Scottish Nationalism, Brexit and the Case for Indyref2

Sean Swan, PhD
Gonzaga University

Abstract

The fact that Scotland voted Remain does not itself justify a second Indyref. The EU issue was not a major factor in the Indyref and a Remain vote does not necessarily translate as a future Yes vote. However, constitutional developments flowing from Brexit, and their consequences for the commitments given in ‘the Vow’ prior to the 2014 Indyref regarding the Sewel Convention and the permanence of the Scottish Parliament and Government, combined with the failure of the UK government to take cognisance of Scotland’s position on Brexit in negotiations with the EU, do provide justification for a second indyref. This is particularly true given that Brexit affects Scotland’s system of government contrary to Scotland’s wishes, which is contrary to the principle of ‘the sovereign right of the Scottish people to determine the form of government best suited to their needs’.

Introduction

One fall-out from Brexit is the reopening of the question of Scottish independence. Scotland voted Remain, a position supported by the Brexit referendum result in Scotland, its government and the vast bulk of its MPs. Yet Scottish opposition to Brexit has made no impact on the UK government’s position in the Brexit negotiations. However, support for remaining in the EU does not automatically translate into support for independence. There is an overlap between a Yes position in relation to independence and a Remain position in relation to the EU, but it is far from total and they remain two distinct positions on two distinct issues – of which the independence issue is the more important for the Scottish electorate.
It might appear that the justification for holding a second independence referendum is solely to give the Scottish people the choice of remaining in the EU, but more fundamental justification can be found in the UK government’s (lack of) response to Scotland’s position on Brexit. That, and the fact that Brexit has revealed that much of what was promised in the pre-Indyref ‘Vow’, and believed to have been delivered in the 2016 Scotland Act, actually lacks substance. Brexit, in the face of Scotland’s democratically expressed opposition, and given its impact on the form of government in Scotland, constitutes a breach of the principle in the Claim of Right that it is the ‘sovereign right of the people of Scotland to determine the form of government best suited to their needs’.

It is this, rather than membership of the EU as such, which constitutes grounds for a second independence referendum.

**The 2014 Indyref**

The Scottish Independence Referendum (Indyref) was held on 18 September 2014 following a two year long campaign. The Indyref had its origins in the SNP victory in the 2011 Scottish Parliament elections. The SNP’s manifesto in 2011 promised to ‘bring forward our Referendum Bill in this next Parliament. A yes vote will mean Scotland becomes an independent nation’.

The referendum question put to the people was ‘Should Scotland be an independent country?’. There were two options for the answer – ‘yes’ or ‘no’. Entitlement to vote in the Indyref was determined by the Scottish Independence Referendum (Franchise) Act 2013 ASP 13, section 2. UK, Irish, Commonwealth and EU citizens resident in Scotland were eligible to vote as were 16 and 17 year olds. Scots residing outside Scotland were ineligible. This was to a degree controversial, but, given the lack

---


of a Scottish citizenship, largely unavoidable as it would have been difficult to decide who, outwith Scotland, was ‘Scottish’ and thus entitled to vote. The total electorate in the Indyref was 4,283,392.³

Two days before the Indyref vote, the leaders of the main British parties made ‘the Vow’⁴ the main point of which was the commitment that the “Scottish Parliament is permanent and extensive new powers for the Parliament will be delivered by the process and to the timetable agreed and announced by our three parties, starting on 19th September”. It is hard to assess what effect the Vow had on voting in the Indyref; it is equally hard to assert that it had no effect. The Vow changed the meaning of the Yes/No options in the Indyref from ‘independence or status quo’ to ‘independence or devo max’. This fact was later acknowledged by the Prime Minister and Deputy Prime Minister:

    We all welcomed [the Yes vote]. But we have also been clear that the Scottish people did not vote for the status quo. They voted for more decisions to be taken in Scotland, as part of a fair and enduring constitutional settlement across the UK.⁵

After the Indyref, the Smith Commission was established to fulfil the Vow. The Smith Commission published its report on 27 November 2014. The Heads of Agreement section of the report began by using the same formula of words as had been used in the Scottish Constitutional Convention’s 1989 Claim of Right that ‘reflecting the sovereign right of the people of Scotland to determine the form of government best suited to their needs’. Its two key points were that 1) the UK parliament would introduce legislation stating that ‘the Scottish Parliament and Scottish Government are permanent institutions’, and 2) that the ‘Sewel Convention will be put on a statutory footing’.⁶

