

**Responding to change: The Question of Scottish Independence and the teaching of Public Law.**

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# Association of Law Teachers Annual Conference, Leeds, 2014.

## Responding to change: The Question of Scottish Independence and the teaching of Public Law.

All in the United Kingdom, and some greatly, will be affected by the result of the referendum to be held this September 18<sup>th</sup> on whether Scotland should become an independent country.

If there is a Yes vote, it can reasonably be expected that negotiations between the UK and Scottish governments will at least open fairly soon afterwards. The Scottish Government, in its White Paper *Scotland's Future*<sup>1</sup> ("The White Paper") envisages they will be concluded swiftly and certainly no later than March 2016. Indeed it has chosen 24<sup>th</sup> March 2016 as the day on which Scotland will become a sovereign state<sup>2</sup>. According to the Scottish government, the first elections in an independent Scotland will be held on 5<sup>th</sup> May, 2016 - the date on which elections for the Scottish Parliament are to be held under the current devolution settlement<sup>3</sup>.

Important and urgent matters of public law are raised and it is necessary to consider them on undergraduate and Graduate Diploma in Law ("GDL") public law courses.

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<sup>1</sup> Published on the 23<sup>rd</sup> November, 2013.

<sup>2</sup> Like citizens, during parts of the 20<sup>th</sup> Century, of some central and eastern European lands, and, closer to home, Ireland it may be possible to be born one in country and then live and die in a different state without ever having moved.

<sup>3</sup> This tight time table will have the effect of avoiding the possibility of a Scottish Parliament with a majority of members opposed to secession forming a government before independence day and claiming a mandate not to proceed. The SNP government believes this short period to conclude negotiations, not only with the UK government but also with the European Union on Scottish membership, is practical and asserts, in its paper *Scotland's Future : From the Referendum to Independence and a Written Constitution*, 5<sup>th</sup> February, 2013( apparently without irony as to the first example) " *Historical examples such as the reunification of Germany in 1990 and independence for the Czech Republic and Slovakia in 1993 show that after a democratically agreed and accepted expression of political will, countries can make significant constitutional changes happen in months rather than years. Of new states which have become UN members since 1945, 30 became independent following a referendum on independent statehood with the average length of time between the referendum and independence day being approximately 15 months*". Some commentators criticise this rapid timescale and consider benefits would flow from a longer period of negotiation, possibly lasting 4 to five years, which would avoid the possibility that the Scottish party to negotiations would make concessions to obtain a quick agreement and would permit Scotland to start formulating a new constitution prior to independence and prepare for separate EU membership. See Nick Barber *After the Vote*, Constitutional Law Group, January 14<sup>th</sup>, 2014.

Scottish separation could form a course in itself, or a distinct part of a course, or aspects of it could be integrated into the existing body of teaching.

Attention of students could be drawn to the flexibility of the un-codified British constitution<sup>4</sup> which has permitted a referendum on the secession of a part of the Kingdom and a contrast drawn between written constitutions having no provision for such a radical change and indeed which seek to prohibit it, for example that of Spain.<sup>5</sup>

The increasingly prominent role of referendums in Britain and their effect on parliamentary sovereignty and representative government could be discussed with students.

Many countries use referendums to decide on a range of day to day public policy question, some at both national and regional level, an outstanding example of this being Switzerland. This has not been UK practice. There is no legal rule about what issues should be the subject of referendums and sometimes governments are criticised for resorting to referendums as a tactical political device - an allegation made against the current administration's plan to hold one on continued EU membership. (Students could be asked whether there should be fixed principles on which a referendum should be called. They might be referred to Chapter 2 of Twelfth Report of The House of Lords Select Committee on the Constitution, Chapter

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<sup>4</sup> Britain along with New Zealand and Israel are the only major countries not to possess a written constitution. Students might be invited to listen to a podcast of a lecture given by Professor Linda Colley at the London School of Economics, on 13<sup>th</sup> March 2014, who makes the point that through its empire and international heft, the UK came to draft and influence more constitutions in more parts of the world in the 19th and 20th centuries than any other power. Yet governments always resisted the introduction of a written constitution in the UK itself. It was felt that whilst other states need their political systems, identity and liberties confirmed in writing the British did not. Their historic uncoded constitution was itself a demonstration and proof of their distinct identity. In her lecture Professor Colley discusses how far writing a constitution might work to reinforce rights in these islands and reconfigure connections.

