Scotland's Political and Constitutional Process:

Negotiating Independence under a Flexible Constitution

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Scotland is often regarded as a model for pursuing independence claims via the political process. In the run-up to the 2014 independence referendum (indyref), members of secessionist movements around the world were not only watching, but also hoping they could extract valuable lessons on how to negotiate and push forward independence claims.[1] While the 45% in favour of Scottish independence did not carry the day, the process itself – from the political negotiations predating the referendum to the referendum campaign and vote itself – has been lauded as democratic, truly participatory and deliberative, and a model of good practice in direct democracy.[2] The push for a second independence referendum has been revitalised following the UK vote for Brexit with its different outcome in Scotland and a perceived marginalisation of Scotland's voice in the negotiations and post-Brexit planning. As this chapter will show, indyref 2 is likely to be more difficult to get off the ground. At the same time, it rehashes the legal issues that were debated before the first indyref, with the added complexities of new legislation, Supreme Court decisions, and political developments in the intervening years.

So what lessons can we extract from Scotland's political process surrounding independence claims? Is its experience eminently *sui generis*, only possible within the specific UK context of a more malleable uncodified constitution and greater propensity for resolving constitutional conflicts through political means and intergovernmental channels? Or is it instead of greater comparative interest, and if so, with what caveats? Furthermore, what was the constellation of constitutional and legal processes in motion that facilitated the perceived success of an ultimately unsuccessful independence vote?

This chapter makes four interrelated claims. First, Scotland illustrates that secessionist claims cannot be resolved by relying on legal rules alone, neither domestic nor international. By definition, secession is a political and constitutional claim that will demand resolution through political and constitutional processes involving political will of the centre to engage in negotiations, sufficiently capacious constitutional principles of democracy and self-government, and informal political agreements and practices facilitating consensus-building. This may well be more likely in cases where the constitutional framework is silent on secession and territorial integrity or, as in the case of the UK, where it is of such a nature as to encourage political resolution of constitutional claims. While political negotiation and political will also play central roles in constitutional settings expressly inimical to secession, the law in these instances becomes a conservative instrument seeking to preserve the status quo rather than facilitate its renegotiation.

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[1] Manon Cornellier, 'Le modèle écossais', *Le Devoir,* 13 September 2014, https://www.ledevoir.com/opinion/chroniques/418378/le-modele-ecossais; Libby Brooks, 'Catalan President Cites "Scottish Model" in Call for Independence Poll', *The Guardian*, 12 July 2018, https://www.theguardian.com/world/2018/jul/12/catalan-president-cites-scottish-model-in-call-for-independence-poll.

[2] Stephen Tierney, 'The Scottish Independence Referendum: A Model of Good Practice in Direct Democracy?' in Aileen McHarg, Tom Mullen, Alan Page, and Neil Walker, eds., *The Scottish Independence Referendum: Constitutional and Political Implications* (Oxford University Press 2016) 53.

Second, the process of politically and constitutionally negotiating independence claims will not be divorced from legal processes. Instead, these will unfold simultaneously, reinforcing but also at times opposing each other. What Scotland's example shows is that thorny questions of legal and constitutional interpretation that may otherwise be conducive to deep crisis and even deadlock can be sidestepped when key political actors agree on a peaceful resolution. As will be seen, avoiding the judicialisation of the independence referendum process was a distinctive goal in Scotland and as such motivated political players to work together rather than seek to block each other through legal means.

Third, Scotland's road to indyref 2014 was facilitated by a series of favourable conditions – both political and constitutional – which are difficult to reproduce elsewhere. In fact, they are proving difficult to reproduce within Scotland's own bid for a second indyref. These include: a constitutional and regulatory framework that ensured the predictability, clarity, and oversight of the referendum process; ambiguous but uncontested boundaries of the political community whose fate was in question, tied to a largely franchise in the referendum; internal homogeneity tied to a clear majoritarian decision-making rule; and as much certainty about the consequences of the vote as possible, though this aspect was muddled by the inescapable ambiguity of independence itself and by a last-minute political intervention from the centre. These factors were conducive to a high degree of democratic legitimacy of the process and acceptance of the referendum's result.[3]

Finally, Scotland also demonstrates that realising secession will rarely be a one-off, linear process. Instead, it is best seen as a long-term project that will involve different constellations of political actors, shifting public attitudes, and sometimes rapidly changing material circumstances influencing perceptions of the case for independence. Secession is deeply embedded in regional, national, and supranational dynamics and often subject to different legal frameworks between these levels. In Scotland's case, in terms of popular votes, we are looking at one national referendum on EU membership, three national elections, one Scottish and one European election in the aftermath of the 2014 indyref. All had the potential to reshape the political map and have influenced the case for Scottish independence. Four legal regimes were interrelated: the international law on secession; European law, through claims about Scotland's EU membership; UK constitutional law and regulatory framework on referendums; and a Scottish regulatory framework developed once competence was devolved for the purposes of indyref 2014. Legal arguments during Scotland's process are variously grounded in one or several of these, with varying outcomes in terms of the strength of and audience for the case for Scottish independence. Taking this longitudinal view will facilitate a more accurate perspective on the political, legal, and constitutional strategies employed in the fight for independence.

The chapter thus focuses, in the first instance, on Scotland's process in the run-up to and immediate aftermath of the independence referendum held in 2014. Comparisons with the likely contours of any second independence referendum, announced by Scotland's First Minister in the aftermath of the 2016 Brexit vote, will be drawn where relevant, though much uncertainty still surrounds it. I will also draw comparisons to secession movements elsewhere on discrete issues. These cross-temporal and transnational comparisons will serve to highlight the exceptional set of circumstances that facilitated Scotland's successful experience with indyref in 2014. They will also illustrate why these conditions will be so hard to replicate elsewhere, or indeed within Scotland at a different point in time.

[3] Ailsa Henderson and Stephen Tierney, 'Can Referendums Foster Citizen Deliberation? The Experience of Canada and the United Kingdom' in Michael Keating and Guy Laforest, eds., *Constitutional Politics and the Territorial Question in Canada and the United Kingdom* (Palgrave Macmillan 2018) 159.

The chapter proceeds as follows. I first discuss secession as a political and constitutional process, arguing that a constitutional framework – one that straddles the divide between law and politics – is best able to capture and address the normative complexity of secessionist claims. This is not to deny the role of supranational legal frameworks, including international and European law. However, while the latter may have strategic roles to play in processes of negotiating secessionist claims, they will not be, on their own, determinative of these claims' resolution. Second, I reconstitute the political process surrounding indyref in 2014. I argue that the political compromise struck by the two parties successfully avoided a potentially divisive judicialisation of the process, as has happened in Catalonia, and brought the referendum process under the umbrella of national and, by extension, international legality. Third, I dive deeper into the factors facilitating the democratic process in Scotland. These include key decisions on the franchise, simple majority voting rule, and planning for the referendum's aftermath. Each is shown to have greatly reduced the scope for divisiveness but also to have been contingent on constitutional, political, and even sociological realities specific to Scotland and the UK. I conclude that secession should best be thought of as a non-linear process dependent on such contextual factors, making the so-called 'Scottish model' difficult to replicate elsewhere or across time.

