

Constitution, Europe, External Affairs and Culture Committee
Thursday 13 November 2025
29th Meeting, 2025 (Session 6)

Legal mechanism for any independence referendum inquiry

1. Having agreed to undertake a short and focused inquiry on the legal mechanism for any independence referendum, the Committee will hear this week from—
 - Professor Adam Tomkins, John Millar Chair of Public Law, University of Glasgow
 - Professor Stephen Tierney, Professor of Constitutional Theory, University of Edinburgh
 - Professor Aileen McHarg, Professor in Public Law and Human Rights, Durham University
 - Dr Daniel Cetrà, Ramón y Cajal Fellow in Political Science, University of Barcelona
2. Correspondence from the Cabinet Secretary can be found at **Annexe A** and written submissions from the witnesses at **Annexes B, C and D**.

Clerks, November 2025



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Clare Adamson MSP

Convener Constitution, Europe, External Affairs and Culture Committee

Scottish Parliament

Edinburgh

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30 October 2025

Dear Convener

Thank you for the opportunity to provide the Scottish Government's position on the legal mechanism for any independence referendum inquiry ahead of my appearance in front of you in December.

The Scottish Government has set out our view that it is for the people of Scotland to decide on their constitutional future in the publication [*Your Right to Decide*](#). I enclose a copy of the publication for information.

Your Right to Decide provides evidence of the consensus across the political spectrum on the voluntary nature of the Union before going into detail on the Scottish Government's view that the decision on whether a referendum should be held ought to be for the Scottish Parliament, empowered to make such decisions by the votes of people who live here.

It further outlines the Scottish Government's position that the Scottish Government 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.

The paper affirms that the precedent of 2011 demonstrates that it is for the people of Scotland to decide when a referendum is to be held, and that when they do it is for the governments of Scotland and the United Kingdom to take the steps required to facilitate that.

I look forward to working with the Committee on this issue and providing more detail when we meet 18 December.

Yours sincerely

ANGUS ROBERTSON

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See www.lobbying.scot



Professor Aileen McHarg

Legal Mechanisms for Triggering an Independence Referendum

Scottish Independence and the United Kingdom Constitution

Under the UK constitution, it is legally possible for Scotland to become independent, but this is not currently explicitly recognised or regulated by law. This contrasts with the position of Northern Ireland, where the Northern Ireland Act 1998 recognises that it may cease to be part of the UK and form part of a united Ireland if a majority of the people wish to do so, and provides for the holding of referendums on this issue.¹

The ability of Scotland to become independent follows from the sovereignty of the United Kingdom Parliament, which encompasses the ability to redraw the boundaries of the state, notwithstanding that the Acts of Union of 1707 declare that the Union between Scotland and England is to last “forever”,² and provide no mechanism for dissolution. As with the formation of the Irish Free State in 1922,³ all that is formally required is an Act of Parliament providing for Scotland to cease to be part of the UK or transferring power to the Scottish Parliament to declare independence.

In *Reference by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998*,⁴ the Supreme Court held that power to hold a referendum on independence also lies with the UK Parliament, as this relates to the reserved matters of the Union and the United Kingdom Parliament under Sch.5, para.1 of the Scotland Act 1998. In order to hold another independence referendum, therefore, legislative competence would have to be transferred, either temporarily or permanently, to the Scottish Parliament using a s.30 Order or primary legislation, or the UK Parliament could legislate directly to authorise such a referendum itself. There is no mechanism whereby the Scottish Parliament can alter this position unilaterally, as the limits on its legislative competence are protected enactments, which it may not modify.⁵ The reservation of the Union may also preclude the devolved institutions from taking other measures aimed at putting pressure on the UK Parliament to agree to the dissolution of the Union, but how far it extends is not clear.⁶

The lack of legal regulation of Scottish independence means that there is no prescribed set of trigger conditions for a second independence referendum, such as a threshold level of popular support, and no minimum time period which must have elapsed. A referendum is also not a legal requirement for independence; some other

¹ Northern Ireland Act 1998, s.1 and sch.1.

