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**The Would-Be Independence Referendum of
October 2023. A Lesson from Scotland**

Keywords: Scotland, independence referendum, Scottish National Party, United Kingdom, British constitution

Słowa kluczowe: Szkocja, referendum niepodległościowe, Szkocka Partia Narodowa, Zjednoczone Królestwo, brytyjski ustrój

Abstract

In the 2014 referendum Scottish voters were asked whether Scotland should be an independent country. Several years and one Brexit referendum later Nicola Sturgeon, the then popular and charismatic leader of the Scottish National Party and First Minister of Scotland, was making a convincing case for another independence referendum. She even proposed October 2023 as its date. But the United Kingdom government and successive Conservative prime ministers have consistently said “no”. This article analyses that constitutional and political ‘tug-of-war’ in the context of devolution settlement, pro-independence aspirations of Scottish people, consequences of Brexit, and growing tensions

between Edinburgh and London. The most fundamental constitutional question within that frame of reference is what Scotland's viable path to independence should be and in other words, under what circumstances the independence vision could be implemented.

Streszczenie

Referendum, którego nie było. Wyboista szkocka droga do niepodległości

We wrześniu 2014 r. odbyło się w Szkocji referendum niepodległościowe. Kilka lat później, już po przełomowym referendum w sprawie członkostwa Zjednoczonego Królestwa w Unii Europejskiej, Nicola Sturgeon, pełniący wówczas funkcję szefowej Szkockiej Partii Narodowej i Pierwszej Minister Szkocji, stała się twarzą kampanii na rzecz drugiego referendum na drodze do odzyskania przez Szkocję statusu suwerennego państwa. Padła nawet konkretna obietnica przeprowadzenia głosowania w październiku 2023 r. Kolejne brytyjskie rządy zdecydowanie sprzeciwiły się jednak wysiłkom Edynburga. W niniejszym artykule podjęto próbę analizy ustrojowo-prawnego i politycznego kontekstu tego swoistego 'przeciągania liny' pomiędzy władzami w Londynie i Edynburgu, z uwzględnieniem procesów dewolucji, niepodległościowych aspiracji Szkotów oraz konsekwencji Brexitu. Podstawowy problem badawczy dotyczy określenia ustrojowych warunków i przeszkód, jakie towarzyszą mieszkańcom Szkocji na ich drodze do niepodległości, szczególnie w związku z coraz bardziej antagonistycznym układem relacji pomiędzy brytyjskimi a szkockimi ośrodkami władzy.

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I.

Scotland was an independent country until the Acts of Union 1707¹, which united Scotland with England (and Wales) in the Kingdom of Great Britain. The crowns of both kingdoms had been held by the same people since 1603, but the Acts of Union merged England and Scotland's Parliaments into one Westminster body, even though the countries retained distinct legal systems. Scotland also kept its national identity and certain separate institutions. For

¹ The Union with Scotland Act 1706, passed by the Parliament of England, and the Union with England Act 1707 by the Parliament of Scotland, are often referred to collectively as the Acts of Union 1707.

most of the 19th and 20th centuries Scottish political scene had been dominated by major Britain-wide political parties of liberal, conservative and labour creed.

The Scottish National Party [SNP] was founded in 1934, but at that time it rejected the goal of full independence. An influential separatist Scottish nationalism began to take shape only in the 1970s². And it was not until the 1960s and 1970s that the party began to make substantial electoral progress. The gains being made by the SNP were met with some response from successive Labour and Conservative governments, in the form of the Kilbrandon Commission and a plan for a Scottish Assembly in the case of the former and a promise to support devolution plans from the latter³.

