

## Editorial

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In 2011 the unimaginable happened. An electoral system designed to produce coalition government or minority administration failed to do so. The pro-independence Scottish National Party (SNP), then led by Alex Salmond, secured the first absolute majority in the Scottish Parliament<sup>1</sup> and in the process the foundations of the Union which had lasted over three centuries<sup>2</sup> began to tremble. During their previous minority administration the SNP had tabled a bill before the Scottish Parliament, with the aim of staging a referendum on Scottish independence. To no one's surprise, that legislation failed to pass. However, the referendum had been a central plank of the party's manifesto in the 2011 election, and its newly acquired majority gave Salmond both the appearance of a popular mandate and the Parliamentary arithmetic to push it forward once again.

Arguments ensued about the Scottish Parliament's legislative competence to enact such a measure alone.<sup>3</sup> Constitutional reform remains, after all, a reserved competence under Schedule 5 of the Scotland Act 1998.<sup>4</sup> The Scottish government had already advanced the argument that with or without consent they were entitled to poll the Scottish people, and that they would treat any result as advisory, hoping

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<sup>1</sup> Severin Carrell, "Salmond hails 'historic' victory as SNP secures Holyrood's first ever majority" *The Guardian* (London, 6 May 2011).

<sup>2</sup> Since the Act of Union 1707.

<sup>3</sup> See *inter alia* Tomkins, A. "The Scottish Parliament and the Independence Referendum" (UK Constitutional Law Association 12/1/12). <http://ukconstitutionallaw.org/2012/01/12/adam-tomkins-the-scottish-parliament-and-the-independence-referendum/>.

<sup>4</sup> Schedule 5 Paragraph 1(a).

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to put pressure on Westminster to enter into negotiation on the basis of the result. With the mandate of the Scottish people, however, Salmond felt, correctly as it turned out, that he was in a strong position to demand a legally binding plebiscite on the future of Scotland in the Union.

Negotiations were opened between Holyrood and Whitehall and the Edinburgh Agreement was signed on 15th November 2012 outlining in principle that the Scottish people would be consulted on independence in a binding referendum, and that competence to arrange such a referendum would be conferred upon the Scottish Parliament. An Order in Council was issued to that effect under s.30 of the Scotland Act 1998,<sup>5</sup> and the Scottish Independence Referendum Act 2013 was passed by the Scottish Parliament. The date for the referendum was then fixed as 18th September 2014,<sup>6</sup> the people of Scotland being asked the simple question, “Should Scotland become an independent country?”<sup>7</sup>

The months which followed were exciting political times. Mainly dominated by political claim and counter-claim over, among other issues, the voice of an independent Scotland on the world stage, estimated oil revenues from the North Sea and access to the BBC, a number of genuinely interesting legal points began to emerge. How would independence take place? What right would Scotland have to use the Pound Sterling in the event of the dissolution of the UK, and what of Scotland’s EU Membership prospects? Particularly in the latter context, the referendum became extremely interesting for Catalan and Basque separatists in Spain.

For a few nail-biting weeks in the lead-up to polling day, the opinion polls, which the ‘no’ campaign had been comfortably leading, closed sharply and there was genuine concern (from a Unionist perspective at least) that the assumed rejection of independence may not have been so certain after all.<sup>8</sup> Late interventions by former Prime Minister Gordon Brown, and extremely unusually, perhaps showing quite how concerned the Westminster establishment had become, from the Sovereign herself,<sup>9</sup> eventually secured a ‘no’ vote. However, in securing that vote, Mr Brown had effectively presented a guarantee from David Cameron of further Scottish devolution and had stored up some constitutional difficulties for the future.

Ultimately, this had the effect of turning what should have been a once in a generation yes or no vote on the future of the Union into something much more nuanced and complex. Rather than merely accepting that Great Britain was to remain a United Kingdom, thoughts turned to the future shape of that Union. More devolution had been promised and thoughts turned to how this might be achieved. In light of promised further powers for Scotland, pressures began to loom from Wales

<sup>5</sup> The Scotland Act 1998 (Modification of Schedule 5) Order 2013, SI 2013/242.