² Union with England Act 1707, Art. 1.

³ Irish Free State (Agreement) Act 1922; Irish Free State (Constitution) Act 1922.

⁴ [2022] UKSC 31.

⁵ Scotland Act 1998, s.29(2)(c) and sch.4, para.4.

⁶ See A. Eustace, “‘A Hidden Scotland’? The Effect of the Independence Referendum Bill Reference on Northern Ireland” [2024] *Public Law* 487.

mechanism, such as a “plebiscitary election”, could in theory be used instead as an indication of public support. In practice, though, a referendum is highly desirable, in order to deliver a clear expression of the popular will as well as to ensure legitimacy from both the domestic and international perspective. Any referendum also requires a clear legal basis in order to be effective and legitimate. A purely informal referendum would be vulnerable to boycott and would lack guarantees of fairness in the conduct of the campaign and the voting process.

Do the People of Scotland Have a “Right to Decide”?

Notwithstanding the legal position just set out, there has been consistent political recognition that the people of Scotland have the right to become independent if the majority wish to do so. The 2014 independence referendum was a clear expression of such a right and this has subsequently been reaffirmed, e.g., by the Smith Commission in 2014⁷ and in a 2018 Opposition Day debate in the UK Parliament endorsing the 1989 Claim of Right.⁸ In refusing requests for legal co-operation in holding a second referendum since 2017, UK ministers have been careful not to dispute that independence for Scotland is possible in principle.

Frustration with the lack of a clear legal route independence has given rise to a number of recent arguments that the people of Scotland do in fact have a legally enforceable “right to decide” or “right to self-determination”. In my view, however, none of these arguments is persuasive.

For example, it has recently been suggested that the 2012 Edinburgh Agreement would create a legally enforceable precedent for a transfer of power to hold a second independence referendum in the event that the SNP (or presumably any other pro-independence party) wins another overall majority in a Scottish Parliament election.⁹ This argument seems to rest on the doctrine of legitimate expectations, whereby past government actions may create expectations about future conduct which the courts will recognise and enforce, unless there are overriding justifications for not doing so. However, in order to create an enforceable legitimate expectation of this nature something akin to a clear and unambiguous promise is required.¹⁰ There is nothing in the Edinburgh Agreement to suggest that it was intended to be anything other than a one-off. At the very most, the 2014 precedent would be one of a range of factors to be taken into account in deciding whether or not to respect a mandate for second referendum, and a court is likely to be highly deferential to ministerial judgment on such a politically sensitive matter.

⁷ *Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament* (2014), para.18.

⁸ H.C. Deb. Vol.644, cols.406-456, 4 July 2018.

⁹ See, e.g. *The Times*, 13 October 2025, [Lawyers debunk John Swinney’s plan to force fresh independence referendum](#).

¹⁰ *R v North and East Devon Health Authority ex p Coughlan* [2001] QB 213.

It has also been argued that the people of Scotland enjoy popular sovereignty under Scots constitutional law, guaranteed by the Claim of Right 1689.¹¹ However, this argument rests on a selective and in some respects inaccurate reading of Scottish constitutional history. While ideas of popular sovereignty were certainly present in Scottish constitutional discourse prior to the Union, the 1689 Claim of Right does not create or affirm any *legal* doctrine of popular sovereignty, nor specify any mechanism by which it is to be exercised. Again, it seems highly unlikely that a court would give any weight to such a claimed historical right in preference to clear modern authority about the location of sovereign authority within the UK constitution.

