

Professor Adam Tomkins

Legal mechanism for any independence referendum inquiry

Is there a constitutional route to Scottish Independence

Yes

All sides are agreed that the decision-maker is the people of Scotland. There is no dispute about this. It was reflected in the Edinburgh Agreement (October 2012) and is consistent with statute. The Northern Ireland Act 1998, s. 1 provides that Northern Ireland shall not cease to remain part of the United Kingdom “without the consent of a majority of the people of Northern Ireland voting in a poll”. The Scotland Act 1998, s. 63A provides that “the Scottish Parliament and the Scottish Government are not to be abolished except on the basis of a decision of the people of Scotland voting in a referendum”. The NI Act recognises that it is for the people of Northern Ireland to determine their constitutional future: whether NI remains part of the UK or becomes part of a united Ireland is ultimately, in UK constitutional law, a question for them, not for Parliament, for Government, or for the UK as a whole. Likewise, the Scotland Act recognises that we have devolution in Scotland because the people of Scotland voted for it in a referendum and that devolution will remain in Scotland unless and until that outcome is reversed in another such referendum. Scotland’s constitutional future (“independence” or “remaining in the UK”) is a question for the people of Scotland to decide. This seems equally clear whether we look to political sources of the constitution (such as the Edinburgh Agreement) or legal sources (such as the legislation I have cited).

The key test, then, is what is the settled will of the Scottish people? For the time being, it is the settled will of the Scottish people to remain part of the UK. Were that to change, and were it to become the settled will of the Scottish people for Scotland to leave the UK and become an independent state, this is what would happen.

So far, so uncontroversial. The next question is: how is the settled will of the Scottish people to be determined: how do we know what it is? There is no one answer to this. There is no single test to resolve it. It is, rather, a matter of judgement—a matter of statecraft. We cannot do much better than to say “we will know when we know”. And who is “we”? All of us: politicians, leaders, opinion formers, commentators, civic society. Politicians will know from the doorstep, from campaigning, from opinion polling and from focus groups. And so will the rest of us. Knowing what is the settled will is a matter of broad consensus, not of partisanship. Everybody knew that, by 1997, the settled will of the Scottish people was to embrace devolution, even if 18 years previously in 1979 this had not been so clear-cut. Likewise, everybody knew in 2012 that it was the settled will of the Scottish people that the time had come to put

the independence question. The settled will of the Scottish people has long been respected, by “winners” and “losers” alike. Thus, even those opposed to devolution in 1997 honoured the fact that they were in the minority; likewise, those who in 2012 would have preferred no independence referendum to be held, accepted that it none the less needed to be held.

So where are we now? It would be interesting to see if anyone would disagree with this proposition: the settled will of the Scottish people in 2025 is that the prospect of independence should remain open to Scotland but that the pursuit of independence is not for the time being a pressing priority. Only a minority want the prospect of independence to be removed entirely from the Scottish political conversation; likewise only a minority desire a second independence referendum in the immediate future. It is only natural that what I shall call “unionist” politicians will try to enlarge the former group whilst what I shall call “nationalist” politicians will try to enlarge the latter.

Where sits the referendum in this analysis?

Referendums come in different forms, some of which are markedly more successful than others. There are three types.

- The first is where a scheme is legislated for (in detail) and the question is whether the people want that scheme to come into force or not. Examples are the 1979 devolution referendum and the 2011 AV referendum (on the electoral system used for elections to the House of Commons).
- At the other end of the spectrum are referendums on questions of principle. Examples are the 2014 independence referendum and the 2016 EU referendum.
- The third type of referendum sits in between, where the question is not as open-ended as were the 2014 and 2016 questions, but not quite so specific as “do you want this particular legislation to come into force”. An example is the 1997 devolution referendum. A white paper had set out what the Government thought devolution would look like, the Government’s proposals mirroring closely those previously worked out by civic society (and by think tanks such as the Constitution Unit). The 1997 referendum was not on the idea of devolution, yet neither was it on a pre-legislated scheme for devolution: it was somewhere in between.

I would argue that the 1997 and 2011 referendums were far more successful than the 2014 and 2016 referendums were. Each of the former settled the issue: after 1997 devolution was delivered and after 2011 the AV alternative to first-past-the-post was shelved. Neither of the latter were anything like as successful at settling matters: after the EU referendum, in particular, our politics was dominated for years by questions left unresolved on 23 June 2016. It took two changes of prime minister and two early general elections before any sort of resolution was reached. Likewise, no one considers that the 2014 independence referendum settled the matter (even if there are some who may wish that it had).

I would contend that we should learn from these experiences, and not repeat their mistakes. Viewed in this light, any future independence referendum should be held to confirm what we already know (or strongly suspect) to be the settled will of the Scottish people: it should not be held to find out what the will of the Scottish people is on any particular day. Proceeding thus would be to repeat the successful process of the 1997 referendum, rather than the unhappier experiences of 2014 and 2016.

We know from the Supreme Court judgment in the Lord Advocate's Reference [2022] UKSC 31 that the Scottish Parliament cannot legislate for an independence referendum without Westminster's consent. Whilst Westminster should not be expected, still less required, to give its consent unless it is the settled will of the Scottish people to pursue independence, Westminster would be acting contrary to constitutional precedent and, I would contend, contrary to constitutional principle were it to withhold such consent in circumstances where it had become clear that the settled will of the Scottish people was to pursue independence.

