

Professor Aileen McHarg

Legal Mechanisms for Triggering an Independence Referendum

Scottish Independence and the United Kingdom Constitution

Under the UK constitution, it is legally possible for Scotland to become independent, but this is not currently explicitly recognised or regulated by law. This contrasts with the position of Northern Ireland, where the Northern Ireland Act 1998 recognises that it may cease to be part of the UK and form part of a united Ireland if a majority of the people wish to do so, and provides for the holding of referendums on this issue.¹

The ability of Scotland to become independent follows from the sovereignty of the United Kingdom Parliament, which encompasses the ability to redraw the boundaries of the state, notwithstanding that the Acts of Union of 1707 declare that the Union between Scotland and England is to last “forever”,² and provide no mechanism for dissolution. As with the formation of the Irish Free State in 1922,³ all that is formally required is an Act of Parliament providing for Scotland to cease to be part of the UK or transferring power to the Scottish Parliament to declare independence.

In *Reference by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998*,⁴ the Supreme Court held that power to hold a referendum on independence also lies with the UK Parliament, as this relates to the reserved matters of the Union and the United Kingdom Parliament under Sch.5, para.1 of the Scotland Act 1998. In order to hold another independence referendum, therefore, legislative competence would have to be transferred, either temporarily or permanently, to the Scottish Parliament using a s.30 Order or primary legislation, or the UK Parliament could legislate directly to authorise such a referendum itself. There is no mechanism whereby the Scottish Parliament can alter this position unilaterally, as the limits on its legislative competence are protected enactments, which it may not modify.⁵ The reservation of the Union may also preclude the devolved institutions from taking other measures aimed at putting pressure on the UK Parliament to agree to the dissolution of the Union, but how far it extends is not clear.⁶

The lack of legal regulation of Scottish independence means that there is no prescribed set of trigger conditions for a second independence referendum, such as a threshold level of popular support, and no minimum time period which must have elapsed. A referendum is also not a legal requirement for independence; some other

¹ Northern Ireland Act 1998, s.1 and sch.1.

² Union with England Act 1707, Art. 1.

³ Irish Free State (Agreement) Act 1922; Irish Free State (Constitution) Act 1922.

⁴ [2022] UKSC 31.

⁵ Scotland Act 1998, s.29(2)(c) and sch.4, para.4.

⁶ See A. Eustace, “‘A Hidden Scotland’? The Effect of the Independence Referendum Bill Reference on Northern Ireland” [2024] *Public Law* 487.

mechanism, such as a “plebiscitary election”, could in theory be used instead as an indication of public support. In practice, though, a referendum is highly desirable, in order to deliver a clear expression of the popular will as well as to ensure legitimacy from both the domestic and international perspective. Any referendum also requires a clear legal basis in order to be effective and legitimate. A purely informal referendum would be vulnerable to boycott and would lack guarantees of fairness in the conduct of the campaign and the voting process.

Do the People of Scotland Have a “Right to Decide”?

Notwithstanding the legal position just set out, there has been consistent political recognition that the people of Scotland have the right to become independent if the majority wish to do so. The 2014 independence referendum was a clear expression of such a right and this has subsequently been reaffirmed, e.g., by the Smith Commission in 2014⁷ and in a 2018 Opposition Day debate in the UK Parliament endorsing the 1989 Claim of Right.⁸ In refusing requests for legal co-operation in holding a second referendum since 2017, UK ministers have been careful not to dispute that independence for Scotland is possible in principle.

Frustration with the lack of a clear legal route independence has given rise to a number of recent arguments that the people of Scotland do in fact have a legally enforceable “right to decide” or “right to self-determination”. In my view, however, none of these arguments is persuasive.

For example, it has recently been suggested that the 2012 Edinburgh Agreement would create a legally enforceable precedent for a transfer of power to hold a second independence referendum in the event that the SNP (or presumably any other pro-independence party) wins another overall majority in a Scottish Parliament election.⁹ This argument seems to rest on the doctrine of legitimate expectations, whereby past government actions may create expectations about future conduct which the courts will recognise and enforce, unless there are overriding justifications for not doing so. However, in order to create an enforceable legitimate expectation of this nature something akin to a clear and unambiguous promise is required.¹⁰ There is nothing in the Edinburgh Agreement to suggest that it was intended to be anything other than a one-off. At the very most, the 2014 precedent would be one of a range of factors to be taken into account in deciding whether or not to respect a mandate for second referendum, and a court is likely to be highly deferential to ministerial judgment on such a politically sensitive matter.

⁷ *Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament* (2014), para.18.

⁸ H.C. Deb. Vol.644, cols.406-456, 4 July 2018.

⁹ See, e.g. *The Times*, 13 October 2025, [Lawyers debunk John Swinney's plan to force fresh independence referendum](#).

