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SCOTLAND'S REFERENDUM FOR INDEPENDENCE: A CONSTITUTIONAL DEFINITION

Posted on 19 Settembre 2014 by [Simone Scarinci](#)

On September the 18th 2014 a meaningful question will be asked to the Scottish citizens and all the residents in Scotland: "[Should be Scotland an independent country?](#)".

This referendum, promoted as a manifesto by the Scottish National Party (the S.N.P., which won the latest Scottish parliamentary elections in 2011, with over the 45% of the votes. Result that led to the first SNP majority government in Scotland's history), under a constitutional point of view, will be just an advisory one.

In fact no legal body in Scotland, even if enforced with a resounding success at the polling stations, has the right to declare independence from the Sovereign State ruler over that part of the country: the United Kingdom.

The U.K. is a unitary State (like France), with monarchy as form of government (Denmark). Not a federation (Germany), a confederation (U.S.A. Before 1865), nor a regional state (Spain); even if it has an articulated constitutional architecture. The many ways in which United Kingdom exercises its sovereignty over different territories, are the direct outcome of the great extent of its (present and past) sphere of influence.

Relationship with the Commonwealth (Australia), Crown dependencies (Channel Islands) and territories with devolved powers (Scotland, Wales and Northern Ireland).

Up to now Scotland benefits of autonomous institutions (like the Parliament and the Government of Scotland) which can rule over all the fields not explicitly reserved to the Central Government. The list of reserved powers can be found in the [schedule 5, of the Scotland Act of 1998](#). Residually, outside the matters listed in schedule 5, lies the area of Scotland's devolved powers.

Several aspects of the Constitution are reserved to the central government (schedule 5, Part I, art. 1), making it explicit that the form of State or Government of the Scotland's territory is not a devolved matter. It is relevant, to better define the relationship between the reserved and the devolved powers, to mention that even a subject not listed in schedule 5, thus constitutionally devolved to Scottish laws, can be "attracted into competence" by the U.K. Parliament. If the regulation in question is supposed to "serve the interest of all the Kingdom", Westminster has the constitutional right to overrule devolved Scottish laws.

The two government established in the "[Sewel Convention](#)" (an agreement with no legal stand, coined by Government Minister, Lord Sewel, who set out the terms of the policy in the House of Lords during the passage of the Scotland Bill, on 21 July 1998), that a previous consent of the Scottish Parliament is required as condition to "invade" the devolved competence. The next electoral event, appears to be the highest point of a persistent demand for Scotland's autonomy. We can rapidly recall some recent Acts of U.K. Parliament to draw a short history of the Scottish path for independence in three phases :

- 1) "Attempt for devolution" ([Scotland Act 1978](#); repealed by [confirmatory devolution referendum in 1979](#))
- 2) Devolution ([Advisory referendum 1997](#), passed; [Scotland Act 1998](#))
- 3) "More Devolution" ([Constituencies Act 2004](#); [Constitutional Reform Act 2005](#); [Scotland Act 2012](#))

After this short analysis on the relation between the British sovereignty

and its devolved territories, we can better understand the advisory nature of this referendum and earthly define the United Kingdom as a “quasi-regional” State. That's because a “tailored” devolved strategy by the U.K. is also acting both in Wales and Northern Ireland territories, shaping the link between “Crown and land” in a way that our continental regionalism can easily understand. Not entirely though. U.K. is not completely parted in regions (like Italy before 1970). England, the closest territory to Westminster, is object of no devolved powers. England has no devolved parliament, it is directly ruled by Westminster. Leaving the English Members of Parliament in an awkward asymmetry: they cannot vote on matters devolved to local parliaments, but Scottish, Welsh and Northern Ireland MPs can express their vote on bills that affect only England. This debate, born in 1977 (with the “first calls” for autonomy) as the “[West Lothian question](#)”, has taken on a new urgency and remains unsolved even after it was faced by the “[Mckay Commission](#)”, appointed by the Government in 2013.

So, doesn't it matter what will come out from the polling station?

Will it be just a strong advice for Westminster to focus his policies on Scotland's issues?

It will be much more.

To cold down the “attractive force” of the “Yes Scotland” independence campaign, U.K. Government already stated that will promptly respond to both possible outcomes of the referendum.

Promising, in one hand, an enrichment of the devolved powers as the “Better together” campaign will prevail. But in the other hand, the central Government had also warned that, in case the majority of votes should be for independence, the proper procedure will be followed to give the constitutional coverage to the initiative. Under a [section 30 Order of the Scotland Act of 1998](#), in fact, a matter (that could be even constitutional) can be canceled from the schedule 5 of the same Act, legitimately withdrawing the U.K. sovereignty from the decisions over the future of Scotland, in a temporarily irreversible way.

The number of variables that the born of a brand new National State in Europe could open is not easily countable.

The first external issues will be with the previous homeland; with issues on matters like: borders, citizenship, common resources, military defense and intelligence. Then the relations with majors international organizations, each regulated by a long and delicate accession procedure. The future relations with U.N., N.A.T.O. and especially with E.U., stimulated an animated debate (samples of which can be found [at this address](#), or in the work of [Prof. Kenneth A. Armstrong](#)).

Looking at the internal of an independent Scotland, sectors like agriculture, energy, currency, finance or the banking system reveal themselves as a system with an high degree of integration with its neighbors and partners. This condition, normally pursued by every modern western state, will surely baffle the path of the new born Scotland (annex A of "[Scotland analysis: Devolution and implications of Scottish independence](#)" commissioned by the U.K. Government to Professor James Crawford SC and Professor Alan Boyle).

Solutions to this few mentioned interrogatives, and further issues, will be developed along the next years, during which the Independent Scotland will regulate its relations with

lots of new treaties. At this point, our review had already faced too many crosswords. Will the independence party win? What will be the reaction of United Kingdom? Which laws and treaties will be enforced? Will Scotland reach a new sustainable balance?

One last situation deserves to be mentioned; it concerns the islands of Orkney, Shetland and Western Islands. Groups of isolated islands that felt for Scotland's devolved Government the same "distant approach" that Westminster allegedly had towards Scotland. Tired of the indifference of Edinburgh, those territories seized the opportunity offered by the referendum to organize [their own one](#). On the 25th of September the islands will vote, choosing between three options: becoming part of the new born Scotland, remaining part of the United Kingdom (in case Scotland becomes

independent), or calling for independence from both countries.

Waiting for the polling results, we should try to understand the reasons behind Europe's general raising demand for independence. Realizing

thought, that self governing is not by definition the best choice to bring a territory, and its citizens, to develop. Especially if during the negotiation's period that will closely follow this separation, the "newborn" State will be in urge for solutions, although without being the strongest power "sitting at the table".