The Scotland Act 1978, enacted by the Parliament of the United Kingdom [UK] during the Labour government of James Callaghan, made provision for the devolved regional government in Scotland. It was intended to introduce a limited form of autonomy and it was subject to approval in a referendum. Although the March 1979 referendum brought a majority (51,6% of those voting, with 63,6% turnout) in favour of the proposed legislation, it did not meet the 40 per cent threshold of the eligible electorate. The Conservative Party which regained power in May 1979 was at that time strongly opposed to the idea of devolution but it remained part of Labour's agenda during their period of 18 years in opposition. Support for greater autonomy also gradually in-

² B. Jackson, *The Case for Scottish Independence: A History of Nationalist Political Thought in Modern Scotland*, Cambridge 2020, p. 2; A. Little, *The story of Scottish independence – what next?*, <https://www.bbc.com/news/uk-64761495> (26.02.2023). All websites in this article as on 31 August 2023. On the British (and Scottish) system of government for the Polish language reader see e.g. T. Wiecech, *System konstytucyjny Zjednoczonego Królestwa Wielkiej Brytanii i Irlandii Północnej*, Warszawa 2019; *Ustawy ustrojowe Zjednoczonego Królestwa Wielkiej Brytanii i Irlandii Północnej* (wstęp P. Sarnecki, tłumaczenie S. Kubas), Warszawa 2010; S. Kubas, *Parlament Szkocki. Dewolucja – wyzwanie dla Zjednoczonego Królestwa*, Warszawa 2004.

³ Devolution denotes a particular form of political, legislative and administrative decentralization. The devolution settlement concerns the three regions of Scotland, Wales, and Northern Ireland. It has been implemented in the United Kingdom since 1997 and it has been widely recognised as one of the most significant constitutional developments in contemporary Britain, as it has been the biggest transfer of legislative power from Westminster since the Acts of Union 1707. On devolution and Scotland see e.g. D. Torrance, *Devolution in Scotland: "The settled will"?*, House of Commons Library, <https://researchbriefings.files.parliament.uk/documents/CBP-8441/CBP-8441.pdf> (30.03.2023).

creased in Scotland in the 1980s and 1990s. The issue returned to the political and legislative agenda when Labour returned to power in 1997.

New proposals were prepared by the government of Tony Blair and approved in the September 1997 referendum, when 74.3 per cent voted in favour of the Scottish Parliament, with 60.1% turnout. Consequently, the Scotland Act 1998 was enacted and elections to the regional parliament in Edinburgh took place in 1999⁴. The Parliament, also called Holyrood, from an area in Edinburgh where its building is located, has been endowed with legislative powers over all matters not expressly reserved to the British (Westminster) Parliament. The UK government, on the other hand, is responsible for national policy on reserved powers, which include e.g. foreign policy and international relations, defence and national security, immigration and nationality, macroeconomic policy, as well as most taxation. Reserved matters set out in the 1998 Act and its Schedule 5 specifically identify certain aspects of the constitution, including the Union of the Kingdoms of Scotland and England⁵.

II.

From 1997 the Labour Party dominated both Westminster and Holyrood. Only in 2007 the SNP replaced Labour as the largest party in the Scottish Parliament, forming first a minority government and, after the 2011 election victory, a majority one (see Table 1)⁶. The pro-union parties – Labour, Conservative, Liberal Democrats – since 2011 have been in a minority. The SNP, under the leadership of Alex Salmond, was already committed to a referendum on independence and the 2011 election gave the SNP enough political

⁴ The leading parliamentary party or coalition appoints the Scottish Executive which is headed by a First Minister. The position of the First Minister of Scotland was held by Donald Dewar (1999–2000, Labour), Henry McLeish (2000–01, Labour), Jack McConnell (2001–07, Labour), Alex Salmond (2007–14, SNP), Nicola Sturgeon (2014–2023, SNP), and currently by Humza Yousaf (SNP).

⁵ <https://www.legislation.gov.uk/ukpga/1998/46/contents> (30.03.2023).

⁶ The SNP was functioning as a minority government again from 2016, cooperating in Holyrood with others, particularly with the pro-independence Scottish Green Party, to pass legislation. After the 2021 election the SNP signed a power-sharing deal – a governing partnership – with the Greens.

power within Holyrood to push for such referendum. In January 2012 A. Salmond announced his plan to hold a referendum in 2014. Following months of discussions and negotiations between London and Edinburgh, an agreement was finally signed on 15 October, 2012 between Prime Minister David Cameron and First Minister A. Salmond. Both governments agreed to support legislation in the UK and Scottish Parliaments that would allow a single-question referendum. The question was later determined as “Should Scotland be an independent country?”⁷.