1. Secession as a political and constitutional process

Secession does not neatly fit within the conceptual boundaries of law, whether domestic or international. International law remains attractive for secessionist claims insofar as it provides independence movements with a framework within which to formulate claims against the state and to seek to pierce the sovereign monolith. However, unless these claims can fit within the very narrow boundaries of what international law recognises as legitimate self-determination claims, such an appeal to a supranational corpus of norms or to international bodies that might mediate politically will not be determinative. It has been argued that, at most, international law may be said to recognise a procedural right to be heard and a duty of good faith negotiation of secessionist claims.[4] International law is far more comfortable with deferring to domestic legality, however, and with recognising the emergence of new states on the basis of internal "democratic consensus".[5] Thus, rather than checking statehood criteria compliance and/or the existence of a historic entitlement, statehood recognition in contemporary international law has been viewed as a political process resulting in a new legal situation.[6]

Domestic law is itself not a straightforward aid in demarcating the process of dealing with secessionist claims arise within the state. Most often, constitutions will be silent on secession.[7] In rare instances, the constitution will make explicit provision for a right to secession, such as Ethiopia's purporting to guarantee to "every Nation, Nationality and People" in the country "an unconditional right to self-determination, including the right to secession" (Article 39(1)). However, this is a misleading example. The clause has been shown to have mostly symbolic value given the political realities of high state

[4] Christine Bell, 'International Law, the Independence Debate, and Political Settlement in the UK' in Aileen McHarg, Tom Mullen, Alan Page, and Neil Walker, eds., *The Scottish Independence Referendum: Constitutional and Political Implications* (Oxford University Press 2016) 197, 202 and 218.

[5] Jure Vidmar, *Democratic Statehood in International Law: The Emergence of New States in Post-Cold War Practice* (Hart 2013), 66.

[6] *Ibid.*, 77.

[7] Tom Ginsburg and Mila Versteeg, 'From Catalonia to California: Secession in Constitutional Law', *Alabama Law Review* 70:4 (2019) 923.

centralisation, single party dominance, and secessionist groups in exile.[8] It may also happen that an initial constitutionalisation of a right to secede is used as an enticement to accept annexation, only to be repealed in subsequent constitutions (an example would be the elimination of such a clause in China's 1975 constitution once it had consolidated its hold on Tibet).[9] More frequent are constitutional prohibitions of secession, either explicit (such as in the constitution of Myanmar, Article 10) or implicit, such as the numerous constitutional entrenchment clauses on territorial integrity, unity, or indivisibility.[10] It has been argued that constitutional silence or ambiguity is associated with higher rates of secessionist claims – insofar as independence movements can seize on this silence or ambiguity – but also with higher rates of conflict and violence – insofar as these claims will trigger central government opposition and judicial interventions declaring them illegal.[11]

These difficulties in dealing with secession at either the national or international level are not surprising when we consider the profound challenges posed by secessionist claims. The latter contest received notions of statehood and sovereignty, in both their internal and external meanings. Insofar as international law has developed as an inter-state body of norms grounded in state consent and respectful of national sovereignty, secessionist claims challenge this state-centrism and expose the disputed foundations of the state. They demand recognition for sovereignty as plurinational, and seek to exceed the bounds of accommodation envisioned by international law, such as through the framework of minority rights.[12] Moreover, they represent a challenge to expectations of state perpetuity and territorial integrity which underpin the international legal imaginary.[13] It is hardly surprising, then, that sub-state secessionist claims have been increasingly channelled through domestic constitutional law rather than international law, at least in liberal constitutional states.[14]

Secessionist claims do not sit entirely comfortably within the constitutional framework either, however, and call into question the constitutional imaginary. They push back against notions of the constituent power as unified, pacified, and uncontested, revealing instead of a single *demos* a multitude of *demoi* vying for constitutional recognition and territorial realignment.[15]

Nevertheless, we should view the constitutional framework as incorporating not just black letter law but also constitutional principles, values, and practices that retain a certain degree of openness. In other words, as straddling law and politics and as such being capable of more responsiveness to competing claims. Constitutional theory has itself shifted in recognition of the challenge of sub-state independence movements. For example, it has developed notions of internationalised or plural constituent power to better capture the multiplicity of actors, both internal and external to the polity,

[8] Tesfa Bihonegn, 'Federalization with a Constitutional Guarantee to Secession: Controversies, Paradoxes and Imponderables in Ethiopia', *Regional & Federal Studies* 25:1 (2015) 45 and Alem Habtu, 'Multiethnic Federalism in Ethiopia: A Study of the Secession Clause in the Constitution', *Publius* 35:2 (2005) 313.

[9] Susanna Mancini, 'Secession and Self-determination' in Michel Rosenfeld and András Sajó, eds., *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 481, 494.

[10] Yaniv Roznai and Silvia Suteu, 'The Eternal Territory? The Crimean Crisis and Ukraine's Territorial Integrity as an Unamendable Constitutional Principle', *German Law Journal* 16:3 (2015) 542.

[11] Ginsburg and Versteeg (2019).

[12] Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford University Press 2004).

[13] Mancini (2012), 482.

[14] Tierney (2004).

[15] Stephen Tierney, '"We the Peoples": Constituent Power and Constitutionalism in Plurinational States' in Martin Loughlin and Neil Walker, eds., *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press 2008) 229 and Zoran Oklopcic, 'Constitutional (Re)Vision: Sovereign Peoples, New Constituent Powers, and the Formation of Constitutional Orders in the Balkans', *Constellations* 19:1 (2012) 81.

involved in processes of constitution-making.[16] It has also developed the notion of post-sovereign constitution-making to refer to the multi-track, staggered nature of constitution-building today, often involving interim legal frameworks that provide uninterrupted legality between different regimes.[17] In this way, the constitutional framework reveals itself as sufficiently capacious to be able to capture the normative complexity of secessionist claims. This normative capaciousness has been argued to have facilitated the process of negotiating Scottish independence. Neil Walker has argued, for example, that the distinctive flexibility of the UK constitution has resulted in a wider space of manoeuvre around secession.[18] As we will see, this flexibility of the constitutional framework was supplemented by political and sociological contingencies that allowed for a successful referendum experience in Scotland in 2014.

This chapter's emphasis on Scotland's political and constitutional processes of negotiating independence is to be understood in light of these developments. It would be erroneous, however, to read this emphasis as meaning that the supranational legal framework did not have a role to play, especially in the run-up to the 2014 referendum. Christine Bell has documented the use of international law in the referendum campaign.[19] She has shown that, contrary to other contexts where nationalists have invoked international legal norms against the state, in the indyref saga it was the No campaign that deployed international legal arguments in a rather conservative and positivist manner. Because the domestic legality of the process was mutually agreed early on, the international illegality of the process itself was also not in question. Instead, international legal arguments were deployed to strategically negate any claims by the Yes side that independence could be categorised as anything other than secession. Arguments on the pro-independence side that independence could instead be viewed as a case of dissolution, insofar as the UK constituted a Union state based on consensus, were thus denied.[20] The implications of such arguments were significant and would have affected the determination of state succession, with consequences for continuation of membership in international organisations (including the European Union) and division of national debt.

European law also played a role in the referendum campaign, in a number of ways. Scottish nationalism was early on positioned as a civic rather than ethnic endeavour, subscribing to European values and legality. Pro-independence forces hoped thereby to defuse views of the independence movement as a regressive effort, as well as to reassure voters that an independent Scotland's future would remain European.[21] These efforts were not merely rhetorical: it was argued that European law was sufficiently malleable and had in the past shown sufficient pragmatism to be able to accommodate an independent Scotland in a manner that would ensure either continuity of membership or a swift re-accession.[22] As Sionaidh Douglas-Scott has argued, European law would have

[16] Hans Agne, 'Democratic Founding: We the People and the Others', *International Journal of Constitutional Law* 10:3 (2012) 836; Oklopcic (2012); and Vicki Jackson, '"Constituent Power" or Degrees of Legitimacy?', *Vienna Journal of International Constitutional Law* 12:3 (2018) 319.

[17] Andrew Arato, *Post Sovereign Constitution Making: Learning and Legitimacy* (Oxford University Press 2016). For an application in the context of secession, see Sujit Choudhry, 'Secession and Post-sovereign Constitution-making after 1989: Catalonia, Kosovo, and Quebec', *International Journal of Constitutional Law* 17:2 (2019) 461.