¹⁰ *R v North and East Devon Health Authority ex p Coughlan* [2001] QB 213.

It has also been argued that the people of Scotland enjoy popular sovereignty under Scots constitutional law, guaranteed by the Claim of Right 1689.¹¹ However, this argument rests on a selective and in some respects inaccurate reading of Scottish constitutional history. While ideas of popular sovereignty were certainly present in Scottish constitutional discourse prior to the Union, the 1689 Claim of Right does not create or affirm any *legal* doctrine of popular sovereignty, nor specify any mechanism by which it is to be exercised. Again, it seems highly unlikely that a court would give any weight to such a claimed historical right in preference to clear modern authority about the location of sovereign authority within the UK constitution.

On the other hand, it is generally accepted that the people of Scotland enjoy a right to self-determination as a matter of international law. Nevertheless, the Supreme Court in the *Independence Referendum Bill Reference* followed the 1998 decision of the Supreme Court of Canada in the *Quebec Secession Reference*¹² in holding that this gives rise to a right of external self-determination (i.e. to become independent) in only three sets of circumstances, none of which apply to Scotland: to colonies, to oppressed people, such as those living under foreign occupation, or to people denied meaningful access to government.¹³ Otherwise, people are expected to exercise self-determination within the framework of their existing state:

“A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law and to have that territorial integrity recognized by other states.”¹⁴

This aspect of the decision has been criticised in an opinion commissioned by Alba from Professor Robert McCorquodale,¹⁵ who argues that the right to external self-determination is not entirely precluded in situations where a territory enjoys internal self-determination, and that international law may have moved on since 1998. He suggests that it might be possible to seek an advisory opinion from the International Court of Justice on Scotland’s right to self-determination, and that it could be argued that the different treatment of Scotland and Northern Ireland in respect of provision for secession referendums amounts to a form of systemic mistreatment of the people of Scotland within the UK, justifying external self-determination.¹⁶ This argument seems entirely speculative, though, and it would in any case be extremely difficult to secure

¹¹ See S. Salyers, *The Treaty Bites Back: A “Forgotten” Constitution, Scotland’s Claim of Right* (Salvo, 2022).

¹² [1998] 2 SCR 217.

¹³ [2022] UKSC 31, paras 88-89.

¹⁴ [1998] 2 SCR 217, para.154.

¹⁵ *Opinion on Matters Relating to International Legal Issues Concerning the Right to Self-Determination for the People of Scotland*, 9 June 2023,

[OPINION ON MATTERS RELATING TO INTERNATIONAL LEGAL ISSUES CONCERNING THE RIGHT TO SELF-DETERMINATION FOR THE PEOPLE OF SCOTLAND.pdf](#).

¹⁶ *Ibid.*, para 130.

an advisory opinion, since this would require the agreement of the UK Government or a majority of the UN General Assembly.

Finally, an organisation called Liberation Scotland is trying to persuade the UN “Committee of 24” (the Special Committee on Decolonisation) to accept that Scotland is a “non-self-governing territory” (i.e., a colony) within the meaning of UN Resolution 1541 of 1960.¹⁷ If successful, this would also create a legal right to become independent, binding on all states including the UK. Once again, though, this argument appears entirely speculative, since the UN has never applied the category of non-self-governing territory to anything other than overseas possessions and because Scotland has conventionally been understood to be an integral part of the UK state, rather than a colony. The argument that it is in fact a colony thus rests on another selective interpretation of our constitutional history.

Should There Be a Legally Agreed Route to Independence for Scotland?

Very few (contemporary or historical) constitutions explicitly allow for secession. A 2018 study of the constitutions of 192 UN member states found that only seven expressly allowed for secession or a right to self-determination, while 152 directly or indirectly prohibited it, 28 were silent on the matter, and a further five were unclear.¹⁸ Of those constitutions which do permit it, high procedural hurdles are typically set for the exercise of the right,¹⁹ or they may affirm the principle of self-determination but without setting out a clear legal pathway.²⁰

It is often argued that constitutional recognition of a right to secede is destabilising. On the other hand, where, as in the case of Scotland, the principle has already been conceded, the lack of a clear pathway to independence may itself be source of constitutional grievance. Certainly, experience in states, including the UK, where there is a constitutionally regulated secession process suggests that it is not *necessarily* destabilising. Conversely, constitutional recognition of a right to secede does not guarantee that its exercise will be uncontested, or even democratic and peaceful.

Constitutionally regulated secession processes may take a number of different forms. For example:

- *Northern Ireland*: The Northern Ireland Act provides that a unification referendum may be held at any time at the discretion of the Secretary of State for Northern Ireland, and *must* be held “if at any time it appears likely to [the Secretary of State] that a majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland.” In either case, though, polls may be held no more

¹⁷ [legalbase](#).

