous to say No means out and Yes means in, when actually the opposite is true. No means we stay in, we are members of the European Union." Leader of the Scottish Conservative Party Ruth Davidson, STV referendum debate, 2 September 2014; "[The Scottish Government] want to try and pretend that if we stay in the United Kingdom we will be out. What we have got in the United Kingdom is three party leaders - Nick Clegg, Ed Miliband and David Cameron - all who say that they support the continued membership of the European Union. The only guaranteed way of leaving the European Union is to leave the United Kingdom." Secretary of State for Scotland, Alistair Carmichael, *Scotland Tonight Debate*, 28 November 2013; "But there is little real danger of the UK leaving the EU. Any Yes campaigner arguing in 2014 that the only way of securing Scotland's membership of the EU is to vote Yes is scaremongering, plain and simple." Prof Adam Tomkins. 29 August 2014. Available at notesfromnorthbritain.wordpress.com/2014/08/29/scotland-and-the-eu/.

- 28 Scotland analysis: Europe and International Issues. UK Government. 2014.
- 29 “The EU needs to change. And it is time for the British people – not politicians – to have their say. Only the Conservative Party will deliver real change and real choice on Europe, with an in-out referendum by the end of 2017.” Strong Leadership: A Clear Economic Plan A Brighter, More Secure Future (The Conservative Party Manifesto). 2015.
- 30 The European Union Referendum Act 2015. c. 36.
- 31 House of Commons, Official Report, Parliamentary Debates (Hansard), 16 June 2015.
- 32 Scottish Parliament, Official Report, Scotland's Future in the European Union, Motion S5M-00190, “that the Parliament supports Scotland and the rest of the UK remaining part of the EU.” Agreed: for 106, against 8, abstentions 3 on 26 May 2016.
- 33 Re-elect: the Scottish National Party Manifesto. 2016.
- 34 First Minister Nicola Sturgeon, EU Referendum result, 24 June 2016.
Available at news.gov.scot/speeches-and-briefings/first-minister-eu-referendum-result.
- 35 Scottish Parliament, Official Report, Implications of the EU Referendum for Scotland, Motion S5M-00601, “that the Parliament welcomes the overwhelming vote of the people of Scotland to remain in the European Union; affirms to citizens of other EU countries living here that they remain welcome and that their contribution is valued; mandates the Scottish Government to have discussions with the UK Government, other devolved administrations, the EU institutions and member states to explore options for protecting Scotland's relationship with the EU, Scotland's place in the single market and the social, employment and economic benefits that come from that, and instructs the Scottish Government to report back regularly to parliamentarians, to the European and External Relations Committee and the Parliament on the progress of those discussions and to seek Parliament's approval of the outcome of that process.” Agreed: for 92, against 0, abstentions 31.
- 36 Scottish Parliament, Official Report, Scotland's Choice, Motion S5M-04710, “that the Parliament acknowledges the sovereign right of the Scottish people to determine the form of government best suited to their needs and therefore mandates the Scottish Government to take forward discussions with the UK Government on the details of an order under section 30 of the Scotland Act 1998 to ensure that the Scottish Parliament can legislate for a referendum to be held that will give the people of Scotland a choice over the future direction and governance of their country at a time, and with a question and franchise, determined by the Scottish Parliament, which would most appropriately be between the autumn of 2018, when there is clarity over the outcome of the Brexit negotiations, and around the point at which the UK leaves the EU in spring 2019; believes that this gives people in Scotland a choice at a time when there is both the most information and most opportunity to act; further believes that 16 and 17-year-olds and EU citizens, who were excluded from the EU referendum, should be entitled to vote, and considers that this referendum is necessary given the Prime Minister's decision to negotiate a hard exit from the EU, including leaving the single market, which conflicts with assurances given by the UK Government and prominent Leave campaigners, and which takes no account of the overwhelming Remain vote in Scotland.” Agreed: for 69, against 59.
- 37 Scottish Government. Scotland's Place in Europe: People, Jobs and Investment. 2018.
