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The United Kingdom – Is the End Nigh?

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Introduction

1. Those in Australia will know that there is to be a referendum on independence for Scotland which has been arranged at the instigation of the present Scottish Government and its First Minister, Alex Salmond. This paper considers first the position of Scotland within the United Kingdom, then explains the circumstances which have led up to the referendum, and finally assesses what is the likelihood of a vote for independence.

2. Whatever may be the constitutional future for Scotland, it is already and has increasingly become a jurisdiction which is regarded as separate from the rest of the United Kingdom. This is a perception derived from its constitutional position as well as emotionally and politically, and it has been the case in particular since the setting up of a separate legislature following devolution in the late 1990s. From the viewpoint of those in Australia, both as a function of distance and because you are familiar with separate states and legislatures in different parts of your country, this apparent separation may seem curious but is nevertheless an increasing reality for those north of the Border.

3. As may be apparent already, I present this paper as an avowed supporter of the United Kingdom and Scotland's place within it. Some may pretend that we are a

dying breed but I hope that they will be shown to be wrong. The first verse of Scotland's supposed unofficial national anthem, *O Flower of Scotland*, which is much beloved by those of a nationalist bent, contains the lines:

> "O flower of Scotland,
> When will we see your like again;
> That fought and died for,
> Your wee bit hill and glen;
> And stood against him,
> Proud Edward's army;
> And sent him homeward
> Tae think again."

As an anthem for a supposedly modern and forward-looking people, what is being referred to is a battle which took place exactly 700 years ago. I hope that it is those who favour the breaking up of the UK who will have to think again.

A separated Scotland

4. Those in Australia will be familiar with the form and function of a federal nation. Australia and the United States are just two examples of where states which were formerly independent agreed to come together in the form of a federation. Each of the states cedes part of its governing functions to the federation and as a result individual citizens are subject both to a federal legislature and to a state legislature.

5. On my side of the world is an example of what was a unitary state moving to achieve a similar result but in the opposite direction. The United Kingdom of Great Britain and Northern Ireland was and remains a unitary state but as a result of devolution, assemblies and a Parliament have been created for parts of that unitary state and which bring about a situation which looks very much like federation.

6. In this part of the paper, I examine how the United Kingdom came to be as it is and look at the features relating to the governing of Scotland. In doing so, I emphasise two caveats. The first is that in matters of history there are many far

more qualified to describe and discuss the steps which have happened over the centuries and which have brought about the present situation. I defer to them in advance and seek to give only the most general summary for the purposes of further consideration. Secondly, at every point in this constitutional journey there is more which could be said. I therefore emphasise that this is very much a superficial view of what I describe, and there are many interesting byways which would merit further description and discussion for those who have an interest in such things.

The history of the Union

7. Until the early part of the 18th century, Scotland may be regarded as having been an independent state in the international sense and in the context of much more rudimentary constitutional times. Although there had been many conflicts both within Europe and between Scotland and England, and times when Scotland was not functionally a truly independent state, including the time of the Battle of Bannockburn which is the battle being referred to in the anthem above, nevertheless Scotland may be said to have been one of the separate nations within the British isles.

8. Upon the death of Elizabeth I of England in 1603, and the succession of James VI of Scotland to the throne of England such that he became the monarch of both countries, nevertheless that did not bring about the combination of the two in a political sense. Scotland remained governed by its own Parliament which sat in Parliament Hall in Edinburgh (now occupied by the supreme courts of Scotland). There was a brief and somewhat illogical period during and following the English Civil War. At that time, battles in the War were fought within the territory of Scotland, and subsequently Scotland was in effect administered as part of the Commonwealth and the independence of the courts in Scotland was subordinated. That ended with the Restoration in 1660.

9. In the opening years of the 18th century, and partly as a result of dire economic

circumstances in Scotland, and not without a great deal of controversy and unrest, Scotland and England agreed to the Union which was enacted separately by the Parliament in each jurisdiction.[1] On 25th March 1707, the Parliament of Scotland sat for the last time in Parliament Hall before being dissolved and transferring its functions to Parliament in Westminster. As the Earl of Seafield put it on that occasion as almost the last words spoken in the old Parliament, "There's the end of an auld sang." The forming of the Union was unpopular in Scotland with many of the leading figures of the day railing against the old Parliament and its members who were said to have been "bought and sold for English gold". One senses a great deal of this history in the emotions which are being exhibited today.