The question of EU membership was an issue in the 2014 Scottish Independence debate. Prime Minister Cameron stated that a Yes vote would "automatically" remove Scotland from the EU, with no

---

guarantees over the terms of membership when it eventually joined. Now, despite the No victory, Scotland is now to be pulled out of the EU on England’s coattails. But the EU was not a major issue in the Indyref, being a significant factor for only 14% of voters and, ranking only eighth amongst the reasons people gave for voting as they did in that referendum. The primary issue for 70% of people who voted ‘Yes’ to Indy was ‘The principal that all decisions about Scotland should be taken in Scotland’. The sole mechanisms for ensuring that decisions about Scotland are made in Scotland are the Scottish Parliament and Government. The importance of ensuring the permanence of the Scottish Parliament is self-explanatory; the Sewell Convention requires further comment. Much of the powers of the Scottish Parliament rests, as it must in a devolutionary settlement, on a convention – namely the Sewel Convention.

The short description of the Sewel Convention as given by Parliament is

The Sewel Convention applies when the UK Parliament legislates on a matter which is normally dealt with by the Scottish Parliament as part of its work. Under the terms of the Convention, this will happen only if the Scottish Parliament has given its consent.

In other words, the Sewell Convention protects the Scottish Parliament from arbitrary interference in its affairs by the UK government. However, a ‘convention’ despite it being one of the three principle foundations of the British constitution, tends to be observed only so long as it is politically convenient to do so. For example, the convention of collective Cabinet responsibility was observed right up to the moment Harold Wilson found it convenient to dispense with it during the 1975 EEC referendum. (See Bogdanor, p. 223). Hence the call to put the Sewel Convention ‘on a statutory footing’. The Scotland

---

7 ‘Warning from Cameron: Yes vote will send you to back of queue for the EU’, *The Herald*, 29 August 2014 http://www.heraldscotland.com/news/13177422.Warning_from_Cameron:_Yes_vote_will_send_you_to_back_of_queue_for_the_EU/
10 http://www.parliament.uk/site-information/glossary/sewel-convention/
Act 2016, which amended the Scotland Act 1998, implemented the Smith Commission report’s recommendations and appeared to resolve the issue of both the status of the Sewel Convention and the issue of the permanence of the Scottish Parliament and government.

There was a high, 84.59%, turnout in the Indyref, resulting in a victory for No on 55.3% to Yes 44.7%. But that was not the end of the matter for Indy supporters who embarked on what might be described as a long march through the institutions. They joined the pro-Independence SNP and Scottish Green party in their thousands. By Monday 22 September, SNP membership had jumped by 70%. Over 18,000 people had joined the party since the referendum, bringing its overall membership to a record level of 43,644. The Scottish Green party also experienced a post-referendum surge in membership, with 3,000 supporters joining in the same period.\footnote{‘SNP poised to become one of UK’s largest political parties’, The Guardian 22 September. https://www.theguardian.com/politics/2014/sep/22/snp-poised-become-largest-political-parties} For the sake of comparison, Labour were “struggling to get beyond around 13,000 – despite being on the winning side”\footnote{‘Scottish Labour leader Johann Lamont: Step down? No chance, I want to be next First Minister’, The Daily Record, 27 September 2014. http://www.dailyrecord.co.uk/news/politics/scottish-labour-leader-johann-lamont-4332320} Six months later SNP membership had hit the 100,000 mark, making the SNP the third largest party by membership in the UK.\footnote{‘SNP boost as membership soars past 100k mark’, The Herald 22 March 2015. http://www.heraldscotland.com/news/13206844.SNP_boost_as_membership_soars_past_100k_mark/}

The result was one of the most dramatic political earthquakes in modern British political history. Labour, who had won 41 seats in Scotland in the previous general election, were reduced to one seat in the 2015 Westminster elections in Scotland, their share of the vote cut from 42 to 24 percent. The 2015 election showed the effects of a First Past the Post electoral system with the SNP winning 56 out of Scotland’s 59 Westminster seats on just over 50% of the vote. The Scottish parliament elections, held in May the following year, saw the SNP returned to power, albeit as a minority government. The SNP manifesto for that election stated that:

the Scottish Parliament should have the right to hold another referendum if there is clear and sustained evidence that independence has become the preferred option of a
majority of the Scottish people – or if there is a significant and material change in the circumstances that prevailed in 2014, such as Scotland being taken out of the EU against our will.\(^\text{14}\)

The Scottish Government interprets Brexit, in the context of a majority in Scotland having voted Remain, as triggering the ‘significant and material change in circumstances’ clause. Consequently, the First Minister has indicated, backed by a mandate from the Scottish Parliament, that the Scottish Government intends holding a referendum on the Indy question.

