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Legal mechanism for any independence referendum inquiry

This paper was drafted to provide written evidence for an inquiry of the Constitution, Europe, External Affairs and Culture Committee of the Scottish Parliament on:

'Options for a legal mechanism for triggering any independence referendum based on principles of certainty and democratic consent within the UK constitutional context. Areas of interest to the Committee include:

- 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.'

I divide the areas of interest in a slightly different way, looking at international law requirements, followed by the UK constitutional order, international examples, and consequences for contemporary political discourse.

1) International Law: Self-determination, sovereignty referendums and consent

a) Self-determination does not afford a right to unilateral secession for Scotland

The people of Scotland enjoy a right to self-determination as a matter of international law. This right to self-determination of peoples is recognised in human rights treaties[1] and has two dimensions: internal and external. External self-determination would give a people a right to secede and to gain independence unilaterally, without the consent of the parent state. However, according to both the Supreme Court of Canada in the *Quebec Secession Reference*,[2] and the UK Supreme Court in the *Reference by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998*,[3] it only applies in three cases: colonies, oppressed people, such as those living under military occupation, and a people with no meaningful access to government.[4] In all other cases, a people is expected to exercise self-determination internally, that is, within the existing polity it finds itself in.

Scotland is not a colony, its situation does not amount to oppression, and its people do have access to government. In fact, the existence of devolved institutions is itself

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[1] Eg, Article 1 of the International Covenant on Civil and Political Rights; Article 1 of the International Covenant on Economic, Social and Cultural Rights.
[2] [1998] 2 SCR 217, https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/1643/index.do.
[3] [2022] UKSC 31, https://www.supremecourt.uk/cases/uksc-2022-0098.
[4] [2022] UKSC 31 paras 88-89, quoting the Quebec Secession Reference, para 138.

seen as evidence for the effective exercise of internal self-determination.[5] It follows that the people of Scotland do not have a right to secede unilaterally as a matter of international law, and international law does not provide any rights to exercise self-determination beyond what the people of Scotland already enjoy.

b) A referendum is required to change sovereignty over a territory

In international law and practice, a referendum is seen as an appropriate tool to agree changes to sovereignty over a given territory. Such referendums must respect the freedom of voters to form and express their will and criteria of equal, universal and secret suffrage.[6] The Venice Commission has spelled out what these guarantees mean in practice.[7] The requirements include that civil and political rights must be protected and that the referendum question must be clear. The 2014 independence referendum in Scotland is a good example of how these requirements can be met in practice and is often cited as such.[8] Evidence of recent state practice suggests that a referendum fulfilling these conditions is recognised as a necessary condition for a secession as a change in sovereignty in customary international law.[9]

If the goal is to achieve statehood, holding another referendum on the question of whether Scotland should be independent is required by international law. But international law does not regulate circumstances that trigger such a referendum and the condition of a referendum outlined above does not imply a right for Scotland to unilaterally hold one. The overall effect of the international law rules on self-determination and referendums is to privilege consensual secession without contributing to a solution where consent of the parent state is unlikely.

2) UK constitutional framework: Only UK institutions may initiate mechanisms of agreeing on sovereignty

Following from the UK Supreme Court's ruling in the *Independence Referendum Bill Reference* it is established that as a matter of constitutional law the Scottish Parliament does not have the competence to hold a referendum – whether advisory or otherwise – on the question of Scottish independence. The power to hold such a referendum instead lies with the UK Parliament because it relates to reserved matters in sense of s.29 of the Scotland Act.[10] This means that an independence referendum either needs to be legislated for by the UK Parliament or that these powers need to be transferred to the Scottish Parliament. This transfer could be temporary or permanent, it could rely on primary legislation or a section 30 order, but in all cases the Scottish Parliament cannot alter this position unilaterally because it may not modify the

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[5] [2022] UKSC 31 para 90; Raible, 'Self-Determination at the UK Supreme Court and the Failure of International Law' (2023) 27 *Edinburgh Law Review* 219.

[6] Article 25(b) of the International Covenant on Civil and Political Rights https://www.ohchr.org/sites/default/files/ccpr.pdf.

[7] Venice Commission Guidelines on Holding Referendums https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2020)031-e.

[8] Daniel Moeckli and Nils Reimann, 'Are Sovereignty Referendums but a Tool to Legitimize Territorial Claims of the Powerful?' *EJIL:Talk!* (1 December 2022) https://www.ejiltalk.org/are-sovereignty-referendums-but-a-tool-to-legitimize-territorial-claims-of-the-powerful/.