[18] Neil Walker, 'Beyond Secession? Law in the Framing of the National Polity' in Stephen Tierney, ed., *Nationalism and Globalisation* (Hart 2015) 155.

[19] Bell (2016).

[20] Bell (2016), 208.

[21] Elisenda Casañas Adam, Dimitrios Kagiaros, and Stephen Tierney, 'Democracy in Question? Direct Democracy in the European Union', *European Constitutional Law Review* 14 (2018) 261.

[22] Sionaidh Douglas-Scott, 'Scotland, Secession, and the European Union' in Aileen McHarg, Tom Mullen, Alan Page, and Neil Walker, eds., *The Scottish Independence Referendum: Constitutional and Political Implications* (Oxford University Press 2016) 175.

had the normative resources to accommodate such claims. However, in Scotland as later in Catalonia, the European Union refrained from intervention or rather, intervened indirectly in favour of the status quo by adopting the view that these processes were matters of internal constitutional law.[23]

This multitude of legal claims is not just reflective of the multiple legal regimes within which Scotland and the UK are embedded. Indeed, such an overlap of national, regional, and international legal regimes has been recognised as having a bearing on secession movements globally.[24] It is also connected, however, to the strategic usefulness, both for the Yes and the No campaigns, of international and European legal claims. In other words, pragmatic considerations and not just the soundness of the legal argument determined which legal framework each side of the debate relied on.

2. Political agreement, legality, and avoiding the judicialisation of the referendum process

Retaining our referendum focus we could start telling the story of the contemporary movement for independence in Scotland in 1979, when the first referendum on Scottish devolution was held. While a majority of voters opted for devolution, the 40% required turnout threshold was not met. Support for Scottish devolution did not disappear but was channelled through initiatives such as the 1989 Scottish Constitutional Convention, an association bringing together multiple political parties, churches, and civic organisations which would put forward the framework for devolution. Scotland had a chance to vote on devolution again in 1997. Part of the Blair government's push for major constitutional reform across a number of areas, similar referendums were held in Wales and Northern Ireland and resulted in the adoption of a series of devolution statutes and the creation of novel devolved legislative and executive institutions.[25] In Scotland, these were the Scottish Government and the Scottish Parliament. The latter's competences were laid out as part of a reserved powers model wherein any powers not explicitly retained by Westminster would be assumed to be devolved (Scotland Act 1998, section 29). It was argued then that the Scotland Act 1998, while seemingly opening the door for a renegotiation of the nature of the UK state toward a more pluralist instantiation, had still retained strong integrative tendencies, such as at the level of intergovernmental and interparliamentary relations.[26] Echoes of this dissatisfaction with devolution arrangements would reverberate during the referendum campaign, even though the latter mostly centred on substantive, not constitutional issues.[27]

The devolution framework has since been refined and expanded, with Scotland gaining more powers such as in the areas of taxation, social security, and electoral administration.[28] Reflecting on the fate of devolution twenty years on, Tony Blair reiterated his view that devolution had been "right in principle and necessary politically." He explained its aims in both democratic and anti-secession terms: "The purpose of devolution was to bring about a new settlement between the constituent parts of the UK so that decision making was brought closer to the people who felt a strong sense of identity. And

[23] Casañas Adam *et al.* (2018).

[24] See discussion in 'Special Issue: Independence in a World of Intersecting Legal and Political Regimes', *Global Constitutionalism* 6:2 (2017) 167.

[25] For an overview as well as assessment of the constitutional reforms introduced at the time, see Michael Gordon and Adam Tucker, eds., *The New Labour Constitution: Twenty Years On* (Hart 2021).

[26] Stephen Tierney, 'Giving with one hand: Scottish devolution within a unitary state', *International Journal of Constitutional Law* 5:4 (2007) 730, 744.

[27] Aileen McHarg, 'The Constitutional Case for Independence' in Aileen McHarg, Tom Mullen, Alan Page, and Neil Walker, eds., *The Scottish Independence Referendum: Constitutional and Political Implications* (Oxford University Press 2016) 101.

[28] For an overview of devolution in Scotland, see David Torrance, *"The Settled Will"? Devolution in Scotland, 1998-2020*, House of Commons Library Briefing Paper No. CBP-8441, 6 April 2020.

politically, also, to ward off the bigger threat of secession."[29] However, concerns still remain that the *ad hoc*, piecemeal manner in which devolution has evolved in the UK in general has not quelled centrifugal forces and has seen the centre taking the Union for granted.[30] There have also been increasingly loud voices asking whether, in light of the expanding devolution settlements, there is now more scope for federal ideas within the UK constitution.[31]

Within this broader story, the 2014 indyref plays a central role as a high watermark of democratic engagement with the question of Scottish independence at all levels: in London, Edinburgh, and in wider society. The lead-up to the referendum allowed for the articulation of the political and constitutional case for and against independence, grounded in particular notions of the state, sovereignty, and democracy itself. The UK constitution's oft-praised flexibility showed its worth then, even while the fast-moving reality on the ground has since raised some doubts about its future.[32]

The Scottish National Party (SNP) gained a majority in the 2011 Scottish elections and on that basis claimed a democratic mandate to pursue its manifesto promise of a vote on independence. As this issue concerned the Union, it was viewed by many (including the UK government) as a reserved matter under section 29 of the Scotland Act 1998 so outside the competences of the Scottish Parliament. Instead, a section 30 order would be needed, whereby an Order in Council would be passed temporarily devolving the matter to the Scottish Government for the purpose of holding the referendum. Alternatively, the Westminster Parliament could legislate on the matter. The SNP pursued a legal route from the onset, wishing to be keep the process within the bounds of domestic (and European) legality. This had long been its proclaimed intention. As expressed by Neil MacCormick, the SNP would need to stick to "a democratic and constitutional path", whatever the obstacles, in line with a history of friendly Scottish-English relations dating back hundreds of years.[33]

A lively debate at the time revolved around whether a section 30 order was in fact required or else whether there were principled grounds on which to argue that the Scottish people retained the right to decide on their future, including via an independence referendum.[34] Those who believed the Scottish Parliament had the authority to conduct a referendum regardless of express authorisation from London saw it as more than a technical question, as one of constitutional principle and constitutional politics as much as of legality.[35] They argued, first, that while the end goal of the SNP was indisputably independence, the narrower purpose of holding the referendum was to seek the views of the Scottish people on the matter; as such, it was plausible to read it as not trespassing on reserved matters under the Scotland Act 1998. Second, the legal effect of the vote would be advisory

[29] *Tony Blair: Devolution, Brexit and the future of the Union*, Institute for Government, 24 April 2019.
[30] House of Lords Select Committee on the Constitution, *The Union and Devolution*, 10th Report of Session 2015–16, 25 May 2016.
[31] Robert Schütze and Stephen Tierney, eds., *The United Kingdom and the Federal Idea* (Hart 2018).
[32] For a discussion of possible ways forward after the indyref vote, see Neil Walker, 'The Territorial Constitution and the Future of Scotland' in Aileen McHarg, Tom Mullen, Alan Page, and Neil Walker, eds., *The Scottish Independence Referendum: Constitutional and Political Implications* (Oxford University Press 2016) 247.
[33] Neil MacCormick, 'Is There a Constitutional Path to Scottish Independence?', *Parliamentary Affairs* 53:4 (2000) 721.
[34] The UK and Scottish governments set out their positions in two consultation documents titled *Scotland's constitutional future: A consultation on facilitating a legal, fair and decisive referendum on whether Scotland should leave the United Kingdom*, January 2012 and *Your Scotland – Your Referendum*, 25 January 2012, respectively.
[35] Gavin Anderson *et al*., 'The Independence Referendum, Legality and the Contested Constitution: Widening the Debate', *UK Constitutional Law Blog*, 21 January 2012, https://ukconstitutionallaw.org/2012/01/31/gavin-anderson-et-al-the-independence-referendum-legality-and-the-contested-constitution-widening-the-debate/.

only, in keeping with the nature of referendums under the UK constitution.[36] While the competences of the Scottish Parliament were limited, it was not constitutionally barred from having an opinion on reserved matters and even campaigning, within Union structures, around them.[37] Those who agreed with the UK government's position refused the more purposive interpretation of the Scotland Act 1998 and argued that any legislation passed by the Scottish Parliament on matters related to the Union would, quite simply, not be law at all.[38] The difference between these positions was therefore not just about disparate answers to the same question, but about different interpretive methodologies, understandings of the purpose of devolution and legislation implementing it, and ultimately, visions of the UK constitution itself.