Table 1. The composition of the Scottish Parliament 1999–2021 (129 seats)

	1999	2003	2007	2011	2016	2021
SNP	35 (27,1%)	27 (20,9%)	47 (36,4%)	69 (53,5%)	63 (48,8%)	64 (49,6%)
Labour	56	50	46	37	24	22
Conservative	18	18	17	15	31	31
Liberal Democrats	17	17	16	5	5	4
Green	1	7	2	2	6	8
Other	2	10	1	1	0	0

Source: <https://researchbriefings.files.parliament.uk/documents/CBP-7529/CBP-7529.pdf> (10.10.2023).

Two statutes of the Scottish Parliament were enacted under the powers temporarily transferred from Westminster: the Scottish Independence Referendum (Franchise) Act 2013 and the Scottish Independence Referendum Act 2013. And two major referendum campaigns – “Yes Scotland” versus “Better Together” – were launched in mid-2012. Recurring public opinion surveys during the campaign found that Scottish voters were becoming more inclined to support independence, but such support did

⁷ See e.g. *Debating Scotland: Issues of independence and Union in the 2014 Referendum*, ed. M. Keating, Oxford 2017; *The Scottish Independence Referendum. Constitutional and Political Implications*, eds. A. McHarg et al., Oxford 2016; K. Łokucijewski, *Scotland’s independence referendum 2014 in the context of devolution settlement – historical background, political framework and constitutional consequences*, “Krytyka Prawa” 2015, t. VII; the Scottish referendum issue of “The Political Quarterly” 2015, no. 2.

not usually exceed 50% of the eligible electorate. On 18 September, 2014 Scotland voted against becoming an independent country, with 55,3% “No” votes against 44,7% “Yes” votes, with turnout of 84,59%, the highest in Scottish electoral history. Following the referendum, A. Salmond resigned from the positions of the leader of the SNP and the First Minister of Scotland in November 2014 and was replaced by his then deputy, Nicola Sturgeon. However, the 2014 referendum did not hurt the SNP. The next general election of 2015 gave the party a landslide victory, devastating The Scottish Labour Party and leaving all three major UK parties with just one seat each (see Table 2).

Table 2. The parliamentary representation of Scotland at Westminster 2001–2019 (House of Commons, now comprising 650 seats; Scotland is currently represented by 59 members)

	1997	2001	2005	2010	2015	2017	2019
SNP	6	5	6	6	56	35	48
Labour	56	55	40	41	1	7	1
Conservative	0	1	1	1	1	13	6
Liberal Democrats	10	10	11	11	1	4	4
Other	0	1	1	0	0	0	0
Total	72	72	59	59	59	59	59

Source: <https://researchbriefings.files.parliament.uk/documents/CBP-7529/CBP-7529.pdf> 10.10.2023).

III.

On 23 June, 2016 the residents of Britain participated in only the third nationwide referendum in UK history and the second one regarding the Britain’s membership in common European institutions⁸. The ‘Remain’ option prevailed in Scotland (62.0%), Northern Ireland (55.8%) and only one out of

⁸ See e.g. K. Łokucijewski, *A tale of two UK’s European referendums. Some remarks on British history, politics and the constitution*, “Przeгляд Prawa Konstytucyjnego” 2016, no. 6.

nine English regions – London (59.9%). The unpopularity of Brexit in Scotland did not lead at first to a decisive surge in support for independence. There were quite a few remain voters who had said no to independence and leave voters who had said yes. However, the SNP has always argued that leaving the EU was the material change which represents significant constitutional innovation for the UK and is therefore a reason to hold another independence referendum, even relatively soon after the first one. Gradually, the experience of Brexit political upheavals in the UK and chaotic negotiations with the EU during the transitional period, exacerbated by growing tensions between Holyrood and Westminster, resulted in a link that emerged between positive attitudes towards independence and backing for being part of the EU⁹. And now support for prospective EU membership and for independence are in Scotland significantly aligned. In the Scottish Social Attitudes survey conducted in 2022 almost two-thirds of Remain adherents said that they supported independence and only 22% of Leave supporters take the same view¹⁰. For the SNP, Brexit has been a boost to the cause of Scottish independence and rejoining the EU has become the first and best argument for independence. N. Sturgeon, who after 2014 was the de facto head of the Scottish independence movement, phrased the choice facing Scotland as being “outside the UK, but inside the EU”, versus being “inside the UK but outside the EU”¹¹.