- 38 Scottish Government. No-deal Brexit: economic implications for Scotland. 2019.
- 39 Scottish Government. Scotland's Place in Europe. 2016.
- 40 UK Government, Joint Ministerial Committee communique, 24 October 2016. Available at www.gov.uk/government/publications/joint-ministerial-committee-communique-24-october-2016.
- 41 For example, UK Government papers published in advance of formal negotiating rounds with the EU to inform discussion: Continuity in the availability of goods for the EU and the UK – position paper (21 August 2017) Confidentiality and access to documents – position paper (21 August 2017); Northern Ireland and Ireland – position paper (16 August 2017); Ongoing Union judicial and administrative proceedings – position paper (13 July 2017); Nuclear materials and safeguards issues – position paper (13 July 2017); Privileges and immunities – position paper (13 July 2017); Safeguarding the position of EU citizens in the UK and UK nationals in the EU (26 June 2017).
- 42 The [Joint report on progress during phase 1 of negotiations under Article 50 TEU on the UK's orderly withdrawal from the EU](#) (8 December 2017), the [draft \(partial\) Withdrawal Agreement in March 2018](#), [Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community](#) (14 November 2018); [Outline Political Declaration on the Future Relationship](#) (14 November 2018) were all published before or at the same time as devolved administrations were provided access to them. The updated [Political Declaration Setting out the framework for the future relationship between the European Union and the United Kingdom](#) (22 November 2018) was provided to devolved administrations under embargo a few hours ahead of its publication.

- 43 For example, see motions S5M-01412 (14 September 2016) on agreeing a UK approach and objectives for negotiations; S5M-02488 (15 November 2016) on seeking clarity from the UK Government its proposals for leaving the EU; S5M-03427 (17 January 2017) on Scotland's Place in Europe; S5M-03858 (7 February 2017) calling for the European Union (Notification of Withdrawal) Bill not to be passed until effective consultation with the devolved administrations has been agreed.
- 44 Motion S5M-01412, "that the Parliament recognises the importance of EU membership to Scotland and welcomes the Prime Minister's assurance that she will not trigger Article 50 of the Lisbon Treaty until there is an agreed UK approach and objectives for negotiations; agrees that Scotland's interests are best served within the EU and that a key objective must be for Scotland and the UK to remain inside the EU Single Market; supports the Scottish Government participating fully in all negotiations between the UK Government and the EU in the run-up to, and during, the Article 50 process, while consulting and reporting back to the Parliament on its objectives, and supports an approach that protects Scotland's democratic and economic interests, social protection, the principle of solidarity and the ability to influence decision-making within the EU." Agreed: for 87, against 34.
- 45 For example, see motions S5M-08352 (25 October 2017), S5M-15032 (5 December 2018), S5M-16107 (5 March 2019), and S5M-18695 (5 September 2019) opposing a 'no deal' outcome and opposing withdrawal agreements negotiated by the UK Government.
- 46 Legislative Consent Memorandum for the European Union (Withdrawal) Bill. Scottish Government. 12 September 2017.
- 47 Motion S5M-12223, "that the Parliament notes the legislative consent memorandums on the European Union (Withdrawal) Bill lodged by the Scottish Government on 12 September 2017 and 26 April 2018, and the reports of the Finance and Constitution Committee of 9 January and 10 May 2018, and, because of clause 15 (formerly 11) and schedule 3, which constrain the legislative and executive competence of the Scottish Parliament and Scottish Government, does not consent to the European Union (Withdrawal) Bill, and calls on both the UK and Scottish Governments to convene cross-party talks in an attempt to broker an agreed way forward." Agreed: for 93, against 30.
- 48 "the consequence is that it is legally possible for the UK Government to react to the passage of a Bill in the Scottish Parliament by making a reference and then persuading the UK Parliament to amend the Scotland Act so as to render the Bill invalid." Scotland's devolved settlement and the role of the courts. Lord Reed, Deputy President of the Supreme Court. February 2019.