10. Scotland and England became together the United Kingdom of Great Britain, and that included Wales which had been subsumed into England some time earlier (and which is a separate topic upon which I am demonstrably unqualified to express any view). Likewise, and although Ireland had been subject to direction from Westminster for some time, and for reasons connected with its own political circumstances, an Act of Union with Ireland was passed in 1800, once again with separate Acts in the individual Parliaments.[2] Since then, the United Kingdom of Great Britain and Ireland has existed and effectively continues to exist, subject to the secession of what became the Republic of Ireland in 1922, since when it has been known as the United Kingdom of Great Britain and Northern Ireland.[3]

11. Throughout this period, the United Kingdom was administered as a unitary state by the sovereign Parliament at Westminster. Only Westminster had the power to pass primary legislation for the whole if the UK (subject to some particular arrangements for Ireland and Northern Ireland which are not material).

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[1] The Union with Scotland Act 1706 which was an Act of the Parliament of England, and the Union with England Act 1707 (customarily referred to in Scotland as the "Act of Union") which was an Act of the Parliament of Scotland, and these are in effect the same legislation passed by the two Parliaments.
[2] The Union with Ireland Act 1800 which was an Act of the Parliament of Great Britain, and the Act of Union (Ireland) 1800 which was an Act of the Parliament of Ireland.
[3] Royal and Parliamentary Titles Act 1927, section 1.

12. There had been attempts to describe the parts of Great Britain in a way which removed the ethnic distinction between England and Scotland. The expressions "South Britain" and "North Britain" were used in the 17th century by James VI and I and Charles I, and before the political Union in 1707, to refer to England and Scotland. The expression "North British" continued to be used into the 19th century particularly in relation to commercial organisations.

13. But the attempts of earlier centuries to neutralise the differences within the former Kingdoms of Great Britain gave way to political trends in the opposite direction. Although there had been a Secretary for Scotland which was an office occupied at times after the Union,[4] Scotland in general was administered by the Home Secretary or the Lord Advocate. The existence of a fully unitary model for the whole of the UK was lessened by the creation of a Secretary for Scotland in 1885, an office which was upgraded to Secretary of State in 1926. From that point, Scotland had its own representation as an essentially distinct element within the UK Cabinet.

14. The Act of Union preserved and continues to preserve within the UK the individual identity of two pre-Union institutions. The first is the independent legal system and judiciary of Scotland. The Act of Union insofar as relevant contains the following articles which remain in force:

> "XVIII. ... That the Laws which concern publick Right Policy and Civil Government may be made the same throughout the whole United Kingdom but that no alteration be made in Laws which concern private Right except for evident utility of the subjects within Scotland.
>
> "XIX. That the Court of Session or Colledge of Justice do after the Union and notwithstanding thereof remain in all time coming within Scotland as it is now constituted by the Laws of that Kingdom and with the same Authority and Priviledges as before the Union... And that all Inferior Courts within the said Limits do remain subordinate as they are now to the Supream Courts of Justice within the same in all time coming And that no Causes in Scotland be cognoscible by the Courts of Chancery, Queens-Bench, Common-Pleas or any other Court in Westminster-hall And that the said Courts or any other of the like nature after the Unions shall have no power to Cognosce Review or Alter the

[4] The office was abolished in 1746 as a consequence of the second Jacobite Rebellion.

Acts or Sentences of the Judicatures within Scotland or stop the Execution of the same."

Putting it shortly: the private law of Scotland should remain for the utility of those in Scotland; no person who is subject to the laws of Scotland can have his cause determined by the courts in England; and the acts or decrees of the courts in Scotland are not susceptible to review by the courts in England. These principles are essentially what have kept the law and courts of Scotland distinct and separate ever since. Innovations such as the evolution of the appellate functions of the House of Lords and their replacement by the United Kingdom Supreme Court have not undermined the principles because these were and are courts exercising jurisdiction in all parts of the UK rather than English courts.[5]

15. The second institution preserved by the Act of Union is the Church of Scotland which is a Presbyterian church separate and distinct from the episcopal Church of England. The history of the Church of Scotland within the Union is an interesting topic in its own right but it is not directly relevant to this paper other than to observe that it is one of the distinct institutions which remain in Scotland and which contribute to the concept of separateness from the rest of the United Kingdom.

16. Within the unitary state that was the United Kingdom, the existence of the single UK Parliament meant that legislation which was required on matters of Scots law had to be passed at Westminster either within Acts dealing also with the law of England, or within Acts passed specifically for Scotland. This led to much concern that the ability to change the law in Scotland was inhibited because it was not a priority at Westminster.