¹⁸ R. Weill, “Anti-Secession Constitutionalism”, in R. Griffiths *et al* (eds), *The Routledge Handbook of Self-Determination and Secession* (London: Taylor and Francis, 2023), p.528, citing R. Weill, “Secession and the Prevalence of Both Militant Democracy and Eternity Clauses Worldwide” (2018) 40 *Cardozo Law Review* 905.

¹⁹ Weill, 2018, p.973.

²⁰ See, e.g., Art.235 of the South African Constitution.

frequently than every seven years. Moreover, it is not clear on what basis the Secretary of State is to form a judgment as to whether a referendum is either mandatory or desirable, and the Act is silent on a range of other key issues, including the franchise, the question to be asked, the voting threshold²¹ and the conduct of the referendum.²² In *Re McCord*, the Northern Ireland Court of Appeal rejected a legal challenge requiring the UK Government to draw up and publish a referendum policy, saying only that the Secretary of State's powers "must be exercised honestly in the public interest with rigorous impartiality in the context that it is for the people of Ireland alone to exercise their right of self-determination"²³ The Northern Ireland Assembly and Northern Ireland Executive have no formal role to play in triggering a border poll, and may be limited in what they can do to promote one.²⁴ In the event of a vote in favour of unification, the Secretary of State comes under an obligation to "lay before Parliament such proposals to give effect to [it] as may be agreed between Her Majesty's Government in the United Kingdom and the Government of Ireland."²⁵ However, under the terms of the Belfast/Good Friday Agreement, a parallel referendum is required in the Republic of Ireland, and confirmatory legislation would be required there too. As a matter of law, the UK Parliament is also not bound to agree to unification legislation.

- *Canada*: The Canadian constitution is silent on the question of secession, but in the *Quebec Secession Reference*, the Supreme Court of Canada held that if the people of Quebec voted by a clear majority on a clear question in favour of independence, this would give rise to a constitutional duty on the other Canadian provinces to open secession negotiations, which would have to be confirmed by a constitutional amendment. The decision to hold a referendum is one for the province which wishes to secede, but in 2000, a so-called "Clarity Act" was enacted, providing, amongst other things, that the clarity of the question and of the result are both questions for the Canadian Parliament to determine, with the possibility that a supermajority might be required.²⁶ The Quebec Parliament passed its own legislation in response, repudiating the right of any other body to set conditions on a secession referendum, and specifically providing for a simple majority vote.²⁷

²¹ Though it seems likely to be just a simple majority.

²² See, e.g., Constitution Unit, *Working Group on Unification Referendums on the Island of Ireland: Final Report* (London, 2021).

²³ *Re McCord (Border Poll)* [2020] NICA 23, para.62.

²⁴ See Eustace, n.6.

²⁵ Northern Ireland Act 1998, s.1(2).

²⁶ An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference 2000.

²⁷ Act respecting the exercise of the fundamental rights and prerogatives of the Québec people and the Québec State 2000 ("Bill 99").

- *Ethiopia*: The 1994 Ethiopian constitution provides in Art.39.1 that “Every Nation, Nationality and People in Ethiopia has an unconditional right to self-determination, including the right to secession.” It then sets out in Art 39.4 a five-step process for the exercise of that right, beginning with a two-thirds majority vote in favour of secession by the Legislative Council of the nation, nationality or people concerned, giving rise to an obligation on the Federal Government to organise a referendum within three years. If there is a majority vote in favour of secession in that referendum, secession will take place when the Federal Government has transferred its powers to the Council of the seceding territory and when a division of assets has been effected “in a manner prescribed by law”. There is, however, no deadline set for these final two steps.
- *The European Union*: The process under Art.50 TEU whereby a member state may withdraw from the European Union is sometimes treated as a form of secession, albeit that the EU is not itself a state. This process is entirely unilateral and unconditional. Any member state may decide to withdraw “in accordance with its own constitutional requirements”, and notification of an intention to withdraw gives rise to an obligation on the EU to negotiate terms for withdrawal, subject to the approval of the Council of Ministers, by qualified majority, and of the European Parliament. At the end of two years, the withdrawing state ceases to be a member of the EU, unless the negotiating period is extended or the notification of withdrawal is reversed,²⁸ whether or not a withdrawal agreement has been reached.

There is thus no single international model to be followed in the case of Scotland, and a range of choices would have to be made about the respective roles of the UK and Scottish Parliaments and Governments, about the process to be followed to ascertain the will of the Scottish people and any conditions or limitations on that process, about what should happen after a majority will has been expressed in favour of independence, and about what timetable, if any, should apply. However, the 2014 referendum would act as a *political* precedent for how any future referendum process should operate, with justification required in order to depart from it.

Aileen McHarg
11 November 2025

²⁸ *Wightman v Secretary of State for Exiting the European Union*, Case C-621/18, [2019] 1 CMLR 29.