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Legal mechanism for any independence referendum inquiry

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

1 Sovereignty

A) Sovereignty is generally used in two ways within international legal and political discourse. First, as an indicator of external and internal independence when looking at the criteria for statehood. Second, what states can do once they are recognised as states.

B) It is possible to be recognised as a state, and subsequently lose sovereignty in this second sense, but remain a state. For instance, Ukraine or Cyprus in the 1960s.

C) There is no 'right' to sovereignty – political, cultural or economic - nor is sovereignty fully defined by international law. The use of 'sovereignty' within international legal texts is often contextual and related to the treaty text. Nonetheless, sovereignty does impact on how politics and law function, and it is most often used with regards to states and their rights and obligations under international law.

D) The political theorist Stephan Krasner divides sovereignty into four categories:

    a. International Legal Sovereignty: states recogniSing one another's sovereignty as independent territories.

    b. Interdependence Sovereignty: which is an eroding mechanism of sovereignty where globalisation means that the power of sovereignty in states is decreased.

    c. Domestic Sovereignty: state authority, structures and the effectiveness of state control within the territory

    d. Westphalian Sovereignty: the concept that states have the right to separately determine their own domestic authority structures.

    (Stephan D. Krasner Sovereignty: Organised Hypocrisy, (Princeton University Press, 1999))

Westphalian sovereignty is generally the form that is most often the subject of international law, followed by international legal and interdependence sovereignty. Domestic sovereignty is generally what domestic constitutional orders are concerned with.

E) Sovereignty is sometimes used as regards to international organisations,

particularly organisations such as the European Union that exercise extensive impact upon domestic law and make binding decisions at the supranational level or where international organisations administer a territory, often in post-conflict situations. For instance, the UN in Kosovo.

F) Increasingly, federal and devolved regions are actors within international law, but this is not regarded as conferring them with sovereignty.

G) Sovereignty is contained within the 1945 Charter of the United Nations. Here, sovereignty is often directly related to the question of equality between states.

Art 2(1) The Organization is based on the principle of the sovereign equality of all its Members

Sovereign equality of states refers to:

The ability/capacity of a state to sign treaties, join international organisations, receive diplomatic protection and to have their statehood and other rights protected under international law. It also means states can equally assume international obligations, for example, human rights or economic obligations. States can take claims against other states or actors and have equal standing before tribunals and courts.

Differential treatment is permitted, for instance, under the law of the World Trade Organization, but this must be agreed to and there must be relevant and objective criteria.

H) Art 2 (4) of the UN Charter states that All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations

While Art 2 (4) does not mention sovereignty, its text is often used as short hand for sovereignty within international law (and as regards the use of force). It is significant that it refers to *both* territorial integrity *and* political independence.

I) Sovereignty also extends to natural resources, airspace and the sea and other waters under relevant treaties, for example, the 1982 UN Convention on the Law of the Sea. It also extends to the regulation of foreign investment.

J) There are territories that have a right to self-determination (see below) that currently do not exercise sovereignty. For example, Western Sahara. There are also other forms of sovereignty, for instance, that of Indigenous Peoples, which while recognised within international law, often are often not accompanied by a right to external self-determination (see below).

K) Older forms of the extension of sovereignty, such as conquest, are no longer recognised under international law. For example, Ukraine and Crimea. Conquest and sovereignty over territories before 1918 are recognised.

L) There are few examples of consistent practice within international law as regards to sovereignty or the exercise of self-determination and/or secession.

2) **The right to self-determination**

a).The 1945 United Nations Charter recognises a right to self-determination.

Under Article 1.2, one of the purposes of the organisation is to:

"To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace."

This article recognises the equality of rights between peoples, and regards self-determination as a collective right.

The two core United Nations human rights treaties also recognises a collective right.

United Nations International Covenant on Civil and Political Rights 1966

Article 1(1) All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

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The Declaration on Friendly Relations recognises three 'modes' of the right emerging

Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations 1970 General Assembly Resolution 2625

5 (4) The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.