17. In the latter part of the 20th century, many of the administrative institutions which had grown up also came to have a distinct existence and to be administered separately in Scotland. These included the National Health Service, local

[5] As an example of this, decisions of the House of Lords in English cases were not technically binding on the House of Lords in Scottish cases.

government, education, the police, town and country planning, roads, agriculture and others. The existence of the whole range of separately administered areas of public administration, whether formally guaranteed as a matter of law or simply as a consequence of administrative arrangements, meant that even before devolution Scotland had a distinctly separate identity within the United Kingdom. That is something which has perhaps perpetuated a feeling of separateness from the other parts.

The creation of the Scottish Parliament

18. During the 20th century, in particular the second half, there came to be an increase in nationalism in Scotland.[6] The details are not relevant but from the 1960s sentiments ebbed and flowed. In 1978, Parliament at Westminster under a Labour administration passed the Scotland Act 1978 which would have brought into existence a devolved Scottish Assembly with some legislative powers (and did the same for Wales). The coming into existence in Scotland of a devolved assembly depended upon at least 40% of those entitled to do so voting in a referendum in favour,[7] and although there was a majority in favour in the referendum which was held, that threshold was not passed. After that, it appeared that sentiment towards devolution had declined but by the late 1990s the pendulum had swung again and following its landslide victory in the general election of 1997, the Labour administration at Westminster, and this time following a pre-legislation referendum,[8] passed the Scotland Act 1998 (the "1998 Act"). The result is that the Act of Union now has effect subject to the 1998 Act.[9]

19. At the same time, the Labour government at Westminster promoted legislation to bring about devolution in Wales.[10] That is not a direct topic for this paper but it is interesting to note how different were the arrangements for the devolved assembly

[6] The Scottish National Party was formed in 1934 following the amalgamation of two earlier nationalist parties.
[7] Scotland Act 1978, section 85(2).
[8] The vote was 63.5% in favour of a devolved Scottish Parliament (as well as a lesser vote in favour of it having tax-varying powers).
[9] 1998 Act, section 37.
[10] Government of Wales Act 1998.

in Cardiff to those for Scotland. Devolution in Wales has been subject to more subsequent change than that in Scotland, and the Welsh Assembly now has some legislative powers, but it means that one cannot really compare devolution in Scotland and in Wales in any direct sense.

20. The 1998 Act created a legislative Parliament to be occupied by elected Members of the Scottish Parliament (or "MSPs") and which is led by an administration headed by a "First Minister" and known as the "Scottish Ministers" (otherwise as it was originally defined the "Scottish Executive", and including its civil servants, the "Scottish Administration"). The Parliament is unicameral but follows the Westminster model generally passing primary legislation which receives the Royal Assent as well as secondary legislation in the form of Scottish Statutory Instruments.[11] Following the first Scottish general election, the Scottish Parliament sat for the first time in July 1999.

21. There are 129 Members of the Scottish Parliament who are elected in two categories. The first are 73 constituency MSPs who are elected in the customary way by the "first-past-the-post" method also used at Westminster. The remainder are regional (or "list") MSPs elected by the number of votes cast by electors normally for identified parties, with members then being selected from lists prepared in advance by the parties. It was believed by those in the Labour Party who devised this system that it would mean that no party would ever gain an overall majority. As with many expectations in politics, that belief was dashed within 12 years of the Parliament's existence.

22. The principal effect of the 1998 Act is that the Parliament is given power to pass Acts of the Scottish Parliament which will be law unless a "provision... relates to reserved matters."[12] This is referred to as "devolved competence" and it means that the Parliament and Scottish Ministers may claim the right to legislate in any

[11] The details of all of these aspects are set out in Parts I, II and VI of the 1998 Act.
[12] 1998 Act, section 29(1) and (2)(b).

area of public affairs except where these relate to reserved matters. The categories of reserved matters are set out in a Schedule,[13] and they include the United Kingdom constitution, foreign affairs and defence, as well as specific aspects of the of the law on UK fiscal, economic and monetary affairs, immigration, national security, trade and industry, consumer protection, energy, transport, social security, the regulation of specified professions (not including the legal profession), employment, medicines, broadcasting and others. Otherwise, the Scottish Parliament is free to legislate in any area, including the elements of these specific aspects which are not reserved. The result is that unless reserved, everything else is devolved meaning that all of the already separate areas of administration are under the control of Scottish Ministers and the Scottish Parliament.

23. As both the Scottish Parliament and the Scottish Ministers are required to act within devolved competence, this has led both to disputes and to resolution by conventions in situations where either the status of a particular issue may be said to be in doubt or where issues cover both reserved and devolved areas. This issue of potential conflict between superior and subordinate legislatures will be familiar to those who have grown up in a federal system, but it has been a novelty in the United Kingdom.