After months of negotiation, the Edinburgh Agreement was signed in October 2012 between the UK Prime Minister David Cameron and the Scottish First Minister, Alex Salmond. It confirmed that indyref would have a "clear legal base" and "deliver a fair test and decisive expression of the views of people in Scotland and a result that everyone will respect."[39] Like Tony Blair before him, Cameron explained his position in democratic terms: "I always wanted to show respect to the people of Scotland. They voted for a party that wanted to have a referendum. I've made that referendum possible and made sure it's decisive, it's legal and it's fair, and I think that's right for the people of Scotland."[40] His decision has since been described as a low risk, high reward calculation grounded in political opportunism rather than any high ideals: given the low support for independence at the time (polling at around 30%), here would be a chance to annihilate the independence demand once and for all.[41] This partially helps explain the very different positioning of the Spanish government vis-à-vis Catalan demands for an independence referendum, where electoral calculations played out differently.[42]

For his part, Salmond saw it as a guarantee that the outcome of the vote would be respected "whatever it is" and that the SNP could focus on the substantive issues.[43] However, it has been noted that the legal status of the Agreement remained ambiguous: despite legal language, it could neither be classified as an international treaty (either between a state and its sub-unit, or unilaterally adopted by the UK) nor as a domestic contractual agreement giving rise to legitimate expectations.[44] The obligations undertaken within it remained of a political nature, relying for their enforcement on the parties' good faith, reciprocity, and reputational considerations, as well as the force of public opinion and debate. While the possibility of one party reneging on their commitments was not seriously

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[36] House of Lords Select Committee on the Constitution, *Referendums in the United Kingdom*, 12th Report of Session 2009–10, HL Paper 99.

[37] Nick Barber, 'The Virtues of Advisory Referendums', *UK Constitutional Law Association Blog*, 21 March 2012, https://ukconstitutionallaw.org/2012/03/21/nick-barber-the-virtues-of-advisory-referendums/.

[38] Adam Tomkins, 'The Scottish Parliament and the Independence Referendum', *UK Constitutional Law Association Blog*, 12 January 2012, https://ukconstitutionallaw.org/2012/01/12/adam-tomkins-the-scottish-parliament-and-the-independence-referendum/.

[39] *Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland*, Edinburgh, 15 October 2012.

[40] 'Scottish Independence Referendum Deal Signed by Cameron and Salmond', *The Guardian*, 15 October 2012, https://www.theguardian.com/politics/2012/oct/15/scottish-independence-referendum-cameron-salmond.

[41] Daniel Cetrà and Malcolm Harvey, 'Explaining Accommodation and Resistance to Demands for Independence Referendums in the UK and Spain', *Nations and Nationalism* 25:" (2019) 607.

[42] *Ibid.*

[43] *Ibid.*

[44] Christine Bell, 'The Legal Status of the "Edinburgh Agreement"', *Scottish Constitutional Futures Forum*, 5 November 2012, https://www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/431/Christine-Bell-The-Legal-Status-of-the-Edinburgh-Agreement.aspx.

entertained as regards the Edinburgh Agreement, it is not an uncommon scenario in other settings where parties may outright breach a pact, stall its implementation, or resort to violence.[45]

A section 30 order, originally annexed in draft form to the Edinburgh Agreement, was formally approved in early 2013.[46] It stipulated that a referendum vote on independence should be held no later than 31 December 2014, on a single binary question, and on a date not overlapping with any other referendum. This sealed the UK government's preference of avoiding a multiple choice question that would include an intermediary, 'devo max' option. It also brought indyref within the scope of the Political Parties, Elections and Referendums Act 2000 (PPERA), the legislation governing UK elections and referendums. This would have an important impact on the regulatory framework governing the independence referendum, including empowering the Electoral Commission to review the referendum question.[47]

The order also had the virtue of quelling the legality debate. By ensuring a legal basis for indyref, it avoided bringing in the courts, particularly the UK Supreme Court, which – in the event of a stand-off between London and Edinburgh and the latter going it alone – would have had to step in and resolve the competence question. There were many unknowns about how the court might have done so. Unusually for a court in a system of multilevel governance, the Supreme Court had had a more limited role in resolving devolution-related disputes up until that point.[48] This was due to the political nature of the UK constitution and the availability of other, non-judicial means of intergovernmental dispute resolution. Where the court had intervened, it had recognised the need to take into account the democratic underpinnings of devolution and had shown some creativity about adapting the UK constitution to the reality of devolution. In the *AXA* case, for example, the *sui generis* nature of the Scottish Parliament had been recognised, which enjoyed a democratic mandate through direct election by the Scottish people and had towards them the same relationship as Westminster, except within the bounds of section 29 of the Scotland Act 1998.[49]

This interpretive openness has not been sustained. In *Imperial Tobacco*, the Supreme Court was asked to rule on whether an Act of the Scottish Parliament had superseded its legislative competence. The court ultimately decided it had not, but was careful to characterise its intervention as strictly one of statutory interpretation, wherein the bounds of the legislative competence of the Scottish Parliament were to be found solely in the legislation passed by Westminster, which continued as the sovereign legislature of the UK.[50] This more restrained approach has since been since in the *Miller* case surrounding the question of triggering the Brexit process, in which the Supreme Court only briefly addressed devolution-related arguments.[51] The question had been raised whether the Sewel convention, as enshrined legislatively by section 2 of the Scotland Act 2016, required that devolved consent should be sought by London when seeking to trigger Article 50 of the Treaty on European

[45] *Ibid.*
[46] The Scotland Act 1998 (Modification of Schedule 5) Order 2013.
[47] See Electoral Commission, *Referendum on Independence for Scotland: Advice of the Electoral Commission on the Proposed Referendum Question*, January 2013.
[48] Alan Trench, 'The Courts and Devolution in the UK', *The British Journal of Politics and International Relations* 14:2 (2012) 303. See also Eugénie Brouillet and Tom Mullen, 'Constitutional Jurisprudence on Federalism and Devolution in UK and Canada' in Michael Keating and Guy Laforest, eds., *Constitutional Politics and the Territorial Question in Canada and the United Kingdom* (Palgrave Macmillan 2018) 47.
[49] *AXA General Insurance Ltd. v Lord Advocate* [2011] UKSC 46, para. 45.
[50] *Imperial Tobacco Limited v The Lord Advocate (Scotland)* [2012] UKSC 61, para. 13.
[51] *R (Miller) v. Secretary of State for Exiting the European Union* [2017] UKSC 5.

