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AN UNANSWERED OR UNANSWERABLE QUESTION? THE SCOTTISH PARLIAMENT'S COMPETENCE TO LEGISLATE FOR AN INDEPENDENCE REFERENDUM FOR SCOTLAND

Elisenda Casañas Adam*

Abstract

This article analyses the debates on whether the Scottish Parliament could unilaterally legislate for an independence referendum leading up to the 2014 vote, setting out first the relevant legal framework, and then highlighting the different positions put forward in this sense. It then argues that these positions responded to different existing constitutional narratives as to the nature of the UK (unitary, federal or quasi-federal, and union) and how by leaving this question open, the specific endorsement of one of these narratives was avoided. Finally, it reflects on the impact of the specific aspects of the 2014 process on the current competence debate and on the available options for the Scottish Parliament to legislate for a second independence referendum. Overall, it argues that because of the existence of these competing constitutional narratives, as occurs also in other plurinational states, a strictly legal approach will not provide a satisfactory answer to the competence question. Despite being framed in legal terms, this is a fundamentally political question that requires a political answer.

Keywords: independence; referendum; plurinational state; Scotland; United Kingdom; Catalan sovereignty process.

UNA PREGUNTA SENSE RESPOSTA O INCONTESTABLE? LA COMPETÈNCIA DEL PARLAMENT ESCOCÈS DE LEGISLAR PER A LA CELEBRACIÓ D'UN REFERÈNDUM D'INDEPENDÈNCIA PER A ESCÒCIA

Resum

Aquest article analitza els debats sobre si el Parlament escocès podia legislar unilateralment sobre la celebració d'un referèndum d'independència que va conduir a la votació de 2014. En primer lloc, s'exposa el marc jurídic rellevant i després es posa de relleu les diferents posicions presentades en aquest sentit. A continuació, sosté que aquestes posicions van respondre a diferents narratives constitucionals existents, pel que fa a la naturalesa del Regne Unit (unitària, federal o quasi federal i unionista) i com, en deixar aquesta qüestió oberta, es va evitar l'aval específic a una d'aquestes narratives. Finalment, es reflexiona sobre l'impacte dels aspectes específics del procés de 2014 en el debat competencial actual i sobre les opcions a l'abast del Parlament escocès de cara a legislar per un segon referèndum sobre la independència. En general, s'observa que un enfocament estrictament jurídic, a causa de l'existència d'aquestes narratives constitucionals contraposades, tal com succeeix també en altres estats plurinacionals, no proporcionarà una resposta satisfactòria a la qüestió competencial. Tot i estar emmarcat en termes legals, aquesta és una qüestió fonamentalment política que requereix una resposta política.

Paraules clau: independència; referèndum; Estat plurinacional; Escòcia; Regne Unit; procés sobiranista.

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1 Introduction

The 2014 Scottish independence Referendum was a unique constitutional development, as it was organised and held on the basis of an agreement between the Scottish and United Kingdom Governments. In this sense, it stands in sharp contrast with other systems, such as Spain, where the requests by Catalonia to hold a referendum in similar circumstances has led to an ongoing confrontation between both orders of government. The Edinburgh Agreement not only ensured the cooperation of the Scottish and UK Governments, it also provided the referendum with a clear legal basis and a solid legal framework, which then resulted in a fair and democratic process that was accepted as such by both sides, and which actively engaged Scottish citizens¹. However, by providing for the specific transfer of competence to the Scottish Parliament to legislate for the referendum, the Edinburgh Agreement left open the question of whether the Scottish Parliament would have been able to legislate unilaterally on this issue. As is less well known from a comparative perspective, the Scottish Nationalist Party's (SNP) landslide victory led to an initial confrontation between the Scottish and UK Governments over whether the Scottish Parliament had the competence to legislate for an independence referendum, with a diversity of academic arguments also being put forward for both sides. While the UK's unwritten and therefore more flexible Constitution is frequently presented as one of the main elements that allowed the 2014 referendum to go ahead, this specific aspect is regulated in the Scotland Act 1998 which provides a detailed and binding written legal framework for competence claims in relation to Scotland. As a result, parallels can also be drawn in this sense with claims regarding the distribution of competences in other federal or quasi-federal states, or to some of the debates that are currently ongoing regarding the holding of an independence referendum in Catalonia². It seems, then, that there are lessons to be learned from a better understanding of the Scottish experience.

On the other hand, the issue of whether the Scottish Parliament has the competence to legislate for an independence referendum unilaterally has again become of current interest in Scotland. As is well known, the First Minister, Nicola Sturgeon, has recently secured a favourable vote in the Scottish Parliament in favour of holding a second Scottish independence referendum and has written to the United Kingdom Prime Minister, Theresa May, requesting a transfer of the competence to legislate for it, similar to the above³. The Prime Minister's far from positive reaction to this request has reignited the debate on whether the Scottish Government and Parliament could proceed with the referendum without her agreement⁴.

This article analyses the debates on whether the Scottish Parliament could unilaterally legislate for an independence referendum leading up to the 2014 vote, highlighting the different positions put forward in this sense. It will then argue that these positions responded to different existing constitutional narratives as to the nature of the UK and how by leaving this question open, the specific endorsement of one of these narratives was avoided. It will also reflect on the impact of the specific aspects of the 2014 process on the current competence debate and on the available options for Scotland to legislate for a second independence referendum. Overall, it will argue that because of the existence of these competing constitutional narratives, as occurs also in other plurinational states, a strictly legal approach will not provide a satisfactory answer to the competence question. Despite being framed in legal terms this is a fundamentally political question that requires a political answer.

1 CASANÑAS ADAM, Elisenda. "The Scottish Independence Referendum: Lessons Learned for the Future". Edinburgh School of Law Research Paper No. 2016/19 (August 25, 2016) [Consulted: June 2017].

2 For examples of excellent comparative analysis in this sense, see ARONEY, Nicholas. "Reserved matters, legislative purpose, and the Scottish Independence Referendum". *Public Law*. (2014), p. 421-443 and TORNOS MAS, Joaquín. *De Escocia a Cataluña. Referéndum y Reforma Constitucional*. Madrid: Iustel (2015).

3 CARREL, Severin. "[Scottish parliament votes for second independence referendum](#)". The Guardian (28/03/2017) [Consulted: June 2017].

4 STEWART, Heather; WALKER, Peter; CARREL, Severin. "[Theresa May rejects Nicola Sturgeon's referendum demand](#)". The Guardian (16/03/2017). SPARROW, Andrew. "[UK government signals it will block second Scottish independence referendum until early 2020s - as it happened](#)". The Guardian (28/03/2017) [Consulted: June 2017].

2 The Competence Question and the Scottish Independence Referendum of 2014

2.1 The Context

The question of whether the Scottish Parliament had the competence to legislate for an independence referendum for Scotland had been an issue of latent constitutional discussion in Scotland since devolution in 1998⁵. However, the specific debates on this question in the context of what would then become the 2014 referendum started after the Scottish National Party's landslide election result in the 2011 elections to the Scottish Parliament⁶. This was a significant and largely unexpected achievement, not least because the system was designed to result in the formation of coalition governments. In 2007, when it was elected in a minority government, its manifesto contained a commitment to publish a White Paper on independence for Scotland⁷. In August of that year, it followed up on its commitment, publishing "Choosing Scotland's Future – A National Conversation"⁸. It described the paper as "the first step in a wide-ranging conversation about the future of Scotland"⁹. The Scottish Government then continued to develop its proposals and published another White Paper, "Your Scotland Your Voice" in November 2009¹⁰. This set out the intention to hold a referendum on Scotland's constitutional future in 2010, and, in this line, the Government also published a first "Draft Referendum Bill"¹¹. However, in September 2010 the First Minister announced that the Bill would not proceed in that parliamentary session, but would be an election issue for the forthcoming elections in 2011. The SNP then entered the elections with a manifesto pledge for a referendum on Scotland's constitutional future.