24. Another of the issues which has arisen is whether Acts of the Scottish Parliament are susceptible to judicial review by an exercise of the supervisory jurisdiction of the Court of Session. The Scottish Parliament is a statutory body having been created by the 1998 Act and the actings of statutory bodies are customarily subject to judicial review. Acts of the United Kingdom Parliament are regarded as not being susceptible to judicial review as Parliament is considered to be sovereign although that is a substantial subject in its own right raising fundamental principles of constitutional law.

[13] 1998 Act, Schedule 5.

25. This issue was resolved by the United Kingdom Supreme Court in the case of *AXA General Insurance Ltd* v *Her Majesty's Advocate and others* in which the Court, having considered the statutory limits on the Parliament's competence which are provided in the 1998 Act, concluded that "Acts of the Scottish Parliament are not subject to judicial review at common law on the grounds of irrationality, unreasonableness or arbitrariness".[14] This does not rule out judicial review entirely but it does anticipate only the most restricted grounds for doing so.

26. There have been many unintended consequences during the course of the Parliament's existence. As is not unusual with public projects, the construction of the Parliament building at Holyrood in Edinburgh, controversially designed by a now-deceased Catalonian architect who was chosen without the usual competitive processes, cost a sum of the order of ten times the original publicly-quoted estimate. This led both to a public inquiry and to continuing public controversy, some would say disdain, about the design of the building.

27. Another arose from the fact that the 1998 Act brought into law in Scotland the need for public authorities to comply with the European Convention on Human Rights some months earlier than it did in the rest of the United Kingdom pursuant to the Human Rights Act 1998.[15] That led to a significant body of law in the criminal courts in Scotland as a result of the opportunity to take a "devolution issue" to the Judicial Committee of the Privy Council in London when it could be alleged that a public authority, normally the Lord Advocate who is the public prosecutor, had acted in breach of convention rights. That opportunity to take what was a form of criminal appeal beyond Scotland was an innovation because before the 1998 Act there had never been any appeal to London in criminal cases. Previously, the High Court of Justiciary, sitting in Edinburgh as the Court of Criminal Appeal, had been supreme in criminal law. This is a very large topic

[14] 1998 Act, section 29(2)(d).
[15] [2012] 1 AC 868, the judgment of Lord Hope of Craighead at pages 913 to 914, paragraph 52.

with an array of decided cases with which is not relevant to this paper.

28. Yet another of the consequences of devolution is the fact that although the Scottish Parliament now has responsibility for a wide range of public affairs in Scotland, and these matters are no longer within the jurisdiction of Parliament at Westminster, MPs elected for seats in Scotland continue to be entitled to participate in and to vote on matters solely concerned with England, such as health and education, which are administered only for England (or in some cases for England and Wales) by the United Kingdom Parliament. This issue about the continuing participation in such matters of Scottish MPs (and Welsh and Northern Irish MPs are in a similar position) is known as the "West Lothian question".[16] It has never been resolved, although attempts have been made to do so, and it remains an issue of contention not unsurprisingly for English Members of Parliament.

29. The Scottish National Party (or "SNP") first gained the greatest number of seats in the Parliament in the Scottish general election held in 2007 and thereafter governed as a minority administration. At the general election held in 2011, the SNP gained an absolute majority.

30. During their minority administration, one of the things that was done by the Scottish Ministers of the SNP was to begin to style themselves as the "Scottish Government". This was done quite openly and publicly, for example in the form of published and printed announcements and correspondence, notwithstanding the fact that there was no warrant for it in the 1998 Act.[17] The title of "Scottish Government" has now been adopted formally because the 1998 Act has been amended on this and on other matters, and a number of additional powers have

[16] The issue was identified by Tam Dalyell MP, who was then the Member for the constituency of West Lothian.

[17] As I understand it, the Labour Party may not have wished to give to the devolved administration in Scotland the right to call itself the "government". The position was the opposite in Wales where under the same Labour government at Westminster, section 45(1) of the Government of Wales Act 2006 created the "Welsh Assembly Government".

been given prospectively to the Scottish Parliament, in the Scotland Act 2012 (the "2012 Act").[18] The 2012 Act was passed to give effect to recommendations contained in the report of a Commission which had been set up to examine the effects of devolution, normally referred to as the "Calman Commission".[19] It was of necessity an Act passed in the UK Parliament and it demonstrates a continuing transfer of powers from Westminster to Holyrood and the increasing stature of devolution in Scotland. These are essentially matters of politics which have been of considerable interest and contention north of the Border. As it was said in 1999 by the former Secretary of State for Wales who had been responsible for devolution there, "devolution is a process not an event". In Scotland, that has certainly turned out to be the case.