<sup>5</sup> On the 24<sup>th</sup> March, 2014 judges of the Spanish Constitutional Court unanimously ruled that a declaration of sovereignty, made by the Catalan government in January 2013, violated Article 2 of the Spanish constitution, which declares the "*indissoluble unity of the Spanish nation*". They took particular issue with a passage in the declaration stating that "*the people of Catalonia have, for reasons of democratic legitimacy, the nature of a sovereign political and legal subject*". Although yet to rule specifically on the legality of a referendum styled as consultative and non-binding on Catalan independence, called by the Catalan government for this November, the judges indicated their opposition to it in the following terms: "*Within the framework of the constitution an autonomous community [such as Catalonia] cannot unilaterally call a referendum on self-determination.*" See *Financial Times*, 25<sup>th</sup> March, 2014. Following an overwhelming rejection by the Spanish parliament on the 8<sup>th</sup> April, 2014 of a petition from Catalonia to allow a referendum on independence the Prime Minister of Spain, Mr Mariano Rajoy, reiterated that it was not possible to grant permission for a vote because such was prohibited by the constitution and added "*The door is wide open for those who are not happy with the way things are: start with reforming the constitution.*" ( *Scotsman*, 9<sup>th</sup> April, 2014.)

2, which sets out arguments for and against referendums<sup>6</sup>). Nevertheless since the 1970s, referendums have become an accepted part of British political life in deciding constitutional questions<sup>7</sup>. The House of Lords select Committee on the Constitution concluded that: "*if referendums are to be used, they are most appropriately used in relation to fundamental constitutional issues*" and especially before "*any of the nations of the UK leaves the Union*"<sup>8</sup>. Among witnesses who appeared before the House of Commons Select Scottish Committee which considered the referendum on separation for Scotland, Professor John Curtice, of Strathclyde University, thought there was a "*de facto convention that any constitutional change in the UK requires to be legitimated by a referendum*"<sup>9</sup>. (This could be used as a springboard from which to discuss with students the role of constitutional conventions and how they arise) Professor Vernon Bogdanor's view was that there was "*a strong argument of principle for having referendums on these matters because the opinion of the people may not be the same as the parties which represent them*"<sup>10</sup>.

There is agreement that the result of the Scottish referendum will be binding, rather than merely advisory on the UK parliament. The tendency towards this form of referendum<sup>11</sup>, further moving away from the representative government and towards popular sovereignty, could be discussed with students and their views obtained.

Opinions of students on whether 16 and 17 year olds should be able to vote in the Scottish referendum, and whether they should be able to do so more widely, could be sought<sup>12</sup>. Views might also be obtained on whether a bare majority vote is adequate for a step of such importance and should a second referendum be held

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<sup>6</sup> *Referendums in the United Kingdom*, HL Paper 99.

<sup>7</sup> A table in the appendix shows how often they have been used, what constitutional questions they decided, and what was the legislative basis of each of them.

<sup>8</sup> Twelfth Report of the Select Committee on the Constitution, Session 2009-10, *Referendums in the United Kingdom*, HL Paper 99, para 94.

<sup>9</sup> *The Referendum on Separation for Scotland: Oral and written evidence*, Session 2010-12, HC 1608, Q 259

<sup>10</sup> *Ibid.*

<sup>11</sup> The Parliamentary Voting System and Constituencies Act 2011, was widely considered legally binding in the sense that the relevant clauses on changing the voting system would come into effect if there was a positive vote in the referendum. In the event this was not achieved. The European Union Act 2011 Act provides for a referendum to be held on any amendment to the Treaty on the Functioning of the European Union. The result of any such referendum would, it is generally held, be binding. By contrast the referendum called by the Labour government in 1975 about whether Britain should remain in the then Common Market had no direct legal effect, though the government made it clear that it would see itself as bound by the result, and it was agreed by all concerned that the referendum was to decide the matter.

<sup>12</sup> Lord Andrew Adonis, *Lent Lectures*, BBC, Radio4, 2<sup>nd</sup> April, 2014, recently put forward arguments for enfranchising those in this age group, partly to stimulate the interest of young people in politics and to increase the proportion who exercise their right to vote.

following negotiations with the United Kingdom government and the European Union<sup>13</sup>.

Under legislation<sup>14</sup>, persons born in Scotland but living abroad, and even elsewhere in the United Kingdom, will not be allowed to vote. Students might be encouraged to debate whether, as a matter of constitutional principle, the franchise for a referendum to determine the national future of a part of a country should be restricted to those resident there at the time<sup>15</sup>.