**2016 Brexit Referendum**

The Brexit referendum, like the 1975 EEC referendum, had its origins in divisions within the party in government as much as in divisions within the country. Largely motivated by the Conservatives’ desire to prevent losing support, and even MPs, to the Eurosceptic UK Independence Party (UKIP), the 2015 Conservative Manifesto contained a pledge to hold a referendum on UK membership of the EU:

> We will legislate in the first session of the next Parliament for an in-out referendum to be held on Britain’s membership of the EU before the end of 2017. We will negotiate a new settlement for Britain in the EU. And then we will ask the British people whether they want to stay in on this basis, or leave. We will honour the result of the referendum, whatever the outcome.\(^\text{15}\)

On 20 February 2016, David Cameron set the date for the Brexit referendum, it was to be held four months later on Thursday 23 June.\(^\text{16}\)

Entitlement to vote in the 2016 Brexit referendum had already been outlined in the European Union Referendum Act 2015 Section 2.\(^\text{17}\) UK, Irish, and Commonwealth citizens resident in the UK were entitled to vote, as were UK citizens living abroad for 15 years or less. EU citizens, as such, resident in

\(^{14}\) SNP Manifesto 2016, p. 24 [https://www.snp.org/manifesto](https://www.snp.org/manifesto)

\(^{15}\) The Conservative Party Manifesto p. 73 [https://www.conservatives.com/manifesto](https://www.conservatives.com/manifesto)


\(^{17}\) [http://www.legislation.gov.uk/ukpga/2015/36/section/2/enacted](http://www.legislation.gov.uk/ukpga/2015/36/section/2/enacted)
the UK, did not qualify. The voting age was left at 18. The total number in Scotland entitled to vote\(^\text{18}\) was 3,987,112. Scots resident elsewhere in the UK – or outside it for up to 15 years – could also vote, but as it is difficult to assess how many there were, and as it is not relevant for the purpose of comparing the Indyref and the Brexit vote, they will be bracketed here. The UK wide result\(^\text{19}\) was 51.9% Leave to 48.1% Remain on a turnout of 71.8%. The result in Scotland was very different. Scotland voted Remain 62%, Leave 38%. But the turnout was lower than for the rest of the UK – only 67.2%. And it was significantly lower that it had been in the Indyref.

The low turnout is curious. It is unsurprising that it was lower than for the Indyref. The indyref touched on a profounder question than membership of the EU. It touched on the question of nationality. The Indref was also a purely Scottish affair in which the relevant democratic unit was Scotland rather than the UK plus Gibraltar. But the fact that turnout was lower in the Brexit referendum in Scotland\(^\text{20}\) than the UK average possibly indicates that the EU question had less relevance in Scotland with 67.2% turnout than in England with 73.0% turnout. It is likely that the essence and driving force of Brexit and Euroscepticism in the UK is English nationalism.

The decisive Remain win in the context of a lower turnout and smaller electorate than there had been with the Indyref, led to some slight statistical paradoxes. The 62% Brexit Remain vote was smaller in absolute numbers than the 55.3% Indy No vote.

Table: Comparison between 2014 independence referendum and 2016 EU referendum votes in Scotland

<table>
<thead>
<tr>
<th></th>
<th>Indyref Yes</th>
<th>Indyref No</th>
<th>Brexit Remain</th>
<th>Brexit Leave</th>
</tr>
</thead>
<tbody>
<tr>
<td>Absolute numbers</td>
<td>1,617,989</td>
<td>2,001,926</td>
<td>1,661,191</td>
<td>1,018,332</td>
</tr>
<tr>
<td>Percentage of vote</td>
<td>44.7%</td>
<td>55.3%</td>
<td>62%</td>
<td>38%</td>
</tr>
</tbody>
</table>

