CEEAC/S6/25/33/1

Constitution, Europe, External Affairs and Culture Committee
Thursday 11 December 2025
33rd Meeting, 2025 (Session 6)

Options for a legal mechanism for any independence referendum inquiry

1. The Committee will continue taking evidence in relation to its Options for a legal mechanism for triggering any independence referendum inquiry.

2. Previous panels took place at the Committee's meetings on 13 November and 27 November 2025.

3. We will be hearing this week from—

    - Professor Aoife O'Donoghue, School of Law, Queens University
    - Dr Lea Raible, School of Law, University of Glasgow
    - Professor Nikos Skoutaris, Professor of European Constitutional Law, University of East Anglia
    - Professor André Lecours, Professor of Political Studies, University of Ottawa
    - Professor Ailsa Henderson, Professor of Political Science, University of Edinburgh

4. Written submissions from the witnesses can be found at **Annexes A, B, C** and **D**.

Clerks, December 2025

Annexe A

Professor Aoife O'Donoghue

Legal mechanism for any independence referendum inquiry

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

1 Sovereignty

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sovereign equality of states refers to:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

United Nations International Covenant on Civil and Political Rights 1966

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

United Nations International Covenant on Economic, Social and Cultural Rights 1966

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

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

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

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

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

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

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

b) The right of territorial integrity

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

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

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Crimea, is not permitted.

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

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

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

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

I) Internal self-determination

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

II) external self-determination

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

3) Right of Succession?

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

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

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

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

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

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

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

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

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

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

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

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

2) Northern Ireland

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2 Subject to paragraph 3, the Secretary of State *shall* exercise the power under paragraph 1 if *at any time it appears likely to him that a majority of those voting would express a wish that Northern Ireland* should cease to be part of the United Kingdom and form part of a united Ireland.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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Dr Lea Raible

Legal mechanism for any independence referendum inquiry

This paper was drafted to provide written evidence for an inquiry of the Constitution, Europe, External Affairs and Culture Committee of the Scottish Parliament on:

'Options for a legal mechanism for triggering any independence referendum based on principles of certainty and democratic consent within the UK constitutional context. Areas of interest to the Committee include:

- 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 divide the areas of interest in a slightly different way, looking at international law requirements, followed by the UK constitutional order, international examples, and consequences for contemporary political discourse.

1) International Law: Self-determination, sovereignty referendums and consent

a) Self-determination does not afford a right to unilateral secession for Scotland

The people of Scotland enjoy a right to self-determination as a matter of international law. This right to self-determination of peoples is recognised in human rights treaties[1] and has two dimensions: internal and external. External self-determination would give a people a right to secede and to gain independence unilaterally, without the consent of the parent state. However, according to both the Supreme Court of Canada in the *Quebec Secession Reference*,[2] and the UK Supreme Court in the *Reference by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998*,[3] it only applies in three cases: colonies, oppressed people, such as those living under military occupation, and a people with no meaningful access to government.[4] In all other cases, a people is expected to exercise self-determination internally, that is, within the existing polity it finds itself in.

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[1] Eg, Article 1 of the International Covenant on Civil and Political Rights; Article 1 of the International Covenant on Economic, Social and Cultural Rights.
[2] [1998] 2 SCR 217, https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/1643/index.do.
[3] [2022] UKSC 31, https://www.supremecourt.uk/cases/uksc-2022-0098.
[4] [2022] UKSC 31 paras 88-89, quoting the Quebec Secession Reference, para 138.

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Scotland is not a colony, its situation does not amount to oppression, and its people do have access to government. In fact, the existence of devolved institutions is itself seen as evidence for the effective exercise of internal self-determination.[5] It follows that the people of Scotland do not have a right to secede unilaterally as a matter of international law, and international law does not provide any rights to exercise self-determination beyond what the people of Scotland already enjoy.