Sovereignty, in the pure form, written about by A. V. Dicey in the 19<sup>th</sup> Century, exists no longer<sup>16</sup>. While the state remains the focus of political organisation, ideas of sovereignty and independence, as monopolistic and comprehensive, have evolved. Authority is now partial and distributed. In place of mutual exclusivity there is overlapping, interlocking, mutual interference and interdependence and leading economic actors are frequently multi-national<sup>17</sup>. There is tacit, if not explicit, recognition of a re-conception of sovereignty by the Scottish government which

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<sup>13</sup> In the opinion of Professor Robert Hazell, Director of the UCL Constitution Unit (Press Release 26<sup>th</sup> November, 2013), a second referendum should be held when the terms of independence are known. These may be very different from the Scottish Government's aspirations of 2014 which include membership of the EU, of NATO, keeping the pound, sharing other services with the UK- matters not entirely within its gift. *In the second referendum the people of Scotland could then be asked, Do you still want independence on these terms?*

<sup>14</sup> The Scottish Independence Referendum (Franchise) Act 2013,

<sup>15</sup> Qualification for voting in the referendum is certainly much narrower than what the Scottish government proposes for citizenship of an independent Scotland ie that British citizens, including British citizens who hold dual citizenship with another country, *habitually resident* in Scotland on independence will be Scottish citizens, as will Scottish born British citizens currently living outside of Scotland. Others could apply for Scottish citizenship by descent if they have a parent or grandparent who qualifies for Scottish citizenship. Those who have a *demonstrable connection* to Scotland and have spent at least ten years living there, whether as a child or an adult, would also be eligible to apply for Scottish citizenship. Migrants on qualifying visas would also be able to apply for citizenship on the basis of naturalisation. (Chapter Seven *Scotland's Future*, White Paper.)

<sup>16</sup> Despite his views on parliamentary supremacy, A.V. Dicey was, perhaps surprisingly, one of the first supporters of the use of referendums in Britain.

<sup>17</sup> There is currently some opposition from a cross-national coalition of environmentalists, trade unions and consumer organisations to the Transatlantic Trade and Investment Partnership, a proposed free trade agreement between the European Union and the United States, because of the inclusion of Investor State Dispute Settlement provisions. Under them investors could bring a case directly against the country where they have invested without the intervention of the government of the investor's country of origin. They see this form of dispute settlement as an unacceptable erosion of national sovereignty enabling corporations to challenge government policies, but allowing neither governments nor individuals any comparable rights to hold corporations accountable.

proposes: a common head of state; sharing the pound; EU membership<sup>18</sup>; and various co-operative arrangements (a "social union" which "*will always bind Scotland to the rest of the United Kingdom.*" ) including membership of the Common Travel Area with the remaining UK ("rUK"), the Republic of Ireland, the Isle of Man and the Channel Islands; joining NATO, though without nuclear weapons, which they describe as a "defence union" and joint defence procurement with the rUK; an island of Britain energy policy and market; and a common academic and science research area with the rest of the UK including existing shared research councils. Already devolution to Scotland, Wales and Northern Ireland, in practical terms, restricts parliamentary supremacy.<sup>19</sup> How parliamentary sovereignty has become more limited should be fully covered on public law courses.

The conceptual difference between devolution and independence could be discussed. It is of note that Scottish nationalists tend to conflate two very different ideas and talk about devolution as a stage on Scotland's "*Historic Constitutional Journey*" towards independence and "*through devolution, the people of Scotland have experienced some of the benefits of independence*"<sup>20</sup>.

The Scottish Government argues "*that an independent Scotland should have a written constitution which expresses our values, embeds the rights of its citizens and sets out clearly how institutions of state interact with each other and serve the people. This will contrast with the UK's largely unwritten constitution in which the Westminster Parliament can do anything except bind its successors.*"<sup>21</sup> *The*

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<sup>18</sup> Speaking at the London School of Economics on the 5<sup>th</sup> March, 2014, Mr Alexander Stubb, Finnish Minister for European affairs and trade, stated, *The notion of interdependence is perhaps the single most important determinant of international relations today. And we have to remember that European integration is built on this fact – de jure states are sovereign, but de facto we have to pool our resources and act together if we want to have an impact on anything significant. This logic of integration has not changed with globalization, only strengthened* ( Transcript and ipod available from LSE Public Events).