On the other hand, it is generally accepted that the people of Scotland enjoy a right to self-determination as a matter of international law. Nevertheless, the Supreme Court in the *Independence Referendum Bill Reference* followed the 1998 decision of the Supreme Court of Canada in the *Quebec Secession Reference*¹² in holding that this gives rise to a right of external self-determination (i.e. to become independent) in only three sets of circumstances, none of which apply to Scotland: to colonies, to oppressed people, such as those living under foreign occupation, or to people denied meaningful access to government.¹³ Otherwise, people are expected to exercise self-determination within the framework of their existing state:

“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.”¹⁴

This aspect of the decision has been criticised in an opinion commissioned by Alba from Professor Robert McCorquodale,¹⁵ who argues that the right to external self-determination is not entirely precluded in situations where a territory enjoys internal self-determination, and that international law may have moved on since 1998. He suggests that it might be possible to seek an advisory opinion from the International Court of Justice on Scotland’s right to self-determination, and that it could be argued that the different treatment of Scotland and Northern Ireland in respect of provision for secession referendums amounts to a form of systemic mistreatment of the people of Scotland within the UK, justifying external self-determination.¹⁶ This argument seems entirely speculative, though, and it would in any case be extremely difficult to secure

¹¹ See S. Salyers, *The Treaty Bites Back: A “Forgotten” Constitution, Scotland’s Claim of Right* (Salvo, 2022).

¹² [1998] 2 SCR 217.

¹³ [2022] UKSC 31, paras 88-89.

¹⁴ [1998] 2 SCR 217, para.154.

¹⁵ *Opinion on Matters Relating to International Legal Issues Concerning the Right to Self-Determination for the People of Scotland*, 9 June 2023,

[OPINION ON MATTERS RELATING TO INTERNATIONAL LEGAL ISSUES CONCERNING THE RIGHT TO SELF-DETERMINATION FOR THE PEOPLE OF SCOTLAND.pdf](#).

¹⁶ *Ibid.*, para 130.

an advisory opinion, since this would require the agreement of the UK Government or a majority of the UN General Assembly.

Finally, an organisation called Liberation Scotland is trying to persuade the UN “Committee of 24” (the Special Committee on Decolonisation) to accept that Scotland is a “non-self-governing territory” (i.e., a colony) within the meaning of UN Resolution 1541 of 1960.¹⁷ If successful, this would also create a legal right to become independent, binding on all states including the UK. Once again, though, this argument appears entirely speculative, since the UN has never applied the category of non-self-governing territory to anything other than overseas possessions and because Scotland has conventionally been understood to be an integral part of the UK state, rather than a colony. The argument that it is in fact a colony thus rests on another selective interpretation of our constitutional history.

Should There Be a Legally Agreed Route to Independence for Scotland?

Very few (contemporary or historical) constitutions explicitly allow for secession. A 2018 study of the constitutions of 192 UN member states found that only seven expressly allowed for secession or a right to self-determination, while 152 directly or indirectly prohibited it, 28 were silent on the matter, and a further five were unclear.¹⁸ Of those constitutions which do permit it, high procedural hurdles are typically set for the exercise of the right,¹⁹ or they may affirm the principle of self-determination but without setting out a clear legal pathway.²⁰

It is often argued that constitutional recognition of a right to secede is destabilising. On the other hand, where, as in the case of Scotland, the principle has already been conceded, the lack of a clear pathway to independence may itself be source of constitutional grievance. Certainly, experience in states, including the UK, where there is a constitutionally regulated secession process suggests that it is not *necessarily* destabilising. Conversely, constitutional recognition of a right to secede does not guarantee that its exercise will be uncontested, or even democratic and peaceful.

Constitutionally regulated secession processes may take a number of different forms. For example:

- *Northern Ireland*: The Northern Ireland Act provides that a unification referendum may be held at any time at the discretion of the Secretary of State for Northern Ireland, and *must* be held “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.” In either case, though, polls may be held no more

¹⁷ [legalbase](#).

¹⁸ R. Weill, “Anti-Secession Constitutionalism”, in R. Griffiths *et al* (eds), *The Routledge Handbook of Self-Determination and Secession* (London: Taylor and Francis, 2023), p.528, citing R. Weill, “Secession and the Prevalence of Both Militant Democracy and Eternity Clauses Worldwide” (2018) 40 *Cardozo Law Review* 905.