b) A referendum is required to change sovereignty over a territory

In international law and practice, a referendum is seen as an appropriate tool to agree changes to sovereignty over a given territory. Such referendums must respect the freedom of voters to form and express their will and criteria of equal, universal and secret suffrage.[6] The Venice Commission has spelled out what these guarantees mean in practice.[7] The requirements include that civil and political rights must be protected and that the referendum question must be clear. The 2014 independence referendum in Scotland is a good example of how these requirements can be met in practice and is often cited as such.[8] Evidence of recent state practice suggests that a referendum fulfilling these conditions is recognised as a necessary condition for a secession as a change in sovereignty in customary international law.[9]

If the goal is to achieve statehood, holding another referendum on the question of whether Scotland should be independent is required by international law. But international law does not regulate circumstances that trigger such a referendum and the condition of a referendum outlined above does not imply a right for Scotland to unilaterally hold one. The overall effect of the international law rules on self-determination and referendums is to privilege consensual secession without contributing to a solution where consent of the parent state is unlikely.

2) UK constitutional framework: Only UK institutions may initiate mechanisms of agreeing on sovereignty

Following from the UK Supreme Court's ruling in the *Independence Referendum Bill Reference* it is established that as a matter of constitutional law the Scottish Parliament does not have the competence to hold a referendum – whether advisory or otherwise – on the question of Scottish independence. The power to hold such a referendum instead lies with the UK Parliament because it relates to reserved matters in sense of s.29 of the Scotland Act.[10] This means that an independence referendum either needs to be legislated for by the UK Parliament or that these powers need to be transferred to the Scottish Parliament. This transfer could be temporary or permanent,

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[5] [2022] UKSC 31 para 90; Raible, 'Self-Determination at the UK Supreme Court and the Failure of International Law' (2023) 27 *Edinburgh Law Review* 219.

[6] Article 25(b) of the International Covenant on Civil and Political Rights https://www.ohchr.org/sites/default/files/ccpr.pdf.

[7] Venice Commission Guidelines on Holding Referendums https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2020)031-e.

[8] Daniel Moeckli and Nils Reimann, 'Are Sovereignty Referendums but a Tool to Legitimize Territorial Claims of the Powerful?' *EJIL:Talk!* (1 December 2022) https://www.ejiltalk.org/are-sovereignty-referendums-but-a-tool-to-legitimize-territorial-claims-of-the-powerful/.

[9] Ibid. See further Daniel Moeckli and Nils Reimann, 'Impendence Referendums in International Law' in Jure Vidmar, Sarah McGibbon and Lea Raible (eds), *Research Handbook on Secession* (Elgar 2022), 102-111.

[10] [2022] UKSC 31 paras 70-83.

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it could rely on primary legislation or a section 30 order, but in all cases the Scottish Parliament cannot alter this position unilaterally because it may not modify the enactments that set it out.[11] This means that the legal power to trigger a mechanism to agree on sovereignty lies with UK institutions, not Scottish ones.

While consent of the parent state is usually desirable in practice, it does not need to come as an exclusive power over whether to trigger a mechanism for agreeing on sovereignty: it can take different forms. International examples illustrate how triggering mechanisms and securing consent could be regulated.

3) International Examples: Agreement on sovereignty is a process, requires several steps and may take significant time

One way to express or secure consent of the parent state would be to regulate secession in the constitution. This is, however, an exceptional path. Most constitutions prohibit or hinder secession in various forms, rather than not regulating it.[12] In the small minority of constitutions that allow for secession the procedures provided for vary. There are both commonalities and differences that can be identified in the examples that follow. Most constitutional regulations of secession include some form of popular vote or referendum, involve more than one step in the mechanism for agreeing on the question of sovereignty, and recognise that negotiations on how to implement decisions to secede are necessary. They differ on which entity or institution has the power to trigger processes to agree on sovereignty.

a) Seceding entities trigger mechanisms of agreement: Ethiopia, Liechtenstein, Canada

Article 39.1 of the Ethiopian constitution articulates a right to self-determination including a right to secession for every 'Nation, Nationality or People'.[13] Article 39.4 further provides that the Federal Government has a duty to organise a referendum within three years of the legislative institution of the nation, nationality or people concerned votes for independence with a two-thirds majority. The same provision also recognises that a transfer of powers and a division of assets must take place following a referendum vote in favour of independence. Consent of the parent state is thus required, but power to trigger the process lies with the nation, nationality or people.

