

# Professor Alan Renwick

## Legal mechanism for any independence referendum inquiry

### Is there a constitutional route to Scottish Independence

The committee has asked me to address three matters:

- 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 write this submission after the committee has received written submissions and heard oral evidence from three eminent legal scholars: Professors Aileen McHarg, Stephen Tierney, and Adam Tomkins. They covered the first of these matters thoroughly, and I have little to add. Given the UK's 'political' constitution, the remaining two are strongly linked. My remarks here therefore focus on the nature of the UK constitution and options available within it. It draws on three UCL Constitution Unit projects:

- the Independent Commission on Referendums, which assessed how to improve the conduct of referendums in the UK <sup>1</sup>
- a report on how to improve discourse in election and referendum campaigns <sup>2</sup>
- the Working Group on Unification Referendums on the Island of Ireland, which examined impartially how any referendums on the unification question in Northern Ireland and the Republic of Ireland might best be conducted. <sup>3</sup>

### **The Union**

It is widely agreed that the Union is voluntary, and that Scotland is entitled to independence if the people of Scotland wish it. That is amply demonstrated by the Scottish government's paper *Your Right to Decide*<sup>4</sup> and by the previous witnesses' evidence. It is taken for granted in the constitutional debate over independence: it was presumed that a Yes majority in 2014 would lead to independence; subsequent debate has presumed that a second referendum would have the same effect.

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<sup>1</sup> UCL Constitution Unit, [Report of the Independent Commission on Referendums](#) (London: Constitution Unit, July 2018).

<sup>2</sup> Alan Renwick and Michela Palese, [Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?](#) (London: Constitution Unit, March 2019).

<sup>3</sup> Working Group on Unification Referendums on the Island of Ireland, [Final Report](#) (London: Constitution Unit, May 2021).

<sup>4</sup> Scottish Government, [Your Right to Decide](#) (Edinburgh: Scottish Government, September 2025).

Though dozens of polling questions have been asked on numerous aspects of the independence debate, I can find no recent poll that asks whether it is for the people of Scotland to decide Scotland's constitutional future, indicating that this point is taken for granted.<sup>5</sup>

Given that Scotland's constitutional future is a matter for the people of Scotland, it is problematic that no established mechanism exists for ensuring that, in appropriate circumstances, the wishes of the people of Scotland can be expressed. The difficulty with the current arrangement – where the UK government and parliament have complete freedom to decide whether a referendum may occur – is that there is little to stop the UK government from ignoring even manifest, sustained, and overwhelming majority support in Scotland for independence. On most matters, the ballot box provides a guardrail against anti-democratic behaviour by government and parliament: voters can dismiss a government that disregards their wishes. But there is a disjuncture in the case of Scottish independence: it is the UK electorate that chooses those with the power to trigger a referendum, whereas the electorate whose wishes are to be respected is that of Scotland. So the democratic mechanism may not work.

It would therefore be preferable to establish – in law or in a statement with cross-party backing – principles as to when a referendum may and/or must be called. It would remain possible for a future parliament to repeal any such law or for a future government to disavow any such statement. But at least the hurdles to ignoring the wishes of the people of Scotland would be raised.

### **Establishing a mechanism for a referendum to be called**

This leads to the question of what the content of any such provision should be. Two approaches are available:

- The provision could stipulate circumstances in which the UK government must initiate a referendum process. This would be analogous to the arrangements for Northern Ireland, where the Belfast/Good Friday Agreement and the Northern Ireland Act provide that a referendum on the unification question must be called 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.<sup>6</sup>

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<sup>5</sup> The closest I have found is a poll conducted by Norstat in June 2023, which asked, 'Do you think the best way of deciding whether or not Scotland should become an independent country is hold a referendum to see if a majority vote Yes, to hold a UK general election to see if a majority vote for parties in favour of independence, or hold a Scottish Parliament election to see if a majority vote for parties in favour of independence?'. The response options included 'None of the above', which was chosen by 26 per cent of respondents. Especially considering that these 26% will have included some people who were simply expressing their opposition to independence, and perhaps also some who thought the will of the Scottish people should be expressed in a different way, it is evident that the proportion who truly think that the Scottish people should *not* be able to decide this question is low. See the [What Scotland Thinks](#) website.

