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Legal mechanism for any independence referendum inquiry

1. I submit this written evidence to the Constitution, Europe, External Affairs and Culture Committee as part of its short inquiry examining '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 invited 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.

   Given my background, I focus primarily on the first two issues. My evidence draws on a range of relevant publications[1] and my experience related to a number of self-determination processes and sovereignty disputes.[2]

   The submission highlights that, although international law recognises the right of self-determination, it offers limited guidance on how non-colonial, democratic states should regulate claims to independence (section A). Consequently, domestic constitutional frameworks play a central role in determining whether, when, and how a referendum on sovereignty may be triggered (section B). Against that backdrop, the submission outlines the distinctive features of the UK's approach, including the statutory arrangements applicable to Northern Ireland and Scotland and the constraints articulated by the UK Supreme Court (section C), before proposing a lawful and democratic trigger mechanism for a Scottish independence referendum that could operate within the existing constitutional settlement (section D).

A. The International Legal Landscape

2. It is the case that 'no one is very clear as to what' the international law of self-determination –and by extension the right to secession— means outside the

[1] *See* e.g. 'Accommodating Territorial Contestation and National Constitutional Change: The Cases of Cyprus and Ireland' (2025) 36 *Irish Studies in International Affairs* 244—265; 'Mind the Gap Between Federalism and Secession: The Relationship Between Two (In)compatible Concepts' (2024) 16 *Perspectives on Federalism* E-211—E-236; 'Accommodating Secession Within the EU Constitutional Order of States' (2024) 64 *Virginia Journal of International Law* 293–348; 'Territorial Differentiation in EU law: Can Scotland and Northern Ireland Remain in the EU and/or the Single Market?', (2017) 19 *Cambridge Yearbook of European Legal Studies* 287–310; 'The Paradox of the Europeanisation of Intra-State Conflicts', (2016) 59 *German Yearbook of International law* 223–253.

[2] *See* e.g. Report on a Special Designated Status for Northern Ireland Post-Brexit: An Independent Opinion Commissioned by the European United Left / Nordic Green Left (GUE/NGL) Group of the European Parliament, 13 April 2018; *The Cyprus Issue: The Four Freedoms in a (Member -) State under Siege*. (Hart Publishing, 2011).

colonial context.[3] The right of peoples under colonial domination to external self-determination and independence was enshrined in the UN Charter[4] and further crystalised in UN General Assembly Resolutions 1514 (XV) 1960[5] and 1541 (XV) 1960.[6] Over time, the legal entitlement of non-self-governing territories to achieve independence from their metropolitan State became well established. The International Court of Justice (ICJ) endorsed the decolonisation processes based on the right of external self-determination in its Advisory Opinions on *Namibia*,[7] *Western Sahara*[8] and, more recently, *Chagos.*[9] As the era of classical colonialism has largely passed, however, this principle now applies to a limited number of remaining non-self-governing territories, such as Gibraltar and New Caledonia.[10]

3. Outside the colonial context, Joint Article 1 of the two covenants in the International Bill of Rights nevertheless provides that '[a]ll peoples have the right of self-determination.'[11] In 1995, the ICJ affirmed that this right 'has an *erga omnes* character.[12] This does not, however, imply that all peoples possess a right to external self-determination and/or independence. A state that respects the principles of self-determination in its internal arrangements 'is entitled to maintain its territorial integrity under international law.'[13] Thus, for metropolitan territories such as Flanders, Scotland, Basque Country (Euskadi) and Catalonia, 'peoples are expected to achieve self-determination within the framework of their existing state.'[14] As the Supreme Court of Canada held, 'international law does not specifically grant component parts of sovereign states the legal right to secede unilaterally from their "parent" state.'[15]

4. That said, international law does not exclude the possibility of *de facto* secession arising from a unilateral, even unconstitutional, declaration of independence.[16] The viability of such secession depends on effective control over territory and subsequent recognition by the international community.[17] The ICJ reaffirmed this