<sup>19</sup> Interestingly the Scottish government, Chapter 10 of the White Paper, *Scotland's Future* in arguing against full devolution of domestic matters and in favour of separation says *Only independence will remove the residual power of the Westminster Parliament to legislate in devolved matters.* There has been no attempt by the UK Parliament to legislate in matters that are devolved. It could be said that there is a binding convention it will not do so. Indeed the flow of powers has been from the UK government to the Scottish government. The recommendations of the Calman Commission, established by the Scottish parliament in 2007, to increase the taxation powers of the Scottish Parliament, led to the UK government's Scotland Act 2012, which received the Scottish Parliament's consent in April 2012, and is now being implemented. Also the UK government permitted the Scottish Parliament, under provisions of the Scotland Act, to legislate for the Independence Referendum by transferring the necessary reserved powers.

<sup>20</sup> Introduction to *Scotland's Future*, White Paper, November, 2013.

<sup>21</sup> Similar views were expressed by Nicola Sturgeon, First Minister of the Scottish government, when delivering the Wales Governance Annual Lecture in Cardiff on the 24<sup>th</sup> March, 2014. During the course of that lecture she said that the absence of a written constitution in Britain amounted to a "*democratic deficit*" and one "*which an independent Scotland will not replicate.*" Although the Scottish government is deeply critical of Britain's uncodified constitution, and strongly desires a written constitution for an independent Scotland, the fact remains that if Britain had a written constitution without a procedure for a part of the state to leave (most codified constitutions with their emphasis on national unity do not) it is unlikely a referendum on whether Scotland should be an independent country would take place.

*Westminster system has sometimes led to major decisions being taken by the government without the possibility of challenge (for example, the decision to go to war in Iraq in 2003". This section, drawn from *Scotland's Future : From the Referendum to Independence and a Written Constitution*, could form the basis of an essay question for students on which they are asked to comment upon their understanding of what is meant by a written constitution<sup>22</sup> and to consider whether Parliament can in reality, as opposed to in legal and constitutional theory, "do anything it wants". Restraints on unlimited parliamentary powers including : European Union membership; incorporation of the European Convention on Human Rights; devolution settlements with Northern Ireland, Scotland and Wales; widely supported constitutional conventions<sup>23</sup> and prerogative powers; and social, economic and political realities might be discussed. As a secondary part of the suggested question, students could be asked to consider the advantages and disadvantages of a written constitution.<sup>24</sup>*

In the paper *From Independence to a Written Constitution* and its White Paper, *Scotland's Future* the Scottish government, in the wake of a Yes vote, calls for the building of a "constitutional platform" to enable the transfer of sovereignty from Westminster to Scotland and to stand as an interim constitutional arrangement before a written constitution is introduced. According to the Scottish government, "*the constitutional platform, along with the refreshed Scotland Act, will be the founding legislation of an independent Scotland and will not be subject to significant alteration pending the preparation of a permanent constitution by the constitutional convention*".<sup>25</sup>

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<sup>22</sup> Much of the British constitution is in writing, but it is not contained in a single document and from a number of sources. A more accurate, and increasingly accepted, description of it is that it is an "uncodified constitution".

<sup>23</sup> Following the Iraq war and proposed military action in Syria most probably there is now a convention that Parliament will be given a vote on whether to go to war, effectively much reducing prerogative powers in this area. It is also worthy of note that many written constitutions give the executive powers to engage in military conflict without, at least initial, authorisation of legislature.

<sup>24</sup> As a background a brief history of written constitutions might be given in lectures, or in directed reading for tutorials, spanning early modern times (San Marino, with a population of just over 30,000, is thought to have the oldest written constitution, which goes back to 1600. It was written in Latin and has six books, covering subjects such criminal law, civil law, sanitation, food hygiene and roads. In 1974, a declaration of rights for citizens was added), then following their proliferation after 1787, the year when the US constitution was drafted, and up to the present. For the sake of balance the point could be made that some of the world's most repressive regimes have had written constitutions and examples presented.