¹⁹ Weill, 2018, p.973.

²⁰ See, e.g., Art.235 of the South African Constitution.

frequently than every seven years. Moreover, it is not clear on what basis the Secretary of State is to form a judgment as to whether a referendum is either mandatory or desirable, and the Act is silent on a range of other key issues, including the franchise, the question to be asked, the voting threshold²¹ and the conduct of the referendum.²² In *Re McCord*, the Northern Ireland Court of Appeal rejected a legal challenge requiring the UK Government to draw up and publish a referendum policy, saying only that the Secretary of State's powers "must be exercised honestly in the public interest with rigorous impartiality in the context that it is for the people of Ireland alone to exercise their right of self-determination"²³ The Northern Ireland Assembly and Northern Ireland Executive have no formal role to play in triggering a border poll, and may be limited in what they can do to promote one.²⁴ In the event of a vote in favour of unification, the Secretary of State comes under an obligation to "lay before Parliament such proposals to give effect to [it] as may be agreed between Her Majesty's Government in the United Kingdom and the Government of Ireland."²⁵ However, under the terms of the Belfast/Good Friday Agreement, a parallel referendum is required in the Republic of Ireland, and confirmatory legislation would be required there too. As a matter of law, the UK Parliament is also not bound to agree to unification legislation.

- *Canada*: The Canadian constitution is silent on the question of secession, but in the *Quebec Secession Reference*, the Supreme Court of Canada held that if the people of Quebec voted by a clear majority on a clear question in favour of independence, this would give rise to a constitutional duty on the other Canadian provinces to open secession negotiations, which would have to be confirmed by a constitutional amendment. The decision to hold a referendum is one for the province which wishes to secede, but in 2000, a so-called "Clarity Act" was enacted, providing, amongst other things, that the clarity of the question and of the result are both questions for the Canadian Parliament to determine, with the possibility that a supermajority might be required.²⁶ The Quebec Parliament passed its own legislation in response, repudiating the right of any other body to set conditions on a secession referendum, and specifically providing for a simple majority vote.²⁷

²¹ Though it seems likely to be just a simple majority.

²² See, e.g., Constitution Unit, *Working Group on Unification Referendums on the Island of Ireland: Final Report* (London, 2021).

²³ *Re McCord (Border Poll)* [2020] NICA 23, para.62.

²⁴ See Eustace, n.6.

²⁵ Northern Ireland Act 1998, s.1(2).

²⁶ An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference 2000.

²⁷ Act respecting the exercise of the fundamental rights and prerogatives of the Québec people and the Québec State 2000 ("Bill 99").

- *Ethiopia*: The 1994 Ethiopian constitution provides in Art.39.1 that “Every Nation, Nationality and People in Ethiopia has an unconditional right to self-determination, including the right to secession.” It then sets out in Art 39.4 a five-step process for the exercise of that right, beginning with a two-thirds majority vote in favour of secession by the Legislative Council of the nation, nationality or people concerned, giving rise to an obligation on the Federal Government to organise a referendum within three years. If there is a majority vote in favour of secession in that referendum, secession will take place when the Federal Government has transferred its powers to the Council of the seceding territory and when a division of assets has been effected “in a manner prescribed by law”. There is, however, no deadline set for these final two steps.
- *The European Union*: The process under Art.50 TEU whereby a member state may withdraw from the European Union is sometimes treated as a form of secession, albeit that the EU is not itself a state. This process is entirely unilateral and unconditional. Any member state may decide to withdraw “in accordance with its own constitutional requirements”, and notification of an intention to withdraw gives rise to an obligation on the EU to negotiate terms for withdrawal, subject to the approval of the Council of Ministers, by qualified majority, and of the European Parliament. At the end of two years, the withdrawing state ceases to be a member of the EU, unless the negotiating period is extended or the notification of withdrawal is reversed,²⁸ whether or not a withdrawal agreement has been reached.