Immediate reactions, particularly in the media, read and implied that the Remain vote in Scotland was a *de facto* Indy vote. This is a fallacy. There was a different referendum result in Scotland than in England, but the Remain vote does not equate with a Yes vote. This can perhaps be best illustrated with reference to Edinburgh. Edinburgh voted 74.4% Remain, 12 points higher than the Remain average in Scotland and the highest Remain vote of any area in Scotland, but in 2014 support for Yes in Edinburgh was only 38.9% - 8 points lower than the Scottish average. A poll conducted by Lord Ashcroft immediately after the Referendum showed that 36% of SNP voters had voted Leave.\(^21\) Alex Neil claims that ‘five or six’ SNP MSPs voted Leave (“Up to six' SNP MSPs who voted for Brexit urged to go public’, *The Telegraph*, 5 November 2016).\(^22\)

Despite strong calls from the SNP for a Remain vote, there was nothing nationalist or unionist *per se* about either a Remain or Leave vote. A vote cast in Scotland to keep the UK in the EU is indistinguishable from one cast to keep Scotland in the EU. In party political terms, all the main Scottish parties were pro-Remain – at least officially. However, there is evidence to suggest that the Independence question played a role in how people voted. For example, in Nicola Sturgeon’s appeal just days before the referendum: ‘if you are basing your [referendum] decision on what it means for independence’, she wrote ‘let me be very clear – the only sensible and logical vote is one for Scotland to remain in Europe’.\(^23\) Of course the unionist side was not immune to such considerations either.\(^24\)

Pro-Indy blogger and columnist in *The National*, Wee Ginger Dug (Paul Kavanagh) advised tactical voting:

> if your main consideration is how best to bring about Scottish independence ..., then you should vote to remain if you live in Scotland, and vote to leave if you live elsewhere [in the UK]. ... vote according to the way which is most likely to produce a second indyref. That’s going to be with a remain vote in Scotland, and a leave vote in the rest of the

---


\(^{23}\) Nicola Sturgeon ‘If you’re voting with independence in mind this Thursday, vote ‘Remain’’, 19.06.2016, [https://www.snp.org/if_you_re_voting_with_independence_in_mind_this_thursday_vote_remain](https://www.snp.org/if_you_re_voting_with_independence_in_mind_this_thursday_vote_remain)

\(^{24}\) See, for example, [https://twitter.com/murdo_fraser/status/744561139841904641](https://twitter.com/murdo_fraser/status/744561139841904641)
UK. [...] It maximises the political distance between a Scotland which will vote to remain, and the rest of the UK which may vote to leave. It’s that political gap which will provide the moral justification for another independence referendum. If we can ensure that Scotland votes to remain in the EU by a larger margin than we voted to remain a part of the UK, and the rest of the UK votes to leave the EU, we have an unanswerable case for a second independence referendum.  

The perceived significance of a higher percentage voting Remain than had voted No is probably one of the causes of the twitter spat between Alex Salmond and JK Rowling. Salmond had said on the BBC’s *Newsnight* on 24 January that a higher percentage of Scots had voted to stay in the EU than had voted to remain in the UK (which is correct); Rowling contradicted this, claiming that more people (in absolute numbers) had voted to stay in the UK than had voted to stay in the EU (which is also correct). The difference in the franchise, and resulting difference in the size of the electorate in the two referendums, combined with the difference in turnout, is what gave rise to these confusing and apparently contradictory claims.

During the 1975 referendum on EEC membership, the SNP had campaigned for an Out vote. The UK as a whole voted 67% ‘In’ for continued EEC membership and 33% ‘Out’ to leave. In Scotland, the result was a narrower victory for In - 58% to 42%. It was not until 1983, due in part to Sillars, that the SNP changed its stance to one of ‘independence within Europe’.

But by the time of the 2016 Brexit referendum, Jim Sillars had changed his mind. The point should be made that the EU of 2016 was not the EEC of 1975, and many of Sillar’s arguments centred on the alleged democratic failings of the EU, but his primary reason was essentially nationalist. Much of his opposition to the EU rested on the fact that the EU had ‘in 2014, repeated their rejectionist message of 2004 that if Scotland should become independent we’d be out and sent to the back of the


queue to apply from scratch’. This was a position which had sowed ‘seeds of uncertainty’, and thus ‘played into the welcoming hands of Better Together in 2014’. There was ‘no evidence that the EU has changed its mind on independence’ since then.27 The functionalist approach of Paul Kavanagh and the rejectionism of Sillars demonstrate how the national question could impact on, or trump, the EU question.