<sup>6</sup> S.1(4) Scottish Independence Referendum Act 2013.

<sup>7</sup> S.1(2) Scottish Independence Referendum Act 2013.

<sup>8</sup> Indeed the YouGov polling agency data showed the yes camp even taking a lead in early September of 2013. [https://d25d2506sfb94s.cloudfront.net/cumulus\\_uploads/document/dpg5ya3hrq/YG-trackers-Scottish-Referendum-150409.pdf](https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/dpg5ya3hrq/YG-trackers-Scottish-Referendum-150409.pdf) last accessed 3/11/2015.

<sup>9</sup> Nicolas Watt et al., “Scottish independence: Queen was asked to intervene amid yes vote fears” (London, *The Guardian* 16 December 2014).

and Northern Ireland for enhanced powers to be devolved to these regions. Within England, attention turned to strengthening the decision-making power of English elected representatives over matters specific to England. Further afield, lessons were learned from the Scottish experience by the Catalan separatists in particular, and although the outcome of the Scottish referendum was not as dramatic as it might have been, consequences for domestic, European and International politics and law were certain.

In April 2015, under the convenorship of the editors of this special edition, Liverpool John Moores University held a conference to explore the plethora of issues arising from the referendum's aftermath, and this special edition brings together a number of contributions from that event.

Laurent Chikoun provides an interesting and engaging contextual assessment of the Scottish question, particularly focussing on the way in which complex legal issues have been portrayed in the media in the run up to the referendum.

Belén Olmos Giupponi and Hannes Hofmeister place these issues in a more concrete international context, considering the consequences within international law should Scotland have voted for independence and trying to assess what lessons can be learned by regions such as Flanders and Catalonia. Their contribution investigates issues of sovereignty and self-determination, as well as touching on issues of state succession and recognition in international law.

Lucia Payero then focusses directly on the Catalonian situation, outlining the context in which that dispute has arisen and investigating the likely lessons which Catalonia can take in more detail. In particular this paper focuses on the practical limitations which domestic political and legal intransigence can place on any secession process, and hints at the potentially dangerous places where such intransigence can lead.

The final two contributions focus on constitutional questions given new prominence by the experience of the Scottish independence referendum. Immediately after the 'no' vote, Conservative politicians in England reacted bizarrely by focussing not on the future transfers of power to Scotland, but instead on the protection of English sovereignty by finally addressing the decades old West-Lothian Question. Rather than federalism and the creation of an English Parliament, or meaningful regional devolution, their preferred solution appeared to be finding a way of privileging English MPs in the Westminster Parliament to take decisions which specifically affected their constituencies. This was achieved on 22nd October 2015 by amending Parliamentary Standing orders to give English MPs an effective veto over legislation which is deemed by the Speaker of the House of Commons to be English.<sup>10</sup> Gary Wilson's contribution to this edition scrutinises the constitutional pitfalls of such an approach, and investigates alternative mechanisms by which the same or similar outcomes can be achieved, including the possible federalisation of the United Kingdom.

Finally, Bleddyn Davies' contribution to this collection examines the nature of referenda, including the Scottish example specifically as a mechanism for involving the popular sovereign in constitutional changes. Moreover, spurred on by discussion

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<sup>10</sup> House of Commons Standing Orders (Public) No. 63.

of a possible future constitutional convention on these issues, the piece looks at that as an alternative mechanism to try and determine whether it would better to allow people to be involved in that process.

The contributions to this edition seek to investigate a broad range of issues thrown up by the referendum campaign and the political and legal fallout from it. They seek to contextualise and explain the referendum in its domestic, international and European setting, and then seek to examine the constitutional consequences of it. What is clear from the discussion which will be conducted over the following pages is that far from being a final act, the Scottish referendum represents merely a stage in a process. It is a process which will continue, and will continue to inspire debate for a great many years.