Union.[52] The court found the convention to constitute a political rule and as such subject to political, not legal, sanction in case of breach. This has been seen by some as undermining the delicate balance between Westminster the devolved legislatures, as well as perceptions of the Supreme Court's role as neutral arbiter between them.[53] Finally (for now), in its *Scottish Continuity Bill* judgment, the Supreme Court has ruled against arguments that the Scottish Parliament had the competence to legislate in areas previously covered by EU law after Brexit.[54]

Returning to the political debates preceding indyref, we find different narratives interplaying – about the UK constitution, devolution, and the role of the UK Supreme Court – at different times, and with different expectations of outcome. Whereas the *AXA* decision has been viewed as chipping away at the unitary state conception in UK constitutionalism, thereby opening up space for some recognition of sub-state claims,[55] more recent decisions may be seen as a retreat to more traditional notions of parliamentary sovereignty and Westminster supremacy. The latter has long been a contested principle of the UK constitution in Scotland, with Scottish jurists arguing that a tradition of popular sovereignty predates the country's Union with England.[56] They have argued that it is prior to the constitutional powers of agencies of state and that it underpins the sovereign right of the Scottish people to choose their frame of government. As we saw in the previous section, similar appeals to history informed arguments that the UK had remained a union state and that Scottish independence would not, or not automatically, be a case of secession but state dissolution.[57] The assumed necessary connection between the principle of parliamentary sovereignty and a unitary conception of the state has been challenged as masking the normative openness and flexibility of statehood in UK constitutionalism.[58] In addition, devolution itself has been said to have transformed the nature of the UK state and, while not entirely federalising it, moving it in a federal direction.[59]

The fact that the UK constitution could accept such conceptual openness, including about the nature of the state, highlights its distinctiveness from other constitutional orders. We need only look to Spain to find a rigid adherence to unitary statehood and a constitution that, while allowing for some regional autonomy, denies the existence of constitutive peoples and only recognises the Spanish nation. The very existence of a constitutionally relevant Catalan people has been central in Spain.[60] The Spanish state has completely rejected Catalan claims of a right to decide their constitutional future, and has further closed off avenues for political negotiation by judicialising the issue and attaching the stigma of illegality to any pursuit of Catalan independence. The interventions of the Spanish Constitutional Tribunal have served to reinforce the unitary conception of the state, have restricted possibilities of sub-state pluralism to be accommodated, and have transformed the court itself into a centralising

[52] The Sewel convention is a political rule stating that the Westminster Parliament will not normally legislate on devolved matters without the devolved units' consent.
[53] Aileen McHarg, 'Constitutional Change and Territorial Consent: The Miller Case and the Sewel Convention' in Mark Elliott, Jack Williams, Alison Young, eds., *The UK Constitution after Miller: Brexit and Beyond* (Hart 2018) 155.
[54] *The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill – A Reference by the Attorney General and the Advocate General for Scotland* [2018] UKSC 64.
[55] Anderson *et al.* (2012).
[56] MacCormick (2000), 730.
[57] Bell (2016).
[58] Neil Walker, 'Beyond the Unitary Conception of the United Kingdom Constitution', *Public Law* [2000] 384.
[59] Schütze and Tierney (2015).
[60] Casañas Adam *et al.* (2018), 268.

force.[61] Elsewhere too, constitutional entrenchment of unitary statehood has shut the door on any sub-state claims for recognition. Romania's constitutional definition of the state as not just unitary but 'national', both features together with the principle of territorial integrity declared unamendable, has served to deny any calls for recognition of its multinational reality and to block even administrative territorial reorganisation.[62]

It can happen that judicial intervention actually helps mediate between secessionists and the centre, with the Canadian *Secession Reference* the much-acclaimed example of this.[63] The Canadian Supreme Court had been called upon to determine the legality of the 1995 referendum on Quebec sovereignty. In effect, it was to decide whether Quebec had a right, under domestic or international law, to secede. It grounded its judgment in four constitutional principles: federalism, democracy, constitutionalism and the rule of law, and respect for minorities, none of which were said to trump or exclude the operation of any of the others. The judgment also emphasised the need for clarity in designing the referendum process in Quebec, ultimately leading to the adoption of the Clarity Act 2000. The *Secession Reference* has since been praised for breaking new ground when recognising a duty to negotiate with would-be secessionists through a constitutional process and for the cautious positioning of the Supreme Court.[64] Its transnational legacy has also been significant.[65] It is easy to forget, however how contested court involvement had been at the time, with Quebec disillusioned with both the constitution and the Supreme Court,[66] or that the centre's legislative steps were seen as exploiting ambiguity in the judgment and as resulting in a usurpation of constitutional democracy.[67] The absence of an explicit prohibition on secession under the Canadian constitution, and a certain degree of flexibility within it, allowed the court to navigate the tricky waters of answering the first order questions before it, though not entirely without criticism.

Court intervention in mediating secessionist claims remains a delicate matter, and both sides were eager to avoid it in the run up to the Scottish independence referendum in 2014. While the political agreement reached in 2012 managed to avoid the issue then, all the unresolved issues of constitutional principle raised then have since returned to the foreground. Since First Minister Nicola Sturgeon announced, in the aftermath of the Brexit vote, her intention to pursue a second independence referendum, the same questions about legality and authority to initiate the process have been asked anew.[68]

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[61] Elisenda Casañas Adam, 'The Constitutional Court of Spain: From System Balancer to Polarizing Centralist' in Nicholas Aroney, John Kinkaid, eds., *Courts in Federal Countries: Federalists or Unitarists?* (University of Toronto Press 2017) 367.

[62] Silvia Suteu, 'The Multinational State That Wasn't: The Constitutional Definition of Romania as a National State', *Vienna Journal on International Constitutional Law* 11:3 (2017a) 413.

[63] *Reference re Secession of Quebec* [1998] 2 SCR 217.

[64] Tierney (2004), 259.

[65] Giacomo Delledonne and Giuseppe Martinico, eds., *The Canadian Contribution to a Comparative Law of Secession: Legacies of the Quebec Secession Reference* (Palgrave Macmillan 2019).

[66] Tierney (2004), 256.

[67] François Rocher and Nadia Verrelli, 'Questioning Constitutional Democracy in Canada:From the Canadian Supreme Court Reference on Quebec Secession to the *Clarity Act*' in Alain-G. Gagnon, Montserrat Guibernau and François Rocher, eds., *The Conditions of Diversity in Multinational Democracies* (IRPP 2004) 207.

[68] Chris McCorkindale and Aileen McHarg, 'Constitutional Pathways to a Second Scottish Independence Referendum', *UK Constitutional Law Blog*, 13 January 2020, https://ukconstitutionallaw.org/2020/01/13/chris-mccorkindale-and-aileen-mcharg-constitutional-pathways-to-a-second-scottish-independence-referendum/.

Theresa May's insistence that "now is not the time" for a second vote may have seemed a temporary obstacle.[69] The strong majority won by the Conservatives at the 2019 general election, however, was a far more categorical indication that the prospects of a second transfer of competences from London were slim. In January 2020, Prime Minister Boris Johnson formally rejected the call to again transfer the power to hold an independence referendum.[70] He cited the SNP's promise that the 2014 vote would be a "once in a generation vote", argued that "the people of Scotland voted decisively on that promise to keep our United Kingdom together", and vowed that the UK government would "continue to uphold the democratic decision of the Scottish people" and this promise. For her part, Sturgeon insisted: ""The Westminster union cannot be sustained without consent. Democracy will prevail." This shift to resistance from the centre has been attributed to the accommodation of Scottish claims no longer being politically expedient: not only has political opinion in the UK shifted against support for holding a second indyref, but the vote itself would no longer be low risk (given the 45% support for Yes in 2014 and holding).[71] Crucially, however, support for independence in Scotland has been remarkably stable, and the same 2019 election could be viewed as, if not outright returning a mandate for the SNP to seek a second indyref (the party won a majority of seats though not of the total votes), at least not a repudiation of its claims that it should do so.[72] But despite the stability and even vigour of demands for Scottish independence, the political space that had previously allowed a politically-negotiated agreement and thereby sidestepped thorny issues of legality has narrowed considerably.