A Brief Comparison

With those caveats in mind, it is still worth comparing the result of both referenda. Much has been made of the fact that support for Remain was stronger amongst younger voters, leading to accusations that the old had betrayed the young.28 This was also true with regards to support for independence, (See charts One and Two) except more so as the Indyref was

---

27 https://www.commonspace.scot/articles/3976/jim-sillars-why-scottish-nationalists-should-back-brexit

28 See, for example, ‘Like most young people, I voted against Brexit – and I know that Theresa May didn't betray us, our parents did’, The Independent, 15 January 2017: http://www.independent.co.uk/voices/brexit-leave-remain-europe-supreme-court-case-young-people-students-theresa-may-parents-betrayed-a7528146.html

essentially lost on the votes of the over-65s. All the arguments about how the Leave result in the UK cheating the young apply equally to the No result in the Indyref. But in terms of class and political position, there were marked differences. Being C2 was a positive indicator for a Yes but a negative indicator for a Remain vote; being B or A was a negative indicator for Yes but a positive one for Remain (see charts Three and Four). But while Yes looks more like Leave in terms of class, There is also clear evidence that Yes is more left-wing than is Remain (see chart Five). The conclusion from this is that it is not possible to map a Yes or No vote directly on to a Remain or Leave position. The results found by YouGov serve merely to confirm this conclusion.29


DK/PNTS excluded. 56% of ‘very right’ ‘preferred not to say’
Base = 1,002 Scottish Residents Aged 16+; Fieldwork conducted 9 - 13 Dec 2016
http://www.bmgresearch.co.uk/scots-2017-independence-vote/
The Consequences of the Brexit Result

The Scottish government had argued, based on the Sewel Convention, that the UK government was required to obtain the consent of the Scottish Parliament in order to trigger Article 50. This assertion was tested during the Brexit Supreme Court Case. Although the Scottish Government was not party to the main issue in this case – the question of Parliamentary sovereignty – there was an intervention in the devolution aspect of it by the Lord Advocate on behalf of the Scottish government. The Scots had hoped that the case would lead to a ruling supporting First Minister Sturgeon’s position that Brexit could not proceed without the consent of the devolved administrations. As the Court explained:

Most of the devolution issues arise from the contention that the terms on which powers have been statutorily devolved to the administrations of Scotland, Wales and Northern Ireland are such that, unless Parliament provides for such withdrawal by a statute, it would not be possible for formal notice of the United Kingdom’s withdrawal from the EU Treaties to be given without first consulting or obtaining the agreement of the devolved legislatures...([2017] UKSC 5, para 6)

The point of law in this regard, at least in relation to Scotland, turned on the Sewel Convention. The origins of the Sewel Convention lie in a speech in the Lords by Lord Sewel during the debate on the 1998 Scotland Act:

the devolution of legislative competence to the Scottish parliament does not affect the ability of Westminster to legislate for Scotland even in relation to devolved matters. [...] However, as happened in Northern Ireland earlier in the century, we would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish parliament.\footnote{Hansard (HL Debates), 21 July 1998, col 791: \url{http://www.publications.parliament.uk/pa/ld199798/ldhansrd/vo980721/text/80721-20.htm}}

This convention was later included in a Memorandum of Understanding and Supplementary Agreements between the UK Government and the devolved governments:

13. The United Kingdom Parliament retains authority to legislate on any issue, whether devolved or not. It is ultimately for Parliament to decide what use to make of that power.

\footnote{R (Miller) v Secretary of State for Exiting the European Union. [2017] UKSC 5). \url{https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf}}
However, the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature.\(^{32}\)

An ‘Explanatory Note’ on page 4 stated that it ‘is not intended that these agreements should be legally binding’.

With regards to this, the Supreme Court judgment noted that ‘Para 2 of the Memorandum of Understanding stated that it was a statement of political intent and that it did not create legal obligations’\([2017] \text{UKSC 5, para 139}\). The Court is here citing the 2013 version (presumably the most recent). The 2001 version of the Memorandum did not include this second paragraph, but the ‘explanatory note’ cited above had the like intent and effect.