There is thus no single international model to be followed in the case of Scotland, and a range of choices would have to be made about the respective roles of the UK and Scottish Parliaments and Governments, about the process to be followed to ascertain the will of the Scottish people and any conditions or limitations on that process, about what should happen after a majority will has been expressed in favour of independence, and about what timetable, if any, should apply. However, the 2014 referendum would act as a *political* precedent for how any future referendum process should operate, with justification required in order to depart from it.

Aileen McHarg
11 November 2025

²⁸ *Wightman v Secretary of State for Exiting the European Union*, Case C-621/18, [2019] 1 CMLR 29.

Stephen Tierney KC (Hon) FRSE*

Professor of Constitutional Theory, Law School, University of Edinburgh

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 2022¹, 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 1998², 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] where a definable group is denied meaningful access to government to pursue their political,

* 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)

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 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

³ Lord Advocate’s Reference, para 90

⁴ Lord Advocate’s Reference, para 89

⁵ Lord Advocate’s Reference, para 88

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 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

⁶ Judgment 259/2015 of December 2, 2015:

⁷ Rulings on the 2017 Referendum Laws (e.g., Judgment 114/2017 of October 17, 2017):

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

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.”

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*. 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.

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

Professor Adam Tomkins

Legal mechanism for any independence referendum inquiry

Is there a constitutional route to Scottish Independence

Yes

All sides are agreed that the decision-maker is the people of Scotland. There is no dispute about this. It was reflected in the Edinburgh Agreement (October 2012) and is consistent with statute. The Northern Ireland Act 1998, s. 1 provides that Northern Ireland shall not cease to remain part of the United Kingdom “without the consent of a majority of the people of Northern Ireland voting in a poll”. The Scotland Act 1998, s. 63A provides that “the Scottish Parliament and the Scottish Government are not to be abolished except on the basis of a decision of the people of Scotland voting in a referendum”. The NI Act recognises that it is for the people of Northern Ireland to determine their constitutional future: whether NI remains part of the UK or becomes part of a united Ireland is ultimately, in UK constitutional law, a question for them, not for Parliament, for Government, or for the UK as a whole. Likewise, the Scotland Act recognises that we have devolution in Scotland because the people of Scotland voted for it in a referendum and that devolution will remain in Scotland unless and until that outcome is reversed in another such referendum. Scotland’s constitutional future (“independence” or “remaining in the UK”) is a question for the people of Scotland to decide. This seems equally clear whether we look to political sources of the constitution (such as the Edinburgh Agreement) or legal sources (such as the legislation I have cited).

The key test, then, is what is the settled will of the Scottish people? For the time being, it is the settled will of the Scottish people to remain part of the UK. Were that to change, and were it to become the settled will of the Scottish people for Scotland to leave the UK and become an independent state, this is what would happen.

So far, so uncontroversial. The next question is: how is the settled will of the Scottish people to be determined: how do we know what it is? There is no one answer to this. There is no single test to resolve it. It is, rather, a matter of judgement—a matter of statecraft. We cannot do much better than to say “we will know when we know”. And who is “we”? All of us: politicians, leaders, opinion formers, commentators, civic society. Politicians will know from the doorstep, from campaigning, from opinion polling and from focus groups. And so will the rest of us. Knowing what is the settled will is a matter of broad consensus, not of partisanship. Everybody knew that, by 1997, the settled will of the Scottish people was to embrace devolution, even if 18 years previously in 1979 this had not been so clear-cut. Likewise, everybody knew in 2012 that it was the settled will of the Scottish people that the time had come to put

the independence question. The settled will of the Scottish people has long been respected, by “winners” and “losers” alike. Thus, even those opposed to devolution in 1997 honoured the fact that they were in the minority; likewise, those who in 2012 would have preferred no independence referendum to be held, accepted that it none the less needed to be held.