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[3] JR Crawford, 'The Right of Self-Determination in International Law: Its Developments and Future', in P Alston (ed) Peoples' Rights (Oxford University Press, 2001) 7, 10.
[4] U.N. Charter arts. 55 and 73.
[5] G.A. Res. 1514, at 66 (Dec. 14, 1960).
[6] G.A. Res. 1541, at 29 (Dec. 15, 1960).
[7] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion*, 1971 I.C.J. Rep. 16.
[8] *Western Sahara*, *Advisory Opinion*, 1975 I.C.J. Rep. 12 (Oct. 16).
[9] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion*, 2019 I.C.J. Rep. 95 (Feb. 25).
[10] *See* United Nations, Non-Self-Governing Territories, https://www.un.org/dppa/decolonization/en/nsgt#:~:text=Under%20Chapter%20XI%20of%20the,measure%20of%20self%2Dgovernment.
[11] *See* International Covenant on Civil and Political Rights, art. 1, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, art. 1, Dec. 16, 1966, 993 U.N.T.S. 3.
[12] *Case Concerning East Timor (Portugal v. Australia)*, Judgment, 1995 I.C.J. 90, para. 29 (June 30).
[13] Supreme Court of Canada, *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 154 (Can.) (hereafter *Reference re Secession of Quebec*).
[14] JR Crawford and A Boyle, *Opinion: Referendum on the Independence of Scotland—International Law Aspects*, (2012), para. 175.
[15] *Id.*, para. 111.
[16] *Id.*, para. 106.
[17] *Id.*, para. 142.

finding in its *Advisory Opinion on Kosovo*,[18] confirming that international law contains no prohibition on declarations of independence and that the obligation to respect territorial integrity binds states, not non-state actors.[19]

5. Accordingly, although the protection of territorial integrity is a fundamental principle of the post-Second World War international legal order, it does not bind sub-state entities. As Cassesse observed:

> [I]nternational law does not ban secessionism: the breaking away of a nation or ethnic group is neither authorized nor prohibited by legal rules; it is simply regarded as a fact of life, outside the realm of law, and to which law can attach legal consequences depending on the circumstances of the case.[20]

This international law orthodoxy is also echoed in *Opinion No. 1* of the Badinter Commission, which emphasised that 'the existence or disappearance of [a] state is a question of fact.'[21]

6. The limits of international law in regulating secession place increased emphasis on the domestic constitutional frameworks within which claims to external self-determination arise. A clearer picture of the legal possibilities therefore requires an examination of how national constitutions address, prohibit, regulate, or facilitate secessionist processes. The next section outlines these comparative constitutional practices.

B. The Comparative Constitutional Landscape

7. Notwithstanding the ambiguities under international law, unilateral declarations of independence often constitute a breach of domestic constitutional law. This reflects the fact that the vast majority of constitutions are, either explicitly or implicitly hostile to secession, typically by affirming the primacy of the state's territorial integrity.[22] Even when they are silent, they frequently adopt mechanisms designed to prevent secession for 'existential—and not so existential—needs, rather than democratic reasons alone'.[23] Such mechanisms include the use of 'eternity clauses' and explicit prohibitions on partition, secession, or even secessionist political parties.[24] For example, the indivisibility of the Republic is enshrined in Article 1 of both the French and Romanian constitutions, while Article 2 of the Spanish Constitution affirms the indissoluble unity of the Spanish nation. Similarly, Article 185 of the Cypriot Constitution prohibits both union with another state and any form of separatist independence.

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[18] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, 2010 I.C.J. 403, para. 119 (July 26).
[19] *Id.*, paras. 79–84.
[20] A Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press, 1995) 340.
[21] Arbitration Commission of the Peace Conference on Yugoslavia, *Opinion No. 1,* available at (1992) 3(1) *European Journal of International Law* 178.
[22] P Monahan et al., *Coming to Terms with Plan B: Ten Principles Governing Secession*, 83 C.D. Howe Inst. Comment. (1996) 7–8.
[23] R Weill, *Secession and the Prevalence of Both Militant Democracy and Eternity Clauses Worldwide*, (2018) 40 *Cardozo Law Review* 905, 913.
[24] *Id.*

8. Comparable restrictions can also be found in constitutional orders exhibiting federal characteristics. The constitutions of Australia,[25] Brazil[26] and Comoros[27] explicitly exclude the possibility of secession. In Germany, although the Basic Law does not address secession directly, the Federal Constitutional Court has held that the *Länder* are not *Herren des Grundgesetzes* [Masters of the Constitution] and therefore cannot unilaterally secede without breaching the constitutional order.[28] In a heavily separatist-prone context, the Constitutional Court of Bosnia and Herzegovina stressed that the constitution 'does not leave room for any "sovereignty" of the Entities or a right to "self-organization" based on the idea of "territorial separation".'[29] The South African Constitutional Court has likewise held that the right to self-determination recognised in the Constitution of the 'does not embody any notion of political independence or separateness.'[30] The Italian Constitutional Court has gone further still, asserting that the 'unity of the Republic is an aspect of constitutional law that is so essential to be protected even against the power of constitutional amendment.'[31]

