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Legal mechanism for any independence referendum inquiry

The path to Scottish independence

1. There are only a handful of countries in the world that include a constitutional right to secession for part of their territory. Many more explicitly prohibit secession or, more commonly, make reference to the territorial 'indivisibility' of the state, while others are silent on the issue. With the exception of Northern Ireland, the constitution of the United Kingdom falls into the latter category. It neither explicitly permits secession nor prohibits it. The centrality of the doctrine of parliamentary sovereignty and the absence of a codified constitution can offer a pragmatic pathway in the face of a clear challenge to the territorial integrity of the United Kingdom. Evidently, the United Kingdom's borders can be, and have been, redrawn.
2. There is no route to Scottish independence, or to a referendum on independence, that does not go through the Westminster Parliament. The Supreme Court's judgment following the Lord Advocate's reference on whether the Scottish Parliament had the legal authority to legislate for an independence referendum made clear that such a law would be beyond devolved competence. This was because it would relate to both the status of the Union between Scotland and England, and whether Scotland should cease to be subject to the sovereignty of the UK Parliament, both of which are reserved matters under the Scotland Act (1998).
3. A unilateral declaration of independence - following a referendum or an election in which pro-independence parties emerged victorious, or where negotiations fail to secure an agreement either on the holding of a referendum or, following a Yes vote, on an independence agreement - would not be a meaningful path to independence. Such a declaration would lack political legitimacy, would not be accompanied by the legal underpinning upon which to build a new state, and would be extremely unlikely to secure recognition from the international community. Such recognition is critical to the ability to be independent, that is, to exercise the authority of an independent state. When the Catalan parliament declared independence in 2017, following an overwhelming majority in a referendum declared illegal by the Spanish authorities, the international community refused to recognise Catalan statehood, regarding the issue as an internal matter for Spain.

4. The 2014 independence referendum was a lawful referendum, legislated by the Scottish Parliament and facilitated by the UK Parliament and Government, via a temporary transfer of power, following the Edinburgh Agreement. The Agreement was focused on the referendum itself; it said little about what would happen in the event of a Yes vote, other than committing the two governments 'to work together constructively in the light of the outcome, whatever it is, in the best interests of the people of Scotland and of the rest of the United Kingdom'¹. In the months preceding the vote, the two governments issued a joint statement, stating: "If more people vote 'Yes' than vote 'No' in the referendum, Scotland would become an independent country. This would not happen straight away. There would need to be negotiations between people representing Scotland and people representing the UK."
5. The Brexit process might shed some light on the steps that a lawful independence process would entail, albeit that the depth of integration between Scotland and the (rest of the) United Kingdom would suggest that the independence process may be longer and more complex. The first stage may involve negotiations to secure an agreement on Scottish independence, including the division of assets and liabilities, citizenship issues, and the state of shared institutions, laws and international obligations. Such an agreement would result in parallel legislation in the UK and Scottish Parliaments, setting a future date for the independence agreement to take effect and, in the former case, for the Act of Union to be repealed. A transitional phase would pave the way for second stage negotiations on the nature and scope of the future relationship between an independent Scotland and the (remaining) United Kingdom.

A referendum to determine the question of independence

6. Referenda are imperfect. They can reduce complex issues to apparently simple binaries, and force voters with a range of preferences into opposing camps. As a result, they can leave a legacy of polarisation. But in a democratic society, it is difficult to identify a better vehicle for determining preferences on a focused question of major import, or for lending democratic legitimacy to extraordinary change. Since the early 1970s, referenda have become an accepted tool for determining the public's support for constitutional change in the UK.
7. Although UK referendums generally pose a question offering a change option and a status quo option as a binary choice, there are other models that can elicit a broader range of preferences, either with a single question with multiple options, or by posing more than one question. The 1997 Scottish referendum on devolution is an example of the latter, seeking, first, support for the Scottish Parliament, then, for that parliament to have tax-varying powers.

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https://assets.publishing.service.gov.uk/media/5a7eae5740f0b62305b827ce/scottish_referendum_agreement.pdf, para.30

8. As a result of the constitutional doctrine that invests sovereignty in the Parliament of the United Kingdom, all referenda in the UK are advisory and have no direct legal effect. But they can carry significant political weight that, where the prevailing view expresses a desire for change, can lead to legal effect. In its judgment on the Lord Advocate's reference, the UK Supreme Court noted:

"A lawful referendum on the question envisaged by the Bill would undoubtedly be an important political event, even if its outcome had no immediate legal consequences, and even if the United Kingdom Government had not given any political commitment to act upon it. A clear outcome... would possess the authority, in a constitution and political culture founded upon democracy, of a democratic expression of the view of the Scottish electorate. The clear expression of its wish either to remain within the United Kingdom or to pursue secession would strengthen or weaken the democratic legitimacy of the Union, depending on which view prevailed, and support or undermine the democratic credentials of the independence movement. It would consequently have important political consequences relating to the Union and the United Kingdom Parliament."²

The question remains what would trigger such a referendum.

