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Legal mechanism for any independence referendum inquiry

Is there a constitutional route to Scottish Independence

The committee has asked me to address three matters:

- International examples of mechanisms for reaching agreement on the question of sovereignty
- the UK constitution and how mechanisms for reaching agreement on the question of sovereignty fit within that constitutional framework
- contemporary political discourse, self-determination and accountability.

I have recently participated in the following initiatives (I can make the full documents available to the Committee if they can be of assistance, as they may not all be available online), and I will base my evidence on these, as I am aware that other relevant comparative examples have already been discussed before the Committee:

1. I participated as an external expert in the drafting of the Territorial Sovereignty Conflicts Code of Good Practice, organised by the Basque Studies Society and the Institute for Catalan Studies (2020).
2. I was one of the experts appointed by the Catalan Government to the Academic Council for the Clarity Agreement, aimed at providing options for the resolution of the territorial conflict between Catalonia and Spain (2023).

A. The UK constitution and how questions for reaching an agreement on the question of sovereignty fit within that constitutional framework

The UK constitutional framework presents a series of distinctive features that have conditioned both the approaches to, and responses of, both the Scottish and UK institutions in the context of successive requests for Scotland to be able to decide its constitutional future. These features are the multinational union state, the political constitution and parliamentary sovereignty, and the 1998 devolution settlements.

- In the Scottish context, the idea of a multinational Union was at the centre of the UK constitutional framework that predated the devolution settlement in 1998, and provides a broader set of constitutional principles that can inform the interpretation of its provisions, and contribute to the resolution of conflicts arising in relation to its content, extension and limits. While not specifically recognised in the constitutional framework, the understanding that Scotland voluntarily entered into a Union with England and the rest of the UK ('voluntary Union') also entails the idea that Scotland can decide to leave the Union and become independent if a majority of the Scottish People decided to

do so. This idea is reflected in political debates on a possible second independence referendum and in the UK Government's responses to requests for a s. 30 Order (the issue is not 'if' Scotland can hold a second referendum, but rather 'when' and 'in what circumstances' would the UK Government agree to it).

- A second unique aspect of the UK constitution is that it is in many dimensions a political constitution, based on the central principle of the sovereignty of the Westminster Parliament. There is therefore no written constitutional text that has primacy over other norms and is binding on all institutions of government. For the questions considered in this briefing, there are no general constitutional provisions that could be argued prohibit or impede the holding of a sub-state referendum or a sub-state secession process in the UK and, analogously, these are not matters that could be brought before a court to ensure compliance with the overarching constitution. All that is required is a political agreement between the Scottish and UK Governments, ratified by both Westminster and the Scottish Parliament.
- The third distinctive feature of the UK constitution is the devolution settlements in Scotland, Wales and Northern Ireland in 1998 are all inherently asymmetrical: they were designed asymmetrically from the start, and each has been subsequently reformed, with the amendment of key aspects of each settlement and the transfer of further competences to the devolved parliaments, in response to the perceived demands or preferences of the citizens of each territory. This provides the basis for the drafting of a referendum process for Scotland that reflects Scotland's own particular context, history and circumstances.

The UK constitutional framework therefore stands in stark contrast to that of other multinational states where, while there might be some constitutional recognition of their internal national diversity, this does not entail an acceptance of the right of their minority nations to decide to break away from the state, if this is the preference of the majority of their citizens. Quite the contrary, in many of these cases this national diversity is subject to constitutional provisions regarding state-wide national sovereignty and unity, which are presented as unbreachable limits for any independence claim put forward by a national minority or sub-state unit.

Furthermore, the constitutional frameworks of many multinational states tend to be notably rigid, and therefore not only to provide no or very limited avenues for a sub-state independence referendum, but also to include unsurmountable barriers to any reform in this sense at the request of a minority nation, leaving them with no real effective avenues to pursue (for example, the situation of Catalonia within Spain).

It is worth noting here that the Scottish Independence referendum of 2014 is comparatively hailed as a model exercise of democratic negotiation, deliberation and decision-making and is considered a paradigmatic example of a response by a liberal democratic state to a sub-state request for independence. In this sense, when

other multinational states hold evidence sessions such as this one, they study the Scottish 2014 referendum process.

This is significant when considering other international examples that may inform and agreement on the question of sovereignty in Scotland. The Scottish 2014 referendum is not only a precedent for any debates on a second independence referendum or for the drafting of a process that could enable the holding of such a referendum in the future, it is also an internationally recognised model of best practice in this context.