9. However, external secession and independence should not be understood as absolute constitutional taboos. Some unitary States including Denmark,[32] Liechtenstein[33] and Uzbekistan[34] allow for the possibility of a consensual and democratic process of partition. Historically, several federal constitutions have also recognised a right of secession. Beyond the socialist constitutions of the Soviet Union and Yugoslavia –which famously included a right to secession[35]—the 1947 Burman constitution,[36] the founding document of the State Union of Serbia and Montenegro,[37] and the transitional constitution of Sudan[38] each provided procedures for consensual secession of part of their territory.

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[25] Commonwealth of Australia Constitution Act, Preamble.
[26] Constitution of the Federative Republic of Brazil, Art. 1.
[27] Constitution of the Union of Comoros, Art. 7.
[28] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 16, 2016, BVerfGE, 2 BvR 349/16 (Ger.).
[29] Constitutional Court of Bosnia and Herzegovina*, Case U 5/98 Partial Decision U 5/98 III* of 1 July 2000, para. 30.
[30] The Constitutional Court of South Africa, *Certification of the Amended Text of the Constitution of The Republic Of South* Africa, 1996 (CCT37/96) [1996] ZACC 24, para. 24.
[31] Italian Constitutional Court, *Judgment 118/2015*, of 29 April 2015, para. 7(2).
[32] The Act on Greenland Self-Government of 21 June 2009, Ch. 8, Art. 21(1). According to it, '[d]ecision regarding Greenland's independence shall be taken by the people of Greenland.'
[33] Constitution of the Principality of Liechtenstein, Art. 4(2). According to it, '[i]ndividual 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.'
[34] The Constitution of the Republic of Uzbekistan, Art. 89. According to it, '[t]he Republic of Karakalpakstan shall have the right to secede from the Republic of Uzbekistan on the basis of a nation-wide referendum held by the people of Karakalpakstan.'
[35] *See* Constitution of the Union of Soviet Socialist Republics (1924), Art. 4; Constitution of the Union of Soviet Socialist Republics (1936), Art. 17; Constitution of the Union of Soviet Socialist Republics (1977), Art. 72; Yugoslav Constitution, Introductory Part. Basic Principles.
[36] The Constitution of the Union of Burma, Ch. X.
[37] Preamble of the founding document of the State Union of Serbia and Montenegro.
[38] The Interim National Constitution of Sudan, Arts. 118 and 222.

10. Currently, Article 39 of the Ethiopian constitution famously grants 'every nation, nationality and people in Ethiopia' an 'unconditional right to self-determination, including the right to secession', and sets out detailed procedures for its exercise.[39] Likewise, the Constitution of Saint Kitts and Nevis allows for the secession of Nevis Island following a clearly prescribed process in Article 113.

11. Between those federal orders that prohibit secession outright and those that explicitly recognise such a right lie constitutional frameworks that allow for negotiated secession through a process of constitutional amendment.[40] One of the oldest examples is found in the United States. Four years after the end of the civil war, the Supreme Court held that the Constitution, 'looks to an indestructible Union, composed of indestructible States.'[41] Nevertheless, it also acknowledged that secession could occur 'through revolution, or through consent of the States.'[42] Following the logic, secession is not unconceivable, if undertaken via an amendment to the US constitution.

12. More recently, the Spanish Constitutional Court has adopted a position broadly consistent with this negotiated-amendment approach. While reaffirming that Autonomous Communities do not possess a unilateral right to organise self-determination referendums, it distinguished itself from the German model of militant democracy, which forecloses secession in all circumstances. Instead, the Court emphasised that:

> Any approach that intends to change the very grounds of the Spanish constitutional order is acceptable in law, as long as it is not prepared or upheld through an activity that infringes democratic principles, fundamental rights or all other constitutional mandates, and its effective achievement follows the procedures foreseen.[43]

In effect, it indicated that a constitutionally valid plebiscite on the future of Catalonia could be organised if supported by the relevant constitutional actors through an appropriate amendment to the Spanish constitution.