Liechtenstein's Constitution also grants a right to secede. Article 4.2 reads:

> 'Individual 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.'[14]

Canada is another example of regulation. Remedying constitutional silence, the Supreme Court of Canada in the Quebec Secession Reference held that if a clear

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[11] Scotland Act 1998, s.29(2)(c) and sch.4, para.4.
[12] Rivka Weill, 'Secession and the Prevalence of Both Militant Democracy and Eternity Clauses Worldwide' (2018) 40 *Cardozo Law Review* 905.
[13] Text available at https://www.constituteproject.org/constitution/Ethiopia_1994.
[14] Text available at https://www.constituteproject.org/constitution/Liechtenstein_2011.

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majority of the people of Quebec were to vote for independence this would impose a duty to negotiate a secession on the other provinces.[15] The province should decide on whether to hold a vote. In response, the Canadian Parliament enacted a Clarity Act, which sets out that clarity of result and question in such a vote may be determined by the Canadian Parliament.[16] The Parliament of Quebec, on the other hand, enacted its own legislation stating that no other body could impose conditions for independence referendums.[17] While the initiating power lies with the seceding entity, some of the modalities may be influenced by the parent state, making this example slightly more ambiguous than Ethiopia and Liechtenstein.

b) Power of initiation is ambiguous: Switzerland

The Swiss constitution sets out a procedure to be followed to change the territory of a Canton (province) within the federation. It presents different challenges than the secession of a state, but it is worth considering by analogy. This example illustrates that mechanisms to agree on sovereignty may require several steps and that addressing underlying causes of conflicts may take considerable time. It also shows that the principles of certainty and democratic consent referenced in the scope of the inquiry may recommend different actions: certainty would favour as few votes as possible and swift decision-making, while democratic consent may favour several referendums with precise questions to ratify concrete proposals.[18]

Article 53.2 and 3 of the Swiss constitution read:

> '[2]Any change in the number of Cantons requires the consent of the citizens and the Cantons concerned together with the consent of the People and the Cantons.
>
> [3] Any change in territory between Cantons requires the consent both of the Cantons concerned and of their citizens as well as the approval of the Federal Assembly in the form of a Federal Decree.'

The provisions are the codification of a (then uncodified) process that created the Canton of Jura in an internal secession from the Canton of Bern in 1979. A series of referendums at four levels of government (federal, cantonal, district, municipal) were held over the course of a decade. Referendum questions addressed whether the Canton of Jura should be created as well as its borders. Including referendums on the local level addressed concerns about creating new minorities and ultimately defused the conflict.[19] Following agreement on creation and boundaries of the new canton, the text of the Jura Constitution was drafted by a constitutional convention. Negotiations between Bern and Jura on responsibilities and assets continued after the Canton of Jura came into existence. And the last town to vote in a referendum to join the Canton

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[15] *Quebec Secession Reference*, paras 86-97.
[16] Text available at https://laws-lois.justice.gc.ca/eng/acts/c-31.8/page-1.html.
[17] Act Respecting the Exercise of the Fundamental Rights and Prerogatives of the Québec People and the Québec State: https://canlii.ca/t/56kkt.
[18] See Lea Raible, 'Why Brexit Shouldn't Be the End of Referendums', *Law Blogs Maastricht* (11 June 2019) https://www.maastrichtuniversity.nl/blog/2019/06/why-brexit-shouldn%E2%80%99t-be-end-referendums; Lea Raible and Leah Trueblood, 'The Swiss System of Referendums and the Impossibility of Direct Democracy' UKCLA Blog (4 April 2017) https://ukconstitutionallaw.org/2017/04/04/lea-raible-and-leah-trueblood-the-swiss-system-of-referendums-and-the-impossibility-of-direct-democracy/.
[19] See https://www.swissinfo.ch/eng/democracy/40th-anniversary_the-turbulent-birth-of-the-youngest-swiss-canton/44422054 (factual overview in English).