31. The effect of the 2012 Act is that further powers will be devolved to the existing Scottish Parliament. The most important of these additional powers relates to taxation. The Scottish Parliament is given powers to set the rate of income tax to be paid by Scottish taxpayers and power to levy other specified taxes relating to interests in land and a landfill tax. In the case of the income tax payable by a Scottish taxpayer, the Scottish Parliament will have the power to vary, upwards or downwards, a proportion amounting to ten per cent of the basic, higher and additional rates determined by the UK Treasury. There is also a power to add new devolved taxes by Order in Council.[20] Other areas where there will be further devolution of powers to the Scottish Parliament and Scottish Government relate to air weapons, misuse of drugs, drink-driving limits, and speed limits.[21] All of these powers, along with associated and consequential changes, will be in force by 2016 assuming that independence does not take place.

32. The conclusion on this part of my paper is that Scotland has always been

[18] Section 12(1) of the 2012 Act renamed the "Scottish Executive" as the "Scottish Government".
[19] The Final Report of the Calman Commission was entitled *Serving Scotland Better: Scotland and the United Kingdom in the 21st Century* and was published in June 2009.
[20] Reference to these powers is contained in Part 4 of the 2012 Act which inserts a new Part 4A into the 1998 Act.
[21] The particular powers are devolved in the 2012 Act by sections 10, 19, 20, and 21 and 22 respectively.

somewhat separate within the United Kingdom even when it was a fully unitary state with a single parliament at Westminster. Devolution in Scotland, as well as in Wales and equivalent events in Northern Ireland, have increased the distinctive administration of these parts of the United Kingdom, and have had consequential effects within England itself.

33. The process of devolution was intended by those who promoted it to make the United Kingdom stronger by giving a more distinct identity to the smaller nationalities. From my perception, it has had precisely the opposite effect. It has made the devolved parts, most particularly Scotland, more separate from Westminster and the other institutions of the UK and it has emphasised the somewhat parochial attitudes which already existed. In England, Scotland is perceived and presented as a separate country (and increasingly as if it were already not a part of the UK) and that has increased in areas such as broadcasting, the law and elsewhere. It has stoked the flames of nationalism hence an independence referendum just over fifteen years after the setting up of a devolved Parliament.

The independence referendum

34. As it now has an overall majority, the SNP has been taking steps since 2011 towards achieving its fundamental political aim which is independence of Scotland from the remainder of the United Kingdom. There have been issues concerning the ability of the SNP to achieve this in its capacity as the Scottish Government because the subject of the United Kingdom constitution is a reserved matter, and thus not within devolved competence under the 1998 Act. On the face of it, independence is not something which any administration at Holyrood should be promoting.

35. Nevertheless, as a matter of political agreement between the UK Government at Westminster and the Scottish Government at Holyrood, and in a document which

is known as the "Edinburgh Agreement",[22] legislation was agreed and has been promoted to bring about a referendum which is to be held on 18th September 2014.[23] Every registered elector in Scotland will be allowed to answer the question:

"Should Scotland be an independent country?"[24]

Not surprisingly, even the form of that question was contentious, with its ultimate wording being proposed by the Electoral Commission.

36. In November 2013, the Scottish Government published a White Paper entitled *Scotland's Future* which explains the position of the present SNP Government in support of independence and provides explanations on a range of consequential issues as well as posing and answering no fewer than 650 questions which the Scottish Government says that it has been asked.

37. The bringing into effect of independence, were that to be the result of the referendum, would be a complicated procedure. Although the SNP Government has said that it could be achieved by March 2016, there is a vast range of uncertainties, most particularly the position of an independent Scotland relative to the remainder of the United Kingdom in matters such as its position in the United Nations and the permanent seat of the UK on the Security Council, membership of the European Union, the share of the UK national debt, and matters of defence including the fact that the United Kingdom's nuclear deterrent is provided by Trident submarines based on the River Clyde. Another is whether an independent Scotland would continue to use the pound sterling rather than the SNP's original intention of adopting the Euro (which would otherwise be expected if Scotland

[22] The *Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland* which was signed by the Prime Minister and the First Minister, as well as by the Secretary of State for Scotland and the Deputy First Minister, was entered into on 15th October 2012.
[23] The power to hold the referendum was given by the UK Government to the Scottish Parliament by the Scotland Act (Modification of Schedule 5) Order 2013 (SI 2013 No 242) which was made on 12th February 2013. This was an Order in Council made primarily under section 30 of the 1998 Act. The Scottish Independence Referendum Bill was introduced in the Scottish Parliament on 21st March 2013. The separate Scottish Independence Referendum (Franchise) Act 2013 was passed principally to permit 16 and 17 years olds to vote, a matter which was part of the political agreement.
[24] Scottish Independence Referendum Act 2013, section 1(2).

was to join the European Union) but which has become much less desirable following the various financial crises within the Eurozone. Yet another is that the SNP wishes to set up a separate Scottish Broadcasting Service and to use the assets of the BBC in Scotland for this purpose[25] but it is not clear how this could be achieved given that the BBC is not a nationalised entity and its assets do not belong to the UK Government. These and many other topics are addressed in *Scotland's Future* and they are essentially political issues which are beyond the scope of this paper.