13. The most nuanced and influential articulation of negotiated secession is that of the Supreme Court of Canada in *Reference re Secession of Quebec*. The court held that 'the secession of Quebec from Canada cannot be accomplished […] unilaterally, that is to say, without principled negotiations, and be considered a lawful act.'[44] At the same time, it affirmed that:

> the clear repudiation of the existing constitutional order and the clear expression of the desire to pursue secession by the population of a

[39] Constitution of the Federal Democratic Republic of Ethiopia, Art. 39(4).
[40] K Kössler, 'Federal Constitutions and Secession: From "Perpetual Union" to a Right to Separate?' in A Eppler et al. (eds), *Qualified Autonomy and Federalism versus Secession in EU Member States*, (Studien Verlag 2021) 75, 80.
[41] US Supreme Court, *Texas v White*, 74 (7 Wall) 700 (1869), 725.
[42] *Id*., 726.
[43] Constitutional Court of Spain, *Judgment n. 42/2014* of 25 March 2014, 12-13 available in English here.
[44] *Reference re Secession of Quebec*, para. 104.

> province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire.[45]

In other words, while denying any unilateral right of secession, the Court recognised that 'a referendum unambiguously demonstrating the desire of a clear majority of Quebeckers to secede from Canada, would give rise to a reciprocal obligations of all parties of the Confederation to negotiate secession'.[46] It also stressed that such negotiations 'would be governed by the same constitutional principles which give rise to the duty [itself]: federalism, democracy, constitutionalism and the rule of law, and the protection of minorities'[47] –thereby linking the secession process directly to the underlying federal spirit of the Canadian constitutional order.

14. Against this comparative backdrop, it is necessary to examine how the UK's own constitutional framework accommodates, restricts, or facilitates processes for determining questions of sovereignty.

C. The UK Constitutional Landscape

15. 'Westminster has formally conceded that Northern Ireland can secede from the United Kingdom to join a united Ireland, if its people, and the people of the Irish Republic, voting separately, agree to this'.[48] The Belfast/Good Friday Agreement (GFA) recognises, in unambiguous terms, a right of consensual and democratic secession for Northern Ireland.[49] These international legal commitments have been incorporated directly into UK domestic law. Section 1 of the Northern Ireland Act 1998 is a clear example of a statutory provision –within a constitutional statute– expressly recognising the possibility of a region's secession. Schedule 1 of the Act sets out the circumstances under which a referendum on Irish reunification *may* and *must* be called by the UK Secretary of State.

> [T]he Secretary of State is given a discretionary power to order a border poll under Schedule 1 paragraph 1 even where she is not of the view that

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[45] *Id*., para. 88.

[46] S Mancini, 'Secession and Self-Determination', in M Rosenfeld & A Sajó (eds.) *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 481, 497.

[47] *Reference re Secession of Quebec*, para. 90.

[48] J McGarry, 'Asymmetrical Autonomy in the United Kingdom' in M Weller and K Nobbs (eds), *Asymmetric Autonomy and the Settlement of Ethnic Conflicts* (University of Pennsylvania Press 2010) 148, 156.

[49] The Belfast Agreement: An Agreement Reached at the Multi-Party Talks on Northern Ireland, N. Ir.-U.K., Art. 1, Apr. 10, 1998, Cm 3883, provides that the United Kingdom and the Republic of Ireland:

> (i) recognise the legitimacy of whatever choice is freely exercised by a majority of the people of Northern Ireland with regard to its status, whether they prefer to continue to support the Union with Great Britain or a sovereign united Ireland;
> (ii) recognise that it is for the people of the island of Ireland alone, . . . to exercise their right of self-determination on the basis of consent, freely and concurrently given, North and South, to bring about a united Ireland, if that is their wish, accepting that this right must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland; . . .
> (iv) affirm that if, in the future, the people of the island of Ireland exercise their right of self-determination on the basis set out in sections (i) and (ii) above to bring about a united Ireland, it will be a binding obligation on both Governments to introduce and support in their respective Parliaments legislation to give effect to that wish[.]

> it is likely that the majority of voters would vote for Northern Ireland to cease to be part of the United Kingdom and to become part of a united Ireland. [50]

However, where it appears to her that a majority would be likely to vote for a united united Ireland, then, she is under a duty to call a poll.