So where are we now? It would be interesting to see if anyone would disagree with this proposition: the settled will of the Scottish people in 2025 is that the prospect of independence should remain open to Scotland but that the pursuit of independence is not for the time being a pressing priority. Only a minority want the prospect of independence to be removed entirely from the Scottish political conversation; likewise only a minority desire a second independence referendum in the immediate future. It is only natural that what I shall call “unionist” politicians will try to enlarge the former group whilst what I shall call “nationalist” politicians will try to enlarge the latter.

Where sits the referendum in this analysis?

Referendums come in different forms, some of which are markedly more successful than others. There are three types.

- The first is where a scheme is legislated for (in detail) and the question is whether the people want that scheme to come into force or not. Examples are the 1979 devolution referendum and the 2011 AV referendum (on the electoral system used for elections to the House of Commons).
- At the other end of the spectrum are referendums on questions of principle. Examples are the 2014 independence referendum and the 2016 EU referendum.
- The third type of referendum sits in between, where the question is not as open-ended as were the 2014 and 2016 questions, but not quite so specific as “do you want this particular legislation to come into force”. An example is the 1997 devolution referendum. A white paper had set out what the Government thought devolution would look like, the Government’s proposals mirroring closely those previously worked out by civic society (and by think tanks such as the Constitution Unit). The 1997 referendum was not on the idea of devolution, yet neither was it on a pre-legislated scheme for devolution: it was somewhere in between.

I would argue that the 1997 and 2011 referendums were far more successful than the 2014 and 2016 referendums were. Each of the former settled the issue: after 1997 devolution was delivered and after 2011 the AV alternative to first-past-the-post was shelved. Neither of the latter were anything like as successful at settling matters: after the EU referendum, in particular, our politics was dominated for years by questions left unresolved on 23 June 2016. It took two changes of prime minister and two early general elections before any sort of resolution was reached. Likewise, no one considers that the 2014 independence referendum settled the matter (even if there are some who may wish that it had).

I would contend that we should learn from these experiences, and not repeat their mistakes. Viewed in this light, any future independence referendum should be held to confirm what we already know (or strongly suspect) to be the settled will of the Scottish people: it should not be held to find out what the will of the Scottish people is on any particular day. Proceeding thus would be to repeat the successful process of the 1997 referendum, rather than the unhappier experiences of 2014 and 2016.

We know from the Supreme Court judgment in the Lord Advocate's Reference [2022] UKSC 31 that the Scottish Parliament cannot legislate for an independence referendum without Westminster's consent. Whilst Westminster should not be expected, still less required, to give its consent unless it is the settled will of the Scottish people to pursue independence, Westminster would be acting contrary to constitutional precedent and, I would contend, contrary to constitutional principle were it to withhold such consent in circumstances where it had become clear that the settled will of the Scottish people was to pursue independence.

To conclude this part of my analysis, the constitutional route to independence is precisely the party political and broader civic society debate ongoing in Scotland which seeks, on the unionist side, to maintain the position that the settled will of the Scottish people is to remain in the United Kingdom and, on the nationalist side, to reverse this. This is a constitutional path which is rooted in democracy; is committed to the notion that Scotland's constitutional future is for the people of Scotland to determine; is consistent with both political and legal sources of constitutional authority; and is consistent both with constitutional precedent and constitutional principle.

Secession in the UK in comparative perspective

This is as clear as we can be as to what the constitutional route is, even if some might be frustrated at what they consider to be unsatisfactory vagueness. It is instructive to compare this answer to those which would be given in other countries' constitutional orders. When we compare the UK's constitutional position on secession with the position which obtains in the United States, in Canada, and in Spain, we will find the following: where constitutions are clear about secession (or "constitutional routes to independence", if you prefer that phrase), they tend not to permit it. Where countries are more permissive about secession, as the UK is, there tends to be less clarity and more vagueness. A comparative analysis would therefore invite us to "choose our poison" (as it were): do we want a clear rule that outlaws secession or a rather less clear approach which permits it. Perhaps the price of (relative) permissiveness about secession is (relative) vagueness about how it may be achieved.

