Democratic pathways to a second Scottish independence referendum: advisers' briefing

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What does international law have to say about secession?

It is fairly clear that an independent Scotland would be recognised by the international community of states as an independent state if independence from the United Kingdom occurred with the consent of the UK. If that consent however is not forthcoming, there is a question mark over whether international law provides for pathways towards a second independence referendum (and ultimately towards independence).

That question is typically discussed under the broad heading of whether a territory that currently forms part of a larger state has a right to secession. Such a right would be based on the right to self-determination. Article 1 (2) of the UN Charter lists as one of the UN's purposes "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples […]". The right to self-determination rubs up against another paramount principle of international law: territorial integrity. The UN General Assembly's Friendly Relations Declaration of 1970 addresses this issue as follows after setting out the substance of self-determination:

> *[N]othing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and*

> *self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.*[1]

The Declaration can be seen as a testament to the reluctance of international law to allow for interference with territorial integrity (and concomitant overall political stability) outside the context of decolonisation.

The above statement is ambiguous, however, as it is based on the premiss that the state concerned conducts itself in compliance with the principle of self-determination. What then if it does not? Recent years have seen an argument develop in favour of the recognition of so-called "remedial secession". Remedial secession would allow a territory to secede from a state in the case of grave injustices against the population of that territory.[2] The existence of such a right is, however, disputed. Those who oppose the existence of a right to remedial secession point to a lack of state practice and *opinio juris*; in other words, they contend that the right to remedial secession is nowhere to be found in customary international law,[3] the existence of which relies on consistent state practice on the basis of states' conviction that that practice is mandated by law (*opinio juris*).[4] Others point out that since 1970 there has been a turn to a more rights-based practice in international law[5] and to authorities which appear to imply the existence of such a right.[6] For instance, in the *Katanga* case the African Commission of Human and People's Rights requests the people of Katanga to exercise their right to self-determination in a way that is compatible with the territorial integrity of Zaire "in the absence of concrete evidence of violations of human rights to the point that the territorial

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[1] UN General Assembly, Resolution 2625 (XXV) of 24 October 1970.
[2] A Buchanan, "Theories of Secession" (1997) *Philosophy and Public Affairs* 32 at 36.
[3] J Vidmar, "Remedial Secession in International Law: Theory and (Lack of) Practice," (2010) 6 St Antony's International Review 37; D Thürer, M Burri, "Secession" (Max Planck Encyclopaedia of Public International Law; 2009).
[4] See eg M Dixon et al, *Cases and Materials on International Law*, 7th edn (2024) 25.
[5] O Okafor, "The International Law of Secession and the Protection of the Human Rights of Oppressed Substate Groups: Yesterday, Today and Tomorrow" (2017) 1 Nigerian Yearbook of International Law 143 at 152.
[6] Eg the Catanga case by the African Commission of Human and People's Rights requests

integrity of Zaire should be called into question".[7] In other words, if there had been such evidence, the territorial integrity of Zaire might have been called into question. In its *Kosovo* advisory opinion the International Court of Justice – having found Kosovo's unilateral declaration of independence not to violate international law – expressly did not pronounce on the question, but noted that on the question whether "the international law of self-determination confers upon part of the population of an existing State a right to separate from that State is, however, a subject on which radically different views were expressed."[8]

This suggests, at least, that despite international law's general reluctance to allow secessions,[9] the international law on self-determination is in flux. Whether it has gelled into a right to remedial secession in case of (unbearable) human rights violations against a group of people inhabiting a territory within that state is unclear.

It is equally unclear, whether the right to self-determination grants a right to take (democratic) steps towards secession. In this context it should be noted that the Canadian Supreme Court – whose reference is discussed in more detail below, based the duty to negotiate secession if a province expressed a clear will to secede on the federalism principle, viz. Canadian constitutional law, and not on international law.

What does seem clear is that, wherever the law on self-determination settles, international law on its own is unlikely to establish for Scotland a democratic right to secede from the UK nor a right to take democratic steps (such as an independence referendum) towards secession. In the *Quebec Secession Reference*, the Canadian Supreme Court agreed with a submission made to the court that:

> *The Quebec people is not the victim of attacks on its physical existence or integrity, or of a massive violation of its fundamental rights. The Quebec people is manifestly not, in the opinion of the amicus curiae, an oppressed people.*

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[7] For further references see P Hilpold, "Self-determination and Autonomy: Between Secession and Internal Self-Determination" (2017) 24 International Journal on Minority and Group Rights 302.

[8] International Court of Justice, Advisory Opinion, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, 22 July 2010, ICJ Reports 2010, 403, para 81.

[9] J Crawford, *Brownlie's Principles of International Law*, 9th edn (2019) 133.