A final phase of a decisive attempt to hold a second independence referendum started on 28 June, 2022 during the meeting of the Scottish Parliament. N. Sturgeon determined a ‘route map’ for her government which would lead

The 1975 European Economic Community referendum was the first nationwide referendum in British history.

⁹ Cf. e.g. J. Curtice, *Scottish independence: how Nicola Sturgeon’s pledge to rejoin the EU could impact a referendum vote*, <https://theconversation.com/scottish-independence-how-nicola-sturgeons-pledge-to-rejoin-the-eu-could-impact-a-referendum-vote-193047> (26.10.2022); *Scotland’s new choice: Independence after Brexit*, eds. E. Hepburn, M. Keating, N. McEwen, Centre on Constitutional Change, Edinburgh 2021; M. Keating, *State and Nation in the United Kingdom: The Fractured Union*, Oxford 2021.

¹⁰ J. Curtice, *Survey shows Brexit vote has undermined support for the United Kingdom’s union*, <https://theconversation.com/survey-shows-brexit-vote-has-undermined-support-for-the-united-kingdoms-union-191138> (22.09.2022).

¹¹ J. Curtice, *Scottish independence...*

to a referendum¹². To hold a referendum Holyrood needed Westminster to grant a section 30 (of the Scotland Act 1998) order, as it happened before the 2014 referendum. Such move would pass power to the Scottish Parliament to legislate on the issue. But in the case of the second referendum the UK successive prime ministers had consistently refused such temporary transfer of power, which would allow the Scottish Parliament to deal with a constitutional issue normally reserved for the British Parliament. Under those circumstances the Scottish government decided to refer the case to the UK Supreme Court. Dorothy Bain, the Lord Advocate, who has been the principal legal advisor to the government in Edinburgh, put forward the question of whether a freshly written draft of the Scottish Independence Referendum Bill would be within Holyrood's powers. She argued that a referendum would be only consultative and given its limited character it did not relate to the Union itself and therefore did not constitute a reserved matter as set out in the Scotland Act 1998. Consequently, the Scottish Parliament would have authority to legislate the issue. The UK government's argument went in the opposite direction – that constitutional law and practice consider such referendum law-making as a matter reserved to Westminster.

The Supreme Court heard the case on 11 and 12 October 2022 and the judgment was given on 23 November¹³. The ruling supported the UK government's position that Holyrood did not have the power to organise the ref-

¹² Cf. <https://www.parliament.scot/chamber-and-committees/official-report/search-what-was-said-in-parliament/chamber-and-committees/official-report/what-was-said-in-parliament/meeting-of-parliament-28-06-2022?meeting=13851&iob=125584> (30.03.2023); see also *Scotland's Right to Choose* in which the Scottish Government presented its case for "giving the people of Scotland the right to choose their constitutional future", available at <https://www.gov.scot/publications/scotlands-right-choose-putting-scotlands-future-scotlands-hands> (30.03.2023). and a series of papers *Building a New Scotland*, a prospectus for an independent Scotland at <https://www.gov.scot/newscotland> (30.03.2023). Given the limited space of this article I must largely leave out of description specific legislative and political actions related to the period preceding June 2022.

¹³ Interestingly, Lord Reed, the Supreme Court President, noted in his opening remarks on 11 October that the five judges in the case would have to assess 8,000 pages of legal material and it was "likely to be some months before we give our judgment", as quoted at <https://www.theguardian.com/politics/2022/oct/11/the-scottish-referendum-supreme-court-case-what-you-need-to-know-indyref2> (11.10.2022). However, the ruling was given as quickly as on 23 November, and its speed was attributed to the unanimity and prioritization of the judgement,

erendum without Westminster's consent, as the issue did constitute a reserved matter¹⁴. In particular it relates to the Union of the Kingdoms of England and Scotland and the Parliament of the United Kingdom, which are specifically mentioned in Schedule 5 of the Scotland Act 1998. The judgment meant that even if the SNP would claim political legitimacy and democratic mandate for its demand to carry out a second referendum, it would be legally irrelevant. To secure a lawful referendum would require the agreement of the UK Parliament. However, on the other hand, there are no intrinsic constitutional obstacles to Scottish independence.