Despite the SNP's landslide victory in 2011, the polls at that time did not show a significant increase in support for independence in Scotland. Indeed, in this sense Chris McCorkindale describes the referendum that followed as "accidental", highlighting that the SNP's victory was more due the perceived competence of SNP as a party of in government, and the collapse of other parties¹². Since 2007, when the SNP's National Conversation began, polls consistently showed that the Scottish people's preference for Scotland's constitutional future was spread across three options: maintaining the status quo (for 2010, 2011 2012: 27, 21 and 24 %, respectively); an intermediate option of further devolution, but short of independence (32, 29, and 32 %); and independence itself (28, 43, 35%)¹³. Although stressing their preference for independence, the Scottish Government's 2007 White Paper reflected this division and included the discussion on extending Scottish devolution. It also referred to the possibility of holding a multi-option referendum, including a second question on "more devolution"¹⁴. In the same way, its 2009 White Paper included the discussion of a model of "full devolution" (or "devo-max") and noted that its "National Conversation" had indicated support for range of proposals which reduced the reservations of policy areas under the Scotland Act but did not eliminate them all¹⁵; again, it highlighted its openness to consider including a third option in the referendum seriously, if this were clearly defined, noting that its inclusion in its own documents would have helped that process¹⁶. Interestingly, polls also showed that supporters of independence would still prefer more devolution

5 For a notable example, see MACCORMICK, Neil. "Is There a Constitutional Path to Scottish Independence?". *Parliamentary Affairs* 53 (2000) 721-727.

6 In the 2011 elections to the Scottish Parliament the SNP won 65 seats, Labour 37, the Conservatives 15, and the Liberal Democrats 5.

7 In the 2007 elections to the Scottish Parliament the SNP won 47 seats, Labour 46, the Conservatives 17, and the Liberal Democrats 16.

8 SCOTTISH GOVERNMENT. "[Choosing Scotland's Future: A National Conversation: Independence and Responsibility in the Modern World](#)" (2007). ISBN 978-0-7559-5493-3.

9 Ibid.

10 SCOTTISH GOVERNMENT. "[Your Scotland, Your Voice: A National Conversation](#)". (2009) ISBN 978-0-7559-8114-4.

11 SCOTTISH GOVERNMENT. [Draft Referendum \(Scotland\) Bill \[Consultation Draft\]](#) (2010).

12 MACCORKINDALE, Christopher. "An Accidental Referendum". *Scottish Constitutional Futures Forum Blog* (16/08/2013).

13 SCOTCEN. "[The option not on the table. Attitudes to more devolution](#)" (2013), p. 3 [Consulted: June 2017].

14 SCOTTISH GOVERNMENT (2007) p. 7-18; p. 33.

15 SCOTTISH GOVERNMENT (2009) p. 17

16 SCOTTISH GOVERNMENT (2009) p. 187-188.

to the status quo (albeit as a second best) and therefore that, in the case of a multi-option referendum and depending on how the questions were asked (for example, if people were asked if they wanted the Scottish Parliament to have more powers, and if so, if these should enable independence), the intermediate option of “further devolution” could secure around 60% of the vote¹⁷.

The Scottish Government's promises for a referendum and the above debates on the different options for Scotland's constitutional future were, however, constrained by the framework of devolution and the provisions of the Scotland Act 1998, which put the Scottish Parliament in a significantly different position to that of the Parliament of the United Kingdom¹⁸. The Scotland Act 1998 provides for a Scottish Parliament of limited powers, restricted by the list powers reserved to the UK Parliament (“reserved powers”) included in the Act itself, and compliance with EU law and ECHR rights¹⁹. It also states clearly that “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”²⁰. To ensure that the Scottish Parliament and Government do not act outside their powers, the Scotland Act includes a variety of (pre and post enactment) mechanisms to block and also review their legislation, which in final instance can be struck down by the courts.²¹ What is also interesting to note here is that challenges may be brought by the UK institutions, but also individuals that are affected by the statute, and that the rules of standing for individuals were made significantly more flexible by a decision of the Supreme Court in 2011 (the “AXA decision”)²². As a result, any legislation for a referendum on Scotland's constitutional future enacted by the Scottish Parliament would be vulnerable to a diversity of challenges, including from any individual considered to have a “sufficient interest” in the issues included in the Act²³.

This is an important distinction from the position of the UK Parliament, whose legislation is not subject to this constitutional “ultra vires” review by the courts. The “sovereign” UK parliament is free to legislate on all matters of the UK constitution, including specifically matters devolved to the Scottish Parliament in the Scotland Act 1998²⁴. Interestingly, however, it has developed a convention (“Sewel Convention”) for when it wants to legislate in an area devolved to the Scottish Parliament or which affects the Scotland Act 1998 itself, which requires it to consult the Scottish Parliament and obtain its consent²⁵. Because of the significance of this convention, it was formally set out in statute in the amendments to the Scotland Act that resulted from the Smith Commission and the devolution of further powers to the Scottish Parliament after the 2014 referendum²⁶. However, the first test of the justiciability of this provision came in the recent Supreme Court Miller case, and the judges unanimously treated it as merely the acknowledgment of a convention rather than establishing a legally binding rule²⁷.

Finally, the Scotland Act 1998 also provides for the amendment of the list of matters reserved to the UK Parliament to be modified by Order in Council for purposes “considered necessary and expedient”²⁸. However, this will require the approval of both Houses of Westminster Parliament and also of the Scottish

17 SCOTCEN (2013) p. 4.

18 See, generally, HIMSWORTH, Chris; O'NEILL, Christine. *Scotland's Constitution: Law and Practice*. Bloomsbury Professional (2015).

19 Scotland Act 1998, section 29 together with Schedule 5.

20 Scotland Act 1998, section 30.

21 Scotland Act 1998, sections 31-36 and Schedule 6.

22 AXA General Insurance v Lord Advocate [2011] UKSC 46. The Supreme Court in this case expanded the standing test to one of “sufficient interest”. This was then also included in the Courts Reform (Scotland) Act sec 89. For a discussion of the significance of these changes, see HIMSWORTH and O'NEILL (2015), p. 427-430.

23 Ibid.

24 Scotland Act 1998, section 28 (7).

25 See CAIRNEY, Paul; KEATING, Michael. “Sewel Motions in the Scottish Parliament”. *Scottish Affairs*, 47 (2004), p. 115-134.

26 Scotland Act 2016, section 2.

27 R (Miller & Anor) v Secretary of State for Exiting the European Union & Ors [2017] UKSC 5.

28 Scotland Act 1998, section 30.

Parliament itself. These are known as “section 30 Orders”, and this was the mechanism used to devolve the specific powers for the Scottish Parliament to legislate for the referendum in 2014.