> *For close to 40 of the last 50 years, the Prime Minister of Canada has been a Quebecer. During this period, Quebecers have held from time to time all the most important positions in the federal Cabinet. During the 8 years prior to June 1997, the Prime Minister and the Leader of the Official Opposition in the House of Commons were both Quebecers. At present, the Prime Minister of Canada, the Right Honourable Chief Justice and two other members of the Court, the Chief of Staff of the Canadian Armed Forces and the Canadian ambassador to the United States, not to mention the Deputy Secretary-General of the United Nations, are all Quebecers. The international achievements of Quebecers in most fields of human endeavour are too numerous to list. Since the dynamism of the Quebec people has been directed toward the business sector, it has been clearly successful in Quebec, the rest of Canada and abroad.*[10]

For the Court, "[t]he population of Quebec cannot plausibly be said to be denied access to government. Quebecers occupy prominent positions within the government of Canada. Residents of the province freely make political choices and pursue economic, social and cultural development within Quebec, across Canada, and throughout the world. The population of Quebec is equitably represented in legislative, executive and judicial institutions".[11] Consequently, "Quebec does not meet the threshold of a colonial people or an oppressed people, nor can it be suggested that Quebecers have been denied meaningful access to government to pursue their political, economic, cultural and social development. In the circumstances, the National Assembly, the legislature or the government of Quebec do not enjoy a right at international law to effect the secession of Quebec from Canada unilaterally".[12]

In the *Draft Independence Bill Reference*, the UK Supreme Court said that, in its view, these observations about the position of Quebec and the people of Quebec "apply with equal force to the position of Scotland and the people of Scotland".[13]

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[10] Reference re Secession of Quebec 1998 CanLII 793 (SCC) para 135, available at 1998 CanLII 793 (SCC) | Reference re Secession of Quebec | CanLII.
[11] Quebec reference at para 136.
[12] Quebec reference at para 154.
[13] Reference by the Lord Advocate of devolution issuesunder para 34of Sch 6 to the Scotland Act 1998 [2022] UKSC 31 at para 89.

A complicating factor here is that it is by no means clear what kind of action counts as secession. In 1980 and 1995 respectively the Quebec Government proposed "sovereignty-association", and becoming "sovereign" on the basis of a pre-agreed economic partnership with Canada. The Basque Government at one point proposed becoming a "freely-associated state" to Spain. During the Scottish independence referendum of 2014 the SNP promised to remain in five of the existing six unions (leaving the political union with the UK but retaining membership of the European Union, co-operating with NATO, maintaining a monetary union with the UK, retaining the Union of the Crowns and continuing in "social union" with the UK.[14] Plaid Cymru, while favouring Welsh independence, would maintain a close association with the UK. The same is true of Catalan nationalists with regard to Spain.

How have domestic courts treated questions of secession?

The issue of secession has been tested in the courts in recent decades in three western democracies which are comparable as plurinational states with two orders of government. These are Spain (in respect of Catalonia and the Basque Country), Canada (in respect of Quebec) and the United Kingdom (in respect of Scotland). The questions put to the Spanish Constitutional Court and the Supreme Courts of Canada and the United Kingdom were essentially:

1. Does the constitution permit secession?
2. Can part of a state secede unilaterally?
3. Can part of a state stage a referendum on secession, even advisory?
4. Is there anything more to be said?

In Spain the courts tested the issue in respect of an effort in the Basque Country to establish a "freely associated state" (something like "independence lite" or "devolution max") and the Catalan Government's independence referendum of 2017. The answers were:

[14] See D Torrance, *Standing Up for Scotland: Nationalist Unionism and Scottish Party Politics, 1884-2014* (2020) ch 8.

1. No. The Spanish constitution of 1978 declares the indissoluble unity of the Spanish people. The courts have not recognised the argument that the constituent nations are nations with rights predating the constitution.
2. No, follows from 1.
3. No. The referendum of 2017 was forcibly countered by the Spanish Government and the leaders in the secession movement prosecuted.
4. No court has said that there is. In the last decade or more, however, individual and groups of academic and other constitutional specialists have claimed that a way could be found within the existing Constitution. In 2023, a multi-disciplinary Academic Council, consisting of scholars with diverging views on secession and self-determination for Catalonia, was commissioned to report on the way forward. It also suggested way in which a referendum might be possible within the Constitution but the report's impact on the constitutional debate in Catalonia has so far been limited.

In Quebec referendums on "sovereignty" were held in 1980 and 1995. While not recognising them as legal or binding, the Canadian Government did join in the campaign. Following the 1995 referendum the federal government referred the issue of the legality of secession to the Supreme Court. The Court's answers were:

1. Yes, in that secession was not prohibited in the Constitution.
2. No, it would require constitutional amendment and thus agreement from the Federal Government and other provinces according to a formula.
3. Yes, this was not in dispute although some political actors had argued at the time that the referendums could be disallowed.
4. There is a lot more to be said. The court provided a sophisticated reading of Canada's domestic constitutional order, going beyond the narrow wording and arguing that it is subject to domestic constitutional principles of federalism and the rule of law, the rights of individuals and minorities, and the operation of democracy in the other provinces and in Canada as a whole. This meant that if a province expressed the wish to secede by a clear majority on a clear question, the federal government and the other provinces would be obliged to negotiate the necessary constitutional amendment in good faith. The federal government responded with the Clarity Act. Enacted in 2000, the Act asserted that the federal Parliament alone would decide what constituted a clear

question and a clear majority. Presumably, however, those decisions would come back to the Supreme Court if there was a successful secession referendum.