It should be also remembered that any such referendum would have only advisory, consultative and pre-legislative nature. Regardless of its political significance it would have no automatic legal impact. Consequently, even the pro-independence outcome would only lead to a start of negotiations between the British and Scottish governments.

When the Scottish government lost the court case, N. Sturgeon came up with the idea of treating the next general election as a referendum in all but name (a so-called *de facto* referendum), treating a UK Parliament election as a plebiscite. The SNP wanted to use the election as a single-issue campaign on independence. N. Sturgeon "suggested that if more than half of votes were cast for parties in favour of independence, the Scottish government would regard that as a mandate to pursue negotiations"¹⁵.

see <https://www.centreonconstitutionalchange.ac.uk/news-and-opinion/supreme-court-doubles-down-uk-referendum-position> (23.11.2022).

¹⁴ For a more detailed account of the legal context and the proceedings see e.g. D. Torrance, *Scottish independence referendum: legal issues*, <https://researchbriefings.files.parliament.uk/documents/CBP-9104/CBP-9104.pdf> (10.01.2023) or S. Tierney *line of analysis* on UK Constitutional Law Association Blog at <https://ukconstitutionallaw.org> (30.03.2023). Also see C. Martin, *Scotland's place in the Union will not be decided in the courts: only politicians can enable or prevent independence*, <https://constitution-unit.com/2021/09/15/scotlands-place-in-the-union-will-not-be-decided-in-the-courts-only-politicians-can-enable-or-prevent-independence> (15.09.2021) and C. McCorkindale, A. McHarg, *Constitutional Pathways to a Second Scottish Independence Referendum*, <https://ukconstitutionallaw.org/2020/01/13/chris-mccorkindale-and-aileen-mcharg-constitutional-pathways-to-a-second-scottish-independence-referendum> (13.01.2020). For the Supreme Court's ruling see <https://www.supremecourt.uk/cases/docs/uksc-2022-0098-judgment.pdf> (30.03.2023).

¹⁵ <https://www.theguardian.com/uk-news/2023/jul/05/scottish-voters-humza-yousaf-100-days-in-office-snp> (5.07.2023).

On 15 February, 2023 N. Sturgeon delivered a speech in which she unexpectedly announced her resignation, after eight SNP election victories (general, regional, local government, and European) in more than eight years of her career as the Party leader and the First Minister of Scotland¹⁶. It triggered the SNP's first leadership contest since 2004 and after two rounds of the online ballot of party members in March 2023 Humza Yousaf, former justice and health secretary in Sturgeon's governments, replaced her in both, party and governmental, posts. It is worth mentioning that for the first time in Britain's history, the country has now a Hindu prime minister in London and a Muslim first minister in Edinburgh. Interestingly, Anas Sarwar, the leader of Scotland's main opposition party Labour, is of the same, Pakistani Muslim heritage, as is H. Yousaf and also Sadiq Khan, the Mayor of London.

H. Yousaf positioned himself as the continuity candidate, but he has had to offer independence supporters a credible alternative route to Scottish statehood. During a special convention on independence strategy in June 2023 in Dundee, he softened N. Sturgeon's de facto referendum plan and declared that winning the next general election in Scotland should give a mandate to apply further pressure on the British government for the legislative powers necessary to hold another referendum¹⁷. However, for the time being there seems to be no consensus in the SNP and the nationalist camp on how or when to secure a second referendum¹⁸.

¹⁶ She gave mostly personal reasons for her resignation and quoted "the unrelenting and unforgiving pressures of modern politics, with a 24-hour news cycle, the intensity of social media and modern politics' focus on personality", which make impossible to live a normal life; <https://www.theguardian.com/politics/2023/feb/15/nicola-sturgeon-resignation-why-now-and-what-happens-next-on-key-issues> (15.02.2023).