2.2 The Debate on the Competence of the Scottish Parliament to legislate for an Independence Referendum

The Provisions in Contention

As noted above, while there is sometimes a generalised perception that what allowed the 2014 independence referendum was the UK's largely unwritten and flexible constitution, the Scotland Act 1998 sets out a comprehensive and detailed legal framework regarding the organisation and functioning of the institution for Scottish self-government. The same can be said about the conferral of competences on the Scottish Parliament, their limits, and the specific criteria to resolve any conflict regarding any of the former. Firstly, the Scotland Act 1998 establishes that an Act will be outside the competence of the Scottish Parliament so far as “it relates to” reserved matters²⁹. The Scotland Act 1998 is notably silent on the issue of referendums, thus allowing the Scottish Parliament to legislate in this field and hold referendums on devolved matters. It must also be noted that the general regulation of referendums included in the Political Parties, Elections and Referendum Act (PPERA) 2000 only applies to referendums organised by the Westminster Parliament, and therefore didn't apply in this case.

The specific provisions at the centre of the debate in this case were the reservation of powers over the “Constitution” to the UK Parliament, including “the Union of the Kingdoms of Scotland and England”³⁰. The central question then became if a referendum on Scottish independence would relate to the Union of the Kingdoms of Scotland and England in the sense stated in the Act for it to be *ultra vires*. The Scotland Act 1998 also provides additional indications as to how such provisions should be interpreted, adding that “the question whether a provision of an Act of the Scottish Parliament relates to a reserved matter is to be determined [...] by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances”³¹. The debate therefore centred on what were the “purpose” and the “effect in all circumstances” of the proposed legislation to enable the holding of the independence referendum. It must also be noted that the Scotland Act provides some indications for the courts in the interpretation of Acts of the Scottish Parliament in the case of challenges being brought before them: “Such a provision is to be read as narrowly as is required for it to be within competence, if such a reading is possible, and is to have effect accordingly”³². This provision was also significant in the debates that followed.

In other federal or quasi-federal systems, the relevant case law from the courts would provide further clarification as to how to interpret the above provisions. However, a particular feature of the Scottish devolution settlement is that it did not result in a significant number of competence challenges based on the devolved/reserved division of competences before the courts. At the time, the majority of challenges to Act of the Scottish Parliament had been brought and decided on human rights grounds. There was not a clear body of case law regarding how the above provisions should be interpreted in this specific case³³.

The Positions in the Debate

There are at least three central positions that can be identified as put forward by leading and well-respected academics and/or practitioners in the debate on the Scottish Parliament's competence to legislate for a

29 Scotland Act 1998, section 29 (2) b.

30 Scotland Act 1998, Schedule 5.

31 Scotland Act 1998, section 29 (3).

32 Scotland Act 1998, section 101 (2)).

33 The one case that was highlighted in the debates was *Martin and Miller v HM Advocate* (2010) UKSC 10, which involved a challenge to the Criminal Proceedings (Reform) Act 2007, enacted by the Scottish Parliament. In considering whether the amendments in the 2007 Act “related to” a reserved matter, the court took a wide approach to the “purpose test”, stating that this should not mean simply a narrow reading of the challenged provision, but rather a broad contextual approach, considering also the situation which it was designed to address. However, the extension of this wide approach to the debates above was contested, and is this it had been adopted to declare the legislation *intra vires*, not to strike it down.

referendum on Scottish independence, following the SNP's landslide victory in 2011. The first, and most restrictive, was based on the denial of the existence of a separate "Scottish People", able to decide unilaterally on Scottish independence. An example of this position was put forward by Aidan O'Neill, arguing that "If the United Kingdom, as a constitutional monarchy, allows for the notion of a 'sovereign people', then it encompasses all the peoples of the United Kingdom. On this constitutional model, the 'Scottish people' are no more sovereign than the 'people of Basingstoke' or the 'Men of Kent' or the 'women of Wales'"³⁴. Further on in the piece, he concludes: "(...) if a referendum is indeed properly to be understood as a consultation with the 'sovereign people' to which Parliament is answerable, then any such 'dissolution referendum' cannot be confined to a consultation with the people of Scotland alone but must properly extend to all the peoples of the United Kingdom"³⁵. He adds to this point by arguing that such a referendum would also have a profound effect on the politics of the United Kingdom, notably reinforcing the Conservative party dominance in Westminster.

For the issues considered in this article, it is worth highlighting that, first, this argument could have been plausibly made on the basis of the existing constitutional and legal framework of the United Kingdom. Second, this argument was indeed initially made, in a strong and well-argued manner, despite it soon becoming superseded by the developments that followed the 2011 Scottish parliamentary elections. As is well known, the UK Government's accepted the right of the Scottish people to decide their constitutional future after the SNP's landslide victory, and from then on the debate focused specifically on the what order of government should legislate for the referendum. It is worth noting that, a year later, O'Neill was no longer arguing that Scottish independence should be decided by all the peoples of the UK, but he again stressed that Scottish independence could not be considered "a matter of purely Scottish interest"³⁶.

The second position that can be identified in the debate was that put forward by Nick Barber, and focused specifically on whether such legislation would "relate to" the Union, and therefore a matter reserved to the UK Parliament. In contrast with O'Neill's initial position, Barber took the question of whether Scotland is an appropriate territory to secede as a given, seemingly including also the right of the citizens of Scotland to decide this³⁷: "Just about everyone accepts that Scotland is the type of territory that can properly gain statehood if its people wish it"³⁸. In his analysis, he then distinguished between the competence to dissolve the United Kingdom in the case of a successful independence referendum and the competence to organise the referendum itself. Any decision about whether, and if so, how, to give effect to Scottish independence would correspond to the Westminster Parliament. However, the Scottish Parliament could still legislate for a referendum on independence, as this would not be binding and would not therefore alter the legal relationship between Scotland and Westminster, even if it might, as he noted, "affect the political pressure for some sort of change"³⁹. Focusing on the purpose of legislation, a similar argument was also put forward by Stephen Tierney, stating that "If a question is carefully crafted, asking people whether or not their preference is for independence and making clear that would only be treated by the Scottish Government as a political mandate to enter negotiations, this would seem to fall within competence"⁴⁰. An analogous point, albeit framed in a different manner, was put forward by Cormac MacAmlaigh, suggesting that if a referendum Bill "contained a 'saving clause', explicitly stating that the purpose of the bill was not to give effect to secession nor directly affect the Union (...) but rather was a simple exercise of devolved power (the power to hold referendums)", this might allow it to pass the competence test⁴¹. This was the general position adopted by the Scottish

34 ONEILL, Aidan. "We need to talk about the referendum...". *UK Supreme Court Blog* (04/11/2011).

35 Ibid.

36 ONEILL, Aidan. "Now We're Talking – About the Scottish Referendum". *UK Supreme Court Blog* (04/11/2012)

37 BARBER, Nicholas. "Scottish independence and the Role of the United Kingdom". *UK Constitutional Law Association Blog* (11/01/2012).

38 Ibid.

39 Ibid.

40 TIERNEY, Stephen. "A constitutional conundrum...". *The Herald* (11/01/2012).

41 MACAMLAIGH, Cormac. "...yes, but is it legal? The Scottish Independence referendum and the Scotland Act 1998". *UK Constitutional Association Blog* (1/12/2012).