In 2022, the UK Supreme Court ruled on whether a draft Independence Referendum Bill would be within the Scottish Parliament's legislative competence following a pre-introduction reference made by the Lord Advocate on the request of the First Minister. Its answers to these questions were:

1. Yes. The possibility of secession has never been denied. It is expressly provided for in the Northern Ireland Act 1998 and there is a precedent in Scotland when the UK and Scottish Governments negotiated the terms of the 2014 Independence Referendum and agreed to respect the result of that vote.
2. No.
3. No, except with the permission of the UK Parliament.
4. No, but there is an anomaly here. The UK Supreme Court, in support of its judgment, cited the Supreme Court of Canada to bolster its conclusion that there is no unilateral right of secession. Yet it ignored the other part of the Canadian judgment which accepted the obligation of the federal government and the other provinces to negotiate in good faith if, in response to a clear question, a clear majority in one province expressed support for secession.

What have the UK and Scottish Governments said about the democratic pathway to a second referendum in light of the Supreme Court ruling?

UK Government

Having negotiated the terms of the 2014 referendum, successive UK Governments have continued to accept the possibility of a second referendum on Scottish independence. However, they have been vague on the timing of any such vote and on the conditions that might trigger a referendum. On timing, the UK Government has argued (i) in 2020, that insufficient time had passed since the "once in a generation" referendum in 2014[15] and (ii) in 2017 (in the midst of Brexit

[15] Indyref2: What does 'once in a generation' mean? - BBC News

negotiations)[16] and in 2022 (whilst "tackling the cost of living, energy security…Russia's invasion of Ukraine and growing the economy")[17] that prevailing political conditions meant "now [was] not the time" to hold a referendum. On the conditions that might trigger a referendum the then Secretary of State for Scotland told the Scottish Affairs Committee that it would "of course" be possible for a second referendum to be held but only when there was a "sustained majority and a clear consensus between [the UK and Scottish] governments, between the political parties, across civic society".[18] Jack's view was a highly discretionary one:

> *It's the duck test. If it looks like a duck and it sounds like a duck and it waddles like a duck then it's probably a duck. People know when they've reached that point. They knew [in 2014] that they'd reached it. We don't believe we've reached it now.*

More recently, the current Secretary of State for Scotland, Douglas Alexander, told the House of Commons that the UK Government would "take seriously any SNP majority" in the 2026 Scottish Parliament elections but without making any firm commitment about the consequences of any such result and with a reminder that the people of Scotland "made [their] choice in 2014" to remain in the United Kingdom.[19]

Scottish Government

Following the Supreme Court ruling, the then First Minister, Nicola Sturgeon, announced that the SNP would use the next (as it happened, 2024) general election as a "de facto" referendum on independence. In its manifesto for the 2024 General Election the SNP pledged that "if [it] wins a majority of seats, the Scottish Government will be empowered to begin immediate negotiations with the UK Government to give democratic effect to Scotland becoming an independent country".[20]

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[16] 'Now is not the time' for Scottish independence vote – Theresa May
[17] Now is not the time to talk about Scottish independence vote -PM Johnson's spokesman | Reuters
[18] Alister Jack sets out 'duck test' for second independence referendum | The Herald
[19] Douglas Alexander: UK Gov will 'take seriously' SNP majority | The Herald
[20] 2024-06-20b-SNP-General-Election-Manifesto-2024_interactive.pdf

More recently, in 2025 the Scottish Government published its paper *Your Right to Decide*[21]which reiterated the Scottish (and Welsh) Government's view that the United Kingdom is a "voluntary union of nations" as opposed to a "unitary state"; that as such the people of Scotland have the right to decide their constitutional future; that this is a "real" right that has been exercised (eg in the 1997 devolution referendum and in the 2014 independence referendum); and that Scotland's place in that voluntary union rests on "the ability of the people of Scotland to decide to exercise their right to decide again at any point in the future". A failure to recognise that right, the paper continued, would undermine the claim that the United Kingdom carried the consent of the people across each part of the Union.[22] On timing, the Scottish Government's view is that it is for the Scottish people to decide in elections to the Scottish Parliament (unbound by conditions such as "once in a generation"). On the conditions that would trigger a referendum the "precedent" of 2011-14 points to a pro-independence majority being returned to the Scottish Parliament and a consequent transfer of legislative competence from Westminster to the Scottish Parliament for the latter to legislate for a referendum.

Is there anything more to be said about democratic pathways to a second independence referendum?

A paper published by Kezia Dugdale (former leader of Scottish Labour) and Stephen Noon (former Yes Scotland strategist) for the Centre for Public Policy at the University of Glasgow sought to establish an agreed path through the impasse between the UK and Scottish Government views. It emphasised the voluntary nature of the UK – "upheld by consent and not just by law" - and advocated for there to be a "recognised, legal and fair process to test, when appropriate, whether the people who live in Scotland can determine whether they want the country to remain in the Union or to transition to independence".[23] The paper proposed:

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[21] *Your Right to Decide* (Scottish Government, 4 Sept 2025), available at Your Right to Decide - gov.scot.
[22] Ibid p 9.
[23] K Dugdale and S Noon, "Scotland and the Constitution: Agreeing a way forward (Centre for Public Policy, 25 Sept 2024), available at REPORT - Scotland and the Constitution: Agreeing a way forward.