The Sewel Convention remained merely a convention, and, as such, not justiciable. The court’s judgment was clear on this ‘It is well established that the courts of law cannot enforce a political convention’ \([2017] \text{UKSC 5, para 141}\).

In 2016 the \textit{Scotland Act 1998 Section 28 was amended} to include a new subsection:

\[
(8) \text{But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.}\(^{33}\)
\]

This was in accordance with the Smith Commission’s commitment to giving the Sewel Convention statutory recognition, thus elevating it from a merely political convention to a piece of legislation. But it should be noted that subsection 7 of section 28 of the original 1998 Act, which immediately precedes the above, was left intact:

\[
(7) \text{This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.}
\]


\(^{33}\) \url{http://www.legislation.gov.uk/ukpga/1998/46/section/28}
In any case, the Supreme Court judgment recognised that the insertion of subsection 28.8 meant that the Sewel Convention had received ‘statutory recognition’ ([2017] UKSC 5, para 147), but added that:

by such provisions, the UK Parliament is not seeking to convert the Sewel Convention into a rule which can be interpreted, let alone enforced, by the courts; rather, it is recognising the convention for what it is, namely a political convention [...]. That follows from the nature of the content, and is acknowledged by the words (“it is recognised” and “will not normally”), of the relevant subsection. We would have expected UK Parliament to have used other words if it were seeking to convert a convention into a legal rule justiciable by the courts. ([2017] UKSC 5, para 148)

In other words, the clause gave the convention ‘recognition’ but no legal effect. Even the Bill of Rights was quoted to prove that the convention could not be enforced by any court ([2017] UKSC 5, para 145).

In light of the above, it is hardly surprising that the Court upheld that:

The Lord Advocate and the Counsel General for Wales were correct to acknowledge that the Scottish Parliament and the Welsh Assembly did not have a legal veto on the United Kingdom’s withdrawal from the European Union. ([2017] UKSC 5, para 150)

Three Judges dissented from the Courts judgment on the main issue of the need for a vote in Parliament to trigger Article 50, Lords Reed, Carnwath and Hughes, but not a single judge dissented in relation to the Sewel Convention (see [2017] UKSC 5, paras 242, 243 & 282).

No surprises here. Every mention of the convention, whether in Parliament, law or memoranda of understanding, is prefaced by or ringed with, caveats implying or boldly asserting the right of the Westminster Parliament to legislate on any matter in Scotland, devolved or not, should it so chose – Sewel Convention or no Sewel Convention.

The Sewel Convention is not a Scottish version of the Statute of Westminster. The Supreme Court’s ruling was a reassertion of a basic fact of the British constitution – the sovereignty of (the Westminster) Parliament. Scotland’s (claimed) right to veto Brexit was considered in terms of ‘devolution legislation’, ‘devolution arguments’ or ‘devolution issues’ (eg [2017] UKSC 5, paras 6, 9 & 10). ‘Devolution’ is here the key term. The Scottish Parliament is not a sovereign body. Such powers
as it has are simply powers *devolved* upon it from Westminster, the sovereign parliament. Not only is Westminster sovereign in a Weberian sense, but it is sovereign in Carl Schmitt’s sense of deciding the exception\(^\text{34}\) – whether with relation to the Sewel Convention or any other matter.

Holyrood can be over-ruled on any issue, devolved or reserved. The Sewel Convention remains a mere convention and, as such, is observed for exactly as long as it is politically necessary and expedient to do so.

First Minister Nicola Sturgeon’s reaction to the Supreme Court’s decision was to assert that even if there was no legal requirement for Westminster to seek the approval of the devolved governments prior to triggering Article 50, there is still a "clear political obligation to do so". Speaking after the Supreme Court judgement, the First Minister stated that:

> The claims about Scotland being an equal partner are being exposed as nothing more than empty rhetoric and the very foundations of the devolution settlement that are supposed to protect our interests - such as the statutory embedding of the Sewel Convention - are being shown to be worthless. This raises fundamental issues above and beyond that of EU membership.\(^\text{35}\)

The First Minister is right, but she might also have considered the implication of this ruling, and Brexit in general, for clause (63A) of the Scotland Act 1998 (inserted by the Scotland Act 2016). This clause’s intention was to guarantee the permanence of the Scottish Parliament. The clause states:

(1) The Scottish Parliament and the Scottish Government are a permanent part of the United Kingdom’s constitutional arrangements.