> It is necessarily implied in this provision that the Secretary of State must honestly reflect on the evidence available to her to see whether it leads her to the conclusion that the majority would be likely to vote in favour of a united Ireland. Evidence of election results and opinion polls may form part of the evidential context in which to exercise the judgment whether it appears to the Secretary of State that there is likely to be a majority for a united Ireland.[51]

16. Although Scotland's right to self-determination is undisputed, no equivalent statutory mechanism exists requiring the calling of a referendum on Scottish independence. Under section 29 of Scotland Act 1998, the Scottish Parliament enjoys residual legislative competence over matters not explicitly reserved to Westminster. Among the reserved matters is 'the Union of the Kingdoms of Scotland and England' which forms part of the UK constitution.[52] As a result, '[a]s a matter of UK law, the Scottish Parliament cannot pass a declaration of independence'.[53] However, referendums are not, in themselves reserved. This raised the question of whether Holyrood could lawfully legislate for a referendum (a devolved matter) on Scotland's constitutional future (a reserved matter). The UK Supreme Court resolved this issue holding that:

> A Bill which makes provision of a referendum on independence –on ending the sovereignty of the Parliament of the United Kingdom over Scotland—has more than a loose or consequential connection with the sovereignty of that Parliament.[54]

So, an Act of the Scottish Parliament providing for the organisation of an independence referendum would relate directly to the reserved matter of the Constitution and thus it would be deemed *ultra vires*.

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[50] High Court of Justice in Northern Ireland, *In re Raymond McCord* [2018] NIQB 106, para. 18.

[51] *Id*., para. 20. A similar statutory duty for calling a referendum on Irish unification does not exist in the other side of the Irish border. If one looks at the Irish Constitution, and especially at the text of the revised Articles 2 and 3, they would realise that there is nothing that explicitly states that the Taoiseach or any other institution and/or office holder is obliged by the Constitution, and the duties of their office, to pursue a United Ireland. The procedure for holding a referendum in the Republic of Ireland can be found in Article 46 of the constitution, and the Referendum Acts. In sum, the proposal must be supported by both houses of the *Oireachtas*, submitted to and approved by the electorate and signed into law by the President. So, in purely legal terms, the decision to propose a referendum on unity lies with the parliament, while the approval or rejection of the Irish unification proposal rests with the electorate.

[52] *See* Scotland Act 1998, Sch. 5.

[53] E Smith and A Young, 'That's how it worked in 2014, and how it would have to work again', *UK Constitutional Law Association*, 15 March 2017.

[54] UK Supreme Court, *Reference by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998*, [2022] UKSC 81 (hereafter *Independence Referendum Bill Reference*).

18. Notwithstanding the limits set by the Supreme Court, an independence plebiscite could still be lawfully organised if the process that led to the 2014 one is repeated. At that time, the 'two governments of Scotland' chose to resolve the constitutional question through political agreement. Under the *Edinburgh Agreement*,[55] David Cameron and Alex Salmond agreed to amend the Scotland Act 1998. Pursuant to section 30 of the Act, an Order[56] was issued inserting a new section 29A, explicitly conferring on the Scottish Parliament the power to hold an independence referendum no later than 31 December 2014. In effect, Westminster temporarily devolved this competence enabling Holyrood to lawfully organise an independence referendum held on 18 September 2014.

19. In the present political context, however, such an arrangement appears unlikely. This raises the pressing question of whether it is possible to establish an alternative trigger mechanism for the organisation of a Scottish independence referendum.

D. A Way Forward: Establishing a Scottish trigger mechanism

20. The search for a Scottish trigger mechanism is not new. On 28 March 2017, the Scottish Parliament passed a motion stating that there should be another independence referendum. Following this, then First Minister Nicola Sturgeon asked the then Prime Minister Theresa May 'to begin early discussions between our governments to agree an Order under section 30 of the Scotland Act 1998 that would enable a referendum to be legislated for by the Scottish Parliament.'[57]

21. In December 2019, a week after the UK Parliament elections, the Scottish Government published its case for a second independence referendum: *Scotland's Right to Choose: Putting Scotland's Future in Scotland's Hands*.[58] Their case rested on three core claims: first, that the Scottish people possess the sovereign right to determine their own constitutional future; second, that Brexit constitutes a material change of circumstances justifying a second independence referendum; and third, that the Scottish National Party's electoral victories in the 2016 Holyrood election and in the 2017 and 2019 Westminster elections provide a democratic mandate for the Scottish Government to pursue such a referendum. In Annex B of this document, the Scottish Government went further by proposing amendments to the devolution settlement. These proposals included the explicit legal recognition of the Scottish people's right of self-determination within the Scotland Act and the permanent conferral on the Scottish Parliament of competence to legislate for an independence referendum. They also suggested that, in the event of a pro-independence vote, the UK and Scottish Governments should be placed under a statutory duty to co-operate in managing the transition to independence.

