

Gordon Craigie

This month, I'm on holiday – hey, even lifelong independistas need a break! So, instead of an interview, we have a guest article...

IT'S BECOME an accepted truism that "a week is a long time in politics" but, in these interesting times we're living through a week could reasonably be redefined as a political generation – unless you're a unionist, of course, in which case a political generation could be up to 50 years! As we are putting together this edition of *iScot Magazine* the First Minister has announced the Scottish Government's plans for the long-awaited second referendum and has set the date as 19 October 2023.

Predictably, the unionists have kicked Project Fear II into action while simultaneously trying to argue that there is no mandate for this referendum despite the Scottish Government being elected just over a year ago with precisely this mandate – given to them by us, the people of Scotland. And, equally predictably, many on our side of the debate have started to explore in greater detail the alternatives to such a referendum should the plan outlined by the First Minister be somehow stymied by the increasingly authoritarian right-wing cabal currently masquerading as the UK Government.

One of the intriguing arguments being promoted by a new organisation, Salvo (www.salvo.scot) focuses on the (much vaunted but seldom fully understood) concept of popular sovereignty in Scotland as a vehicle to

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regain our nation's independence. Sara Salyers – a former journalist and educator who is now an independence activist – is one of the founders of Salvo and outlines her vision of an alternative route to independence for *iScot* readers in the following article...

Claiming the Right to Self-Determination

So, here we are, gearing up for another referendum in 2023. For many of us this has been a long time coming and to say that there are gaps to be filled before we can mount an effective campaign is an understatement. If we are to succeed this time, we will have to address many of these gaps together, by engaging in the kind of discourse and imaginative thinking that characterised the Indy movement in 2014. One of the most important gaps is the present hole in the constitutional route.

On the same day that the First Minister announced a new referendum on independence for 2023, come what may, Alex Salmond pledged his support but also pointed out the danger of the campaign taking place in a constitutional "vacuum". That is, without a clear explanation of how the Scottish Parliament plans to "bend Westminster" to its will or find another way of asserting the sovereignty of the Scottish people. What exactly did he mean?

Holyrood is no more or less than the Scottish executive arm of Westminster, albeit referring to itself as the Scottish Government. Its powers are the powers of Westminster devolved through the Scotland Act and it answers directly to Westminster under that Act. So how, legally, can the Scottish Government hold a referendum without the consent, under Section 30 of the Scotland Act of its ruling body, the UK Government? Without an answer, there's no doubt that the Supreme Court of the UK will, correctly, rule as unlawful any attempt to conduct a referendum



An independent mind...

Salvo launch event,
3 July 2022

1689 - PRESENT THE CLAIM OF RIGHT Whose Right? YOUR RIGHT!

Venue: Dobbie Hall, Main Street, Larbert. FK5 4BL
Date: 3rd July 2022 Time: 11am to 4.30pm

www.SALVO.scot

under powers the devolved Scottish Government simply does not have. The vacuum Alex Salmond refers to is this absence of a clear constitutional route to a referendum, the result of which would both be accepted by the international community and would not incur serious punitive measures by the UK Government which retains the power to dissolve the Scottish Parliament at will and we should not doubt that Johnson would be delighted to have an excuse to do this.

There are, however, solutions. The most obvious lies in Salmond's concluding words: "We need Scotland's Claim of Right to resound far and wide." He is correct. But, before we proclaim it, we have to understand what it is and why and how it is a legal, political *and* social game changer.

At the heart of the Claim of Right is the Scottish doctrine of "popular sovereignty". This stands in diametric opposition to the English, now UK, doctrine of "parliamentary sovereignty".

In England, the Bill of Rights 1689 replaced the absolutism of the monarch with the absolutism of the parliament - parliamentary sovereignty. Parliament has supreme authority in every jurisdiction, including the rights of the individual. Rights we might assume to be constitutionally or legally protected, from tenants' rights and workers' rights to basic human rights, exist at the will and favour of the UK Parliament. This doctrine is now one of the defining characteristics of Westminster although, as Lord Cooper famously remarked in 1953 (*McCormick vs the Lord Advocate*):

"The principle of the unlimited sovereignty of parliament is a distinctively English principle which has no counterpart in Scottish Constitutional Law."

In Scotland, of course, neither parliament nor government are sovereign, the people are sovereign, as Westminster has acknowledged repeatedly. In May this year, Ian Blackford quoted Lord Cooper, as he also did in 2018, when he told the British Government that Scotland does not need its permission to hold a referendum because in

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Scotland the people are sovereign. But what, exactly does this mean? And do our politicians really understand what they are saying?

First, popular sovereignty means what it says. It is *not* transferable to parliament. If it could, then that would just be parliamentary sovereignty by another name. It is irremovable from the will of the people, which may be expressed through an election, or a referendum or another mechanism, but it can never be vested in the politicians or government elected by that will. Sovereignty always remains with the people.

Second, popular sovereignty was not established by the Claim of Right made by the Scottish Constitutional Convention in 1988. Important as it was to argue that "the people of Scotland have a sovereign right to determine the kind of government best suited to their needs", it had no legal force. Yet the assertion was accepted by Westminster. It has been put to a vote at least twice since then, most recently in 2018, and was accepted then too. But it directly contradicts the absolute authority of Westminster under the doctrine of parliamentary sovereignty. So why was it accepted at all?