Importantly, this was written in the context of decolonisation and Anti-Apartheid movements, which made the recognition of these modes more straightforward through the United Nations decolonisation process. Albeit this is yet to be completed, for example, Western Sahara or Palestine.

Where most of the world's land territory is now made up of states, secession, for example South Sudan, reunification, for example, Germany, or voluntary dissolution, for instance Czechoslovakia are the three most likely modes.

There are instances, for example, South Sudan or the break-up of Yugoslavia, where this also involves the use of force.

b) The right of territorial integrity

A state's right to territorial integrity is recognised in the UN Charter.

Conquest or the use of force to claim territory, for instance, Ukraine and

Crimea, is not permitted.

Any changes to a state's territory, with some exceptions (see below) must be fully consensual and underpinned by a democratic practices. Stability of borders has been a principle of international law and relations since 1945.

'Devolution' in international law, where a previous sovereign 'grants' independence to a former part of its territory, is recognised as a way for new states to emerge. This can be immediate or happen gradually over time.

In both the *Reference re Secession of Quebec* [1998] 2 SCR 217, [138]. and the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Request for Advisory Opinion)* ICJ 2010, ICGJ 423 before the International Court of Justice it was stated that territorial integrity is not a bar to self-determination and the self-determination is not confined to former colonies. In the *Reference on Devolution Issues* judgment before the UK Supreme Court, while the Court did refer to the Kosovo case, it was only to the UK submission rather than the decision of the International Court of Justice.

C) Self-determination is often divided into two parts, which work together:

I) Internal self-determination

This is the relationship between a government and 'peoples', which includes the right to democratic governance and effective representation. Devolution is a form of exercising internal self-determination.

II) external self-determination

This is the ability to act as a state within international law, including all rights and obligations.

3) Right of Succession?

a) Most international legal scholars would agree that a *right* of secession only exists in situations of subjugation of a peoples, a remedial secession. This is regarded as a very high bar to reach. This must go beyond mere violations of human rights. Human rights violations would have to be severe, systematic and targeted at a particular peoples.

b) This does not, however, prevent a state from having its own domestic arrangements for secession to occur that is democratic and consistent with international standards. Such an act of secession would generally be recognised by other states within international law. For example, South Sudan, Bangladesh, Singapore.

C) Latvia, Lithuania and Estonia declared independence from the Soviet Union, and this was subsequently recognised by the State Council of the Soviet Union, which also confirmed the *restoration* of their independence. Their applications for UN membership were recognised after this point.

D) This could also be remedied by the provision of a form of internal self-determination, but there must be a free and effective choice. There are examples of failed attempts at secession e.g. Biafra, Tibet, Chechnya, Abkhazia. The context in each is specific.

E) Some states, such as the UK, Austria, Ethiopia, France, and Saint Kitts and Nevis, have constitutional provisions, have that either explicitly (the UK), or contain implied acceptance of the possibility of secession.

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

1) International Law is rarely concerned with the internal operation of constitutional law other than in circumstances where it may be leading to a severe violation of human rights law or in considering whether an act of independence to create a new state was completed in line with democratic requirements.

Parliamentary sovereignty is unique to the UK (with close comparators being New Zealand and Canada), with popular sovereignty being more common. However, devolution and its basis in referendums complicate a simplistic reference back to Parliamentary sovereignty as resolving all issues. The use of democratic processes to claim internal self-determination would make any attempt to unilaterally withdraw devolution a question with international legal implications.

The 1998 Good Friday Agreement (see more below) has explicit recognition of a right to external self-determination. The previous independence referendum in Scotland recognises a similar right belonging to the ‘peoples’ of Scotland. However, the mechanics of doing so remain largely a matter of UK Constitutional Law, unless there were a dramatic change in circumstances.

It is possible for a unit to declare independence, and for it be ‘unconstitutional’ and for it be subsequently recognised as a new state. This may be immediately, or after a period. This would not make the act retroactively constitutional.