(2) The purpose of this section is, with due regard to the other provisions of this Act, to signify the commitment of the Parliament and Government of the United Kingdom to the Scottish Parliament and the Scottish Government.

---

\(^\text{34}\) See Schmitt, K., *Political Theology: Four Chapters on the Concept of Sovereignty* (University of Chicago Press, 2006)


(3) In view of that commitment it is declared that the Scottish Parliament and the Scottish Government are not to be abolished except on the basis of a decision of the people of Scotland voting in a referendum.

Here again we have a contortion of the British constitution. The sovereign parliament is pretending to limit itself. And it has probably failed.

Firstly, the language of subsection 2 is ambiguous and could be read as meaning that this section amounts only to a political declaration which the UK government had wished to make at that time (in the political context of the Vow). This exact point was raised by the Lords’ Constitutional Committee: Subclause 2 “might serve to weaken the effect of the section as a whole: if the purpose of the section is to "signify the commitment", then that might be taken to mean that it is not the purpose of the section to (among other things) prevent the UK Parliament from going back on that commitment”. 36

We have already seen how ambiguous legal language reduced the statutory entrenching of the Sewel Convention to a nonsense.

Secondly, the Lords also noted that if this pretense at limiting the sovereignty of parliament ‘were ever to be tested, it is by no means clear what view the Supreme Court would take’. 37 This does not sound like a firm legal basis. And that was written prior to the reassertion of Parliamentary Sovereignty in the Supreme Court Brexit case.

To state the problem from a different angle, it is a fact of parliamentary sovereignty that one parliament cannot bind another. That is, a future parliament has the power to amend or repeal the Scotland Act 2016, or any section of it. The principle that one parliament cannot bind another had been challenged by the judgment in the second Factortame case (1991) (R (Factortame Ltd) v Secretary

37 Constitution Committee - Sixth Report Scotland Bill S. 34 [20 November 2015]
of State for Transport), the implication of which was that, as HWR Wade stated ‘Parliament can bind its successors’. But this ‘binding’ was based, ultimately, on the 1972 European Communities Act – an Act which, as Bogdanor wrote, ‘produced a structural change in the British constitution’.38

Bogdanor argued that ‘Before the European Communities Act [1972], the basic rule of the British legal system, its rule of recognition, was that Parliament was sovereign ... it could not bind itself [...] ’. But we are now ‘in a period of transition when a traditional interpretation of parliamentary sovereignty...is falling into desuetude’.39 But this was written in 2009, before the Supreme Court dramatically reasserted the principle of parliamentary sovereignty and before Brexit made the repealing of the 1972 ECA an inevitability rather than remote and abstract possibility.

The assumption that one parliament can bind its successors, and that the existence of the Scottish Parliament has somehow been ‘entrenched’, no longer applies (if it ever did). It belongs to a pre-Brexit constitutional era. The situation before the 2016 Scotland Act was passed was that the UK government could abolish the Scottish Parliament by an ordinary Act of Parliament: that is exactly the situation today. It would be more difficult politically, but legally it still lies entirely within the powers of the Westminster Parliament to abolish the Scottish Parliament. Their lordships wrote:

While we recognise that it is extremely unlikely that this will ever be tested in the courts, it is nonetheless symbolically important and we are concerned that these provisions, as currently worded, risk introducing uncertainty concerning the absolute nature of parliamentary sovereignty where there should be none. [Bold Emphasis in original]40

And the same symbolic importance and need to avoid uncertainty applies to the security of the foundations of the Scottish Parliament. It is not to say that Westminster would abolish Holyrood – their lordships noted that ‘it has always been highly implausible in political terms, if not absurd, to

38 (Bogdanor, V., The New British Constitution (Hart, 2009) p. 29
40 Constitution Committee - Sixth Report Scotland Bill S. 36 [20 November 2015]
consider a scenario in which Parliament might unilaterally attempt to abolish the Scottish Parliament"41 – but that it could.