<sup>25</sup> In the course of delivering the Annual Wales Governance Centre Annual Lecture on the 24<sup>th</sup> March, 2014 (March 2016 being the date chosen by the Nationalists to be "independence day", as the audience were reminded) the Deputy First Minister, Nicola Sturgeon, announced that a draft Scottish Independence Bill will be released for consultation before the Scottish Parliament's summer

Constructed with the UK parliament, it would :

give the Scottish Parliament powers to declare independent statehood for Scotland in the name of the sovereign people of Scotland;

remove the central effects of the 1707 Treaty of Union and acknowledge the end of the power of Westminster to make laws for Scotland (in a way similar to the Malta Independence Act 1964 and the 1931 Statute of Westminster) ;

provide in law for the sovereign right of the Scottish people to determine the form of government best suited to their needs;

extend the powers of the Scottish Parliament and Scottish government into all policy areas whilst retaining the separation of powers between executive and legislature;

provide for the transition of Scotland's status in the EU from membership as part of the UK to independent membership;

consolidate the protection of human rights in Scotland so that all ECHR human rights are protected as they are for devolved matters under the Scotland Act 1998, bringing Scotland fully into the European mainstream of human rights protection;

provide for the continuity of the monarchy in Scotland;

implement agreements between the Scottish and UK governments;

provide for Scots law, including laws in all currently reserved areas, to continue after independence unless specifically amended;

establish a Scottish Treasury function to enable the Scottish government to control and manage Scotland's public finances. This would build on the work already underway to establish Revenue Scotland. A Scottish Treasury function would also ensure that an appropriate macroeconomic framework for an independent Scotland is in place and ready to operate effectively from independence day, in line with advice from Scotland's Fiscal Commission Working Group;

define entitlement to Scottish citizenship on independence day and subsequently;

enable Scotland to fully participate in the international community and take its place on the world stage and provide for the continuing application to

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recess which will enshrine "*Scottish values*" and put in place the legal necessities, until a constitutional convention prepares a "permanent constitution" for Scotland after independence.



Scotland of international arrangements with other countries and international organisations;

enable Scotland to join international organisations and give the Scottish Parliament powers to ratify international treaties;

provide for the Supreme Court of Scotland (The Inner House of the Court of Session and the High Court of Justiciary sitting as the Court of Criminal Appeal would collectively be Scotland's Supreme Court); and

ensure that the Scotland Act 1998 is updated to apply in the context of independence so that the Scottish Government and Parliament adapt smoothly to independence.

The White Paper states that, after independence day and the elections of May 2016, a constitutional convention will be established to '*prepare the written constitution*'<sup>26</sup> which "*expresses our values, embeds the rights of its citizens and sets out clearly how institutions of state interact with each other and serve the people*"<sup>27</sup>. The Scottish government believes "*a constitutional convention should ensure a participative and inclusive process where the people of Scotland, as well as politicians, civic society organisations, business interests, trade unions and others, will have a direct role in shaping the constitution*". No estimate of how long this would take and therefore no provisional date for the new constitution is given<sup>28</sup>. The White Paper refers to citizen-led assemblies and constitutional conventions established in British Columbia (2004), the Netherlands (2006), Ontario (2007) and Iceland (2010).<sup>29</sup> Although the Scottish government does not propose to draft the

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<sup>26</sup> During the transitional stage between the referendum and Independence Day on 24 March, the White Paper says that legislation will be passed placing a duty on the Scottish Parliament elected in 2016 to establish a constitutional convention. Although it is not clear by whom this legislation will be passed Stephen Tierney, *The Scottish Constitution After Independence*, 2<sup>nd</sup> December, 2013 (available at <http://ukconstitutionalallaw.org>) considers that *the goal is either for concurrent legislation of the UK and Scottish Parliaments or for the Westminster Parliament to transfer power to the Scottish Parliament for this purpose*. He questions whether the 2016 Parliament would be bound by such legislation. *There would of course be no written constitution in place to restrict its powers*. He asks: *Would it be bound by the sovereignty of Westminster?* and answers *Surely not, as the newly elected Parliament of an independent country. This issue is worthy of more detailed consideration in due course and important lessons may well be found from comparative cases*.

<sup>27</sup> *From Independence to a Written Constitution*.

<sup>28</sup> The question where would sovereignty rest in this period? has been asked – would the Scottish Parliament take on a new sovereign power through the constitutional platform, or would there be some notional reversion to the sovereignty of the pre-1707 Scottish Parliament? See Stephen Tierney, *After the referendum- the Scottish Government's proposal for a written constitution*. March 12<sup>th</sup>, 2013.