It would be possible for the UK to entirely dissolve itself. From an international legal perspective to be recognised, this would have to be a free and effective choice. This may clash with democratic choice were it to be a unilateral act of perhaps English MPs. The break-up of the UK with the creation of the Irish Free State (Saorstát Éireann) was a mix of a war of independence (unconstitutional in UK constitutional terms), acts of Parliament, Irish claims of the emergent right of self-determination and the operation of the British imperial constitution alongside international legal practices of recognition, and the Free State undertaking acts only a state could do.

The dissolution of Czechoslovakia was achieved through parliamentary action rather than through a referendum, the process for which had been set out in constitutional terms. However, both the federal governments of Czechia and Slovakia were involved in the negotiations. This was recognised even though the constitutional process had required a referendum.

2) Northern Ireland

Northern Ireland was the first part of the UK to have devolution, following a decades long debate about the possibility for Irish Home Rule. This followed the incorporation of Ireland into the UK after the Act of Union 1801 and the closing down of the Parliament in Dublin. While Unionists had opposed Home Rule throughout this period, after the Irish War of Independence and the 1921 Anglo-Irish Treaty, it was considered the preferred option, and the new Northern Ireland Government opted out of joining an all-island Free State. This could be described as an act of self-determination (the creation of a polity to maintain a majority of one particular group, would no longer be legal under international law, but it was at the time – Northern Ireland is six out of the nine counties of Ulster).

Northern Ireland had a border poll in 1973. The vote was in favour of staying in the UK, though it was boycotted by all the nationalist parties.

The Good Friday Agreement sets out the terms of what is referred to as a 'border poll'. Should it be a positive vote, it would be an act of self-determination to (re)unify Ireland into a single political entity. It would be re-unification as Northern Ireland opted out of the Irish Free State, and the Act of Union 1801 regarded Ireland as a single political point.

The UK Constitution, Bunreacht na hÉireann (the Irish Constitution) alongside the Good Friday Agreement and the 1998 Northern Ireland Act, as well as international law, set out the terms in which reunification may occur. The principle of consent is key in all these arrangements.

Ireland has much experience with referendums, embedded with a constitutional concept of popular sovereignty. The relevant provisions of Bunreacht na hÉireann regarding Northern Ireland are:

> **ARTICLE 2**
> It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish Nation. That is also the entitlement of all persons otherwise qualified in accordance with law to be citizens of Ireland. Furthermore, the Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage.
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> **ARTICLE 3**
> 1 It is the firm will of the Irish nation, in harmony and friendship, to unite all the people who share the territory of the island of Ireland, in all the diversity of their identities and traditions, recognising that a united Ireland shall be brought about only by peaceful means with the consent of a majority of the people, democratically expressed, in both jurisdictions in the island. Until then, the laws enacted by the Parliament established by this Constitution shall have the like area and extent of application as the laws enacted by the Parliament that existed immediately before the coming into operation of this Constitution.
>
> 2 Institutions with executive powers and functions that are shared between those jurisdictions may be established by their respective responsible

authorities for stated purposes and may exercise powers and functions in respect of all or any part of the island.

The Northern Ireland Act 1998 (UK) s 1 replicates the language of the Good Friday Agreement and recognises the right of both internal (remaining a devolved part of the UK) and external (unifying with Ireland) self-determination.

Northern Ireland Act 1998 (UK) s 1 Status of Northern Ireland.

(1) It is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purposes of this section in accordance with Schedule 1.

(2) But if the wish expressed by a majority in such a poll is that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland, the Secretary of State shall lay before Parliament such proposals to give effect to that wish as may be agreed between Her Majesty's Government in the United Kingdom and the Government of Ireland.

The processes for when and how the border poll should happen are not specific and are outlined in general terms.

Northern Ireland Act 1998 (UK), sch 1, para 2.

1 The Secretary of State *may* by order direct the holding of a poll for the purposes of section 1 on a date specified in the order.

2 Subject to paragraph 3, the Secretary of State *shall* exercise the power under paragraph 1 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.