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of Jura will finalise the change on 1 January 2026.[20] The process and outcomes, which took decades to materialise since independence for the Jura was put on the agenda in earnest, successfully addressed underlying conflicts.

c) UK framework is comparatively flexible, except for power of initiation

Canada and Switzerland are ambiguous on who has the power to initiate secessions, while the examples of Ethiopia and Liechtenstein grant this power to would-be seceding entities. In the UK, as shown above, the legal power to initiate lies with UK institutions, rather than Scottish ones. Other than this aspect the UK constitution implements low hurdles to secede and is more flexible than most constitutions.[21] In my view, that a procedure for Scottish independence is not regulated in law contributes to this fact. On the other hand, international examples of mechanisms as well as international law recommend or require the use of at least one referendum to agree on sovereignty. Regulations on when and how to trigger it, and on how to run such a vote would be beneficial. Such regulations of triggers should not, in my view, allocate the power of initiation exclusively to UK institutions. Leaving the power of triggering any process even in exploratory form in the hands of the parent state alone has been shown to contribute to protracted tensions rather than productive solutions.[22] Because of this it would in my view be preferable to allow Scotland to assess the will of the population at reasonable intervals, possibly jointly with UK institutions, and to require some form of good faith in recognising stable public opinion and negotiating mechanisms of agreement on sovereignty.[23]

4) Contemporary political discourse

This note focuses on legal parameters for triggering mechanisms to agree on sovereignty. But the combination of international law, UK constitutional law, and a comparative look at other mechanisms are instructive on what questions political discourse might address.

First, the right to self-determination applies to Scotland, and means that it should be the people of Scotland who decide on whether to become independent. However, UK institutions need to consent in some form to such a decision, and currently the power to trigger the process also lies with UK institutions. This means, second, that political discourse and persuasion will have two broad audiences: the people of Scotland on the one hand, and UK institutions on the other.

Finally, most international examples require several steps in the form of legislation, consent, or referendums. Democratic principles and the fact that agreement on sovereignty is a process as opposed to an event inform this. Processes involving several steps and the consent of the parent state value democracy and foster legitimacy. The same is true for regular and open debate. In other words, the legal

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[20] See https://www.swissinfo.ch/eng/politics/moutier-to-join-canton-jura-by-2026/46970176 (in English).
[21] See written submission to the inquiry by Adam Tomkins.
[22] For an argument about this effect of how self-determination is regulated by international law: Marc Weller, 'The Self-Determination Trap' (2003) 4 *Ethnopolitics* 3 (only partly applicable to the Scottish context because it addresses many instances involving armed conflict).
[23] Similar: Marc Weller, 'The UK Supreme Court Reference on a Referendum for Scotland and the Right to Constitutional Self-determination: Part II' *EJIL:Talk!* (13 December 2022) https://www.ejiltalk.org/the-uk-supreme-court-reference-on-a-referendum-for-scotland-and-the-right-to-constitutional-self-determination-part-ii/.

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positions outlined as well as democratic principles recommend political debate in Scotland that seeks to persuade people of remaining within the UK, on the one hand, and becoming independent on the other. Modalities of the process of determining an outcome should also be discussed. And ideally, political discourse would include space for expressing different visions for the details of the process, and each potential outcome – particularly in situations where the chance of an immediate renewal of a process to agree on sovereignty seems remote.

Annexe C

Professor Nikos Skoutaris

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).

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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.

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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.*

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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

[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.

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Montenegro,[37] and the transitional constitution of Sudan[38] each provided procedures for consensual secession of part of their territory.

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 […]

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[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.

[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.

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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 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–

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[44] *Reference re Secession of Quebec*, para. 104.

[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[.]

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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 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

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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.

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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*.

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

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[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*).

[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/.

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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,

> [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**

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

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(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 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.

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

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Professor André Lecours

Legal mechanism for any independence referendum inquiry

Québec and Canada have arguably the most experience of any established liberal-democracies with self-determination processes featuring referenda. Twice, in 1980 and 1995, has the Québec government consulted Quebeckers on the political and constitutional future of the province, and the Parti québécois (PQ), currently leading in the polls with a provincial election less than one year away, has promised to hold a third referendum on independence if it forms a majority government. Hence, the case of Québec and Canada represents a significant international example, and precedent, for thinking about mechanisms leading to independence referenda and examining the political discourse around such mechanisms. The striking thing about the two Québec independence referenda, from a comparative perspective, is that the Québec government did not seek to strike an agreement with the federal government on the parameters of the referendum, nor did the federal government actively look for input into such parameters. Of course, Canada is a federation, that is, a state where sovereignty is divided and the distribution of powers constitutionalized. This simple fact helps explain the peculiarity of the Québec and Canadian case, albeit only partially since independence referenda and the possibility of secession would most likely trigger successful constitutional challenges in many, if not most, federations (for example, the United States).