Thirdly, the above section, even if it did secure the existence of the Scottish Parliament, does nothing to guarantee its powers. That is, it does not prevent any future emasculation whether legal or financial. It is possible for a powerless parliament to be permanent. And nothing in this section rules out the temporary proroguing of the Scottish Parliament by Westminster. Westminster remains an arbitrary power in relation to Holyrood.

**Conclusion**

Even were the permanence and present powers of the Scottish Parliament assured, Brexit has exposed the limitations of those powers to enact the democratic will of the people of Scotland in relation to a key issue of determining their form of government. In relation to Brexit:

1) A clear majority in Scotland voted to Remain in the EU in the Brexit referendum;
2) 57 of Scotland’s 59 MPs are opposed to Brexit;
3) Scotland’s parliament and government are opposed to Brexit.

By any democratic metric, Scotland is opposed to Brexit. This fact has had no visible effect on the UK government’s approach to the Brexit negotiations.

The Claim of Right produced by the Scottish Constitutional Convention declared “the sovereign right of the Scottish people to determine the form of Government best suited to their needs”42 Brexit, a move which will remove Scotland’s representation in the EU Parliament, disallow EU regulation in Scotland, and strip Scottish citizens of EU citizenship, undoubtedly means a change in Scotland’s form of government.

---

41 Constitution Committee - Sixth Report Scotland Bill S. 32 [20 November 2015]
Sturgeon made this point in Parliament while proposing the motion for an independence referendum:

The sovereign right of the people of Scotland to determine the form of government best suited to their needs is a longstanding and widely-accepted principle.

Brexit will fundamentally change the form of government in Scotland – a change that Scotland opposed. The people of Scotland voted overwhelmingly to remain in the European Union, yet we now face being dragged out of Europe – and the single market – against our will.43

The text of the motion, which was passed by the Scottish Parliament on 28 March by 69 votes to 59, reads:

That the Parliament acknowledges the sovereign right of the Scottish people to determine the form of government best suited to their needs and therefore mandates the Scottish Government to take forward discussions with the UK Government on the details of an order under section 30 of the Scotland Act 1998 to ensure that the Scottish Parliament can legislate for a referendum to be held that will give the people of Scotland a choice over the future direction and governance of their country at a time, and with a question and franchise, determined by the Scottish Parliament, which would most appropriately be between the autumn of next year, 2018, when there is clarity over the outcome of the Brexit negotiations and around the point at which the UK leaves the EU in spring 2019.44

The formulation ‘the sovereign right of the Scottish people people to determine the form of government best suited to their needs’ was used by the Scottish Constitutional Convention in the Claim of Right for Scotland, in a motion passed by the Scottish Parliament in 2012, in the Smith Commission, and again in the above motion. The ‘sovereign right’ contained in the Claim of Right may be slowly hardening into a convention. In any case, this sovereign right of the Scottish people was granted de facto recognition by the holding of the 2014 Indyref. The fact that Scotland freely chose to remain in the UK in the 2014 Indyref does not negate the

Indyref as an act of sovereignty – nor does the No vote in 2014 mean that that decision holds good in perpetuity and regardless of circumstances. No more than did the UK’s ‘In’ vote in the 1975 EEC Referendum.

The UK government’s response to the referendum motion came before it was even passed. The Scottish Secretary, David Mundell, tweeted that there would not ‘be any negotiations in response to such a request’.45

The basis for a new referendum on Scottish independence is not membership of the EU as such. It must rest on two pillars:

1) The fact that Scotland’s position on such a vital issue was effectively ignored by London. This point would hold good regardless of what the particular vital issue was.

45 https://twitter.com/DavidMundellDCT/status/846758016619876352
2) The fact that the outworkings of Brexit – in particular the Supreme Court Bexit case – have revealed that much of what the Vow had supposedly delivered, the legal permanence of the Scottish Parliament and the giving of statutory effect to the Sewel Convention, is either illusory or without firm foundation. This fact alone potentially calls into question the validity of the 2014 Indyref result.

This is what Brexit has brought into sharp focus. EU membership is not the main issue either for Scotland in general nor for Yes voters in particular, for whom the principle of decisions about the government of Scotland being made in Scotland is much more important.

The Scottish government wants a referendum. London has set its face against it. The constitution groans. London might be better advised to remember that sovereignty does not necessarily equate with independence (it didn’t in 2014) but it does equate with the right to choose between Independence or the Union – Scotland’s sovereign right to choose its form of government.