It is precisely because a second independence referendum is fully compatible with the UK constitutional framework, and because of the 2014 precedent, that the current situation of uncertainty regarding the requirements and process that would enable such a referendum to go ahead is problematic from a number of perspectives: from a democratic perspective, where the consistently expressed view of the people of Scotland through their Parliament is not being acknowledged or responded to; from the perspective of the equality and balance between the majority and minority nations within the UK's multinational Union, where the vulnerability of the Scottish nation within the constitutional framework is continuously highlighted but not addressed; and more generally, from the perspective of legal certainty.

While the distinctive features of the UK's constitutional framework are contributing to the deadlock and situation of legal uncertainty in the current political circumstances, they also have the potential to provide the basis for the legal establishment of a pathway for a Scottish independence referendum that is tailored to Scotland's particular circumstances, preferences and context, and that again reflects the most recent research and recognised international experiences and best practice in this field, should a political agreement be reached between the Scottish and UK Governments.

The examples I discuss below highlight a recent shift towards focusing on reaching democratically negotiated and agreed solutions to territorial or sovereignty conflicts, and on establishing clarity in relation to the procedures and requirements that can enable sub-state nations or units to express their views and decide on their future status within the wider constitutional framework.

B. International examples for reaching an agreement on the question of sovereignty

The Catalan Clarity Report Process (2023)

This process was set up in April 2023 by the Catalan President, in a context where both the Catalan and Spanish Governments had moved towards a conflict-resolution approach to the territorial conflict between Catalonia and Spain. Despite ongoing negotiations between both governments, there was a stalemate regarding the question of an independence referendum for Catalonia: while this remained a priority for the Catalan Government, the Spanish Government refused to discuss the issue or change its position on this point.

Inspired by the Canadian model and the principles of the Quebec Secession Reference Supreme Court decision (Reference re Secession of Quebec 1998 2 SCR 2017), but also the Scottish 2014 referendum process, the Catalan President established an independent Academic Council to write a report on a Clarity Agreement for the resolution of the territorial conflict between Catalonia and Spain. The Academic Council included a group of nine scholars in the fields of law and political science (including specialists in the constitutional law, conflict resolution, secession, federalism, multilevel democracy and democratic theory) and the novelty of this approach was that the priority was to construct a diverse group of experts, and in particular, a group with very different views on the potential accommodation of Catalan self-determination and secession within the Spanish constitutional framework.

The report was to be structured around answering 5 questions, that were prepared by the Catalan Government but also discussed and amended by the members of the Council before they were made public.¹ The idea was that, in answering these questions, the Council would set out a series of consensual, negotiated options for the resolution of the territorial conflict that were based on their academic expertise, and that would take the arguments of both sides into consideration. In this way, it would be an independent and balanced report, in contrast to the sometimes conflicting reports that tend to be presented by both sides in territorial conflicts. The plan was that the resulting options would then be put, firstly, to the other parties in the Catalan Parliament, then subject to citizen consultation, and finally the Catalan Government would bring the proposals to the Spanish Government as a starting point for negotiations.

After approximately 6 months of meetings, the Academic Council published a collective final report, with no dissenting opinions.² The report set out a variety of procedural options, with referendums at different stages of the process, which could provide avenues to break the existing deadlock. While these options are designed specifically for the Spanish constitutional framework, the report's considerations on the aims of providing clarity in this context are worth highlighting, as it also stresses the potential of a clarity framework to strengthen, rather than weaken, the Union:

“Accommodating the demand for secession on the basis of a clarity agreement not only facilitates a pact on the eventual separation, but could also promote a more welcoming accommodation and reconciliatory state position that could help to

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Question 1- What characteristics should a clarity agreement with the Spanish state include in order to resolve the political conflict?; Question 2- What mechanisms exist in comparative politics that could provide solutions to the political conflict?; Question 3- Which political actors and institutions should take the initiative in order to implement these solutions?; Question 4- What role should a referendum on the political future of Catalonia, or other similar mechanisms, play in resolving the political conflict?; Question 5- What characteristics should a referendum on the political future of Catalonia, or other similar mechanisms, fulfil in order to obtain the maximum legitimacy and inclusiveness and ensure its validity and implementation?

² Academic Council for the Clarity Agreement, Report on the Clarity Agreement (2023).

maintain the union. Agreeing reasonable rules for separation could be a way of respecting and accommodating territorial pluralism".³

In the Catalan case, unfortunately, due a number of unexpected political developments that occurred around the time of its publication, the report ended up being shelved. Nonetheless, it may become of relevance to the Catalan territorial conflict in the future, and I also believe it is of relevance and potential use in other contexts such as Scotland.

