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I submit evidence in relation to a short inquiry by the committee "to examine options for a legal mechanism for triggering any independence referendum based on principles of certainty and democratic consent within the UK constitutional context."

I have been asked to address three issues:

- International examples of mechanisms for reaching agreement on the question of sovereignty
- the UK constitution and how mechanisms for reaching agreement on the question of sovereignty fit within that constitutional framework
- contemporary political discourse, self-determination and accountability

International examples of mechanisms for reaching agreement on the question of sovereignty

The first two questions I have been asked to address use the word 'sovereignty'. Sovereignty appears to be used in different senses. The first appears to refer to the issue of secession: Scotland breaking away from the United Kingdom to form a new state – what is often called 'external' sovereignty: the sovereignty of the state under international law. The second meaning, to which I return in relation to the second question posed, concerns something different – constitutional authority; the nature of 'internal' constitutional sovereignty within the United Kingdom, and whether or not it might be applied to facilitate the secession of Scotland.

Turning first to the position in international law, the United Kingdom Supreme Court (UKSC), in the Lord Advocate's Reference of 2022[1], explained the scope of the principle of self-determination under international law. It did so by making reference to a case before the Supreme Court of Canada in 1998[2], which the UKSC stated, applied "with equal force to the position of Scotland and the people of Scotland within the United Kingdom".

The UKSC recognised that, according to the *Quebec* case:

> *the international law right to self-determination only generates, at best, a right to [i] external self-determination in situations of former colonies; [ii] where a people is oppressed, as for example under foreign military occupation; or [iii]*

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* I serve as Legal Adviser to the Constitution Committee of the House of Lords. This evidence is submitted in a personal capacity.

[1] Throughout this note I will refer, in explaining the legal position, to the Lord Advocate's Reference to the Supreme Court in 2022: *REFERENCE by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998*, [2022] UKSC 31 https://www.supremecourt.uk/cases/uksc-2022-0098

[2] *Reference re Secession of Quebec* (1998)

where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination.

The question whether there is ever a right of 'external' self-determination under international law – i.e. a right to secede – is contested, but even those who argue that there can be such a right, accept that this would only apply in a case where one of these three conditions apply. Scotland certainly does not meet conditions [i] or [ii]. What then of [iii]; the denial of meaningful access to government: what is often called, 'internal self-determination'?

The UKSC stated in relation to s.29(2)(b) of the Scotland Act 1998 (which sets the limit of the Scottish Parliament's competence in relation to 'reserved matters'):

> "…no reading of that subsection, whether wide or narrow, could result in a breach of the principle of self-determination in international law. The Scotland Act allocates powers between the United Kingdom and Scotland as part of a constitutional settlement. It establishes a carefully calibrated scheme of devolution powers. Nothing in the allocation of powers, however widely or narrowly interpreted, infringes any principle of self-determination. On the contrary, the legislation establishes and promotes a system of devolution founded on principles of subsidiarity."[3]

In other words, devolution to Scotland fully meets, or exceeds, any right of internal self-determination which Scotland as 'a people' under international law enjoys; as such, there can be no claim of a right to secede based upon its denial.

The Supreme Court of Canada went on to state that, in the absence of any right of 'external' self-determination, peoples are expected to achieve self-determination within the framework of their existing state, by way of federalism, devolution etc.:

> "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. 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."

The UK Supreme Court endorsed this in relation to Scotland: "In our view these observations apply with equal force to the position of Scotland and the people of

[3] Lord Advocate's Reference, para 90

Scotland within the United Kingdom."[4] It also said: "There are insuperable obstacles in the path of the intervener's argument based on self-determination… the principle of self-determination is simply not in play here."[5]

It is not difficult to conclude, therefore, that there is no right under international law that would entitle the unilateral secession of Scotland.

Turning to comparative cases, I have noted that the Supreme Court of Canada did not consider Quebec to enjoy a unilateral right to secede. The Scottish Parliament may also wish to note the position of its European partners, and that of the European Union and Council of Europe expressed through the European Court of Human Rights.

In December 2016, the German Federal Constitutional Court (Bundesverfassungsgericht) unanimously rejected a claim for secession made in a case brought by certain individuals from Bavaria. The court's ruling confirmed that Germany's constitution does not permit any state (land) to secede from the federal republic. Individual German lander are not "masters of the constitution", and the power to change the constitutional order rests with the German people as a whole. Since the constitutional framework does not recognise or permit secession, any move in this direction would violate the constitutional order. The court affirmed the legal principle that Germany is a unified nation-state.

The Spanish Constitutional Court has made similar affirmations. In 2015 the court declared the Catalan Parliament's Resolution on the initiation of the political process towards independence unconstitutional and null and void. It held that the resolution ignored and violated the constitutional provisions which vest national sovereignty in the Spanish people as a whole. The court proclaimed the indissoluble unity of the Spanish nation as a constitutional commitment.[6]

In 2017, the Spanish court reiterated this position. It unanimously struck down the laws passed by the Catalan Parliament to provide a legal framework for the unilateral independence referendum planned for 1 October, 2017. The court reiterated that the Spanish Constitution is the guarantor of the state's territorial integrity and that referendums on sovereignty may only be held at the national level with the consent of all Spanish citizens.[7]

At that time, the European Commission also accepted that the Catalan independence referendum was "not legal" under Spanish law. It described the vote as an "internal matter" and suggested that the European Union would not heed calls to intervene. A spokesperson for the Commission said: "This is an internal matter for Spain that has to be dealt with in line with the constitutional order of Spain."