<sup>6</sup> [Northern Ireland Act 1998, Schedule 1, paragraph 2.](#)

- A triggering mechanism could be granted in some form to the Scottish Parliament or to the people of Scotland. One version of such a mechanism is proposed in the Scottish government's recent paper:

The Scottish Government's position is that it secures a democratic mandate to negotiate with the UK Government a transfer of power for a lawful referendum whenever the people of Scotland, following a party's clear manifesto commitment to the holding of a referendum, return a Scottish Parliament that supports the holding of a referendum and a Scottish Government committed to delivering one.<sup>7</sup>

The following paragraphs offer thoughts on each of these approaches.

### **Option 1: Stipulating rules for the UK government**

Two aspects of the arrangements for Northern Ireland may be noted:

- It is for the UK government to call and run a referendum. No role is given to the Northern Ireland Assembly or Executive. This contrasts with the 2014 Scottish independence referendum, where the two governments worked together.
- While the Act states that the likelihood of a majority for unification is the test – a power that 'must be exercised honestly in the public interest with rigorous impartiality'<sup>8</sup> – it gives no indication of how this likelihood is to be assessed.

There would be no merit in adopting the approach of the Northern Ireland Act on the first of these points. As set out powerfully by Professor Tierney in his evidence to the committee, one strength of the 2014 referendum was the way the two governments and the various parties in the Scottish Parliament worked collegially in developing the arrangements for the vote. Repeating this approach would be highly desirable in any future referendum. Legal provisions on their own cannot enforce a collegial ethos; but they can at least establish the principle that this is the approach that is expected.

The Working Group on Unification Referendums on the Island of Ireland looked at whether the UK government should clarify how it would assess the likelihood of majority support for unification. The Northern Ireland courts have ruled that there is no legal obligation to do so.<sup>9</sup> The Working Group concluded that doing so would also be undesirable. The Secretary of State is legal obliged to take account of all relevant evidence; it would not be sensible to attempt to define in the abstract, without specific context, the weight that should be attached to each.<sup>10</sup>

### **Option 2: Establishing a Scottish trigger mechanism**

The alternative is to create a referendum trigger within Scotland. The most radical version of this would give the Scottish Parliament an unfettered power to call a ballot

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<sup>7</sup> [Your Right to Decide](#) (note 4), p. 16.

<sup>8</sup> [McCord Court of Appeal case](#), 2020, para. 67.

<sup>9</sup> *Ibid.*, para. 101.

<sup>10</sup> Working Group on Unification Referendums on the Island of Ireland, [Final Report](#) (note 3), chapter 8.

at a time of its choosing. This would certainly solidify the principle that it is for the people of Scotland to decide. But it would be undesirable for the same reason as the approach of the Northern Ireland Act would be undesirable: it would make the process unilateral, whereas stability and 'losers' consent' are more likely if the governments work together. Furthermore, the UK authorities do have a legitimate interest in the process: if, say, a vote were chaotic or its legitimacy were contested, or if referendums were called repeatedly at short intervals, that could be highly disruptive for the rest of the Union.

Thus, any process by which the Scottish Parliament could initiate a referendum would better lead to a discussion between the governments.

In a question at committee's previous oral evidence session, Patrick Harvie asked whether there might be a direct democracy mechanism for the people of Scotland to trigger a referendum. I struggle, however, to see what such a mechanism could be:

- It would not be sensible to hold a referendum on whether to hold a referendum.
- An alternative would be to allow citizens to call a referendum by petition, as is permitted in some countries on some issues. The number of signatures would need to be very high for this to be legitimate, however. Furthermore, initiation of referendums by petition can be problematic if it removes any stage for careful scrutiny and deliberation from the process.
- Mr Harvie also floated a potential role for a citizens' assembly. I strongly favour the use of such assemblies for some purposes in the context of a referendum (see below). But citizens' assemblies typically contain only 50–150 members, so they are not best placed to clarify the state of opinion on a matter where the debate is polarized and the two sides may be finely balanced.