The Constitution of Scotland after independence

38. The vote on independence will be carried if a majority of those who vote answer "yes".[26] There will then be a period of negotiation with the UK Government leading to Scotland becoming independent on 24th March 2016. This period of approximately eighteen months between the referendum and independence is seen by many to be an unrealistically short one but it is the stated position of the SNP that it can be achieved.[27] As part of the arrangements to bring about independence, it was agreed in the Edinburgh Agreement that both the UK and Scottish Governments would respect the outcome of the referendum and it is anticipated that in the event of a "yes" vote legislation will be passed in both Westminster and Holyrood.[28]

39. It may be expected that the critical provision within Westminster legislation will follow the precedent of previous occasions when the United Kingdom has granted independence to states over which it previously exercised sovereignty. The most obvious parallel is separation of what became the Republic of Ireland which was initially achieved by the Government of Ireland Act 1920. That Act was just the beginning of a legislative process which took place in stages over a period of

[25] *Scotland's Future*, Chapter 9, pages 318 and 319.
[26] *Scotland's Future*, Question 536.
[27] *Scotland's Future*, Question 539.
[28] *Scotland's Future*, Question 540.

years and involved the statutory acknowledgement of treaties and agreements.[29] *Scotland's Future* does envisage the entering into of agreements after a "yes" vote with the UK Government (and with the European Union)[30] but it is not suggested that these would be enshrined in statute as the earlier examples relating to Ireland were. An example of what was a retrospective acknowledgement of independence is contained in section 1 of the Australia Act 1986. An example of where there was a direct and unqualified granting of independence is section 1 of the Kenya Independence Act 1963 which provided:

> "(1) On and after 12th December 1963 (in this Act referred to as "the appointed day") Her Majesty's Government in the United Kingdom shall have no responsibility for the government of Kenya or any part thereof.
>
> (2) No Act of the Parliament of the United Kingdom passed on or after the appointed day shall extend, or be deemed to extend, to Kenya, or any part of Kenya, as part of the law thereof..."

By one or other of such legislative means, Scotland would become independent of the United Kingdom and would thereby gain (or, perhaps more properly, regain) its own sovereignty.

40. What would be the constitutional shape of Scotland in the event of independence? As expressed in *Scotland's Future*, the intention is that Scotland would remain a monarchy under Her Majesty.[31] In relation to its governance, this would on the face of it remain much as it is at present, subject to all legislation being passed by a sovereign parliament in Scotland rather than directly or indirectly subject to the ultimate sovereignty of Westminster. As already discussed, the distinct and separate nature of the law of Scotland has been preserved throughout the period of the Union and this would be preserved save that all decisions would be made in

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[29] Section 1 of the Government of Ireland Act 1920 ("the 1920 Act") established Parliaments under the King for Southern Ireland and Northern Ireland. Subsequent agreements which were entered into were endorsed by the Irish Free State (Agreement) Act 1922, the Irish Free State Constitution Act 1922 and the Eire (Confirmation of Agreements) Act 1938. The powers of the Parliament of Eire were also enhanced by the Statute of Westminster 1931. The 1920 Act was repealed by the Northern Ireland Act 1998.
[30] *Scotland's Future*, Question 540.
[31] *Scotland's Future*, Question 581.

Scotland.[32] The characteristics of the administration of justice in Scotland, in particular in relation to the criminal law, are quite different to those in the rest of the United Kingdom where the procedures are based upon those developed by the common law of England. Scots have therefore always enjoyed their own legal system and judiciary and that situation would not change in the event of independence except that there would no longer be any right of appeal to the United Kingdom Supreme Court.[33]

41. Although this means that Scotland's approach to law would not change, it does appear that some of the constitutional safeguards with which we are familiar would be lost. Were independence to be achieved, a government of Scotland of whichever political hue would be free to chart its own course on matters of law and it could depart from accepted principles of justice. Whilst Scotland remains part of the United Kingdom, the Scottish Government is not entirely free to do so but in the event of separation there would be nothing to discourage a government with an overall majority from pursuing policies which could undermine the very principles upon which Scotland has so long depended.