[9] Ibid. See further Daniel Moeckli and Nils Reimann, 'Impendence Referendums in International Law' in Jure Vidmar, Sarah McGibbon and Lea Raible (eds), *Research Handbook on Secession* (Elgar 2022), 102-111.

[10] [2022] UKSC 31 paras 70-83.

enactments that set it out.[11] This means that the legal power to trigger a mechanism to agree on sovereignty lies with UK institutions, not Scottish ones.

While consent of the parent state is usually desirable in practice, it does not need to come as an exclusive power over whether to trigger a mechanism for agreeing on sovereignty: it can take different forms. International examples illustrate how triggering mechanisms and securing consent could be regulated.

3) International Examples: Agreement on sovereignty is a process, requires several steps and may take significant time

One way to express or secure consent of the parent state would be to regulate secession in the constitution. This is, however, an exceptional path. Most constitutions prohibit or hinder secession in various forms, rather than not regulating it.[12] In the small minority of constitutions that allow for secession the procedures provided for vary. There are both commonalities and differences that can be identified in the examples that follow. Most constitutional regulations of secession include some form of popular vote or referendum, involve more than one step in the mechanism for agreeing on the question of sovereignty, and recognise that negotiations on how to implement decisions to secede are necessary. They differ on which entity or institution has the power to trigger processes to agree on sovereignty.

a) Seceding entities trigger mechanisms of agreement: Ethiopia, Liechtenstein, Canada

Article 39.1 of the Ethiopian constitution articulates a right to self-determination including a right to secession for every 'Nation, Nationality or People'.[13] Article 39.4 further provides that the Federal Government has a duty to organise a referendum within three years of the legislative institution of the nation, nationality or people concerned votes for independence with a two-thirds majority. The same provision also recognises that a transfer of powers and a division of assets must take place following a referendum vote in favour of independence. Consent of the parent state is thus required, but power to trigger the process lies with the nation, nationality or people.

Liechtenstein's Constitution also grants a right to secede. Article 4.2 reads:

> '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 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.'[14]

Canada is another example of regulation. Remedying constitutional silence, the Supreme Court of Canada in the Quebec Secession Reference held that if a clear majority of the people of Quebec were to vote for independence this would impose a duty to negotiate a secession on the other provinces.[15] The province should decide on

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[11] Scotland Act 1998, s.29(2)(c) and sch.4, para.4.
[12] Rivka Weill, 'Secession and the Prevalence of Both Militant Democracy and Eternity Clauses Worldwide' (2018) 40 *Cardozo Law Review* 905.
[13] Text available at https://www.constituteproject.org/constitution/Ethiopia_1994.
[14] Text available at https://www.constituteproject.org/constitution/Liechtenstein_2011.
[15] *Quebec Secession Reference*, paras 86-97.

whether to hold a vote. In response, the Canadian Parliament enacted a Clarity Act, which sets out that clarity of result and question in such a vote may be determined by the Canadian Parliament.[16] The Parliament of Quebec, on the other hand, enacted its own legislation stating that no other body could impose conditions for independence referendums.[17] While the initiating power lies with the seceding entity, some of the modalities may be influenced by the parent state, making this example slightly more ambiguous than Ethiopia and Liechtenstein.

b) Power of initiation is ambiguous: Switzerland

The Swiss constitution sets out a procedure to be followed to change the territory of a Canton (province) within the federation. It presents different challenges than the secession of a state, but it is worth considering by analogy. This example illustrates that mechanisms to agree on sovereignty may require several steps and that addressing underlying causes of conflicts may take considerable time. It also shows that the principles of certainty and democratic consent referenced in the scope of the inquiry may recommend different actions: certainty would favour as few votes as possible and swift decision-making, while democratic consent may favour several referendums with precise questions to ratify concrete proposals.[18]

Article 53.2 and 3 of the Swiss constitution read:

> '[2]Any change in the number of Cantons requires the consent of the citizens and the Cantons concerned together with the consent of the People and the Cantons.
>
> [3] Any change in territory between Cantons requires the consent both of the Cantons concerned and of their citizens as well as the approval of the Federal Assembly in the form of a Federal Decree.'