Government in the debate, as will be seen below, although they never clearly set out their legal arguments in detail.

The third position that can be identified in the debate was represented by Adam Tomkins, among others, whose piece was written in response to Barber⁴². Tomkins did not engage with the question of whether the Scottish people were entitled to decide on independence unilaterally; his disagreement with Barber was specifically on the Scottish Parliament's competence to legislate for an independence referendum. According to Tomkins, an Act of the Scottish Parliament authorising a referendum on independence would clearly "not be law", because it would relate to the Union. In support of this, he quoted the SNP's own 2011 election manifesto, where they stated "A yes vote will mean Scotland becomes an independent nation". Furthermore, Tomkins contested Barber's claim that the Scottish Parliament could legislate for an independence referendum, because it would be advisory in nature. Firstly, he argued that under the UK constitutional framework most referendums were advisory in the sense that they were not legally binding. He also added, however, a reminder of the significance of referendums, distinguishing them from opinion polls: "their purpose is not to test public opinions but to make decisions"⁴³. In this sense, he also quoted the House of Lords Constitutional Committee report on referendums stating that, even when a referendum was advisory, "it would be difficult for Parliament to ignore a decisive expression of public opinion"⁴⁴. Finally, Tomkins also contested Tierney's claim that the outcome was to be treated simply as a mandate for the Scottish Government to enter into negotiations with its UK counterpart. In this sense, he argued that a requesting a mandate to negotiate the terms of the Union would again clearly relate to a reserved matter; and, more generally, that there was no need for a referendum before the Scottish Ministers could talk to the UK Government about Scotland's constitutional future.

As will be seen below, Tomkins position was the one adopted by the UK Government, who argued from the start that the Scottish Parliament did not have the competence to legislate for the referendum, and by other influential commentators. The decisiveness with which this argument was being presented, led a group of academics from some of the main Scottish Universities (Anderson et al) to defend the plausibility of the Scottish Government's claims and contend that the legality of such a referendum legislated for by the Scottish Parliament was more of an open question than had been acknowledged⁴⁵. The position put forward by these authors has elements in common with the one put forward by Barber (indeed, as seen, Tierney also put forward an argument in this sense); but it can also be seen as potentially going much further in considering the position and competences of the Scottish Parliament in the context of the debates over the holding of the independence referendum and its outcome.

According to these authors, the case for legality rested on a particular reading of both the purposes of the proposed referendum Bill, and of the purposes of the Scotland Act 1998. Regarding the purpose of the proposed referendum Bill published by the Scottish Government, they argued, firstly, that it stated that its purpose was simply to seek "the views of the people in Scotland on a proposal about the way Scotland is governed"⁴⁶. The authors then argued that to adopt a broader reading of the Bill resulted in conflating the intention of the Scottish Government with the intention of the Scottish Parliament. While the Scottish Government was clearly putting forward the Bill to try to obtain independence for Scotland, there could be many different reasons why the members of the Scottish Parliament would vote in favour of it, for example, to resolve the issue with a no vote and remove it from the political agenda. In this sense, they pointed out also that taking a broader approach to what would be the effects of the referendum seemed to be arguing on the assumption that the Yes side would win, and that this would lead to the dissolution of the Union. If, on the other hand, the outcome of the referendum were a No vote, then the overall consequence of the referendum

42 TOMKINS, Adam. "The Scottish Parliament and the Independence Referendum". *UK Constitutional Law Association Blog* (2012)

43 SCOTTISH NATIONALIST PARTY. "[Election Manifesto](#)" (2011), p. 28 [Consulted: June 2017].

44 Ibid. 12th Report of 2009-10, House of Lords, 99, para 197.

45 ANDERSON, Gavin; BELL, Christine; CRAIG, Sarah; McHARG, Aileen; MULLEN, Tom; TIERNEY, Stephen; WALKER, Neil. "The independence referendum, legality and the contested constitution: widening the debate". *UK Constitutional Law Association Blog* (31/01/2012).

46 Ibid.

would be to reinforce the Union and the UK as a whole. The legality of the Bill, they concluded, could not be made to depend on the practical outcome of the referendum, as this would lead to absurdity. Reference to the “effect” of the Bill had to be to its legal effect, rather than its practical effect, and the legal effect of the proposed Bill would be simply to seek the views of the people of Scotland. Any further effects attributed to it would be non-binding and speculative.

Anderson et al then moved on to consider if the proposed independence referendum Bill (understood as a consultative Bill) would nevertheless still “relate to” the Union in the sense that would make it *ultra vires*. Here they argued that the Scotland Act 1998, as a constitutional measure, should not simply be interpreted literally, but rather “generously and purposively”⁴⁷. Therefore, a challenge to the competence of a Bill had to show more than merely that Bill had something to do with a reserved matter (the Union). This brought them to what they considered the core constitutional issue or question of the debate, what was the purpose of the Scotland Act 1998 and thus the impact of devolution on the UK constitution. And here they stress what they describe as the “nub of the difficulty” in responding to the competence question: the existence of at least three competing narratives regarding the UK constitutional framework⁴⁸. Of these, that of the United Kingdom as a Union state was the one that would potentially put the Scottish Parliament in a much stronger position in the referendum debate than the one put forward by Barber. This aspect will be explored in more detail in the next section.

The Different Narratives Regarding the UK's Constitutional Framework

Taking a broader approach in this debate, Anderson et al highlight that there are at least three different possible narratives regarding the UK's constitutional framework. The first is the unitary state narrative, according to which “the Scottish Parliament is politically and legally subordinate to Westminster, and the latter remains the sole font of sovereign authority within the state”⁴⁹. The second is the federal or quasi-federal narrative, which sees the Scottish Parliament as “politically equal to Westminster, within its sphere of competence, but it is bound by the norms of the UK constitution as a whole”⁵⁰. The third is the union-state narrative, which views “devolution as a renegotiation of the terms of the Union between Scotland and England, established in 1707 on the part of the sovereign Scottish people, and hence sees the Scottish Parliament as a legitimate representative of the Scottish people in the course of any further renegotiation (...)”⁵¹. The existence of these different constitutional narratives is not new and has been a feature of the development of the UK constitutional framework even before the 1998 devolution process⁵². The specific or more technical legal question regarding the competence of the Scottish Parliament to legislate for the referendum simply brought the tensions between the different narratives to the fore.

Indeed, we see these different narratives present in the positions regarding the legality of the referendum. O'Neill characterises the United Kingdom as a unitary state, arguing that “power devolved from the Westminster centre is power retained; rather than power ceded and sovereignty divided”⁵³. Barber, on the other hand, describes it as a “somewhere between a unitary state and a federation”⁵⁴. In this sense, he argues that in many respects the UK now looks more like a federal than a unitary state, with the Westminster parliament and the Scottish Parliament having their own area of power, on which the other level cannot

47 Ibid.

48 Ibid.

49 Ibid.

50 Ibid.

51 Ibid.

52 See, for example TIERNEY, Stephen. “Giving with one hand: Scottish devolution within a unitary state”. *International Journal of Constitutional Law* (2007), p. 572-597; “Scotland and the Union State”. MCHARG, Aileen; MULLEN, Tom (eds.). *Public Law in Scotland*. Edinburgh: Avizandum (2008); “Federalism in a Unitary State: A Paradox too Far?”. *Regional and Federal Studies*, (2009), p. 237-254; and WALKER, Neil. “Beyond the Unitary Conception of the United Kingdom Constitution?”. *Public Law* (2000), p. 384-404.