To conclude this part of my analysis, the constitutional route to independence is precisely the party political and broader civic society debate ongoing in Scotland which seeks, on the unionist side, to maintain the position that the settled will of the Scottish people is to remain in the United Kingdom and, on the nationalist side, to reverse this. This is a constitutional path which is rooted in democracy; is committed to the notion that Scotland's constitutional future is for the people of Scotland to determine; is consistent with both political and legal sources of constitutional authority; and is consistent both with constitutional precedent and constitutional principle.

Secession in the UK in comparative perspective

This is as clear as we can be as to what the constitutional route is, even if some might be frustrated at what they consider to be unsatisfactory vagueness. It is instructive to compare this answer to those which would be given in other countries' constitutional orders. When we compare the UK's constitutional position on secession with the position which obtains in the United States, in Canada, and in Spain, we will find the following: where constitutions are clear about secession (or "constitutional routes to independence", if you prefer that phrase), they tend not to permit it. Where countries are more permissive about secession, as the UK is, there tends to be less clarity and more vagueness. A comparative analysis would therefore invite us to "choose our poison" (as it were): do we want a clear rule that outlaws secession or a rather less clear approach which permits it. Perhaps the price of (relative) permissiveness about secession is (relative) vagueness about how it may be achieved.

In the United States and Spain the constitutional rules would appear to be relatively clear. In the leading case of *Texas v White* 74 US 700 (1868) the US Supreme Court ruled that the USA is an "indissoluble" and "indestructible" union in which the states have only those rights which are reserved to them under the Tenth Amendment. Once a state enters the union, this is "final", said the Court:

there is “no place for reconsideration, or revocation, except through revolution, or through the consent of the states”. Thus, there is no right of unilateral secession: secession could come about only by consent or extra-constitutionally (that is, by revolution).

The position in Spain appears to be similarly uncompromising. In 2014 that country’s Constitutional Court ruled that Catalonia “cannot unilaterally call a referendum of self-determination to decide on its integration in Spain” (quoting from (2014) 10 EuConst 571, at 580). Sovereignty, for the Court, vests in the Spanish people as a whole (i.e., in the Nation): no region of Spain may claim sovereignty for itself, not even a high-autonomy region such as Catalonia. When an unlawful independence referendum was subsequently held in Catalonia, the politicians who had promoted it were jailed by Spain’s Supreme Court to lengthy terms of imprisonment (the longest sentence was for 13 years’ imprisonment).

Matters in Canada are different. In the Quebec Secession Reference [1998] 2 SCR 217 the Supreme Court of Canada did not rule that a province (such as Quebec) could not hold a secession referendum; still less did they intimate that to do so would be criminal. However, the Court also ruled that, even if a secession referendum were to yield a “yes” vote, this would not mean that secession would necessarily follow for that province. All it would mean, ruled the Court, is that the other provinces and the federal government would be under a duty to come to the negotiating table to discuss whether (not necessarily how) secession could be secured. Even the most emphatic of “yes” votes would mean nothing more, in constitutional terms, than that “negotiators would have to contemplate the possibility of secession” (para 97). The Court was quite clear about this: the notion that there would be “a legal obligation on the other provinces and federal government to accede to the secession of a province” was rejected by the Court as an “absolutist” proposition (at para 90).

The constitutional position in the United Kingdom can be distinguished from all these cases. Unlike in the US, there is no rule of law here which provides that the union (or unions) which make up the United Kingdom are “indissoluble”. As pointed out above, the sovereignty of the Scottish people and the sovereignty of the people of Northern Ireland are recognised in statute, in ways which are manifestly inconsistent with what the US Supreme Court said about the states in *Texas v White*. The contrast between the UK and Spain is all the greater. There is no constitutional rule here which vests sovereignty in only one place. Whilst there is the “sovereignty” of Parliament, in the Diceyan sense that an Act of Parliament may make or unmake any law whatever, there is also the sovereignty of the Scottish and Northern Irish people, as we have seen. Sovereignty is shared in the UK, even if it is not in Spain. Significantly, there is also a contrast to be drawn between the UK and Canada. No one in the UK thought that, had there been a “yes” vote in 2014, it would have triggered nothing but talks about independence. Had there been a “yes” vote, it would have triggered independence. Of course there would have been negotiations (just as there were after the 2016 EU referendum), but those negotiations would have been about how to deliver independence, not about whether independence should be delivered.

This is why I have said that the UK's approach to secession (i.e., to constitutional paths to independence) is permissive. It is markedly more permissive than the US and Spain, and significantly more permissive even than Canada. As matters stand, the constitutional path to independence is easier for Scotland to follow than it would be for any of Texas, Catalonia or Quebec. This is why I have said that the UK's approach to secession (i.e., to constitutional paths to independence) is permissive. It is markedly more permissive than the US and Spain, and significantly more permissive even than Canada. As matters stand, the constitutional path to independence is easier for Scotland to follow than it would be for any of Texas, Catalonia or Quebec.