3 The Secretary of State shall not make an order under paragraph 1 earlier than *seven years* after the holding of a previous poll under this Schedule.

4 (1) An order under this Schedule directing the holding of a poll shall specify—
(a) the persons entitled to vote; and
(b) the *question or questions* to be asked.
(2) An order —
(a) may include any other provision about the poll which the Secretary of State thinks expedient (including the creation of criminal offences); and
(b) may apply (with or without modification) any provision of, or made under, any enactment.
(emphasis added)

At the time of the negotiations, the Secretary of State determination was considered to be a political assessment based on a number of sources, such as opinion polls or election results. The *McCord* case, the Courts emphasised the ability of the minister to

‘honestly reflect on the evidence available *In re McCord* [2018] NIQB 106, [20] (Girvan LJ). This, the Courts said should be read in line with the UK Government’s required ‘rigorous impartiality’ under the Good Friday Agreement in decision making that affects Northern Ireland’s governance. *In re McCord* [2020] NICA 23, [82] (Stephen LJ). Good Friday Agreement, Constitutional Issues, para 1(v).

This leaves considerable space for deciding how the process should operate.

The seven-year requirement, while not requiring a poll every seven years, is likely to have the political impact that once the first is called, there will be political calls for another poll as soon as the seven years pass.

If a poll in favour of unification occurs, under the Northern Ireland Act 1998 (UK), s 1(2).

‘the Secretary of State *shall* lay before Parliament such proposals to give effect to that wish as may be agreed between Her Majesty’s Government in the United Kingdom and the Government of Ireland’

This is a positive requirement for the Secretary of State to act. If a future UK Government failed to give effect to that wish, there would be a conflict between the will of the 1998 Parliament and that future Parliament, as well as a clash of international legal obligations under the 1998 Agreement and parliamentary sovereignty.

Following the Good Friday Agreement, Ireland, by referendum, altered its territorial and sovereignty claims to the whole island. Under the replaced Articles 2 and 3, Ireland accepts the principle of consent as being essential to any territorial claims.

Some obligations under the Good Friday Agreement would transfer to Ireland, as the new entity with sovereignty over the territory, this includes ‘rigorous impartiality’ and the ability of the people of Northern Ireland to identify as ‘British, or Irish, or both’.

Germany is the closest international legal example of unification. This required complex negotiations.

Ireland and Scotland could be distinguished as Ireland is recognised as a former colony, while Scotland is not. This was stated in James Crawford and Alan Boyle’s Report Opinion: Referendum on the Independence of Scotland – International Law Aspects (2013) at para 26. The importance of that difference, however, is unclear as both the Quebec and Kosovo decisions (discussed above) argue that from the perspective of territorial integrity, this is not important. A further point of difference is the current role of the Irish Government – dating from the 1985 Anglo Irish Agreement – in the affairs of Northern Ireland, where its interest has been recognised.

Contemporary political discourse, self-determination and accountability
Contemporary Political Discourse & Self Determination

The contemporaneous international legal discussions around sovereignty and self-determination focus on specific examples.

This includes Ukraine and other regions of Russia's peripheries, including Abkhazia, South Ossetia and Transnistria.

They also include the final aspects of the break-up of Yugoslavia such as Kosovo.

There are also longer-term issues such as Western Sahara, Palestine, Tibet, North Cyprus, the Basque Country, Catalonia and Kurdistan.

There are some attempts to (re)create corporate sovereignty (not quite alike, but similar to Hudsons' Bay Company or the East India Company), for example, the city of Próspera in Honduras, which was deemed to be unconstitutional by the Honduran Supreme Court.

There are no specific accountability mechanisms. Nonetheless, it is possible for issues to be brought to the UN Human Rights Bodies, either through the treaty bodies or via the Universal Periodic Review, but these would likely require a severity of human rights breaches. Standing is required before the International Court of Justice, albeit an advisory opinion - as has occurred with regards to Palestine or Kosovo - via the UN General Assembly or a third state is possible.

Other accountability mechanisms would likely be political, particularly given the UK veto at the UN Security Council.