53 ONEILL, (2011).

54 BARBER, (2012).

encroach⁵⁵. Anderson et al highlight this diversity of understanding of the constitutional nature of the UK, and its relevance to the debate, and point to some of the elements that would support the union-state narrative⁵⁶. According the authors, this narrative would suggest a much broader role for the Scottish Parliament in debating, and facilitating public deliberation, on questions about the future of Scotland. Interestingly, in other work Tomkins also describes the UK as a union-state, but in a different sense and with different consequences to those above, as can also be seen by his position on the competence debate⁵⁷. This highlights that each of these narratives is not uniform, and may thus present different variants and articulations.

These different constitutional narratives were at the core of the competence and more general referendum debate, and it seems that the endorsement of each of these narratives would lead to a particular conclusion as to the scope of the competence of the Scottish Parliament to legislate for the referendum. As the authors highlight, there are elements in the UK and Scottish constitutional frameworks that would seem to support each of these narratives, but none has clear precedence over the others. As seen above, the different positions on the competence of the Scottish Parliament to legislate for the referendum were clearly and convincingly put forward by leading legal scholars or practitioners, based on their own understanding of the constitutional framework. And, as to be expected, both the Scottish and UK Governments adopted the position that most favoured their own interests and their own understanding of the wider articulation of the state. It must be noted here that this is not a unique feature of the UK. It is indeed a feature of many plurinational states that different narratives on the foundations and overall constitutional framework co-exist, but there is sufficient ambiguity in the framing of the general norms and principles to allow the system to function effectively in ordinary conditions and without them resulting in conflict⁵⁸. While in the UK this can be attributed to its unwritten constitution, as we have seen, the framework provided by the Scotland Act 1998 is very much codified in this sense. And similar arguments could be made in relation to plurinational states with a written constitution.

Within this context, the questions regarding the competence of the Scottish Parliament to legislate for the referendum then posed what MacAmlaigh describes as an archetypal “hard case”⁵⁹; and it was a hard case because it presented a confrontation between these different narratives, which normally coexisted largely unproblematically. In other words, the black or white endorsement of one of these narratives would have involved the rejection of the others and the alienation of those who adhered to them, with significant consequences for the developments that would follow. And this was the concern in relation to a potential legal challenge to legislation adopted by the Scottish Parliament for the referendum, and to the matter being decided by the courts. If they ruled that the Scottish Parliament was not competent to legislate for the referendum, this would have strong repercussions within Scotland and could lead to a potential confrontation between the Scottish and UK institutions of self-government, such as has happened in Spain. On the other hand, if the courts decided that the Scottish Parliament did indeed have competence to legislate for the referendum, but with the opposition of the UK Government and/or Parliament, this might condition their own participation in the process and would also present serious complications in the case of a Yes vote, as any dissolution of the Union would necessarily involve legislation by the UK Parliament. Furthermore, once one particular constitutional narrative had been specifically endorsed by the courts, this would then limit the scope for political negotiations, agreement and compromise between both orders of government to resolve any conflicts regarding Scotland’s constitutional future. As a result, various commentators expressed

55 Ibid.

56 ANDERSON et al (2012).

57 TOMKINS, Adam. “Scotland’s choice, Britain’s future”. *Law Quarterly Review*. 130 (2014), p. 215-220; TOMKINS, A. Written Evidence provided to the House of Lords Select Committee on the Constitution for their Report on the ‘Union and devolution’ (25 May 2016).

58 TIERNEY, Stephen. *Constitutional Law and National Pluralism*. Oxford: OUP (2004); “We the Peoples’: Constituent Power and Constitutionalism in Plurinational States”. LOUGHLIN, Martin; WALKER, Neil. (eds) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*. Oxford: OUP, p. 229-246.

59 MACAMLAIGH (2012).

concerns about a legal challenge being brought against an Act of the Scottish Parliament legislating for an independence referendum and for leaving the resolution of this issue to the courts⁶⁰.

3 The Edinburgh Agreement

3.1. The Road to the Edinburgh Agreement

In response to the SNP's surprising landslide victory, the UK Government stated clearly that it wanted to keep the United Kingdom together but, acknowledging the SNP's significant victory in the elections, it agreed not to stand in the way of the referendum. In its own words, it accepted that "the future of Scotland's place within the United Kingdom was for the people of Scotland to vote on"⁶¹. This is significant because they could have argued that under the existing constitutional framework there were no separate "Scottish people" entitled to decide their constitutional future and, more importantly, to unilaterally end the United Kingdom. It is also significant from a comparative perspective, and in contrast with the reaction of the Spanish Government to similar requests posed by the institutions of self-government of Catalonia.

We can only speculate as to the reasons why the United Kingdom Government, and David Cameron in particular, accepted that Scotland could have a referendum. Chris Himsworth and Christine O'Neill highlight that there had been a longstanding understanding on the part of successive UK Governments that should the SNP achieve a majority of Scottish seats in the House of Commons or, after devolution, in the Scottish Parliament, they would allow them the right to hold a referendum⁶². But such a commitment dates back to a time when those in the UK government would have thought such a rise in support for the SNP as highly improbable. Indeed, the SNP's 2007 election victory was completely unexpected, and its 2011 landslide victory even more so, in particular, as has been noted, because the model was designed to produce coalition governments in Scotland. Another reason is that, by allowing the referendum to go ahead, the UK Government thought they could put an end to the issue. As has been seen also, despite the SNP's election victories, actual support for independence among citizens in Scotland had not actually risen, and at the time it did not seem to have any real possibilities of winning. Whatever the reasons, the consequence of this was that from the start the debate in Scotland was never on whether the referendum could be held; The debate became about what level of government should legislate for it.

Despite the UK Government agreeing to the holding of the referendum, it also became clear from the beginning that it wanted a say in the "how", "when", and "under what conditions" the referendum should be carried out, and that it had a different position on certain aspects of the referendum from that of the Scottish Government. As will be seen below, by strongly contesting the competence of the Scottish Parliament to legislate for the referendum, it put forward its case for the necessary intervention of the UK Parliament and Government in the process, thus ensuring some role in the referendum's design. The competence debate then became one about designing the referendum and its particulars, and having control over the process.

In January 2012, both Governments held parallel consultations on a Scottish Referendum on Independence. The UK Government made the first move with its White Paper "Scotland's Constitutional Future", described as "A consultation on facilitating a legal, fair and decisive referendum on whether Scotland should leave the United Kingdom"⁶³. It was published on the 10 January and closed on the 9 March. In this document, the UK Government presented its own view on how the referendum should be carried out and asked for the views of the people of Scotland. The consultation also had an element of challenge about it, noting in the preface that "there is a great uncertainty about the Scottish Government's proposals for a referendum. We do not know when a referendum will happen, or what question will be asked. Most importantly, the UK Government

60 Among others, MACAMLAIGH (2012) and ANDERSON et al.

61 This was then included formally in the "Preface" of their consultation on the referendum. SCOTLAND OFFICE. "[Scotland's constitutional future](#)", Cm 8203 - Official Documents (2012) [Consulted: June 2017].

