

ПОЛИТИЧЕСКИЕ ПРОЦЕССЫ В СОВРЕМЕННОМ МИРЕ

AFTER THE REFERENDUM: “RULE, BRITANNIA” OR “SCOTLAND THE BRAVE”?

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The article analyzes referendum on independence of Scotland in the context of democratic approach to claims for independence of different regions in Europe.

Key words: Scotland, referendum, sovereignty, parliament.

On 18 September 2014, the question „Should Scotland be an independent country?“ was submitted to the Scottish (remarkably, not the whole UK) electorate in a referendum. With a turnout of 84,6% (of more than 4 million persons registered for the referendum), 55,25% voted against, 44,65% for independence. The two alternative answers that could be chosen were just „yes“ and „no“, while there was no option to combine answer „no“ with a request for more devolution. In his speech on the day after the referendum, however, the Prime Minister did not only refer to the United Kingdom as a country consisting of four different nations, but also announced new legislation on devolution — rightly assessing, it appears, that both many of those in favour of independence and of those against it would expect Scottish autonomy to be strengthened.

As Scotland has already been given more powers under devolution than either Wales or Northern Ireland [2; 13], an increase of Scottish powers would also increase existing constitutional asymmetries between these regions. England, moreover, might be concerned even more particularly, as, despite its importance, it is the only remaining region without regional autonomy, apart from the specific metropolitan autonomy granted to Greater London: (1) The originally intended autonomy for parts of Northern England had been rejected by a popular consultation in 2004. The Prime Minister’s promise to submit draft legislation by the beginning of 2015 thus extended not only to new powers for Scotland, but included plans for autonomy for all parts of the United Kingdom.

This announcement is not only highly ambitious in political terms, but also poses enormous legal challenges. Previous legislation on devolution was enacted through Acts

of Parliament that specifically related to the respective region, and these would have to be amended (2). A strengthening of Scottish powers would, however, raise further problems alluded to as the „West Lothian Question“, since Scottish members in the Westminster Parliament take part in all legislative processes even if they are concerned with „only-England“ laws, while laws concerning Scotland may be made by the Scottish Parliament, as far as it has power to do so [3; 9; 10; 20]. Options such as a regional parliament for England or an exclusion of non-English members from legislative decisions concerning “England-only” laws have been discussed for some time, but not been realized [3; 10; 18].

A first step ahead was taken by the establishment of the so-called “Smith Commission” [23] on 19 September 2014 which is in charge of the discussion on further powers for Scotland, while a Command Paper [21] including the 3 main UK political parties’ proposals on further devolution for Scotland was published in October 2014.

Yet it is remarkable that another important aspect of the Scottish referendum has raised little attention so far, namely the question if the referendum would have been legally binding in case of a “yes”. Within and even beyond the UK, the referendum has largely been regarded as a legally binding decision by the Scottish people on the question of Scottish independence [8; 17; 24]. However, the term “referendum” has an ambiguous meaning, as it is sometimes only used for describing legally binding decisions by the people in a narrow sense of the word, while it sometimes appears to comprise non-binding instruments of popular consultation as well [15]. As both such types of plebiscites exist, their distinction cannot be neglected in this context. According to Schedule 5 Part I § 1 b Scotland Act 1998, the “Union of the Kingdoms of Scotland and England” is a reserved matter of the UK Parliament. Still, the The Scotland Act 1998 (Modification of Schedule 5) Order 2013 — a piece of subordinate legislation, which, in accordance with Sec 30 para 2 Scotland Act 1998, was enacted by the Queen after approval by both Houses of the Westminster Parliament as well as the Scottish Parliament — modified Schedule 5 Part I by inserting § 5a. According to this new provision, the reserved subject-matter on the Union of the Kingdoms of Scotland and England “does not reserve a referendum on the independence of Scotland from the rest of the United Kingdom if the following requirements”, which are described as technical-administrative preconditions for the referendum, “are met”. Accordingly, a Scottish law, namely the Scottish Independence Referendum Act 2013, made operative provisions for the referendum. Obviously, the amended distribution of competences must be understood in the sense that the legality of the referendum was to be put beyond doubt, but not as if the very decision on Union or independence were devolved to Scotland or as if the UK Parliament were legally obliged to implement the results of the referendum. Moreover, Sec 28 para 7 Scotland Act 1998 (3) provides that the UK Parliament retains power even over devolved matters, even though it chooses not to interfere, if possible, with Scottish matters under the so-called “Sewel Convention” [5; 12; 19; 26]. Whether a people is entitled to vote on its independence quite apart from the question whether the Constitution entitles it to do so or not, is another issue not to be treated in this short paper. At any rate, public international law does not regard

a secession as lawful unless this concerns former colonies or regions where human rights were seriously violated [14]. Only very few constitutions explicitly provide “secession clauses” (4), while most of them are hostile to secession or even expressly emphasize the “indivisibility of the state”.