The provisions are the codification of a (then uncodified) process that created the Canton of Jura in an internal secession from the Canton of Bern in 1979. A series of referendums at four levels of government (federal, cantonal, district, municipal) were held over the course of a decade. Referendum questions addressed whether the Canton of Jura should be created as well as its borders. Including referendums on the local level addressed concerns about creating new minorities and ultimately defused the conflict.[19] Following agreement on creation and boundaries of the new canton, the text of the Jura Constitution was drafted by a constitutional convention. Negotiations between Bern and Jura on responsibilities and assets continued after the Canton of Jura came into existence. And the last town to vote in a referendum to join the Canton of Jura will finalise the change on 1 January 2026.[20] The process and outcomes, which

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[16] Text available at https://laws-lois.justice.gc.ca/eng/acts/c-31.8/page-1.html.
[17] Act Respecting the Exercise of the Fundamental Rights and Prerogatives of the Québec People and the Québec State: https://canlii.ca/t/56kkt.
[18] See Lea Raible, 'Why Brexit Shouldn't Be the End of Referendums', *Law Blogs Maastricht* (11 June 2019) https://www.maastrichtuniversity.nl/blog/2019/06/why-brexit-shouldn%E2%80%99t-be-end-referendums; Lea Raible and Leah Trueblood, 'The Swiss System of Referendums and the Impossibility of Direct Democracy' UKCLA Blog (4 April 2017) https://ukconstitutionallaw.org/2017/04/04/lea-raible-and-leah-trueblood-the-swiss-system-of-referendums-and-the-impossibility-of-direct-democracy/.
[19] See https://www.swissinfo.ch/eng/democracy/40th-anniversary_the-turbulent-birth-of-the-youngest-swiss-canton/44422054 (factual overview in English).
[20] See https://www.swissinfo.ch/eng/politics/moutier-to-join-canton-jura-by-2026/46970176 (in English).

took decades to materialise since independence for the Jura was put on the agenda in earnest, successfully addressed underlying conflicts.

c) UK framework is comparatively flexible, except for power of initiation

Canada and Switzerland are ambiguous on who has the power to initiate secessions, while the examples of Ethiopia and Liechtenstein grant this power to would-be seceding entities. In the UK, as shown above, the legal power to initiate lies with UK institutions, rather than Scottish ones. Other than this aspect the UK constitution implements low hurdles to secede and is more flexible than most constitutions.[21] In my view, that a procedure for Scottish independence is not regulated in law contributes to this fact. On the other hand, international examples of mechanisms as well as international law recommend or require the use of at least one referendum to agree on sovereignty. Regulations on when and how to trigger it, and on how to run such a vote would be beneficial. Such regulations of triggers should not, in my view, allocate the power of initiation exclusively to UK institutions. Leaving the power of triggering any process even in exploratory form in the hands of the parent state alone has been shown to contribute to protracted tensions rather than productive solutions.[22] Because of this it would in my view be preferable to allow Scotland to assess the will of the population at reasonable intervals, possibly jointly with UK institutions, and to require some form of good faith in recognising stable public opinion and negotiating mechanisms of agreement on sovereignty.[23]

4) Contemporary political discourse

This note focuses on legal parameters for triggering mechanisms to agree on sovereignty. But the combination of international law, UK constitutional law, and a comparative look at other mechanisms are instructive on what questions political discourse might address.

First, the right to self-determination applies to Scotland, and means that it should be the people of Scotland who decide on whether to become independent. However, UK institutions need to consent in some form to such a decision, and currently the power to trigger the process also lies with UK institutions. This means, second, that political discourse and persuasion will have two broad audiences: the people of Scotland on the one hand, and UK institutions on the other.

Finally, most international examples require several steps in the form of legislation, consent, or referendums. Democratic principles and the fact that agreement on sovereignty is a process as opposed to an event inform this. Processes involving several steps and the consent of the parent state value democracy and foster legitimacy. The same is true for regular and open debate. In other words, the legal positions outlined as well as democratic principles recommend political debate in Scotland that seeks to persuade people of remaining within the UK, on the one hand, and becoming independent on the other. Modalities of the process of determining an

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[21] See written submission to the inquiry by Adam Tomkins.

[22] For an argument about this effect of how self-determination is regulated by international law: Marc Weller, 'The Self-Determination Trap' (2003) 4 *Ethnopolitics* 3 (only partly applicable to the Scottish context because it addresses many instances involving armed conflict).

[23] Similar: Marc Weller, 'The UK Supreme Court Reference on a Referendum for Scotland and the Right to Constitutional Self-determination: Part II' *EJIL:Talk!* (13 December 2022) https://www.ejiltalk.org/the-uk-supreme-court-reference-on-a-referendum-for-scotland-and-the-right-to-constitutional-self-determination-part-ii/.

outcome should also be discussed. And ideally, political discourse would include space for expressing different visions for the details of the process, and each potential outcome – particularly in situations where the chance of an immediate renewal of a process to agree on sovereignty seems remote.