



DEMOCRACY INTERNATIONAL

Position Paper

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Challenging separation

Three main points processes towards independence have in common

On 18 September 2014, the Scottish people will have a once-in-a generation opportunity to have their say about their country's future. The Scottish case has put in the spotlight the issue of independence referendums.

In brief, we argue that independence movements are exposed to the same main challenges:

- The relationship between legitimacy and legality,
- Issues with regards to the formation of a new state and
- Compliance with rules for referendums according to the Code of Conduct of the Venice Commission.

The Scottish case is an exemplary model how to deal with the process of separation. In Scotland, all actors of the referendum process (politicians, the media and citizens) approached these challenges as much as possible ahead of the independence referendum.

The three challenges referendums have in common

1. Relationship between Legitimacy and Legality

The legitimate claim of independence is not a legal right at the same time. Legitimacy for independence bases on the right of nations to self-determination, which is enshrined in international law. The constitution of a country sets out legality of independence.

The governments of the United Kingdom and Scotland agreed to hold the referendum and created the legal framework of the Edinburgh Agreement. The United Kingdom drafted an Order to Council under section 30 of the Scotland Act 1998, which allows Scotland to hold the referendum. This Agreement is an expression of legitimacy. In Catalonia instead, the legitimacy for independence could be appropriate but, so far, the Spanish political system does not provide a legal framework.

The dilemma between legitimacy and legality does not only exist within a country, but also on the international level. Questions arise if and how a new state is integrated in international organisations like the UN or the European Union. Especially, the membership of an independent Scotland is not yet solved.

2. Issues with regards to the formation of a new state

Questions here are what will happen after the referendum in case there will be a decision for independence: Is there a planned strategy? How will be designed the process of writing a new constitution?

In particular, the temporary arrangements and social as well as economic issues need to be clarified. How are the boundaries determined? How is the free movement of people defined? How are natural resources separated? Does citizenship change if a state becomes independent? Who can vote? Will there be a new constitution? Is there a time limit for solving these issues following the referendum?

The Scottish case shows that an independent Scottish state does not automatically assume the rights, obligations and powers of the predecessor. Scotland would therefore have to seek new institutional arrangements. In addition, Scotland is going to face issues such as fiscal, economic and monetary policy, arrangements for national security, citizenship and border controls. Moreover, the Scottish government wants to keep the pound as part of a formal currency union. Concerning questions of the legitimate separation of natural resources, Scotland has a huge share of oil gas reserves, which hence will create a contested issue once Scotland was independent.

The case of South Sudan shows that it is important to solve these issues. In South Sudan there are still conflicts over power, oil revenues and scarce resources.

In general, another conflict arises from the right to citizenship in the new-formed state. The Scottish government wants British nationals who reside in Scotland and Britons with dual citizenship to become Scottish citizens. Currently, the agreement with the rest of the UK makes it possible to have British and Scottish nationality. This shows that there are conflicting standpoints in Edinburgh and London on what the next steps of the independence process will be.

3. Compliance with rules for referendums

The report by the Venice Commission, "Code of good practice on referendums", says that "The use of referendums must comply legal system as a whole, and especially the procedural rules. In particular, referendums cannot be held if the Constitution or a statute in conformity with the Constitution does not provide for them, for example where the text submitted to referendum is a matter for Parliament's exclusive jurisdiction."

The Venice Commission has set out important criteria, which deal with the following questions: How is the referendum question formulated? Who has the right to vote? Is there a balanced exchange of information? Which role played the media? Which other actors took part in the debate? The code of the Venice Commission also defines conditions for implementing these criteria.

The Scottish process towards independence has been a role-model on how to implement the recommendations by the Council of Europe's Venice Commission. The Electoral Commission made use of the regulative approach. This ensured equality and fairness during the opinion-building and decision-making process in Scotland.



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