3. Factors facilitating the democratic process in Scotland

While the Edinburgh Agreement guaranteed a legal basis for the 2014 vote, the referendum's perceived democratic legitimacy would hinge just as much on the regulatory framework of and actual conduct during the run-up to the referendum. The high degree of clarity, transparency, predictability, oversight, and participation, and the deliberative quality, of the process have all been said to have made the Scottish independence referendum into a democratic success story.[73] In reconstructing some of the key decisions taken then, I wish to highlight the constitutional, political, and even sociological and historical factors present that facilitated consensus-building. My aim is to show that, while Scottish secessionist claims presented a challenge of sub-state pluralism in the same way other secessionist movements have done, the features of the Scottish context were such as to smooth over markers of division that have been far more difficult to reconcile elsewhere. One such feature has already been discussed above: the flexible nature of the UK's constitution allowed for the contestation of notions of sovereignty and statehood without triggering an immediate confrontation with the centre, whereas a tradition of conflict resolution through political means helped avoid the judicialisation of the process. I will show that important features of the pre-indyref context are difficult to replicate not just elsewhere, but also across time within the UK.

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[69] Heather Stewart *et al.*, 'Theresa May Rejects Nicola Sturgeon's Referendum Demand', *The Guardian*, 16 March 2017, https://www.theguardian.com/politics/2017/mar/16/theresa-may-rejects-nicola-sturgeons-scottish-referendum-demand.

[70] Libby Brooks, 'Boris Johnson Refuses to Grant Scotland Powers to Hold Independence Vote', *The Guardian*, 14 January 2020, https://www.theguardian.com/politics/2020/jan/14/boris-johnson-refuses-to-grant-scotland-powers-to-hold-independence-vote.

[71] Cetrà and Harvey (2019), 623.

[72] Rob Johns, Ailsa Henderson, Christopher Carman, Jac Larner, 'Brexit or Independence? Scotland's General Election', *Political Insight* 11:1 (2020) 28.

[73] Stephen Tierney, '"And the Winner is… the Referendum": Scottish Independence and the Deliberative Participation of Citizens', *UK Constitutional Law Blog*, 29 September 2014, https://ukconstitutionallaw.org/2014/09/29/stephen-tierney-and-the-winner-is-the-referendum-scottish-independence-and-the-deliberative-participation-of-citizens/.

i. The boundaries of the political community: franchise and citizenship

In 2013, the Scottish Parliament passed two pieces of legislation that would govern the referendum campaign and vote in addition to PPERA: the Scottish Independence Referendum (Franchise) Act was passed in August 2013 and the Scottish Independence Referendum Act in December that same year. Together, they formed a regulatory framework that addressed the main aspects of the referendum process, including voter eligibility, the date of the vote, the referendum period, campaign registration, financial reporting and oversight, and more. The regulation of the referendum process was later praised by the Electoral Commission for providing clarity and sufficient time to run the referendum.[74] It has also been argued that it was precisely the Scottish Parliament's limited powers, resulting as they did in a plurality of actors legislating and regulating the indyref process, that ultimately occasioned this more fulsome regulation.[75]

The franchise issue is relevant here. The electoral register used for elections for the Scottish Parliament and local government was relied on. Centred on residency, this meant that Scots living outside Scotland were ineligible to vote in the referendum and that resident European citizens did have a vote. For the first time, the vote was also extended to 16 and 17 year olds, a long-standing policy of the SNP which has since been adopted in Wales as well. The franchise did not trigger much contestation, except for the ban on prisoners' voting (denied in UK general elections as well), which was soon settled by the UK Supreme Court.[76] This was thus another area where the flexibility of constitutional structures facilitated a pragmatic solution. The alternative to using the electoral register for Scottish elections would have been to find some definition of who constituted a 'Scot'. This would have been a difficult proposition to resolve, as well as to seek to manipulate for electoral gain in a country where national identity does not align neatly with attitudes towards independence.[77]

It has also been argued that the possible sensitivity of the franchise issue was in part defused by decoupling it from the question of citizenship in an independent Scotland.[78] In other words, a pragmatic if imperfect solution was adopted for the 2014 vote, while different plans were announced for determining the putative Scottish citizenship in the event of a vote for independence.[79] The old 'boundary problem' in democratic theory,[80] which raises the question of how to determine the boundaries of the *demos* that is supposed to exercise self-government, was evaded, whereas the question of the contours of the political community in whose name independence would be declared (the citizens of a future independent Scotland) was deferred.

The franchise question has been much more hotly disputed in other referendums, both around secession and otherwise.[81] For example, given that the electoral roll is under central government control in Spain, Catalan authorities found it difficult to gain access to reliable voter data, especially about Catalans living outside the region. Part of their solution, incorporated in Article 6(1) of the Law

[74] Electoral Commission, *Scottish Independence Referendum: Report on the Referendum Held on 18 September 2014*, December 2014.
[75] Tierney (2016), 59.
[76] *Moohan and another v. Lord Advocate* [2014] UKSC 67.
[77] Ailsa Henderson, Charlie Jeffery and Robert Liñeira, 'National Identity or National Interest?: Scottish, English and Welsh Attitudes to the Constitutional Debate', *Political Quarterly* 86:2 (2015) 265.
[78] See debates around this issue in Ruvi Ziegler, Jo Shaw and Rainer Bauböck, eds., *Independence Referendums: Who Should Vote and Who Should be Offered Citizenship?*, EUDO CITIZENSHIP Forum and EUI Working Paper RSCAS 2014/90 (2014).
[79] See chapter 7 in the Scottish Government's 2014 white paper, *Scotland's Future*.
[80] Eva Erman, 'The Boundary Problem and the Ideal of Democracy', *Constellations* 21:4 (2014) 535.
[81] For further examples, see Dejan Stjepanović and Stephen Tierney, 'The Right to Vote: Constitutive Referendums and Regional Citizenship', *Ethnopolitics* 18:3 (2019) 264.

on the Referendum on Self-determination (*Llei del referèndum d'autodeterminació*) passed by the Catalan parliament in 2017, included an opt-in for "those Catalans resident abroad whose most recent registration to vote was in Catalonia." The Catalan vote on self-determination would proceed without an official electoral roll. Another example of contested franchise is the 2016 referendum on EU membership, which used the electoral register for Westminster elections to determine eligible voters. This choice both EU citizens and long-term UK citizens who were resident abroad from voting in a referendum whose outcome seriously impacted their lives. The UK government's choice has since been described as overly restrictive and formalist, departing from any consideration of the democratic idea of all affected interests being given access to decision-making.[82]

The choice of franchise for the 2014 independence referendum was thus chiefly pragmatic. The appeal to the political community which was to be represented (and to some, resurrected) – Scotland – was no less forceful for its boundaries being difficult to pin down in fact or in law. Such an exercise of boundary-drawing was simply not necessary at the time of the vote, leaving the door open for historical claims and rhetorical fancy. This indeterminacy was also a luxury, one not always enjoyed by secessionists operating in more formalist constitutional settings.[83]

ii. The decision-making rule: simple majority voting and societal homogeneity

A simple majority rule would determine the outcome on 18 September 2014. The 40% turnout threshold operating during the 1979 Scottish devolution referendum had been proposed precisely to make a vote in favour of devolution harder and, because of inaccuracies in the electoral register for Scotland at the time, was widely perceived as unfair.[84] The 1979 devolution referendums in Scotland and Wales remain the only such referendums in the UK where a threshold was used. Turnout thresholds are widespread in referendum rules around the world,[85] although the Venice Commission recommends against adopting one due to their propensity to distort the meaning of abstentions.[86] Neither did the UK government insist on an approval quorum, i.e. approval by a minimum majority of registered voters. The explanation appears to lie in political calculations that the nationalists would in any case lose the vote on substance.[87]

The matter of thresholds is more complex when it comes to secession referendums, which threaten to reshape the very contours of the political community. The simple majority of votes cast rule employed in Scotland was enabled by the country's internal homogeneity: with no politically salient minorities, the rule was not questioned.[88] Elsewhere, the matter has been fervently contested. In the run-up to the 1995 Quebec referendum, for example, the Canadian Prime Minister stated he would only act on the basis of a "clear vote" for independence, which he explained would need to be higher

[82] Jo Shaw, 'The Quintessentially Democratic Act? Democracy, Political Community and Citizenship in and after the UK's EU Referendum of June 2016', *Journal of European Integration*, 39:5 (2017) 559

[83] Indeed, I have argued elsewhere that this indeterminacy of the political community question could not be maintained in all UK processes either. Calls for a UK-wide constitutional convention that would engage in far-reaching constitutional reform have largely ignored the difficulties of ensuring the representativeness of such a body given the country's asymmetries in devolution arrangements, demographics etc. See Silvia Suteu, 'The Scottish Independence Referendum and the Participatory Turn in UK Constitution-Making: The Move towards a Constitutional Convention', *Global Constitutionalism* 6:2 (2017b) 184.