- That the existing trigger for a unification referendum in Northern Ireland should be the basis for this process;
- Therefore, that the test would be whether there would be a likely majority vote in favour of independence;
- That meeting this test should place upon the UK Government a legal duty to agree to a referendum and to transfer via a section 30 Order the necessary competences to the Scottish Parliament to legislate for a referendum;
- That the model for a referendum should be based on the 2012 Edinburgh Agreement;
- That the decision as to whether the test has been met should rest with the Secretary of State for Scotland within a set of criteria previously agreed between the Scottish and UK Governments;
- That the threshold should not create an insurmountable barrier to independence but should test the solidity of pro-independence support;
- That victory in the referendum would be on the basis of 50% plus one of the votes.

Lessons from Northern Ireland: how to judge a likely majority[24]

The 1998 Good Friday (Belfast) Agreement is relevant to this inquiry, then, because it has put the principles of self-determination and of majority consent into legal form which allows Northern Ireland leave the United Kingdom.[25] Specifically, Section 1 and Schedule 1 of the Northern Ireland Act 1998 (NIA) states that Northern Ireland will only cease to be part of the United Kingdom if a majority consent for that to be so in a poll, and confers on the Secretary of State the power 'to direct the holding of' such a poll.[26] As a ministerial order (under section 96[2]) of the NIA), it would need to be approved in both houses of the UK Parliament.

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[24] The rigorous research conducted by the UCL Working Group on Unification Referendums on the Island of Ireland (2019-2021), of which Katy Hayward was a member, is drawn upon in this summary. The final report can be found here: https://www.ucl.ac.uk/social-historical-sciences/sites/social_historical_sciences/files/working_group_final_report.pdf.

[25] Agreement between the Government of Ireland and the Government of the United Kingdom of Great Britain and Northern Ireland, done at Belfast on 10 April 1998, available at https://assets.gov.ie/static/documents/irish-treaty-series-no-18-of-2000.pdf.

[26] Northern Ireland Act 1998 s 1, available at https://www.legislation.gov.uk/ukpga/1998/47/section/1 and Sch 1 https://www.legislation.gov.uk/ukpga/1998/47/schedule/1.

This power may be exercised at the Secretary of State's discretion at any time (save within seven years of a previous such poll) but he [sic] has a duty to do so:

> *if at any time it appears likely to him 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.*

Thus, a referendum may be called in Northern Ireland only through the use of the Secretary of State's discretionary power or mandatory duty. While this is not the case in Scotland, *what is of common interest is how to assess the likelihood of a majority vote in favour of constitutional change*. In Scotland and Northern Ireland alike, whilst the UK government's judgement in this regard is critical, the assessment of others (including elected representatives) is also of significant importance and influence.

Making a judgement about how a majority would vote in a referendum is complicated by four variables. First is the rather important matter of what people are voting for. Thanks to the 2014 referendum, potential features of an independent Scotland have been set out in far more detail than those of a united Ireland. Whether such details should be issued before or after the decision to hold a referendum will surely affect people's views regarding such constitutional change, and thus the likely majority. A related variable is the wording of the question to be posed in the referendum. Thirdly, the task is to anticipate what the majority view will be at the conclusion of a referendum campaign which will be hard-fought by both sides. The purpose of campaigning is to exploit the potential for voters to change their minds, and thus add an element of dynamism to the outcome. A final complication is the matter of who would be given the franchise to vote in such a poll. As seen in 2014, if the franchise is extended or curtailed from that for elections, then a new variable is added to the calculation. All four factors (the nature of the constitutional change proposed, referendum wording, campaign effects, franchise) underscore the difference between a stated (or estimated) preference and a vote cast.

The McCord case was an attempt to compel the Secretary of State to establish a formal policy setting out the circumstances in which a border poll would be held, including what would be taken as evidence of a pro-unification majority. The

Secretary of State opposed this request, and the Northern Ireland High Court[27] and later the Court of Appeal[28] ruled that there was no legal requirement to do so and, indeed, that the production of such criteria could itself be controversial or destabilising.

The Working Group on Unification Referendums on the Island of Ireland (2021: 140) proposed five criteria to help guide the selection of sources that could be used to inform the Secretary of State's decision. As abstract principles, they can be adapted to apply to the Scottish case too:

i. To what degree does the source provide direct evidence of people's views on the question of independence itself?
ii. To what degree is the source likely to anticipate the attitudes that would pertain on polling day itself?
iii. To what degree can the source be relied upon to give an unbiased guide to the views of the people who would be able and likely to vote in a referendum?
iv. To what degree is the source open to manipulation by those interested in giving the impression of a clear majority view in one direction or another?
v. To what degree is the source free of measurement error?

The same report identified six potential sources of evidence that maybe considered. These can be simplified into three categories: election results, votes by elected representatives, public opinion data.[29] The merits and risks of each are outlined below.