A „political“ obligation to respect the results whatever they might turn out to be, was, however, established in the Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland (“Edinburgh Agreement”) [22] of 15 October 2012. The Agreement states that both the UK Government and the Scottish Government “look forward to a referendum that is legal and fair producing a decisive and respected outcome. The two governments are committed to continue to work together constructively in the light of the outcome, whatever it is, in the best interests of the people of Scotland and of the rest of the United Kingdom”.

Would the referendum have been in favour of independence, it would still have needed UK implementing legislation. Seen from a purely legal perspective, the UK Parliament would not have been under a constraint to enact such legislation. Even if such a constraint could be derived from the The Scotland Act 1998 (Modification of Schedule 5) Order 2013, the UK Parliament could have overruled this by a new Act of Parliament. It is argued that given “the principle of the sovereignty of Parliament, the UK Parliament could, of course, repeal such legislation even after a Yes vote in a referendum, but until it did so the result of the referendum would be legally binding as it was in 1979 [where legislation prior to the 1979 referendums on Scottish devolution gave automatic effect to their outcomes]” [16]. But neither can the aforementioned legislation on the legality of the 2014 referendum be conceived as if it gave automatic effect to the outcome of the referendum nor is it quite clear whether we could truly speak of a legally binding referendum if such enabling legislation existed: It seems as if Parliament could have adopted repeal legislation either prior or subsequent to enabling (or even implementing) legislation. This is due to the UK’s “unwritten constitution” which, differently from continental constitutions (and most constitutions worldwide), recognizes no formal distinction between a constitutional and an ordinary law and does not prescribe any kind of qualified amendment procedure or „perpetuity clause“ that might prevent the sovereign Parliament from certain amendments in matters that are constitutional in substance [1; 4; 6; 7; 18; 25]. Also continental constitutions might enable parliaments to repeal legislation, which, submitted to a referendum after being passed in Parliament, had entered into force after a Yes vote, in a “second” legislative procedure, without challenging the legally binding character of these referendums in the “first” legislative procedure (leading to the legislation repealed by repeal legislation afterwards). The Scottish referendum would have requested the UK Parliament to pass legislation only after a Yes vote (5). However, if it is still for Parliament to enact implementing legislation, while it could repeal this legislation at the very same time, i.e. even in the “first” legislative procedure, this is a case different from those (veto or abrogative) referendums that decide on the future validity of previously enacted legislation or on the enforcement of legislation that needs a Yes vote in order to become law at all. The question thus is: Must Parliament enact legislation requested by a referendum, although it may repeal the same legislation afterwards (even with retroactive effect)?

Or does it depend on Parliament if the outcomes of the referendum enter into force at all? In the latter case, I would argue that a referendum is not “legally binding”, at least not in the thorough sense of the word.

The Scottish people have voted against independence, not perhaps with an overwhelming majority, but with an extraordinarily high turnout which vests the result with a high standard of democratic legitimacy. Whether we may call this a “referendum” in the genuine sense of the word, may be doubted, though. It would rather seem that the decision taken was a consultation only — although, admittedly, one with considerable political weight. In any case, it is an impressive token of more awareness for and consideration of democracy on both sides than can be observed in the context of all other European regions where claims for independence have been raised.

NOTES

- (1) Greater London Authority Act 1999 (as amended, particularly, by Greater London Authority Act 2007).
- (2) Scotland Act 1998 (as amended, particularly, by Scotland Act 2012), Northern Ireland Act 1998 (as amended, most recently, by Northern Ireland [Miscellaneous Provisions] Act 2014), Government of Wales Act 1998 (as amended, particularly, by Government of Wales Act 2006).
- (3) This provision reads as follows: “This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland”.
- (4) Examples are Art 4 para 2 Constitution of Liechtenstein or Art 47 Constitution of Ethiopia.
- (5) It is only in rare cases that continental constitutions, such as those of Switzerland and Liechtenstein, allow for “popular legislation”, where parliaments may be forced to adopt legislation subsequent to referendums; whether repeal legislation would need another referendum in the sense of a “*contrarius actus*” in order to protect the strong constitutional protection given to direct democracy shall not be discussed here.

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ПОСЛЕ РЕФЕРЕНДУМА: «ПРАВЬ, БРИТАНИЯ» ИЛИ «ШОТЛАНДИЯ ОТВАЖНАЯ»?

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В статье анализируется референдум о независимости Шотландии в контексте демократического подхода к разрешению вопросов о независимости отдельных регионов в Европе.

Ключевые слова: Шотландия, референдум, суверенитет, парламент.