[84] UCL Constitution Unit Independent Commission on Referendums, *Report of the Independent Commission on Referendums*, July 2018, 111.

[85] *Ibid.*

[86] European Commission for Democracy Through Law (Venice Commission), *Code of Good Practice on Referendums*, CDL-AD(2007)008rev-cor, 25 October 2018, para. 7.

[87] Jure Vidmar, 'The Scottish Independence Referendum in an International Context', *Canadian Yearbook of International Law* 51 (2013) 259, 260.

[88] Tierney (2016), 55.

than a simple majority vote.[89] The Canadian Supreme Court's emphasis on the need for a clarity of outcome of such a vote and the subsequent inclusion of such a requirement in the Clarity Act (though without stipulating a numerical threshold) have been seen as entrenching this view. They have been described as having "the potential to silence the democratic will of the Quebec people."[90] Another example is Montenegro's 2006 independence referendum. It operated on the basis of a controversial 55% threshold, proposed by the EU and initially opposed by the pro-independence government.[91] There was also a 50% turnout requirement, similarly endorsed by the EU, which was seen as enhancing the legitimacy of the process by Brussels and as maintaining internal legality by domestic actors opposed to independence, as the constitution of Serbia and Montenegro stipulated such a threshold for all referendums.

This illustrates a tension within the *Code of Good Practice on Referendums* of the Venice Commission, which has been relied on to determine international standards in the conduct of referendums, including in Scotland. On the one hand, the Code requires that "referendums within federated or regional entities must comply with the law of the central State"[92] (if extended to secession referendums, this confirms that the democratic consensus rule retains its appeal). On the other hand, the same Code recommends against either turnout or approval thresholds, as they risk distorting the meaning of abstentions to vote and may create tensions where a simple majority vote does not meet the approval requirement.[93] This admission of possible fallout from a mismatch between referendum design and political reality is not addressed by the Commission. Neither is the tricky requirement of maintaining internal legality when pursuing secession: a proposition easier to meet when the situation on the ground is peaceful and the stakes are low (as was the case in Scotland) and much more complicated under conditions of deep division and the threat of violence.

The threshold question in the UK was neither new prior to indyref 2014 nor would it remain moot. It was broadly believed that the 1998 referendum to approve the Belfast Agreement in Northern Ireland, the peace agreement ending the conflict in the country and bringing about a complex set of power-sharing institutions, would require cross-community support in order to gain legitimacy.[94] Only a simple majority was legally required, but the political reality demanded more. We have also seen the threshold issue re-emerge during the run-up to and aftermath of the Brexit vote. An amendment to the 2015 EU Referendum Act would have required a double majority for the vote to be valid: both of the UK population as a whole and within the four constituent nations.[95] The decision to proceed on the basis of a simple majority of votes cast would become even more contested in light of the pro-remain votes in both Scotland and Northern Ireland. The SNP argued that Scotland was being taken out of the EU against its will and tied the issue back to its quest for independence. Given the prominence of EU-centred arguments during the 2014 referendum debates and the No campaign's insistence that independence would mean loss of EU membership and EU citizenship rights, the Brexit-independence link was already there.

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[89] Tierney (2004), 321.

[90] Rocher and Verrelli (2004), 208.

[91] The EU's intervention was criticised both internally and by the Parliamentary Assembly of the Council of Europe for being more stringent than international standards demanded. See discussion in Pau Bossacoma Busquets, *Morality and Legality of Secession: A Theory of National Self-Determination* (Palgrave Macmillan 2020), 300.

[92] *Code of Good Practice on Referendums*, para. 32.

[93] *Ibid.*, para. 7.

[94] Tierney (2004), 322.

[95] House of Commons, Notices of Amendments given up to and including Thursday 16 July 2015, European Union Referendum Bill, amendment NC3.

iii. The consequences of the vote: voter information and a mandate for negotiations

The final aspect I wish to highlight about the Scottish 2014 indyref refers to the consequences of the vote. On the one hand, both governments had agreed to respect the outcome of the vote in the 2012 Edinburgh Agreement. This provided a certain degree of confidence that the vote would be decisive either way.[96] On the other hand, voters were being asked to make a decision on whether independence should happen, the contours of which would – indeed *could* only – be determined after the vote. The Edinburgh Agreement had contained nothing concrete on steps to be taken in the event of a Yes vote. The regulatory framework governing the referendum, while comprehensive, concerned the referendum process rather than its substance. Within that process, the Electoral Commission was duty-bound to provide voters with neutral information on the object of the vote. The leaflets it distributed to Scottish voters, however, did not explain independence but merely reproduced statements from the two campaigns and a joint statement on what would happen after the vote. Voters were merely reassured that a process of negotiation between the two governments would follow, as well as legal continuity until independence would be effected.

The Scottish Government had the burden of making the case for independence. It published its White Paper, *Scotland's Future*, in November 2013, seeking (although not always succeeding) to provide more clarity about the shape of an independent Scotland. The *Scottish Independence Bill: A Consultation on an Interim Constitution for Scotland* followed in June 2014, which set out the interim legal framework that would come in effect in anticipation of a permanent written constitution being adopted. The bill was praised for filling in gaps left open by the White Paper and providing clarity about the vision for the future state, even while some questioned the move away from the British tradition of an uncodified constitution and the proposed constitutionalisation of certain policy choices.[97] Interestingly, the promised post-independent process would include a constitutional convention to draft the new permanent constitution, which would also be ratified in a referendum.[98]

The UK Government, for its part, published its own booklet with information for voters in June 2014, titled *What Staying in the UK Means for Scotland*. They had of course an easier task given that they were arguing in favour of the status quo. An interesting development occurred only days before the vote. With polls showing a rise in support for independence, three unionist party leaders published the so-called 'Vow', promising to devolve more powers to Scotland in the event of a No vote. This last minute intervention in the campaign was controversial and its impact on the vote is difficult to measure. The process of delivering on the Vow was set in motion immediately after the vote. The Smith Commission was set up on 19 September 2014, tasked with delivering on these promises, culminating in the passing of the Scotland Act 2016 and other transfers of legislative competence to Holyrood.

We do not know how plans for a Yes vote would have panned out in practice. What is certain, however, and from a certain perspective ironic, is that voters were being asked to cast a vote not on immediate

[96] Though again, see Bell (2012) on how the Agreement still rested on political rather than legal enforcement. In contexts where such good faith between the parties is not guaranteed, a more legalistic route may be taken, such as enshrining the agreement in an international treaty.

[97] See different views collated in 'Scotland's Draft Interim Constitution: Limiting or Liberating?', Democratic Audit, 19 June 2014, https://www.democraticaudit.com/2014/06/19/scotlands-draft-interim-constitution-a-new-constitutional-order/. Interestingly, this multi-stage process would have brought Scotland's among other post-sovereign constitution-making processes. See Arato (2016).