Election results

As leader of the SNP, John Swinney has put independence as core to the party's appeal: 'I want to persuade independence supporters that the way to deliver independence is only with an emphatic SNP win in 2026 and the priority is to do that

[27] McCord High Court Judgment (2018) https://www.judiciaryni.uk/files/judiciaryni/decisions/McCord%27s%20%28Raymond%29%20Application..pdf

[28] McCord Court of Appeals Judgment (2020) https://www.judiciaryni.uk/files/judiciaryni/decisions/Raymond%20McCord%E2%80%99s%20Application%20Border%20Poll.pdf

[29] The Report also considered "demographic data", given the significance of religious affiliation and background in the formation of political opinion in Northern Ireland.

now.'[30] A consequence of trying to attract supporters of independence to vote for the party is that votes for the SNP could be taken as indication of the proportion of the population who would vote for independence. This is not a strategy without its risks; for example, a backlash against the SNP for other reasons could lead to a result that considerably under-represents likely support for independence. More fundamentally, the constitutional question is a highly political matter but it is more than *party* political.

The Secretary of State for Northern Ireland submitted in the McCord case that election results could not be a determining indication of opinion for the purpose of calling a referendum [paragraph 11 of the judgment]. There are several reasons for this. First, there is a difference between votes cast and seats won. A majority of seats held by parties favouring constitutional change adds more to the influence and impact of political nationalism, but is less than direct evidence of voters' views on the matter. Relatedly, a vote for a party (including a nationalist party that has campaigned on the constitutional question) can be cast for reasons other than subscription to that particular position, including tactical voting, support for an individual candidate, or other policy commitments or (imagine!) achievements. Votes in elections are for a wider array of matters than in a referendum. Furthermore, the profile given to the matter by a nationalist party may vary from election to election. Thirdly, the difference between electoral systems (proportional representation or first past the post) will mean different voting tactics and outcomes.

Finally, votes for nationalist parties are at least an indication of the views of those who do exercise their right to vote, i.e. who are more likely than not to vote in a referendum. However, turnout in elections may differ considerably from that in referendums, particularly those on highly consequential matters (as seen in the 85% turnout in the 2014 referendum). Voters in an election are likely to turn out in a poll but so are those who are typically non-voters – and they are the ones whose votes are likely to be key.

Votes by elected representatives

If the devolved legislature was to vote on the holding of a referendum, it would be politically transformative (including in relations with Westminster) and difficult for the

[30] "John Swinney: Why I'm launching a renewed strategy for independence" (The National, 18 July 2025), available at https://archive.is/oMffH#selection-1825.2-1825.159.

UK Government to ignore. This is particularly true because elected representatives would have the likely response of their support base and constituency in mind in holding and casting such a vote. However, following on from the caution noted above about votes and seats for nationalist parties, such a vote could not be taken as indication of the existence of public willingness to vote a certain way in a referendum.

Public opinion data

During argument in the *McCord* case, the then Secretary of State acknowledged she may take account of opinion polling and could even decide to commission such evidence (paragraph 11). More recently, a minister in the Northern Ireland Office made a similar indication.[31] There is a clear rationale for this. An opinion poll can ask respondents essentially the same question as would be posed in a referendum. This can be repeated over a period of time, thus tracking trends and indicating the sustained nature of any majority. But there are concerns too. These include the fact that there is disagreement about the reliability of different types of poll, e.g. how data is gathered (online or face to face), the nature of the sample (probability sampling or quota-based sampling), the use of weighting in the data, the treatment of 'don't knows'.

Qualitative data can add useful context, nuance and explanation to polling results (e.g. how they are affected by information, different options, campaigns). It cannot offer an indication of whether there would be a majority in favour of constitutional change, even though it could help explain the grounds on which such a majority may emerge.

[31] Fleur Anderson MP, "Calling border poll 'would be based on opinion polls" (Agenda NI, April 2025), available at https://www.agendani.com/fleur-anderson-mp-calling-border-poll-would-be-based-on-opinion-polls/.

Figure 1. Summary of the criteria for sound sources of evidence of the existence of majority opinion for constitutional change

Source of evidence	Direct evidence of opinion on constitutional status	Likely to anticipate preference on polling day	Unbiased guide to opinion of those likely to vote in a poll	Not open to manipulation	Freedom from measurement error
Votes cast in elections	Limited degree of confidence	Limited degree of confidence	Limited degree of confidence	Strong degree of confidence	Strong degree of confidence
Seats won in elections	Limited degree of confidence	Limited degree of confidence	Low degree of confidence	Strong degree of confidence	Strong degree of confidence
Votes held in the devolved legislature	Limited degree of confidence	Low degree of confidence	Low degree of confidence	Strong degree of confidence	Strong degree of confidence
Quantitative public opinion data	Strong degree of confidence	Strong degree of confidence	Limited degree of confidence	Low degree of confidence	Low degree of confidence
Qualitative public opinion data	Low degree of confidence	Low degree of confidence	Low degree of confidence	Low degree of confidence	Low degree of confidence