42. Before devolution, legislation which dealt with Scotland proceeded through Parliament at Westminster in much the same way as all other UK legislation. The passing of a Bill was subject to the checks and balances inherent in the Westminster system, including procedural requirements in the House of Commons, and the opportunity for subsequent scrutiny in the House of Lords.

43. In creating the new Scottish Parliament under devolution, the passing of legislation in all devolved areas in Scotland became much more straightforward. As it currently exists, the Scottish Parliament has the power to alter all devolved aspects of law and order and justice. As the Scottish Parliament is a unicameral

[32] *Scotland's Future*, Question 391.
[33] *Scotland's Future*, Question 406.

legislature, a Bill is passed by a majority and can then proceed for Royal Assent.[34] Despite what is a simpler system than exists for the passing of legislation at Westminster, the passing of Scottish legislation does have some safeguards. A Bill may be the subject of referral to the Supreme Court by the Advocate General for Scotland, who is one of the UK Government's Law Officers, as well as by the Attorney General, as to whether the Bill complies with a number of aspects including the European Convention on Human Rights.[35] The Secretary of State on behalf of the UK government may intervene if a Bill would be incompatible with international obligations.[36] As a last resort, and because devolution depends upon the ultimate sovereignty of the UK Parliament, Westminster could enact legislation for Scotland in any respect should that be seen to be justified. And, of course, changes in reserved areas such as economic and monetary affairs, trade and industry, consumer protection, energy, social security, broadcasting and others, as well as foreign affairs and defence, still require legislation at Westminster.

44. The creation of the system for the passing of legislation in the existing Scottish Parliament was also itself intended to have in-built safeguards. A Bill requires to be considered by a Committee but there is nothing to stop the Parliament voting by a simple majority to reject the recommendation of a Committee. Even before the existence of a governing party with an overall majority, there were concerns that the views of Committees were being over-ridden. As I have said, another safeguard was intended to be that there would never by one party with an overall majority but that was only an expectation and not an embedded safeguard.

45. Such safeguards as there are would no longer exist in the event of independence. Although the SNP Government's White Paper, *Scotland's Future*, does give general reassurance in relation to respect for human rights after independence,[37] it

[34] 1998 Act, section 28(2) and section 32.
[35] 1998 Act, section 33.
[36] 1998 Act, section 35.
[37] *Scotland's Future*, for example, Question 613.

confirms that the passing of legislation would remain the responsibility of a unicameral parliament with no second chamber.[38] The White Paper does explain the intention to accede to the European Convention on Human Rights and to join the European Union, and thus to be subject to the European Court of Human Rights and the Court of Justice of the European Union,[39] but both of these are aspirations which remain the subject of some political uncertainty and they would not be safeguards in place at independence nor at any certain point thereafter.

46. Even under devolution, the extent of the power of a majority government in the unicameral Scottish Parliament has been recognised as something which might justify judicial intervention. In *AXA General Insurance Ltd*, Lord Hope said:[40]

> "We now have in Scotland a government which enjoys a large majority in the Scottish Parliament. Its party dominates the only chamber in that Parliament and the committees by which bills that are in progress are scrutinised. It is not entirely unthinkable that a government which has that power may seek to use it to abolish judicial review or to diminish the role of the courts in protecting the interests of the individual. Whether this is likely to happen is not the point. It is enough that it might conceivably do so. The rule of law requires that the judges must retain the power to insist that legislation of that extreme kind is not law which the courts will recognise."

As well as acknowledging the risks of the single chamber parliament which exists under devolution, and which would also exist in the event of independence, that may be seen as an example of the very limited extent to which judicial review could apply to an Act of the Scottish Parliament.

47. It is said that after independence Scotland should have a written constitution to be prepared through a constitutional convention and this is proposed in *Scotland's Future*.[41] This was also the subject of an earlier paper by the Scottish Government entitled *Scotland's Future: from the Referendum to Independence and a Written Constitution* which was published in February 2013. In both of

[38] *Scotland's Future*, Question 622.
[39] *Scotland's Future*, for example, page 47.
[40] [2012] 1 AC, page 913, paragraph 51.
[41] *Scotland's Future*, Chapter 10, pages 351 and 352.

these documents, the creation of a written constitution is described in aspirational terms with an emphasis on participation in the process and the inclusion of essentially political objectives such as the exclusion of nuclear weapons from Scottish soil.[42]

48. More recently, the Scottish Government has published a consultation paper which includes a draft Scottish Independence Bill.[43] That draft Bill would be introduced into the Scottish Parliament in the event of a vote for independence and it contains in Part 2 what is to be the constitution of Scotland until a permanent constitution is drawn up.[44] The draft Bill provides for a number of the aspects foreshadowed in *Scotland's Future*, but as before, and although there is reference in the draft Bill to compliance with the ECHR,[45] there is no acknowledgement of the need to protect the rights of individuals against the excessive exercise of power by a majority in the Scottish Parliament. This means that in none of these documents is there any particular indication that, in creating an interim or permanent constitution which would replace the constitution of the UK, there should be any recognition of the need to consider constitutional checks and balances which would ensure that there is a proper balance between the ability of a government with an overall majority to exercise its will and the avoidance of such a government using its majority in a way which could become excessive.