In 2019 the Spanish court issued enforcement orders to block renewed debates and resolutions in the Catalan Parliament on self-determination, considering them attempts to circumvent previous rulings and alter the Constitution through

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[4] Lord Advocate's Reference, para 89
[5] Lord Advocate's Reference, para 88
[6] Judgment 259/2015 of December 2, 2015:
[7] Rulings on the 2017 Referendum Laws (e.g., Judgment 114/2017 of October 17, 2017):

procedures other than those legally prescribed. The European Court of Human Rights later upheld these decisions, refusing to admit a challenge to these, and confirming that the Spanish Constitutional Court had acted within its powers to uphold the state's territorial integrity.[8]

To summarise: in Germany, secession is expressly unconstitutional; in Spain, any change to the constitutional guarantee of the state's territorial integrity would need fundamental constitutional change by way of the amendment process; and in Canada, in light of the Supreme Court of Canada's Opinion of 1998, Quebec, or any other province, enjoys no unilateral right to secede, but would have to seek to negotiate any claim to secede with the national authorities and the other provinces.

In short, neither international law nor the constitutions of other comparable countries recognises a unilateral right to secede for any of their component territories. Any move towards secession in comparable countries (insofar as it is not entirely forbidden by the constitution, as it is in Germany) would require the constitutional consent of the central authorities, and a formal process of constitutional amendment.

The UK constitution and how mechanisms for reaching agreement on the question of sovereignty fit within that constitutional framework

Turning to 'internal' sovereignty, the most fundamental principle of the United Kingdom constitution is the sovereignty of Parliament, which means the legislative supremacy of Parliament to make or unmake any law. The Scotland Act 1998 – and later Scotland Acts – are situated within the constitution as laws made by the UK Parliament, and subordinate to it: a relative hierarchy explained and endorsed repeatedly by the UK Supreme Court.

The Scottish Parliament can make law in devolved but not reserved matters. In 2022, the Scottish Government, seeking to introduce a bill to the Scottish Parliament to authorise a referendum on independence, considered that there was a question mark as to whether the Scottish Parliament had the legal authority to hold a referendum on Scottish independence, even on an 'advisory' basis. The Lord Advocate submitted a reference to the court seeking a ruling on this matter. The meaning of s.29 of the Scotland Act 1998, which demarcates devolved and reserved matters, was central to the Lord Advocate's Reference. The Supreme Court ruled unanimously and unequivocally that, under s.29, there is no such right in light of the reservation of the Union and the constitution within Schedule 5 of the 1998 Act:

> "the provision of the proposed Bill which makes provision for a referendum on the question, "Should Scotland be an independent country?" does relate to matters which have been reserved to the Parliament of the United Kingdom under the Scotland Act. In particular, it relates to the reserved matters of the Union of the Kingdoms of Scotland and England and the Parliament of the United Kingdom. Accordingly, in the absence of any modification of the definition of reserved matters (by an Order in Council or otherwise), the Scottish Parliament does not have the power to legislate for a referendum on Scottish independence."

[8] Costa i Rosselló and Others v. Spain 2025

In light of this statement, and of the principle of legislative supremacy of the United Kingdom Parliament, any move to achieve the independence/secession of Scotland from the United Kingdom would require the express authorisation of the UK Parliament, either through the granting of power by way of an Order in Council through the Scotland Act 1998, s.30, as occurred in 2012-14; an amendment to the Scotland Act, passed by the Westminster Parliament; or in some other way, for example, by the Westminster Parliament passing a dedicated enabling act specifically authorising a referendum.

The outcome of the UK Supreme Court's ruling is that the legal position is now clear. It is of course open to those who seek a referendum to make a political claim, and to request that the UK Parliament provides the legal mechanism to allow a referendum to be held lawfully. This is now a matter for political debate and persuasion.

Contemporary political discourse, self-determination and accountability

I discussed the international law principle of self-determination above. Turning to political discourse, there is, of course, a wide array of political opinion upon the morality and/or advisability of independence/secession as a political goal for Scotland. There have been many, many books and articles written on the subject from various points of view on each side of the debate. As a legal scholar, I do not engage with these in this note. I simply state that, in legal terms, these debates take place against the backdrop of a very clear position under both international and domestic law.

What I will comment upon is the importance of legality to any referendum process. I published a book on fair and lawful referendum processes in 2012,[9] and then served as special adviser to the Scottish Independence Bill Committee from 2012-13. What struck me about that committee, chaired collegiately by Bruce Crawford MSP, and composed of members from all of the parties represented in the Scottish Parliament at that time, was how it worked energetically and consensually to arrive at a fair and lawful process for the 2014 referendum. In my view, the result of the committee's deliberations and of the legislation that was passed by the Scottish Parliament to facilitate the 2014 referendum was, in process terms, a considerable success. The referendum offered a benchmark to others who engage in processes of direct democracy as to how a referendum can be run fairly, in terms of planning the process, establishing independent oversight, setting the question, organising voter registration, in controlling finance and spending, and in facilitating the provision of public information.

When one contrasts Scotland 2014 with the acrimony that surrounded the secession referendums in Quebec in 1980 and 1995, or that which continues to poison Catalan-Spanish relations after the unlawful process in 2017, the relatively consensual and entirely lawful nature of the Scottish process of 2012-14 strikes me as all the more crucial. The legitimacy of any referendum depends upon a result which losers as well as winners can agree *to*, even if it is not one they agree *with*.

[9] S. Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford: Oxford University Press, 2012)

And that legitimacy rests upon a process that is seen by all as legitimate, lawful and fair.

In any discussion about a future referendum in Scotland, it strikes me that, for the health of civil society in Scotland and the wider United Kingdom, and as an exemplar to the rest of the world (which I believe the 2014 process was and remains), the importance of legality is fundamental and unassailable.