62 HIMSWORTH and O'NEILL (2015) p. 70.

63 SCOTLAND OFFICE. (2012).

has grave concerns that the Scottish Government's proposals for a referendum would not be legal"⁶⁴. In the foreword they insisted again on the same point, declaring that "we had been asking the Scottish Government to explain its position since May last year, but the Scottish Government has not set out a formal view on the issue of legal competence nor come forward with any further proposals for a referendum"⁶⁵.

In the consultation, the UK Government stated that it believed that it was not within the Scottish Parliament's powers, because it would relate to the "Union of the Kingdoms of Scotland and England". Its line of argument was based on sec. 29 of the same Act, which establishes that "whether a provision relates to reserved matters is to be determined by reference to its purpose, and in determining its purpose, it is necessary to have regard to a range of factors, including the effect of the provision in question". According to the UK Government, the purpose of the legislation would be to obtain independence for Scotland, as this would be the effect of the "yes" vote, and therefore would relate to "the Union" (and thus be "*ultra vires*"). They then proposed two options to enable the referendum to be held "legally": the first, to legislate to give the Scottish Parliament the power to legislate for the referendum, via a section 30 Order under the Scotland Act 1998; the second, for the UK Parliament to legislate directly for a referendum on Scottish independence.

The Scottish Government responded with its own consultation, "Your Scotland. Your Referendum", which included a draft referendum bill attached⁶⁶. This was published on the 25 January and closed two months after the UK Government's, on the 11 May. Here, the tension between both governments can also be seen, as it made clear that any UK legislation to aid the holding of the referendum would require the consent of the Scottish Parliament and "should be made without conditions"⁶⁷. It declared that "The Scottish Government's electoral mandate to hold a referendum is clear. It is for the Scottish Government to propose to the Scottish Parliament the timing and terms of the referendum and the rules under which it is to be conducted"; Adding, "The Scottish Parliament should decide these matters"⁶⁸. On the competence question, the Scottish Government argued that the Scottish Parliament was competent to legislate for the referendum and highlighted that much independent legal opinion supported its view. However, it also stated that it was ready to work with the UK Government to agree a clarification of the Scotland Act 1998 that would remove their doubts and put the referendum effectively beyond legal challenge, expressing also a preference for a section 30 Order.

Despite the openness of both governments to the option of using a section 30 Order to allow the Scottish Parliament to legislate for the referendum, they also presented a strong disagreement on some of the specific aspects of the referendum, among them: the overview of the process, the timing, the franchise, and fundamentally, the number of questions the referendum should include, with the UK Government clearly rejecting the inclusion of an intermediate option together with independence. Because of this, and notwithstanding the concerns expressed in this sense, it did initially look as if the matter might have indeed ended up before the courts.

3.2 A Political Agreement – Leaving the Competence Question for Another Time?

It came as a surprise to many when, after a period of negotiations, the United Kingdom and Scottish Governments signed the Edinburgh Agreement on the 15 October 2012⁶⁹. It states that both governments have agreed "to work together so that a referendum on Scottish independence can take place, and that this should: i) have a clear legal basis; ii) be legislated for by the Scottish Parliament; iii) be conducted so as to command the confidence of parliaments, governments and people, and; iv) deliver a fair test and a decisive expression of the views of people in Scotland and a result that everyone will respect". The specific details of the agreement were laid out in a Memorandum of Understanding and a draft Section 30 Order under the

64 SCOTLAND OFFICE. (2012), p. 5.

65 SCOTLAND OFFICE. (2012), p. 6.

66 SCOTTISH GOVERNMENT. "[Your Scotland – Your Referendum – A Consultation Document](#)" (2012), ISBN: 978-1-78045-633-1 [Consulted: June 2017].

67 SCOTTISH GOVERNMENT (2012), p. 5.

68 Ibid.

69 "[Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland](#)" (15/10/2012) [Consulted: June 2017].

Scotland Act 1998, which were also part of the agreement. In this way, as the agreement notes, the order would put beyond doubt that the Scottish Parliament could legislate for that referendum, and it would not be open to legal challenge on competence grounds. As part of the agreement, both Governments expressed their commitment to working together on matters of mutual interest and to the principles of good communication and respect; and also to continue to work together constructively in the light of the outcome, whatever it was, in the best interests of the people of Scotland and the rest of the United Kingdom⁷⁰.

Regarding the other issues of contention, fundamentally the Edinburgh Agreement enabled the Scottish Parliament to legislate for a referendum that would take place before the end of 2014. In most other aspects, the UK Government agreed to all the conditions the Scottish Government wanted for the holding of the referendum, so long as the referendum excluded the question on the “middle option”, and only included one Yes/No question on independence. It is worth noting that both Governments presented the Edinburgh Agreement as a victory. On the one hand, the Scottish Government had secured the competence of the Scottish Parliament to legislate for the referendum, and the security that this legislation would not be challenged on competence grounds. On the other hand, the UK Government was able to set certain conditions and limits in relation to the referendum, in particular, that there would be no second question with an intermediate option of more devolution. As noted in the start of this article, the polls seemed to indicate that an intermediate option would have probably obtained the majority of votes in the case of being included, and this would have forced the UK Government to negotiate the transfer of further powers to Scotland. It could have also been framed as the Scottish Government’s “Plan B”, which they could then have presented as a victory, even if they lost on the issue of independence.

The Edinburgh Agreement has been praised as an example of dialogue and conciliation, and has been described as the most significant date in Scottish history since the Union of Scotland and England in 1707⁷¹. As is well known, it provided the referendum with a clear legal basis and a solid legal framework, which then resulted in a fair and democratic process that was accepted by both sides and which actively engaged Scottish citizens who turned out in high numbers on the day of the vote. For the issues considered in this article, it is worth highlighting two additional points. The first, that despite the lack of a specific provision regarding the holding of an independence referendum, the Edinburgh Agreement allowed for the use of the existing legal instruments within the framework of the Scotland Act 1998 (namely, a section 30 Order), to transfer specific powers to the Scottish Parliament to legislate for the referendum. The second is that, in providing for the holding of the referendum in this way, it allowed for the ongoing ambiguity and coexistence of the three constitutional narratives regarding the United Kingdom. By doing so, it avoided the constitutional crisis that could have followed a potential legal challenge and a decision by the Supreme Court. Neil Walker makes a similar point when he concludes his analysis of the UK’s “constitutional unsettlement” by highlighting its values, among which he includes the crystallisation of pluralism⁷². He refers to the Edinburgh Agreement and the 2014 independence referendum that followed as an example of keeping the constitution out of the courts and within the political system. He also stresses the virtue in the retention of constitutional fluidity for these cases, contrasting the successful negotiated outcome and process in Scotland with recent similar developments in Catalonia and Spain. Building on this idea, Andrew Tickell describes the situation resulting from the Edinburgh Agreement as representing an (albeit) “uneasy kind of constitutional truce”, but which is defensible from both pro-independence and anti-independence perspectives⁷³. Overall, then, the impact of the Edinburgh Agreement on the debates on the UK’s territorial constitution was considered positive⁷⁴. At the

70 Ibid.

71 DEVINE, Tom. “Today is the most important date since the 1707 Act of Union”. *The Scotsman* (1/10/2013).

72 WALKER, Neil. “Our constitutional unsettlement”. *Public Law* (2014) p. 529-548.

73 TICKEL, Andrew. “The Technical Jekyll and the Political Hyde. The Constitutional Law and Politics of Scotland’s Independence ‘Neverendum’”. MACHARG, Aileen; MULLEN, Tom; PAGE, Alan; WALKER, Neil (eds.). *The Scottish Independence Referendum: Constitutional and Political Implications*. Oxford: OUP (2016).