¹⁷ N. Sturgeon first proposed to hold a conference on independence in December 2022. It was originally scheduled to take place in Edinburgh in March 2023, but was postponed after her resignation.

¹⁸ Moreover, there are growing tensions between Westminster and Holyrood. The UK government blocked the Gender Recognition Reform (Scotland) Bill, aimed to make it easier to legally switch gender without medical certification. The Secretary of State for Scotland in Rishi Sunak's cabinet used section 35 of the Scotland Act 1998 to veto (prohibiting from submitting the Bill for Royal Assent) Scottish legislation that has been strongly supported by both N. Sturgeon and H. Yousaf; see D. Torrance, D. Pyper, *The Secretary of State's veto and the Gender Recognition Reform (Scotland) Bill*, <https://researchbriefings.files.parliament.uk/documents/CBP-9705/CBP-9705.pdf> (26.04.2023). London also challenged another important

Further, the SNP has been recently struck by a plethora of problems. In February it lost its popular and charismatic leader, even though some of her policies and initiatives left the party divided. In March Peter Murrell, who had been chief executive of the SNP for more than 20 years and N. Sturgeon's husband, resigned over misleading statements regarding party membership, which happened to be much lower than officially claimed. There is also the continuing police investigation into the SNP's finances, which was launched in July 2021 over the use of £600,000 raised by the party among its members and supporters for a fresh independence referendum campaign that has not taken place. Between April and June 2023 Police Scotland announced that they arrested, interviewed and later released without charges P. Murrell, the then SNP's treasurer Colin Beattie, and N. Sturgeon herself. Michael Russell, the president of the SNP, described the circumstances as the biggest party crisis in 50 years¹⁹.

IV.

The 2014 independence referendum preparation and campaign led to a range of proposals designed to transform the existing devolution settlement in a way that they might convince the population of Scotland to say “no” in the referendum. Dubbed “Devo[lution] More”, “Devo Plus”, “Devo Max” or even referring to potential federal arrangement of the British system of government they were devised to offer more autonomy to Scotland and greater financial powers to the Scottish Parliament, specifically in the area of taxation²⁰. The prospect of the second independence referendum and approaching next general election have revived political projects supporting further devolution in recent years. In particular, the Labour Party, a hopeful winner of the 2024 election, proposed new reforms to avoid breaking up the UK and to regain lost ground in the Scottish representation at Westminster²¹.

Scottish government's initiative – a proposal to decriminalize some drugs for personal use. These examples denote a further shift in the working of the devolution settlement away from conventions and towards reliance upon legal force.

¹⁹ <https://www.bbc.com/news/uk-scotland-scotland-politics-65219944> (8.04.2023).

²⁰ Cf. K. Łokucijewski, *Scotland's independence referendum 2014...*, pp. 255–256.

²¹ The Labour proposals have been epitomised by former prime minister Gordon Brown's plan to offer “change within Britain rather than change by leaving Britain” and current Party

A democratic system of government implies that the Anglo-Scottish union is upheld by consent and therefore Scotland should have the right to leave that union. However, it seems constitutionally and politically impossible now to conduct an independence referendum in Scotland, without a radical change of mind at Westminster. As shown above, both major British parties – Conservative and Labour – are fundamentally opposed to the idea of such referendum and potential break-up of the UK. Therefore, a road for a lawful, democratic and consensual secession does not readily exist. As Nikos Skoutaris aptly observed: “This leads to a potential paradox. Scotland is a nation within a voluntary union with a recognised right to self-determination but no apparent and meaningful way to exit from it in a lawful way unless the UK Parliament experiences a damascene conversion”²². But still, Scotland’s only workable path to independence is by agreement with the central government of the UK.

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²² N. Skoutaris, *Scottish Indyref 2: Towards another constitutional crisis*, <https://www.centreonconstitutionalchange.ac.uk/news-and-opinion/scottish-indyref-2-towards-another-constitutional-crisis> (4.07.2022).

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