### **The relative merits of the two approaches**

I do not see strong reasons in principle for favouring one or other of these two approaches. Protagonists on either side of the constitutional debate will presumably tend to have views on the matter that align with their constitutional preferences.

### **Threshold levels of support for triggering a referendum**

Under either approach, the question arises of what level of support for independence (or for calling a referendum) would be required to trigger a vote. In Northern Ireland, the likelihood of a bare majority is enough. Similarly, the Scottish government's paper envisages a bare majority in the Scottish Parliament as sufficient. On the other hand, Professor Tomkins, in his evidence to the committee, put forward the idea of a 'settled will', which might imply a higher threshold.

As was discussed in the committee's previous oral evidence session, the concept of 'settled will' does not have a settled meaning. Two interpretations seem plausible:

- that there is a stable majority in favour of a specific view, such that there is no significant prospect in the foreseeable future that the majority will flip

- that there is wide agreement that a specific view reflects the will of the people as a whole, even among those who do not personally agree with it.

We might be more confident that the first of these conditions is met where the majority is larger. On a polarized issue where many people have fixed views, however, even a very slender majority may satisfy the criterion of stability. For the second condition, a large majority – combined with an unimpeachably fair process – may enhance consent. But that does not help if settled will in this sense is absent. To say that a majority for change may not have its way until opponents of change are reconciled to it may skew the pitch unfairly in favour of the status quo, and may be a recipe for severe, legitimate dissent.

For these reasons, setting a supermajority threshold for triggering a referendum would be problematic. There would be a strong case, however, for saying that a majority in favour of independence (or in favour of a referendum) should be seen to endure for some time before a referendum is called. Under the option of a trigger in the hands of the Scottish Parliament, for example, it could be that two parliamentary votes for a referendum would be needed, with an election taking place between them. This would be analogous to the procedure for constitutional amendment in Denmark, which requires two parliamentary votes, with an election between, followed by a referendum.

### **Other features of referendum process**

If the UK and Scottish authorities agreed a process for calling referendums, other features of the referendum might also be agreed. Indeed, it would be desirable for many such features to be settled in advance, rather than left to ad hoc determination. These could include the following.

- The referendum franchise: The franchise for Scottish Parliament elections should be adopted without amendment. This is the accepted definition of ‘the people of Scotland’. Ad hoc franchise changes are always made with an eye to the results, and therefore harm legitimacy.
- The referendum threshold: For the same reasons as above, the threshold in any referendum should be a simple majority. There may, however, be a strong case for a two-referendum process. That is partly for the same reason as above: to clarify that majority support for change is stable – perhaps even ‘settled’. It would also open up the possibility highlighted in the next point.
- Stages of decision-making: As discussed in the committee’s previous evidence hearing, a referendum can be held on a principle, before detail has been worked out; or on a specific proposal, after detail has been agreed. In theory, the latter is clearly preferable: voters should be able to know what options they are choosing between. On a matter such as Scottish independence, however, that is not entirely possible: while some features of an independent Scotland could be decided in Scotland alone, and hence settled before a referendum, others could not: they would require negotiation with the UK government, the EU, and others, and these parties would not

negotiate before a referendum. One solution could be to set out a two-referendum process: the first vote would be on whether in principle to pursue independence; the second would be on whether to confirm that decision once the detail had been decided. The Independent Commission on Referendums examined such an approach.<sup>11</sup>

- Fostering informed discussion: Discussion in the course of a referendum campaign should, so far as possible, be informed and deliberative. That is getting harder to achieve in an era of rampant misinformation and declining trust in traditional sources of news. No matter what their position on the constitutional question, democrats should be horrified at the prospect of holding a referendum without better protections. Such protections could include: stronger campaign finance regulations; better regulation of online content; improved education on matters such as media literacy, critical thinking, and psychological biases; and use of deliberative processes such as citizens' assemblies to foster deliberative discussion in the course of the campaign.<sup>12</sup>

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<sup>11</sup> [Report of the Independent Commission on Referendums](#) (note 1), p. 120.

<sup>12</sup> Many of these options are explored in [Doing Democracy Better](#) (note 2).