9. In 2011, following the election of a majority of SNP MSPs to the Scottish Parliament, the then Prime Minister, David Cameron, immediately accepted that the SNP had won a mandate to hold an independence referendum and that the UK Government would not stand in the way of this happening. That acceptance paved the way for the negotiations that led to the Edinburgh Agreement, leading in turn to Scottish Parliament referendum legislation and the 2014 referendum. There was no legal obligation for the Prime Minister to reach the decision he made. Nor does his decision place any obligation on a future leader to respond in a similar way, notwithstanding the political precedent. How the Prime Minister of the day responded to a parliamentary majority for the SNP, should that recur, or a majority for pro-independence parties, would be a matter of their own political judgment. If, faced with either of those scenarios, the prime minister of the day came to a different judgment to that of Mr Cameron, this could have political consequences. Whether it would have political consequences may depend upon the extent to which voters' electoral preferences were a result of pro-independence mobilization. When pro-independence parties secured parliamentary majorities in recent Scottish Parliament elections, prime ministerial refusals to facilitate a new referendum on independence had little discernible direct political consequences.
10. Uniquely in the United Kingdom, the 1998 Belfast/Good Friday Agreement implicitly provided the conditions for a referendum, or border poll, on Irish

² https://supremecourt.uk/uploads/uksc_2022_0098_judgment_5ca161fc9b.pdf, para.81

unity. And ‘if the wish expressed by a majority in such a poll is that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland placed’, it placed an obligation on the Secretary of State to lay proposals before Parliament to give effect to that wish. The Agreement defines the appropriate duration between referendums as at least seven years, but there remains much ambiguity with respect to the conditions that would trigger a border poll. The Agreement states simply that the process would be initiated by the Secretary of State ‘if at any time it appears likely to him that a majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland’³. It is not clear what would constitute the empirical basis for assessing that likelihood, nor whether the Northern Ireland Assembly would have any role in this process.

11. It seems unlikely that a similar constitutional provision would be made for Scotland. The Belfast/Good Friday Agreement is an international treaty and the result of a long-running process intended to bring an end to armed conflict. It was also complemented by the commitment from the Irish Government to amend the Irish constitution to give up its territorial claim to Northern Ireland and enshrine the principle of consent in both jurisdictions on the island. Any similar provision made for Scotland would not have a basis in international agreement or in international law. And, since the doctrine of parliamentary sovereignty underlines that no parliament can bind its successors or be bound by its predecessors, any such provision could be amended by a future parliament. The alternative, however, is to leave matters to political chance, for example, in a scenario where a pro-independence party holds the balance of power in the Westminster parliament, or to the whims of a future prime minister when faced with a referendum demand.
12. Opinion polls suggest that Scots remain divided on the issue of independence and Union. Support for independence remains high, in historical terms, and higher than in the 2014 referendum. But it is far from representing what might be considered the ‘settled will’ of the people of Scotland. Moreover, tracking data from the Scottish Election Study suggests that the constitutional issue has declined in importance in recent years; fewer than one in five in the latest survey included Scotland’s constitutional future among the three most important issues facing Scotland at the moment (compared to around half choosing the economy and health, and around one third choosing immigration).⁴
13. The low salience of independence currently presents an opportunity (after the election) for calm reflection and deliberation on the conditions that should generate a new referendum and what form it should take. To secure political legitimacy, any future referendum must be seen as fair by those on competing

³ <https://www.gov.uk/government/publications/the-belfast-agreement>, Schedule 1, para 2

⁴ <https://scottishelections.ac.uk/scoop-monitor/>

sides of the question. A civil society forum and/or a citizens' assembly can offer an opportunity for reflection and consensus-building that could help to nurture empathy and foster consensus among those with diverse views. Such a process could also support future parliamentary processes in Holyrood and Westminster should the issue become more salient again or when political circumstances generate concessions that lead to referendum legislation. In that event - and in light of the importance of the UK Parliament in enabling an independence referendum - inter-parliamentary engagement may also support parliamentary oversight and engagement in the pre-legislative process that, in the wake of the 2011 election, was dominated by behind-closed-doors negotiations between governments until the Edinburgh Agreement was reached.