[98] On this type of sequencing of participatory mechanisms of constitutional change in order to maximise democratic legitimacy, see Silvia Suteu and Stephen Tierney, 'Squaring the Circle? Bringing Deliberation and Participation Together in Processes of Constitution-Making' in Ron Levy, Hoi Kong, Graeme Orr, and Jeff King, eds., *The Cambridge Handbook of Deliberative Constitutionalism*, (Cambridge University Press 2018) 282.

and well-defined independence, but on whether a process of further political negotiation should commence.[99] This is ironic given the high emotive value attached to the vote. It was entirely predictable, however, given that what was being sought through the vote was a democratic mandate to initiate these negotiations and in light of the intractable ambiguity of any case for independence. I would further argue, however, that in the event of a Yes vote in 2014, these ambiguities and the residual flexibility about steps that would have been taken to give effect to the vote would have been helpful. There is a delicate balance that processes of state- and constitution-building alike must strike between seizing the initial moment of political opportunity and allowing sufficient time for political negotiations and public consultation. There is a risk that actors lock themselves into options that seem desirable before independence but lose their appeal in its aftermath and may even derail negotiations. Thus, while the pressure on the pro-independence side prior to the 2014 vote to clearly lay out its case is understandable, it was also to an extent unavoidable and also appropriate that a certain degree of openness and vagueness would remain.

Retaining this openness about post-secession steps may not always be an option, however. In some instances of negotiated secession, certain substantive outcomes may be preconditions for allowing a popular vote to go through. For example, South Sudan's 2011 secession referendum was held on the basis of the right to self-determination of the South Sudanese enshrined in the 2005 Comprehensive Peace Agreement. That Agreement also enshrined oil revenue sharing between the North and the South, a political as well as practical arrangement in light of the South's dependence on pipelines, refineries, and ports in the North. Although South Sudan was thought to be 'taking its oil with it' at the moment of independence, sharing of oil revenues has continued post-independence as well, with oil production facilities largely near or across the border. Here is a case then of independent statehood with economic independence seriously curtailed by pre-secession realities.

We have also seen the price to be paid by insufficient planning for a possible change in the status quo. The result of the Brexit referendum caught the UK government by surprise and saw it scramble to react. The referendum had been advisory, as all other UK referendums are, but official promises during the campaign that the people were being called on to make a 'decision' had made it difficult to backtrack from implementing the outcome. Not only did this interpretation of the referendum quickly become a mantra, but the meaning of the vote was seized upon by those who framed it as reflecting 'the people's will' and a clear choice to exit the EU (eventually at all costs). As I have argued elsewhere, at least some of these uncertainties could have been prevented had the post-referendum steps been clarified beforehand—as indeed had been done in legislation governing past UK referendums.[100] Brexit would always have been a messy process, but the legislative silences and ambiguities surrounding the referendum bringing it about exacerbated political strife. Eventually, they required judicial intervention,[101] causing further dissension.

The cautious balance between precommitment and openness about the future struck ahead of the 2014 independence referendum need not remain unique to Scotland. However, it required a sufficiently lengthy period of preparation in order to enable the Yes side, as the side arguing for radical change, to lay out its case and to allow for extensive societal deliberation to occur. The almost two years between the signing of the Edinburgh Agreement and the holding of the referendum permitted careful process design, discussion of substantive issues, as well as course correction where

[99] McHarg (2016), 101 and Bell (2016), 211.
[100] Silvia Suteu, 'Brexit and the Courts: The Uncertain Fate of Constitutional Referendums in the UK', *Quaderni Costituzionali* 38:3 (2018) 741.
[101] *R (Miller) v. Secretary of State for Exiting the European Union* [2017] UKSC 5.

necessary.[102] It may not always be possible to set aside such a long period of time to prepare a secession vote, but doing so can certainly facilitate consensus-building, high information levels among voters, and as much planning for the vote's outcome as possible.

4. Conclusion: Secession as a non-linear process

This chapter has argued that the secessionist road necessarily intertwines political and constitutional processes. This turn to domestic processes should be understood as encompassing not just positive constitutional law, but also constitutional principles, values, and practices that may assist the democratic negotiation of secessionist claims. In the face of a lack of answers from international or European law, looking inward in this manner is also likely unavoidable.

The path towards the 2014 Scottish independence referendum and its aftermath illustrate the benefits and some of the pitfalls of such a politically and constitutionally negotiated route to independence. The flexibility of the UK's constitution allowed for its radical questioning without risking to judicialise the process at a key time. Political will on both sides allowed for a mediated way forward and ensured a legal basis for the process. The ability to move forward with organising the referendum while retaining a certain degree of ambiguity about core issues, such as the contours of the relevant political community in whose name independence was sought, facilitated pragmatic decision-making on matters such as the franchise. Divorced from the question of citizenship in the future state, the elsewhere divisive issue of eligibility to vote in the referendum was thus neutralised. Similarly, the absence of politically salient minorities and agreement on both sides resulted in a simple majority voting rule being easily accepted. Finally, the time available to prepare for the vote was used wisely to design a process that would meet democratic standards, set out the case for and against independence, allow voters to come to an informed decision, as well as engage in as much contingency planning for after the vote as possible.

As I have argued throughout the chapter, these conditions are difficult to replicate elsewhere. Different constitutional configurations may not allow for the same openness to contestation. The Catalan example has been discussed as just such a counter-point: the constitutional entrenchment of a unitary conception of statehood, without formal and separate recognition of the Catalan people, has left a much narrower space for manoeuvre to secessionists. The repeated interventions of the Spanish Constitutional Court have also judicialised the question of Catalan independence early on and attached a stigma of illegality to it that formed the basis for later repression by the Spanish state. Quebec's example has also shown how the simple majority rule, uncontested in Scotland, was the basis of a tug of war between the centre and the periphery in its 1995 self-determination referendum and beyond. None of this is to say that Scotland does not yield valuable comparative lessons regarding the negotiation of secessionist claims. But anyone looking to replicate its successes should take into account the constitutional architecture and political landscape that made the 2014 process possible.

I have also argued, however, that the same conditions are no longer there now that Scotland seeks a second independence referendum. In their quest, pro-independence forces will face much more forceful opposition from a centre that no longer sees it as politically expedient to allow a vote. The task of providing a legal basis and attendant high degree of international legitimacy to a second indyref

[102] One such correction can be seen in efforts, eventually successful, to ensure deeper engagement with the independence issue among women. See Silvia Suteu, 'Women and Participatory Constitutional Change' in Helen Irving, ed., *Constitutions and Gender* (Edward Elgar 2017) 19.

is therefore harder to meet.[103] Court involvement should London resistance continue and Edinburgh wish to go it alone may also be inevitable.[104] And, while support for independence in Scotland may be stable, public opinion in the rest of the UK seems to have turned against a second vote.[105] While the "participatory turn" in UK-wide constitutional change[106] may be on ice following disenchantment with the Brexit referendum, it has been said that Scotland may yet be headed towards its own "neverendum" but this time "without map or compass".[107] It may well be that political reality has brought Scotland closer to its counterparts where partisanship and legal inflexibility surround secessionist claims. Time, shifting electoral fortunes, and the unsuspected resources of the UK constitution may yet steer it clear.

[103] See in this respect the Referendums (Scotland) Act 2020, an Act of the Scottish Parliament which provides the legal framework for referendums in Scotland. This legislation, however, does not itself provide a legal basis for a second independence referendum.
[104] McCorkindale and McHarg (2020).
[105] Cetrà and Harvey (2019), 623.
[106] Suteu (2017b).
[107] Andrew Tickell, 'The Technical Jekyll and the Political Hyde: The Constitutional Law and Politics of Scotland's Independence "Neverendum"' in Aileen McHarg, Tom Mullen, Alan Page, and Neil Walker, eds., *The Scottish Independence Referendum: Constitutional and Political Implications* (Oxford University Press 2016) 325.