In the United States and Spain the constitutional rules would appear to be relatively clear. In the leading case of *Texas v White* 74 US 700 (1868) the US Supreme Court ruled that the USA is an "indissoluble" and "indestructible" union in which the states have only those rights which are reserved to them under the Tenth Amendment. Once a state enters the union, this is "final", said the Court:

there is “no place for reconsideration, or revocation, except through revolution, or through the consent of the states”. Thus, there is no right of unilateral secession: secession could come about only by consent or extra-constitutionally (that is, by revolution).

The position in Spain appears to be similarly uncompromising. In 2014 that country’s Constitutional Court ruled that Catalonia “cannot unilaterally call a referendum of self-determination to decide on its integration in Spain” (quoting from (2014) 10 EuConst 571, at 580). Sovereignty, for the Court, vests in the Spanish people as a whole (i.e., in the Nation): no region of Spain may claim sovereignty for itself, not even a high-autonomy region such as Catalonia. When an unlawful independence referendum was subsequently held in Catalonia, the politicians who had promoted it were jailed by Spain’s Supreme Court to lengthy terms of imprisonment (the longest sentence was for 13 years’ imprisonment).

Matters in Canada are different. In the Quebec Secession Reference [1998] 2 SCR 217 the Supreme Court of Canada did not rule that a province (such as Quebec) could not hold a secession referendum; still less did they intimate that to do so would be criminal. However, the Court also ruled that, even if a secession referendum were to yield a “yes” vote, this would not mean that secession would necessarily follow for that province. All it would mean, ruled the Court, is that the other provinces and the federal government would be under a duty to come to the negotiating table to discuss whether (not necessarily how) secession could be secured. Even the most emphatic of “yes” votes would mean nothing more, in constitutional terms, than that “negotiators would have to contemplate the possibility of secession” (para 97). The Court was quite clear about this: the notion that there would be “a legal obligation on the other provinces and federal government to accede to the secession of a province” was rejected by the Court as an “absolutist” proposition (at para 90).

The constitutional position in the United Kingdom can be distinguished from all these cases. Unlike in the US, there is no rule of law here which provides that the union (or unions) which make up the United Kingdom are “indissoluble”. As pointed out above, the sovereignty of the Scottish people and the sovereignty of the people of Northern Ireland are recognised in statute, in ways which are manifestly inconsistent with what the US Supreme Court said about the states in *Texas v White*. The contrast between the UK and Spain is all the greater. There is no constitutional rule here which vests sovereignty in only one place. Whilst there is the “sovereignty” of Parliament, in the Diceyan sense that an Act of Parliament may make or unmake any law whatever, there is also the sovereignty of the Scottish and Northern Irish people, as we have seen. Sovereignty is shared in the UK, even if it is not in Spain. Significantly, there is also a contrast to be drawn between the UK and Canada. No one in the UK thought that, had there been a “yes” vote in 2014, it would have triggered nothing but talks about independence. Had there been a “yes” vote, it would have triggered independence. Of course there would have been negotiations (just as there were after the 2016 EU referendum), but those negotiations would have been about how to deliver independence, not about whether independence should be delivered.

This is why I have said that the UK's approach to secession (i.e., to constitutional paths to independence) is permissive. It is markedly more permissive than the US and Spain, and significantly more permissive even than Canada. As matters stand, the constitutional path to independence is easier for Scotland to follow than it would be for any of Texas, Catalonia or Quebec. This is why I have said that the UK's approach to secession (i.e., to constitutional paths to independence) is permissive. It is markedly more permissive than the US and Spain, and significantly more permissive even than Canada. As matters stand, the constitutional path to independence is easier for Scotland to follow than it would be for any of Texas, Catalonia or Quebec.