The 1980 Referendum: The Gradualist Approach.

The 1980 Québec referendum occurred in the context of significant socio-political change in the primarily French-speaking province. The so-called Quiet Revolution that started in the 1960s involved a transformation of nationalism in the province that featured a re-territorialization of the nation away from the pan-Canadian notion of French-Canada and towards the idea of a Québécois nation. It also involved efforts at accelerating economic development, and in particular at boosting the social-economic mobility of Francophones, in part through legislation on the use of French in the public sphere and at the workplace. For the PQ, such tasks involved Québec possessing all the powers of a sovereign state. After it formed a provincial government in 1976, the secessionist party sought to make good on its promise to hold a self-determination referendum in its first mandate.

The PQ's central concept was 'sovereignty-association.' Sovereignty was not an incorrect term to reflect the quality of statehood pursued by the PQ and it also had the advantage of being 'softer' and more palatable for greater number of Quebeckers than 'independence'. The 'association' part was largely undefined but responded to the widely shared notion that a majority of Quebeckers wanted to retain some type

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of link with Canada. It was also coherent with the so-called gradualist (étapiste) approach to self-determination. Indeed, the PQ government specified that its 1980 referendum would be, in the event of a ‘yes’ result, the first of a pair. In that first referendum, Quebeckers were asked if they agreed to give the PQ government the mandate to negotiate ‘sovereignty-association’ with Canada. A second referendum would then be held for Quebeckers to make a final determination on ‘sovereignty-association’ after having been presented with the results of these negotiations. The PQ government never consulted the federal government about the referendum process, the question asked, or the majority required for a declaration of independence to be put forward. It considered that Québec's parliament (the National Assembly) had the necessary authority and legitimacy to make all decisions in regard to the referendum. Interestingly, the federal government never challenged that position, perhaps in large part because the ‘yes’ camp was never expected to win and therefore contesting the Québec government's position might have been viewed as antagonistic by many Quebeckers. In the end, the clear victory of the ‘no’ camp (60% to 40%) seemed to end the debate over Québec's political and constitutional future for at least a generation.

The 1995 Referendum: Take Two.

The second Quebec referendum came on the heels of failed constitutional negotiations aiming at meeting the demands of a Québec government formed in the 1980s and the early 1990s by the Québec Liberal Party. The failure of these negotiations was interpreted by secessionist forces as a rejection of Québec by the rest of Canada. In this context, the PQ government formed in 1994 promised to hold another referendum Québec's political and constitutional future. Consistent with the precedent of 1980, no thought was ever given by the PQ government to consult the federal government in any way shape or form on the parameters of the referendum. In contrast to 1980, the so-called gradualist approach was dropped; there would be only one vote, which could pave the way for a declaration of independence. The question, criticized by many for being overly long and complicated, referenced an offer of partnership to the rest of Canada following a hypothetical ‘yes’ victory (although such offer would not have been the subject of another referendum). This time again, the federal government did not object to the Québec National Assembly alone deciding on the question, timing, and majority deemed sufficient for independence being declared, perhaps in part because of the precedent of 1980 and also because it was once again expecting a fairly easy win by the ‘no’ side. This time, however, the ‘no’ side’s victory was by the narrowest of margins (50.6% to 49.4%).

The Aftermath of a Close Result: Empowering the House of Commons.