The Scottish/UK context is of course notably different to that of Catalonia / Spain, and the Scottish / UK constitutional framework is also very different to the Catalan / Spanish one. However, there is a similar deadlock in the positions of the Scottish and UK Governments regarding the holding of a second independence referendum, and the circumstances which would justify this. The principles cited in the Canadian Secession reference decision and in the Catalan report as also core principles of the UK constitutional framework, in particular, after devolution. Furthermore, a positive reading of the UK Supreme Court's decision in the Lord Advocate's Reference [2022] UKSC 31 is that, because of the significance of the referendum question, such a process cannot be carried out by the Scottish Parliament alone. In other words, it requires prior negotiation and agreement with Westminster. A process such as the one carried out in Catalonia could contribute to providing a starting point for negotiations towards reaching this such a political agreement.

Territorial Sovereignty Conflicts Code of Good Practice (2020)⁴

This document was the result of a research project on 'A Code of Good Practice in Resolving Territorial Sovereignty Conflicts' funded by *Eusko Ikaskuntza* [Basque Studies Society] and the *Institut d'Estudis Catalans* [Institute of Catalan Studies], which involved the participation of 60 Spanish and international experts on self-determination, secession and conflict resolution. The focus of the project, as the document itself states, was 'to propose the basis for the writing of a code of good practices for the democratic resolution of territorial conflicts of sovereignty in European States', and in particular to 'appeal to the States and the various European institutions to (...) ensure that these types of conflicts are resolved in accordance with democratic values and respect for fundamental rights and the rule of law, taking as a reference the good practices that emerge from past experiences'.⁵

The starting point for this document, which is relevant for the current Scottish context, is that 'Appropriate management of such conflicts should allow the expression of the will of the democratically-expressed majority in the sub-state community, and channel it with full respect for the individual and collective rights of the people concerned. In this sense, it is convenient to have a framework or tool for the democratic management of these situations that avoids undesired consequences or permanent political deadlocks'.⁶

³ Ibid, p 15.

⁴ [Territorial Sovereignty Conflicts.pdf](#)

⁵ Ibid, p 3.

⁶ Ibid.

For this, this, the document places notable emphasis on the centrality of dialogue between both levels of government: 'The code of good practice underlines the need to manage sovereignty conflicts through a peaceful and democratic dialogue that respects human rights, minority rights and the principle of legality. Mutual recognition between the substate community and the State of which it forms a part are basic conditions for a fair and effective dialogue.⁷

Among other aspects, some of which focus on the role of European supranational institutions in this context, it then includes both a set of general values and principles that should guide the approach to the resolution of these conflicts, and a set of more specific 'Conditions for the democratic management of territorial sovereignty disputes'. These are then organised with regard to the different stages in the process: the 'legitimacy of the claim', the 'legitimacy of the decision' and the 'conditions of legitimacy and guarantees in implementing the new status.⁸

For example, the general principles stress that that the 'conditions for clarity regarding the exercise of the right to decide of the sub-state community should be agreed in good faith between the institutions of the State and the representation of the sub-state community, with no insurmountable limitations being placed on the materialisation of the free will of the citizens.'⁹

Additionally, and with reference to the current Scottish context, I would highlight the following paragraphs, under the section on 'Conditions of legitimacy of the claim to sovereignty':

11. [Democratic legitimacy of the claim] The democratic legitimacy of the claim to sovereignty is based on the support of broad sectors of the population, the pronouncement in this sense of their representative institutions, and respect for fundamental rights and the rule of law in the defence of their propositions.

Consequently, obtaining significant percentages of votes in the territorial area that they aspire to represent is an important criterion for this purpose, as is the direct expression of the popular will by means of a popular consultation called for this purpose.

12. [Quantifiable democratic will at the start of the process] It is essential to differentiate between the support required to initiate this review process, not necessarily a majority, and the final decision on the controversy raised. Therefore, assessing the will of the people as sufficient to initiate the statute review process of the sub-state community can be done in different ways:

a) In the case of a demos or an institutionalised sub-state political community with a legislative chamber, the condition to initiate the process would be the existence of a parliamentary and/or governmental majority in this sense. The role of the sub-state parliament, if any, should be especially relevant. (...).

⁷ Ibid, p 11.

⁸ Ibid, pp 23-28.

⁹ Ibid, pp. 23-24.

The above sections of the expert Code of Good Practice would therefore support (i) the need for a negotiated process between the Scottish and UK Governments, in order to (ii) develop a framework or process that clarifies the circumstances that would enable Scotland to hold a second independence referendum in the future, in response to the continuous support expressed by Scottish citizens for pro-independence parties in Scottish Parliament elections.

Further sections of the Code could also assist in the establishment of the content of such a framework, and therefore contribute to providing a starting point for the negotiation of a political agreement in this sense.