Are there international comparators that the committee might draw upon?
Constitutions which explicitly provide for a right to secede are rare. Of the handful currently in force, the most relevant examples are:

Ethiopia
Ethiopia is a landlocked country in the Horn of Africa region of East Africa. It shares borders with Eritrea, Djibouti, Somalia, Kenya, South Sudan and Sudan with a population of about 135 million people. Following the collapse of military rule in 1991, the 1995 Constitution of Ethiopia provided for a federal system of government comprised of nine ethnically based regions. There are more than 80 ethnic groups in Ethiopia. Two of those groups, the Omoro and the Amhara, make up around 60% of the population. The Tigraway, which makes up just 6% of the population, has been the dominant political group since 1991 on account of its military prowess. Article 39 of the 1995 Constitution provides that:

> *(1) Every Nation, Nationality and People in Ethiopia has an unconditional right to self-determination, including the right to secession.*
>
> *…*
>
> *(4) The right to self-determination, including secession, of every Nation, Nationality and People shall come into effect:*
>
> > *(a) When a demand for secession has been approved by a two-thirds majority of the legislative Council of the Nation, Nationality or People concerned;*
> >
> > *(b) When the Federal Government has organised a referendum which must take place within three years from the time it received the concerned council's decision for secession;*
> >
> > *(c) When the demand for secession is supported by a majority vote in the referendum;*
> >
> > *(d) When the Federal Government will have transferred its powers to the Council of the Nation, Nationality or People who has voted to secede; and*
> >
> > *(e) When the division of assets is effected in a manner prescribed by law.*

For these purposes the constitution defines a “Nation, Nationality or People” as “a group of people who have or share a large measure of common culture or similar customs, mutual intelligibility of language, belief in a common psychological make-up, and who inhabit an identifiable, predominantly contiguous territory”.[32]

On paper, then, the 1995 Constitution establishes an unconditional right to secession to a broad range of ethnic groups. This was thought necessary in order to induce loyalty to the state. In other words, following the collapse of military rule, it was thought that the Omoro, Somalis and Afar parties would refuse to join transitional arrangements towards a new constitution without explicit recognition of their right to secede – and therefore with the risk of relapse into civil war. However, for political reasons it is thought unlikely that the clause will successfully be invoked. On the one hand, small-medium sized ethnic groups who are dispersed across different regional states are unlikely to find secession to be a viable or even to exercise the right afforded by the constitution. On another, federal police and soldiers are engaged in measures – and indeed in armed combat – against the larger Oromo Liberation Front which is fighting to secede.

Although Article 39 as yet to be tested – and despite the political realities on the ground that might prevent it from being tested – it retains a significant symbolic force. For many ethnic groups the secession clause is a necessary condition for their continued membership in the Ethiopian state.[33]

Liechtenstein

Liechtenstein is sovereign principality bordering Switzerland and Austria with a population of about 40,000 people. A hereditary monarchy, it is made up of 11 communes. Its constitution dates back to 1921 and was the subject of far-reaching reform in 2003.

The 2003 constitutional reform introduced Article 4 (2) into the Liechtenstein which reads as follows:

> *Individual communes have the right to secede from the State. A decision to initiate the secession procedure shall be taken by a majority of the citizens*

[32] Article 39(5). The 1995 Constitution is available at Constitution of the Federal Democratic Republic of Ethiopia | Refworld.

[33] For an overview see A Habtu, “Multiethnic Feseralism in Ethiopia: A Study of the Secession Clause in the Constitution” (2005) (Spring) Publius 313.

residing there who are entitled to vote. Secession shall be regulated by a law or, as the case may be, a treaty. In the latter event, a second ballot shall be held in the commune after the negotiations have been completed.[34]

The provision is probably globally unique in that it (a) contains an express right to secession; and (b) grants this right to communes (akin to civil parishes or council areas). A close reading reveals that the provision only gives communes a right to initiate a secession procedure; which – if successful – would need to be realised either by law or by treaty, in which case there would need to be another referendum on that particular secession treaty. Liechtenstein has so far not passed any legislation to define the procedure further.

The provision is also vague on what would happen to the seceding commune: whether it would become join Austria or Switzerland or become its own independent microstate. Secession of one or more communes would also call into question the continued viability of Liechtenstein as an independent state, particularly if the seceding commune was one of the bigger ones like the capital Vaduz.[35]

It is perhaps interesting to note that there were no secessionist tendencies anywhere in Liechtenstein before the constitutional reform of 2003.[36] In fact, nobody had called for the inclusion of Article 4 (2), except the Prince, who introduced the provision with a very different rationale in mind. His concern was for the continued existence of Liechtenstein and the continued recognition of the self-determination of the Liechtenstein people, which he did not regard as guaranteed. In his reading, a right to self-determination was only guaranteed if the people exercising that right were different from their neighbours "in race religion, language and culture", which he considered Liechtensteiners not to be.[37] By thus enshrining a right to self-determination in the constitution, the Prince wished to influence (and ostensibly broaden) the development of self-determination under international law. However,