22. In *Your Right to Decide* (September 2025),[59] the Scottish Government reaffirms its preferred threshold for triggering an independence referendum. According to it,

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[55] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/313612/scottish_referendum_agreement.pdf.

[56] *See* The Scotland Act 1998 (Modification of Schedule 5) Order 2013.

[57] https://www.snp.org/nicola_sturgeon_s_section_30_letter_to_theresa_may.

[58] https://www.gov.scot/publications/scotlands-right-choose-putting-scotlands-future-scotlands-hands/.

[59] https://www.gov.scot/publications/right-decide/.

> [t]he 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.[60]

23. Although, this broadly reflects the circumstances following the 2011 Scottish Parliament elections –which led to the *Edinburgh Agreement* and the 2014 referendum— there is no indication that a similar electoral outcome in future would produce the same result. Indeed, the responses of successive UK Governments since 2016 demonstrate that even a decisive electoral mandate for a party with a clear manifesto commitment to the holding of a referendum, is unlikely, on its own, to trigger another independence referendum.

    This leads to the question of whether any alternative democratic mechanism exists through which the people of Scotland may trigger a referendum.

24. It is well established that the Scottish Parliament can neither unilaterally declare independence, nor can it lawfully legislate for a referendum on Scotland's constitutional future. Moreover, the cumulative effect of the Supreme Court judgments in cases such as the *Brexit Continuity Bill Reference,*[61] the *Incorporation Bills Reference*[62] and the *Independence Referendum Bill Reference*[63] is that the devolved institutions are precluded from taking measures whose purpose is to pressure the UK Parliament into agreeing to the dissolution of the Union.[64]

25. Nonetheless, 'the Scottish Government can negotiate with the United Kingdom Government in relation to reserved matters, for example where a section 30 order is sought.'[65] If so, the Scottish Government remains entitled to engage politically with the UK Government to seek agreement on a section 30 Order that would allow the organisation of another independence referendum. To demonstrate their mandate for such negotiations, Holyrood could arguably legislate for **a referendum (within devolved competence) asking whether the people of Scotland support the Scottish Government entering negotiations with the UK Government for the issuing of a section 30 Order** –rather than asking a question about the constitutional future of the Union itself (reserved matter).

26. Of course, there is nothing that prevents the UK Parliament to legislate to clarify that holding such a referendum is outwith Holyrood's competence. However, under the current legal framework, a referendum framed in this way may be considered as lawful. Its purpose would not be to 'hold a lawful referendum on the question

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[60] *Id.,* 16.

[61] *The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill - A Reference by the Attorney General and the Advocate General for Scotland (Scotland)* [2018] UKSC 64.

[62] *Reference by the Attorney General and the Advocate General for Scotland - United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill* [2021] UKSC 42.

[63] *See* above n 54.

[64] A Eustace, '"A Hidden Scotland"? The Effect of the Independence Referendum Bill Reference on Northern Ireland' [2024] *Public Law* 487.

[65] *Independence Referendum Bill Reference,* para. 68.

whether Scotland should become an independent country'[66] nor to address 'the question whether the Union between Scotland and England should be terminated, encompassing 'the question whether Scotland should cease to be subject to the sovereignty of the Parliament of the United Kingdom.'[67] Instead, it would merely ascertain whether the Scottish electorate wishes to mandate the Scottish Government to enter negotiations with the UK Government regarding the exercise of a power that the latter already possesses (section 30). In that sense, the purported (political) pressure from such referendum would fall on the two Governments to engage in good-faith negotiations about section 30 and not on the UK Parliament to legislate on the Union (reserved matter). Accordingly, it would not have 'more than a loose or consequential connection with the sovereignty of [the UK's] Parliament.'[68]

27. One might question, perhaps, the political prudence of holding a referendum to authorise negotiations that might in turn lead to another referendum. Nevertheless, this approach is not without a precedent. In 1992, for example, President FW de Klerk held a referendum asking white South Africans whether they authorised his government to continue on the path of ending apartheid. The question sought support for 'the continuation of the reform process […] which is aimed at a new constitution through negotiation.'

28. In sum, a referendum (or another form of political consultation) on whether the Scottish Government should be mandated to seek a section 30 order may offer an alternative lawful mechanism for triggering a further independence referendum.

[66] *Id.,* para 77.
[67] *Id*.
[68] *Id.,* para 82.