74 For a more detailed analysis of the impact of the Edinburgh Agreement and the 2014 referendum process see WALKER, Neil. “The territorial Constitution and the Future of Scotland”. MACHARG, Aileen; MULLEN, Tom; PAGE, Alan; WALKER, Neil (eds.). *The Scottish Independence Referendum: Constitutional and Political Implications*. Oxford: OUP (2016); MACHARG, Aileen. “[The future of the United Kingdom’s territorial constitution: can the Union survive?](#)”. (March 31, 2016) [Consulted: June 2017].

same time, however, it left the strictly legal question of whether the Scottish Parliament had the competence to legislate for the independence referendum unanswered.

4 The Competence Question and the Debates on a New Scottish Independence Referendum

4.1 The Context

It could be argued that the option of a second independence referendum arose immediately after the 2014 poll, and never went away. As is now well known, the outcome of the Scottish referendum was a victory for the “No” side, with 55% of the votes. Another important figure to note was the 84% turnout, the highest for any UK electoral event. However, two aspects conditioned the clear finality of the referendum decision, leaving open the possibility of another vote on the same issue⁷⁵. Firstly, and as is also well known, the joint “Vow” published by the three unionist parties (Conservative, Labour and Liberal Democrats) promising further powers to Scotland in the case of a “No” vote, meant the outcome tied them to fulfilling these promise. In response to this situation, the result was met immediately with claims by the Scottish Government that the unionist parties were required to follow through with their vow and provide more powers for Scotland, and that, if they did not do so fully, this would entitle them to hold another referendum⁷⁶. This led to David Cameron setting up the Smith Commission, and to the enactment of the Scotland Act 2016, with the transferral of significant new competences to the Scottish Parliament and Government⁷⁷.

The 2014 referendum was also followed by a significant increase in the membership and support of the SNP, and by an outstanding success for the party in the May 2015 general elections⁷⁸. Their success in the 2016 Scottish Parliament elections was more limited as they lost their majority in Holyrood by 2 seats, but the rise of the Green Party representation meant that there is still a majority in favour of independence in the Scottish Parliament. During this campaign, the SNP said that another referendum could be held if there was clear and sustained evidence that independence had become the preferred option of the majority of the Scottish people or “if there is a significant material change in the circumstances that prevailed in 2014”⁷⁹.

It has been the second of the aspects, the issue of EU membership, which has resulted in the current call for a new referendum. During the 2014 referendum debate, the issue of Scotland’s continuing EU membership in the case of a vote for independence was a central aspect of the debates and the unionists consistently argued that Scotland would have to leave and apply to rejoin. The case for voting “No” to independence was therefore constructed as a case to remain part of the United Kingdom but also part of the European Union⁸⁰. But even at that time, the UK’s continuing membership of the EU was unclear and therefore the finality of the referendum decision from this perspective was also uncertain. Following the Scottish independence referendum, the UK then held a referendum on whether it should remain part of the EU on the 23d June 2016. A UK-wide majority voted in favour of leaving the Union, but in Scotland 62 % majority voted to remain. It was the argument that Scotland should not be dragged out of the EU against its will, coupled with the refusal from the UK government to consider the possibility of a special agreement with the EU for Scotland, that led Nicola Sturgeon to request the holding of a second independence referendum. On the 28th of March the Scottish Parliament approved a motion in favour of seeking a Section 30 Order⁸¹.

75 CASAÑAS ADAM, Elisenda (2016).

76 CARRELL, Severin “Alex Salmond accepts defeat and presses for new Holyrood powers”. The Guardian (19/09/2014); JOHNSON, Simon. “Nicola Sturgeon urged to stop referendum ‘betrayal bandwagon’”. The Telegraph (18/10/2014).

77 THE SMITH COMMISSION. “[Report of the Smith Commission for further devolution of powers to the Scottish Parliament](#)” (2014) [Consulted: June 2017]. On the Scotland Act 2016, see the “Special Section on the Scotland Act 2016” of the *Edinburgh Law Review* 20 (3) (2016).

78 It won 56 out of Scotland’s 59 seats.

79 SCOTTISH NATIONALIST PARTY, “[Election Manifesto](#)” (2016), p. 23 [Consulted: June 2017].

80 CASANAS ADAM, Elisenda (2016).

81 CARREL, Severin (2017).

4.2 The Competence Debate Returns – Has Anything Changed?

The announcement of the intention to hold of a second independence referendum for Scotland, and the UK Government's less than favourable response, reignited the debate on whether the Scottish Parliament had the competence to legislate for such a referendum. In addition, the holding of a second independence referendum also posed new questions regarding whether the 2014 referendum, the Edinburgh Agreement and the reforms that had followed had any impact on these issues. The first point to highlight is that, despite the negative outcome, the Scottish Independence Referendum of 2014 set a clear precedent for the future: it can no longer be argued that the UK Constitutional framework does not allow Scotland to hold a referendum on independence. The initial position put forward by Aidan O'Neill arguing that a referendum that could result in the dissolution of the Union should require the vote of all the peoples of the UK seems therefore no longer a valid one.

The issue under debate remains the different legal avenues that can enable the Scottish Parliament to legislate for the referendum. It is worth noting here that Nicola Sturgeon's proposal for "Indiyref2" (as it has become known) involved requesting the Prime Minister for the enactment of a Section 30 Order similar to the one enacted after the Edinburgh Agreement. This would transfer specific competences to the Scottish Parliament to legislate for a second independence referendum and therefore put the competence of the Scottish Parliament beyond any doubt. It would also avoid the need to provide a black or white answer to the issue of the Scottish Parliament's competence. However, it would involve a new set of negotiations between both governments and most probably the agreement to a set of conditions set out by Teresa May. Also, in his initial analysis of the legal questions arising out the proposals for another independence referendum for Scotland, Tierney highlights the fact that the UK Government is under no legal obligation to grant a Section 30 Order. In this sense, he states that "the issue is, as it was in 2012, with the signing of the Edinburgh Agreement, entirely political"⁸². He considers that, in order to not be presented as frustrating the will of the Scottish Parliament, the UK Government may agree to the referendum in principle, but that the series requirements they set may be quite strict. At the time of writing, it is unclear what conditions might be required by the UK Government to agree to another Section 30 Order. This uncertainty leads to a series of additional questions.