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[34] Translated by the Council of Europe's Venice Commission, available at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2002)145-e.
[35] On all this see P M Schiess Rütimann, "The right of Liechtenstein municipalities to initiate a secession procedure", available at http://www.dpceonline.it/index.php/dpceonline/article/view/1623.
[36] Ibid.
[37] This argument is somewhat dubious as it is quite clear that the citizens of a sovereign state like Liechtenstein are a "people" for the purposes of the right to self-determination.

the Venice Commission, which examined the proposals for constitutional reform, cast considerable doubt on whether the reform would achieve this, pointing out that the residents of individual communes cannot be considered different "peoples" for the purposes of international law.[38]

St Kitts and Nevis

The Federation of St Kitts and Nevis is a Caribbean island country consisting of the two islands, St Kitts and Nevis. It is the smallest state in the Western Hemisphere with around 48,000 inhabitants. It is a Commonwealth country with King Charles III as its head of state. Until its secession in 1967 the union also included the British dependency of Anguilla. The Constitution of St Kitts and Nevis was adopted in 1983. The constitution establishes a right on the part of Nevis to secede from the federation. There is no equivalent right for St Kitts to secede. The secession of Nevis is provided for in Article 113 of the constitution which states:

> *(1) The Nevis Island Legislature may provide that the island of Nevis shall cease to be federated with the island of Saint Christopher and accordingly that this Constitution shall no longer have effect in the island of Nevis.*

In order for secession legislation to validly be passed by the Nevis Island Assembly a number of conditions apply including super-majorities in the Assembly and in a secession referendum and detailed plans for Nevis's constitutional future being made available before the referendum:

> *(2) …on its final reading the bill [must be] supported by the votes of not less than two-thirds of all the elected members of the Assembly and…shall not be submitted to the Governor-General for his or her assent unless*
>
> *a. There has been an interval of not less than ninety days between the introduction of the bill in the Assembly and the beginning of the proceedings in the Assembly on the second reading of the bill;*
>
> *b. After it has been passed by the Assembly, the bill has been approved on a referendum held in the island of Nevis by not less than two-thirds of all the votes validly cast on that referendum;*

[38] Venice Commission, Opinion 227/2002, para 37, available at https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2002)032-e.

c. *Full and detailed proposals for the future constitution of the island of Nevis (whether as a separate state or as part of or in association with some other country) have been laid before the Assembly for at least six months before the holding of the referendum and those proposals, with adequate explanations of their significance, have been made available to the persons entitled to vote on the referendum at least ninety days before the holding of the referendum.*

The secession clause was invoked in 1998 and it was largely expected that Nevis would vote to secede. However, the 62% majority in favour of secession at the referendum fell (just a few hundred votes short) of the two-thirds majority required to give effect to constitutional change. The then Premier of Nevis (it is said, reluctantly) triggered Article 113 on account of two local factors. The establishment of a federal office on Nevis was perceived in Nevis to be an attempt to undermine local governance. And, a bid from St Kitts, to centralise the management of financial services across the islands was seen in Nevis to undermine Nevis's economic strength in this area. The failure to meet the two-thirds majority threshold has been ascribed to a number of factor including low turnout (57%), deeply rooted familial and economic ties between the islands, international opposition and a failure to provide a compelling vision of ongoing relations between the islands in the event of secession. Whilst the secession question has not been revisited since 1998, and whilst there are some signs (eg in cultural attitudes of younger generations) that the appetite for secession is no longer so strong, constitutional change remains an open question vulnerable to local political and economic factors.[39]

Turks and Caicos Islands

[39] The St Kitts and Nevis Constitution is available here: constitution-of-st-kitts-and-nevis.pdf. For an overview of the political context see J Corbett and J Byron, "Secessionism in Nevis: Why Have Tensions Eased?" (2024) 19(1) Island Studies Journal, available at Secessionism in Nevis: Why Have Tensions Eased? | Published in Island Studies Journal.

The Turks and Caicos Islands are a British Overseas Territory situated in the Carribean with a population of around 51,000.[40] The islands were annexed by the UK in 1799 and subsequently formed part of the colony of Jamaica. Following Jamaican independence they were governed by the governor of the Bahamas. After the Bahamas gained independence in 1973, the Turks and Caicos Islands remained a British dependency, now with their own governor.

In its relations with Overseas Territories in general, the UK Government is committed to the following five principles:

a. devolution and democratic autonomy for the Overseas Territories, and consistency on the principles of partnership and engagement

b. listening to the Overseas Territories, following the principle of "nothing about you without you"

c. partnership with the Overseas Territories based on mutual respect and inclusion, applying to all UK Government departments - rights come with responsibilities, including the responsibility to uphold our common values

d. good governance and ensuring proper democratic accountability and regulation

e. defending the Overseas Territories' security, autonomy and rights, including the right of self-determination.[41]

These demonstrate a commitment to the Overseas Territories' self-governance and crucially to their right to self-determination. A 2024 amendment to the Turks and

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[40] For more details on the islands, including governance, economy, and social conditions, see United Nations General Assemby, Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, Working Paper of 5 March 2025, AC.109/2025/15.