- 49 The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill – A Reference by the Attorney General and the Advocate General for Scotland (Scotland). [2018] UKSC 64. 13 December 2018. One section of the Bill was held to be outside competence on other grounds.
- 50 "We think that the people of Scotland should decide our nation's future in a democratic referendum and opinion polls suggest that most Scots agree. We will, therefore, bring forward our Referendum Bill in this next Parliament. A yes vote will mean that Scotland becomes an independent nation." Re-elect: the Scottish National Party Manifesto. 2011.
- 51 UK Government. Scotland's constitutional future: a consultation on facilitating a legal, fair and decisive referendum on whether Scotland should leave the United Kingdom. HMSO, 2012 (Cmnd. 8203).
- 52 Scottish Government. Your Scotland, Your Referendum. 2012.
- 53 "The decision on Scotland's future should be taken through a process which is beyond reproach. The Scottish Government is committed to a referendum that is conducted to the highest standards of fairness, transparency and propriety." Scottish Government. Your Scotland, Your Referendum. p.8. 2012.
- 54 "The Scottish Government's preference is for a short, direct question about independence '...'. It is ready to work with the UK Government to agree a clarification of the Scotland Act 1998 that would remove their doubts about the competence of the Scottish Parliament and put the referendum effectively beyond legal challenge by the UK Government or any other party." Scottish Government. Your Scotland, Your Referendum. 2012. p. 9.
- 55 "That is not to say that the UK Government wishes to put obstacles in the way of a referendum. Quite the reverse, we firmly believe that we must explore the appropriate ways in which we can put beyond doubt the legal authority to hold a referendum on independence." Scotland's constitutional future: a consultation on facilitating a legal, fair and decisive referendum on whether Scotland should leave the United Kingdom. HMSO, 2012 (Cmnd. 8203) p. 6.
- 56 "We want to assist people in Scotland, in all reasonable ways, to participate in a referendum "Made in Scotland", whose outcome is legal, fair and decisive." Scotland's constitutional future: a consultation on facilitating a legal, fair and decisive referendum on whether Scotland should leave the United Kingdom. HMSO, 2012 (Cmnd. 8203) p. 6.

- 57 Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland. 15 October 2012.
- 58 The United Kingdom and Scottish Governments “look forward to a referendum that is legal and fair producing a decisive and respected outcome. The two governments are committed to continue to work together constructively in the light of the outcome, whatever it is, in the best interests of the people of Scotland and of the rest of the United Kingdom.” Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland. 15 October 2012.
- 59 The Scotland Act 1998 (Modification of Schedule 5) Order 2013 S.I. 2013/242.
- 60 Meeting of the Scottish Parliament, 5 December 2012.
- 61 The House of Commons on 15 January 2013, and the House of Lords on 16 January 2013.
- 62 The Electoral Commission, Scottish Independence Referendum Report on the referendum held on 18 September 2014. ELC/2014/02. December 2014.
- 63 Secretary of State for Scotland Michael Moore, House of Commons, Official Report, Parliamentary Debates (Hansard), 15 January 2013, vol. 556, col. 742.
- 64 The acting leader of the Scottish Conservatives has called for 40 years to pass before a further independence referendum can be held: “Jackson Carlaw: No Indyref2 until after 2050”, The Herald 26 November 2019; and Scottish Labour have a manifesto commitment that “in the early years of a UK Labour Government will not agree to a section 30 order request if it comes from the Scottish Government.” Scottish Labour Manifesto. 2017.
- 65 See, for example, Lord Campbell LC in *Stuart v. Moore* (1861) 4 Macq 1, 49 (quoted with approval by Lord Hope of Craighead in *R v. Manchester Stipendiary Magistrates ex parte Granada Television* [2001] 1 AC 300): “As to judicial jurisdiction, Scotland and England, although politically under the same Crown, and under the supreme sway of one legislature, are to be considered as independent foreign countries, unconnected with one another.”



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