The federal government obviously did not like the close result of the 1995 referendum. The Canadian political class widely blamed what they argued was a confusing question for the strong support for ‘yes’. Moreover, that political class was criticized for its apparent passivity in relation to the referendum. In order to clarify the constitutional implications of a referendum on independence, the federal government asked the Supreme Court of Canada questions on the legality of a secession

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declared unilaterally by Québec's National Assembly. In its famous 1998 Secession reference, the Supreme Court of Canada states that Québec does not have a 'right' to secession either under domestic or international law but that if Québec's National Assembly were to declare independence following the expression of a clear majority on a clear question, all the partners of the federation would have the responsibility to negotiate secession while respecting the principles of democracy, the rule of law, minority rights, and federalism. The court left it to politicians to decide what constituted both a clear majority and a clear question. Then, in 2000, the federal government passed legislation that use some of the elements of the Supreme Court of Canada reference in order to frame decision-making about the parameters of any other independence referendum in the country. The so-called Clarity Act conferred responsibility to the House of Commons for judging the clarity of both a referendum question and the majority required for independence. All Québec political parties opposed the Clarity Act and, more broadly, the idea that the federal government could have any input into the parameters of an independence referendum. In 2000, the National Assembly adopted Bill 99 as a direct reply to the Clarity Act. This Bill, which states that no other parliament or government can constrain the democratic will of the Québec people, was found valid by the Québec Superior Court in 2018.

Towards a Third Québec Independence Referendum?

In the last several years, polls on the question of independence in Québec show support roughly between 33% and 40%, at least 10 percentage points below the 'yes' side result from the 1995 referendum. In addition, until 2025, the PQ was struggling the show significant support in polls. In this context, much was made about the notion that the PQ was a generational party, supported primarily by Quebeckers who had experienced at least the later years of the Quiet Revolution and the period of mega-constitutional politics but much less by the youth, while independence was no longer top of mine for most Quebeckers, even for those sympathetic to the idea. Today, support for independence is still below 40% and polls suggest that most Quebeckers do not want a third referendum on independence but the PQ, which has promised to hold such referendum if it were to form the next government, is leading in the polls with a provincial election less than one year away. Therefore, a third referendum on independence in Québec may very well happen and it is possible that the mechanism for triggering such a referendum would this time be more debated.

The key issue in this context is the Clarity Act. Would the House of Commons want to evaluate the clarity of the referendum question? Would it want to speak to the majority necessary for reaching independence? Would it feel compelled to do both of those things before the vote? In a situation where a Québec PQ government would, as is likely, choose to ignore the voice of the House of Commons if it were to make a pronouncement on the clarity of the question and of the majority, what would then happen? From a political and constitutional perspective, self-determination in Québec would enter a new terrain. A 2027 independence referendum would also involve a greater consideration of Indigenous self-determination than in the past. The plight of Indigenous peoples, who have been victims of colonial and assimilationist

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policies, has become a significant political issue in the last few decades. In this new context, the discourse of the PQ from 1995, consisting in saying that while Québec could secede from Canada Indigenous nations could not secede from Québec, would not be easily tenable. The new political context also involves greater ideological differences in the secessionist camp in comparison to 1995 as well as the end of free trade as we knew it resulting from the Trump presidency, which means that for the PQ the answer to the question about the eventual commercial partners of an independent Québec could not credibly be the United States. The recent announcement by the PQ that an independent Québec would create its own currency after a-10 year transition highlights that the contemporary secessionist project might look somewhat different from what was proposed in the past.

Key Takeaways

1. The case of Québec and Canada represent an international precedent, albeit in a federation, for triggering an independence referendum without consulting the central government.
2. That case shows two different referendum processes: a gradualist approach consisting of two different votes in 1980 and a single vote in 1995.
3. In both Québec independence referenda, the question featured the concept of ‘sovereignty’ rather than ‘independence', to which was added a qualifier to refer to some continued relationship with the rest of Canada (‘association’ in 1980 and ‘partnership’ in 1995).
4. In the event of another referendum in Québec, the federal government may invoke the Clarity Act to have the House of Commons speak to both the clarity of the question (most likely pushing for a short question that would use only the term ‘independence’) and the clarity of the result (perhaps requiring more than 50% + 1).
5. Since the Québec National Assembly views the Clarity Act as illegitimate, considering instead that the province’s representative institutions alone can set the parameters for a self-determination consultation, a serious conflict around process is not to be excluded if there were to be a third independence referendum in Québec.