[41] 2024 UK and Overseas Territories Joint Ministerial Council communiqué, available here: https://www.gov.uk/government/publications/uk-and-overseas-territories-joint-ministerial-council-2024-communique/2024-uk-and-overseas-territories-joint-ministerial-council-communique.

Caicos Islands' constitution – originally adopted in 2011[42] – reflects this commitment by including an express provision allowing the Turks and Caicos Islands legislature to legislate for a referendum on independence.[43] Article 62A of the constitution provides as follows:

> *Power to provide for a referendum*
>
> 62A.—(1) A law enacted by the Legislature may make provision to hold a referendum amongst persons registered as electors in accordance with section 55 on a matter or matters of national importance.
> (2) The question of whether the Turks and Caicos Islands should seek any amendment to this Constitution that may result in their independence shall be deemed to be a matter of national importance.
>
> (3) A referendum may not be held where one or more of the options or proposals on which electors are asked to vote would, if implemented, contravene any provision of Part I[44] of this Constitution.
>
> (4) A law enacted by the Legislature authorising a referendum in accordance with subsection (1) shall specify—
>
> (a)whether its validity requires a specified minimum turnout of persons registered as electors in accordance with section 55; and
>
> (b)the proportion of votes that must be cast in favour of an option or proposal in order for it to be deemed as having been approved.
>
> (5) In any case the result of any referendum under this section shall not be binding.".

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[42] The Turks and Caicos Islands Constitution Order 2011, available here: https://www.legislation.gov.uk/uksi/2011/1681/made.
[43] The Turks and Caicos Islands Constitution (Amendment) Order 2024, available here: https://www.legislation.gov.uk/uksi/2024/1128/article/16/made .
[44] Part I contains fundamental rights guarantees.

The following observations may be of interest from a Scottish perspective.

First, the provision must be placed into the context of decolonization. The Turks and Caicos Islands are one of (relatively few) remaining British Overseas Territories, which are recognised to have a right to self-determination and ultimately to independence. Secondly, the provision itself grants the legislature the power to arrange a referendum by "law", i.e. by a majority of the votes in the legislature.[45] Thirdly, the constitution stipulates a requirement to make provision on whether there should be a quorum and for the majority required. While it is open to the legislature to not require a quorum (minimum turnout) and to decree that a simple majority should suffice for a successful independence vote, it is equally open to it to stipulate more stringent requirements. Fourthly, the referendum result is expressly not legally binding. The constitution attaches no other legal consequences to a referendum vote – such as a duty to negotiate independence on part of the Turks and Caicos Islands government and/or the UK Government – attached to it either. Such a duty – as far as the Turks and Caicos Islands government is concerned – could, however, conceivably be included in the legislation arranging for a referendum. Fifthly, the constitution neither requires nor precludes the holding of a second referendum e.g. to approve the results of an independence negotiation; nor does it stipulate any restrictions on holding a further referendum if e.g. the result of the first referendum is undesired from the legislature's point of view. Like other referendum provisions examined in this paper, Article 62A of the Turks and Caicos Islands constitution is thus characterised by a degree vagueness, which opens up political margins for manoeuvre.

Conclusion

Whilst it is rare for constitutions to make explicit provision for secession – only a handful of those currently in force do whilst the vast majority either prohibit secession (such as in Spain) or are silent (or at least remain uncertain) on the matter (such as in Canada or in the United Kingdom as regards Scotland and Wales) – this paper

[45] See Article 68 of the Constitution.

highlight some of the design choices that have been faced where such provisions do exist. These include:

- To whom the right should be afforded (to all sub-units or only to some);
- The process by which the right might be triggered (by elections to the legislature; by votes in the legislature (and if so, by simple majority or by super-majority); by some other means, such as a majority vote of citizens in the sub-unit; measures of public opinion);
- by what form is the preference for secession to be measured (typically by a referendum in the sub-unit: by simple majority or by super-majority; by the sub-unit only or including votes by the whole nation);
- by what form is the preference for secession to be confirmed (by the conclusion of negotiations; by the passage of legislation or constitutional amendment; by a second – confirmatory – referendum on the terms of secession);
- what is the role of the national body (to decide if the threshold for support has been met; to decide if the process is fair and valid; to facilitate the referendum and/or its result; to participate actively in the decision; to enter into good faith negotiations if a referendum so directs); and,
- what ought to be the consequences of a vote for secession (to enter negotiations to give shape to secession (and should the result of these be subject to a subsequent referendum); to give effect to previously negotiated and published plans).

What is more, in each of the examples discussed above we see secession clauses being negotiated or drafted in order to induce loyalty to the state, not to facilitate its disintegration – where a secession clause is seen as a necessary pre-condition of the sub-units' continued membership of, and continued participation in the affairs of, the state.

In the context of the UK's uncodified constitution – and in the absence of a wider act of constitution-making – the establishment of such a trigger would require an Act of the UK Parliament (which would be subject to the normal conditions of parliamentary sovereignty – including its vulnerability to repeal by a future parliament) and which would require the UK and Scottish (and Welsh?) governments

to enter in good faith into a process that could produce agreement about these and other issues.