It was accepted because the 1988 Claim was based on Scotland's core constitutional document, the Claim of Right Act 1689. And *this act does* have legal force. It was ratified by the parliaments of England and Scotland as the precondition of the Treaty and the Union. And it was clearly to be protected by this proviso, so that even the unionist spy and writer Daniel Defoe observed: "The Laws of Government [in Scotland] continue as the Government continues established in the claim of right, I mean as to the limitations of government and obedience."

The Claim of Right Act 1689 does indeed establish the right of the people to determine the kind of government best suited to their needs, but it also does far more than that. It sets out in detail what popular sovereignty is and what it means.

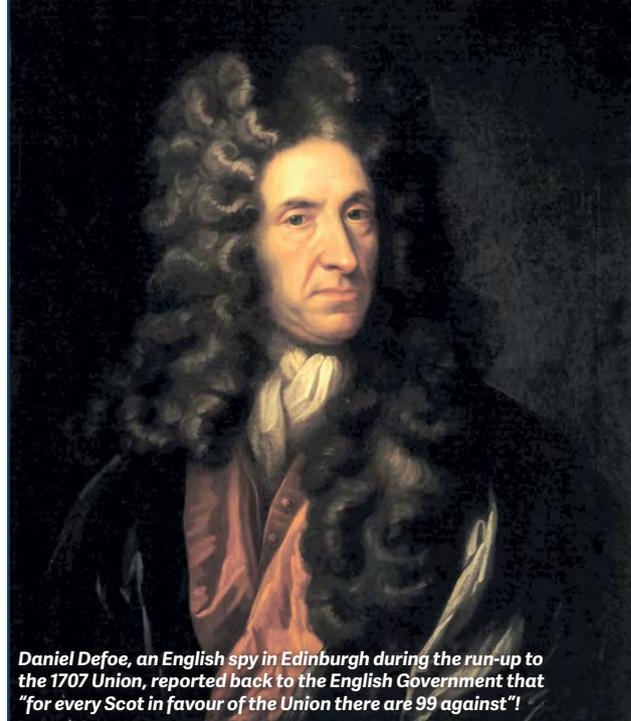
It means that power is only loaned by the people to their representatives and that the loan may be withdrawn. And not merely by voting for another party – the loan may be recalled by the power of the people to sanction, remove and obtain redress from any government that violates Scotland's "fundamental constitution", by which the government is legally limited. It also provides:

1. A definition of an unlawful "invasion" (violation), of Scotland's constitution which is the replacement of a "legal limited monarchy" (government) with absolute (sovereign) rule, or the claim to absolute authority over the people by a parliament!
2. Examples of constitutional violation by breach of those laws that preserve civil rights. It also, therefore, establishes those rights *that may not be violated by a government.*
3. The prescribed consequence of violation, the forfeiture of power in Scotland.
4. The right of the people to act through a representative body, known as the Convention of the Estates, as the "full and free representative of the nation" and to declare the violator illegitimate.

Popular sovereignty rests on the Scottish constitutional provision for the people to remove a tyrannical, corrupt or overreaching government through what is effectively a national tribunal.

What should be clear is that first, the popular sovereignty which successive parliaments and politicians have acknowledged – established by law in the Claim of Right 1689 and referred to by the 1988 Convention – means much, much more than the right of the people to have their vote respected. And second, the constitutional provision for

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real popular sovereignty – without which it has no meaning – cannot be transferred to a government or parliament. The same government may require to be removed by the people for violation of the Scottish constitutional compact, and it would certainly not sanction and remove itself!

So where does this leave us? Well, it leaves us with an open door.

The Scottish government can choose to acknowledge that, while it does indeed answer to Westminster, in Scotland, however, Westminster answers to the higher authority of the Scottish people. And if the Scottish people demand the return of their constitutional rights and instruments, Westminster and Holyrood are obliged to restore them. The first step is the recall of the Convention of the Estates – which was *not* the Scottish Parliament and so not dissolved with the Union – as the constitutional mechanism for the acknowledged sovereignty of the people. This would not guarantee independence, but it would provide a legitimate authority, outside Westminster's "sovereignty" or the competence of the Scotland Act, which could not only lawfully instruct the Scottish government to conduct a referendum, but could put this Westminster cartel on trial, under the Scottish constitution, for crimes against the people of Scotland. More, it could restore the rights and provisions that are traditionally ours and, effectively, depose the violating government – or, in common parlance, sack them!

As the independence movement starts to refresh itself for the big year ahead, it's clear that grassroots organisations like Salvo are an important component. The First Minister took the unionist naysayers completely by surprise when she announced that the referendum process had already started by directly referring the Referendum Bill to the UK Supreme Court for a ruling on its competence while simultaneously declaring her intention to use the next UK general election as a de facto independence vote should the anti-democratic practices of the UK Establishment prevail. Whether we agree or disagree with the alternative route Sara Salyers proposes in this article I'm sure we can all agree that every avenue should be explored so that we are all fully informed about whichever route eventually takes us to the re-establishment of an independent Scottish nation state. Personally, I've long had a feeling that we wouldn't get there via a referendum and that independence would be delivered by some alternative means. Independence is normal – I really don't care how we do it, let's just do it!