The first of these questions is whether the fact that the 2014 referendum was held on the basis of the Edinburgh Agreement and the enactment of a Section 30 Order means that this would necessarily be required again. This seemed to be the generalised assumption by a significant part of commentators and the media, and also that it would be ultra vires for the Scottish Parliament to legislate for the referendum without it⁸³. In response to this, Ewan Smith and Alison Young consider if the Edinburgh Agreement and the process that followed made any difference to the above debates⁸⁴. Firstly, the key point for them is that the Edinburgh Agreement did not change the legal powers of the Scottish Parliament or the Scottish Government. They consider that, at best, it may be seen as giving rise to a convention that Scotland needs to seek the permission of the UK of the UK Government if it wishes to hold a referendum on independence. And they themselves also highlight that, as the recent Miller decision has further confirmed, conventions are only politically and not legally binding. Secondly, they point out that the reference inserted into Schedule 5 of the Scotland Act 1998 as a result of the sec 30 Order cannot be interpreted as a guide to the meaning of the Scotland Act would ordinarily mean that a referendum on independence would be reserved⁸⁵. They highlight that even the Explanatory memorandum to the Order makes clear that it is enacted because the UK Government "considers that such an Act would be outside the competence of the Scottish Parliament" but, while this can be considered relevant, it is not decisive⁸⁶. The question, then, remains as open as in 2014.

⁸² TIERNEY, Stephen. "A Second Independence Referendum in Scotland: The Legal Issues". UK Constitutional Law Association Blog (13/03/2017a).

⁸³ MANCE, Henry. "[Who decides the date of a Scottish independence referendum?](#)". Financial Times (14/03/2017) [Consulted: June 2017].

⁸⁴ SMITH, Ewan; YOUNG, Alison. "That's how it works in 2014, and how it would have to work again". *UK Constitutional Law Association Blog* (15/03/2017)

⁸⁵ The specific wording introduced was: "Paragraph 1 does not reserve a referendum on the independence of Scotland from the rest of the United Kingdom if the following requirements are met -it lists also the requirements".

⁸⁶ Ibid.

A second question that arises regards whether more recent case law on devolution provides any clearer answers to how these issues should be approached. In this sense, Tierney argues that the Supreme Court's recent case law could be interpreted as leading both ways, therefore not providing any more light on the issue⁸⁷. On the one hand, he highlights that devolution cases have adopted an increasing expansive understanding of devolved powers, which would strengthen the argument that the Scottish Parliament does have the competence to legislate for the referendum. On the other hand, he also notes that in the recent Miller case, the Supreme Court not only adopted wide approach to what "the effect" of action was, but also took a very narrow approach to the constitutional understanding of devolution. His conclusion is that "the law is therefore uncertain"⁸⁸.

It seems, then, that the different positions on the competence of the Scottish Parliament, with the exception of the most restrictive one, still offer the relevant options for providing an answer to the question of whether the Scottish Parliament has the competence to legislate for an independence referendum. As discussed above, each of these options was tied to a specific understanding or narrative of the nature of the state (unitary, federal or quasi-federal and union), and in 2014, none of these narratives had been clearly endorsed or had preference over the other. The final question to consider then is if anything has changed in this regard. It is Aileen McHarg who, in her analysis of the second referendum debates, takes a broader approach and comes back to this issue. Here McHarg argues that none of these three accounts can be regarded as having been unequivocally endorsed or rejected by the 2014 referendum process⁸⁹. While she considers that the holding of the 2014 referendum may indicate that the unitary narrative is implausible, from a strictly legal perspective, it could not have gone ahead without the legal authority conferred by the UK Parliament. On the other hand, the union state narrative may have had some political endorsement, again by the holding of the referendum and also by the Smith Commission's report that states that "sovereign rights of the people of Scotland to determine the form of government best suited to their needs"⁹⁰. But the Supreme Court's more recent treatment of the Sewel Convention in the Miller case highlights the lack of force of politically recognised constitutional claims. Macharg then argues that the quasi-federal account seems to be the one that best fits the negotiation and conditional agreement that led up to the 2014 referendum, but that this is hard to reconcile with some of the other aspects of the territorial constitution and the current Brexit process. In short the three different narratives are still present and could provide a different answer to the referendum question.

In her conclusions, McHarg considers that this uncertainty is a recipe for conflict⁹¹. And it is indeed true that, because of the lack of a clear answer to the competence question, both in 2012 and now again, this has led to a confrontation of the two sides in the debate. Yet, at the same time, in the previous 2014 referendum the Edinburgh Agreement and the process that followed avoided exactly that. The signing of a political agreement between the Scottish and UK Governments providing for the use of the existing legal framework to enable the Scottish Parliament to legislate for the referendum without the possibility of it being challenged, avoided the need to provide a clear answer to the specific competence question, which would have resulted in the endorsement of one of the different constitutional narratives, thus rejecting or side-lining the others. Precisely because the current situation is more fraught than in 2012, it seems that the outcome of taking the issue before the courts to get a clear black or white decision would be even more controversial and alienating for the losing side than in the case of the previous referendum. Indeed, while in 2011 the referendum could have been described as "accidental", the conflicting outcomes of the EU referendum vote have in this case provided what can be described as "a cause" or reason for independence. In addition, leading up to the 2014 referendum both sides argued for models that included both more self-government and different ties for Scotland with the rest of the UK, whatever the outcome⁹². If an independent Scotland wants to remain in

87 TIERNEY, Stephen. "A second Scottish independence referendum without a s. 30 Order? A legal question that demands a political answer". *Centre on Constitutional Change Blog* (11/04/2017b).

88 Ibid.

89 MCHARG, Aileen. "Indyre2: Who Decides?". *Scottish Constitutional Futures Forum Blog* (15/03/2017).

90 THE SMITH COMMISSION. (2014), p.13.

91 MACHARG (2017).

92 TIERNEY (2017b).

the EU and the rest of the UK continues with the Brexit process, the possibility of articulating intermediate, interconnected models will be much more complicated, if not impossible. Because of all the above, Tierney warns against a legal challenge, arguing that it would throw the judges “into a vexed and deeply political dispute”, which would lead to claims that the Supreme Court was acting politically, whatever the outcome. He concludes that, while framed as a legal question, this is a political problem that requires political answer; in his own words, that it is “too constitutionally fundamental and politically contentious to be left to the courts”⁹³.

5 Conclusions

The coexistence of different constitutional narratives in relation to the foundation and articulation of the constitutional framework is a common element in a plurinational state. In ordinary conditions they do not affect the functioning of the institutions of government or the relationship between the different orders of government. It is only when certain fundamental constitutional questions are posed, such as whether the Scottish Parliament has the competence to legislate for the referendum, that these different narratives come to the fore and are potentially in conflict. In the Scottish case, this article has shown that the different answers to this question depend on whether one adheres to the unitary state narrative, the quasi-federal narrative or the different variants of the union state narrative, and also that the UK territorial constitution presents elements that point to each of these. It is in this sense that this question remains unanswered, but maybe also unanswerable, as each of the different answers has a legal basis and is constructed in a plausible manner. It seems that, if the question does end up before the Supreme Court, whatever decision they come to will be contested by those who do not agree with the particular narrative adopted, and it will lead to accusations of politisation against the court. As a consequence, a legal challenge would not resolve the conflict, but simply exacerbate it further. The 2012 Edinburgh Agreement avoided a potential constitutional crisis, and enabled the independence referendum to go ahead in conditions that were agreeable to both orders of government. Despite their differences, all parties involved were very much aware of the need to maintain an open constitutional framework that allows space for pluralism and for the different constitutional narratives to coexist. It seems that this is again the best possible option if a second referendum goes ahead. If there is a lesson to be learned from the competence debates leading up the 2014 referendum, it is that the awareness on both sides of the fundamentally political nature of the question under discussion avoided the escalation of the conflict.

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