

# The legal focus of the Scottish independence debate misses the point



*Arguments over whether a new Scottish independence referendum should take place have assumed a mostly legal focus, writes [Anthony Salamone](#). He argues, however, that holding a referendum, and implementing any pro-independence result, would depend on political consensus rather than legal authority. He suggests that the importance of cooperation between Scottish and UK institutions should become more recognised in the ongoing debate.*

Throughout the coronavirus pandemic, the salience of the Scottish independence debate has varied. While it has been [continuously latent](#), full discussion has in large measure been subordinated by the ongoing health, social, and economic circumstances. In the same period, however, Scottish public opinion has evolved. The [last 21 consecutive published opinion polls](#) indicate majority support for independence, when undecided voters are excluded.

In recent years, the procedural arguments over whether a new referendum should take place have assumed significant prominence, often more than the substantive arguments over whether Scotland should become independent. Divisions on both these tracks within Scottish politics have been matched with disagreements between the Scottish and UK governments over the [qualifying criteria](#) for a referendum. It has been evident for some time that the present impasse between Edinburgh and London will only find resolution through this year's Scottish Parliament election. Despite suggestions of postponing the vote as a consequence of the pandemic, it [remains scheduled](#) for its original date of 6 May. Until then, the story is largely suspended, contingent on the electoral outcome and subsequent political developments.

The central question is what sequence of events would follow another pro-independence victory at the Holyrood election, whether through a majority for the Scottish National Party (SNP) or a combined majority between the SNP and like-minded parties, namely the Scottish Greens. In those circumstances, the Scottish government contends that it would [assuredly proceed](#) with a referendum. The UK government maintains that it would consider one to be [entirely unwarranted](#).

The procedural debate has become predominantly concentrated on which institution has the power to underwrite an independence referendum. In that regard, it has been framed in a legalistic way. Competing claims suggest that the Scottish Parliament has the autonomous authority to legislate for a referendum, or that constitutional affairs are permanently reserved to the UK Parliament unless it decides otherwise. The conversation revolves around bills, laws, precedent and legal interpretation.

In reality, the holding of a future referendum would be a matter of a political consensus, not legal determination. Given that Scottish politics has long been based on the principle of [popular sovereignty](#), it would be difficult to suggest that any free and fair referendum conducted to normal democratic standards could not be valid. A democratic event is not comparable to a piece of legislation, which may be judged as within the competence of Scotland's devolved institutions or not. The true determinant is not whether an independence referendum is *legal*, but whether it is *operative*.

To appreciate this fact, it becomes necessary to [conceptualise the pathway](#) that Scotland would have to follow to achieve effective independence, as opposed to symbolic status. It would consist of three principal stages. First, the people of Scotland would demonstrate through a democratic event that they wanted Scotland to become independent. Second, the Scottish and UK governments would negotiate Scotland's separation and independence from the UK. Third, the two would recognise each other as sovereign states at the point of independence. With recognition from other states of the world, Scotland would then become effectively independent.

The debate currently takes account of only the first stage. While alternatives have been variously suggested, the proposed democratic event is a referendum. Yet, all three stages would have to be completed to establish prospective statehood. Each would require consensus between the Scottish and UK political institutions which at present jointly exercise Scotland's sovereignty. Accordingly, it is relatively inconsequential which institution may have definitive authority to legislate for a Scottish independence referendum. Such a process would depend instead on both parties accepting the premise and process of the first stage; agreeing to respect its outcome; and, in the case of a majority for independence, implementing the result through the second and third stages.

The legislative avenues pursued to deliver a referendum and, where relevant, its result are wholly secondary to the requisite political consensus. It would be logical for a plebiscite to be founded on an Act of the Scottish Parliament, given the chamber is Scotland's national legislature. Endorsement at UK level could be provided through an Order in Council, an Act of Parliament or simply a bilateral political agreement. The 2014 independence referendum was based on an [Act of the Scottish Parliament](#), an [Order in Council](#) and the [Edinburgh Agreement](#). This precedent is useful, but need not be prescriptive.

Moreover, a legalistic framing brought to the first stage falls away at the second and third stages. While they would have legal accompaniments, independence negotiations and state recognition would be political matters. In this light, the [recent legal case](#) on whether the Scottish Parliament has unilateral power to legislate for an independence referendum, which was [dismissed for lack of standing](#), seems odd. In the absence of political agreement, a referendum could legitimately take place and simply result in nothing of substance.

In practice, the legality of an independence referendum is immaterial to the fact that the Scottish Parliament could never bind the UK Parliament or government. Under devolution, Scotland operates in a system in which UK institutions retain ultimate agency. Under independence, Scotland could manifestly not instruct the institutions of another state. It follows that any realistic prospect of effective independence for Scotland would require cooperation between Scottish and UK institutions on all three stages of the pathway.

In the context of the response of the international community, it must be noted that legitimacy and acceptance are two entirely different subjects. The appropriateness or justness of a Scottish independence referendum would hold far less relevance than the political relationship between Scotland and the UK. States will shape their reactions to a referendum and its aftermath based on the UK government's stance, as the government of the sovereign state in question, not on the Scottish government's arguments.

Scotland's political institutions, in Edinburgh and in London, serve the Scottish electorate. Despite their obvious differences of opinion, both governments should decide to work together, in a spirit of pragmatism, to give effect to the decisions of Scottish voters. The electorate will express its latest views, including on an independence referendum, in May's election. It would be inadvisable for the Scottish government to proceed with a referendum without agreement and dare the UK government to stop it. It would be unwise for the latter to ignore the implications of election results in Scotland and hope that the independence debate will dissipate.

The Scottish government has announced that it will [publish its draft bill](#) on a referendum question and date in the coming weeks. Yet, legal mechanisms will remain subsidiary to political circumstances. Were Scottish voters to choose independence at some point, the pathway to statehood would require sensible cooperation between Scottish and UK institutions. The future Scotland-UK bilateral relationship would also demand far greater consideration than it has been given to date. Considering the approaching election and the transformation of public opinion, this debate would benefit from greater maturity.

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## About the Author

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