Is the end of the United Kingdom nigh?

49. At the outset of what has been a long campaign, the answer appeared to be obvious for a supporter of the Union. The support for independence in recent years had never been beyond the order of 30% and it seemed to be unlikely that the nationalists would prevail. Since then, there have been many events which have affected the support for each side but within the last few months support for

[42] *Scotland's Future*, Chapter 10, page 353, and Question 613; *Scotland's Future: from the Referendum to Independence and a Written Constitution*, paragraphs 1.4 to 1.10.
[43] *The Scottish Independence Bill A Consultation on an Interim Constitution for Scotland*, published by the Scottish Government in June 2014.
[44] Draft Scottish Independence Bill, sections 4(1) and 33. (As a matter of terminology, bills before the Scottish Parliament contain "sections" rather than "clauses".)
[45] Draft Scottish Independence Bill, section 27.

independence had been judged by polls to have risen into the order of 40%. At a conference at the end of June, a speaker from one of the polling organisations explained that the general trend at that time suggested 43% in support of independence and 57% against. These figures are complicated by a large contingent of apparently undecided voters of more than 10%.

50. More recent events may have narrowed the position even more. After what was considered to be a disappointing performance by Mr Salmond in the first of two televised debates between him and Alastair Darling, the leader of the pro-Union "Better Together" Campaign,[46] Mr Salmond was seen to have been more persuasive in the second debate held on 25th August. The polls of actual voter intention taken afterwards suggest a further narrowing with the lead of those who intend to vote against independence being reduced to only six points. On 29th August, it was reported that 48% intended to vote "No" and 42% to vote "Yes", and with as many as 11% still undecided.[47] How those who are apparently undecided do actually vote may turn out to be critical to the result.

51. The polls in the referendum may, or may not, turn out to be accurate. This is an electoral process which is unique at least in the United Kingdom, with the vote to leave the Union being a once-and-for-all decision. This means that the drawing of parallels with previous UK general elections and referenda may be unjustified. All that can be said is that the result should be known by 19th September and this will bring to an end a period of national uncertainty which has had an effect on all areas of national life, not least on business and commerce, and has given rise to a degree of internal acrimony whose consequences may last for some time or perhaps indefinitely.

52. If there is a vote for independence, it will mark the end of what those like me

[46] Mr Darling was the Chancellor of the Exchequer in the last (UK) Labour government which lost power in the general election held on 6th May 2010.
[47] BBC News website: Scottish referendum poll tracker. (The figures are presumably rounded up as they total more than 100%.)

regard as our country and as a most successful and prosperous union which has existed for 307 years to the benefit of all of its members, not just Scotland, but also England, Wales and Northern Ireland. The breaking of that Union will have a myriad of consequences, foreseen and unforeseen. It would be unheard of for the citizens of a prosperous nation in which there is no internal conflict or persecution to decide voluntarily to leave. All of these are reasons why it is to be hoped that the undecided will vote not to take that course but that remains to be seen. As a consolation, all that could be said in such an outcome would be that the example of the United Kingdom in allowing a part of itself to secede in a situation without conflict would probably be almost unique in the administration of the nations of the world.

53. As to my question, the answer is inevitably no. Even if Scotland votes to become independent and that takes place, the United Kingdom will still survive as encompassing England, Wales and Northern Ireland. All international law principles suggest that the rest of the United Kingdom (or "rUK" as it is often styled) would be a continuing state and would succeed to all of the international rights and obligations of the present United Kingdom, the most obvious being its memberships of the United Nations, the European Union and the North Atlantic Treaty Organisation. It would succeed to the permanent membership of the Security Council of the UN. It would be for Scotland as a newly independent state to seek to achieve membership of such organisations and to acquire such international rights and obligations as it could.

54. The answer to my question is therefore that whatever happens in the referendum the end for the UK is not nigh. It must be said, however, that it is impossible to predict the longer term consequences for it of the leaving of its second most populous member. This raises its own substantial political and constitutional issues.