<sup>29</sup> At one point it rather grandly sees Scotland following in the footsteps of the United States Constitutional Convention in Philadelphia in 1787 and at another references are made to Thomas Jefferson and Abraham Lincoln.

constitution itself, restricting itself to convening the convention, it sets out an extensive list of what it thinks it should contain. These include:

equality of opportunity and entitlement to live free of discrimination and prejudice;

entitlement to public services and to a standard of living that, as a minimum, secures dignity and self-respect and provides the opportunity for people to realise their full potential both as individuals and as members of wider society;

protection of the environment and the sustainable use of Scotland's natural resources to embed Scotland's commitment to sustainable development and tackling climate change;

a ban on nuclear weapons being based in Scotland;

controls on the use of military force and a role for an independent Scottish Parliament in approving and monitoring its use;

the existence and status of local government;

rights in relation to healthcare, welfare and pensions;

children's rights;

rights concerning other social and economic matters, such as the right to right to education and a Youth Guarantee on employment, education or training;

And Scotland would remain a constitutional monarchy *'for as long as the people of Scotland wish us to be so'*.

Perhaps it is not an entirely unfair observation that conspicuously missing from the list is a provision that would permit a part of the country to leave the state after a prescribed procedure had been followed. This omission is of relevance given the position of Orkney and the Shetlands, rich from the proceeds of oil production, abundant with natural energy and with a culture and heritage distinct from the mainland, where opinions have been expressed against membership of an independent Scottish state and in favour of remaining with United Kingdom, or establishing a Crown Dependency status with it, similar to those which are enjoyed by the Isle of Man, the Channel Islands and the Falklands, or independence<sup>30</sup>.

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<sup>30</sup> See *The Economist*, The British Vikings, 13<sup>th</sup> February, 2014. A petition was lodged in March at the Scottish Parliament asking requesting that a vote be held on whether Orkney, Shetland and the Western Isles should remain a part of Scotland. The author of this paper requested the view of the Scottish government on a constitutional provision that would allow secession of a part of the state, but to no avail. Three messages were sent to the Deputy First Minister, Nicola Sturgeon. To date there has been no reply or acknowledgement.

It does not seem that the Scottish government proposes that provisions about educational opportunity, training or employment and welfare support and health care, should be enforceable in the courts but declares them to be *'questions of social justice at the forefront of the work of Scotland's Parliament, government and public institutions.'* In contrast the inclusion of social rights in the South African constitution, and the restrictive way they have been interpreted, could be discussed with students.

The White paper states that the convention will be *'open, participative and inclusive'* and that *'The people of Scotland, as well as politicians, civic society organisations, business interests, trade unions, local authorities and others, will have a direct role in shaping the constitution.'* Citizen-led assemblies and constitutional conventions established in British Columbia (2004), the Netherlands (2006), Ontario (2007) and Iceland (2010) are referred to as examples of best international practice.

Questions have asked about how representative of Scottish society the convention will be<sup>31</sup>. Unlike the Citizens' Assemblies in British Columbia and Ontario, where there was a deliberate attempt to take constitutional decision-making out of the hands of elites, be they politicians or members of the sometimes rather vaguely defined 'civil society,' it is not intended that it will be composed of citizens selected randomly from the electoral roll. It is uncertain, given the open process, whether the substantive proposals for the written constitution set out in *Scotland's Future* could be departed from. What, for example, would be the position if the constitutional convention decided not to include social rights or chose a republican system of government rather than a monarchical one? According to the White Paper the convention will be limited by one substantive precondition: *'Key equality and human rights principles, including the requirements of the European Convention on Human Rights (ECHR), would be embedded in the written constitution'*. Students could be invited to compare the method the European Convention on Human Rights has been given domestic effect by the UK parliament in the Human Rights Act 1998.

An essential part of a draft constitution, upon which precision is vital, is the procedure for its amendment. Dangers exist both if constitutional amendment is too easy, lessening constitutional protection against temporary concern or fashion, or if it is too hard, freezing a constitution in time, a criticism sometimes levelled against certain provisions of the United States constitution, for example those concerning the

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<sup>31</sup> Including Stephen Tierney, *The Scottish Constitution After Independence* who asks " will the process really be a popular and meaningful engagement with citizens, or will it be a largely elite-led event, like the Scottish Constitutional Convention from 1989-1995? Will in fact the new constitution be drafted by elites – politicians, civic society organisations, business interests, trade unions and local authorities? If so, is this satisfactory? After all, of these groups only politicians are elected by the citizens of Scotland. To whom are the other organisations accountable and in what ways? Who would select members of these groups to sit on the convention, on what basis, and with what degree of decision-making power would they be vested? The reference to 'civic society organisations' introduces a risk that pressure groups with fixed agendas and well-oiled activism machinery could hijack the process, arguing persuasively for the entrenchment in the new constitution of their own particular priorities, priorities which may not have the support of a plurality of citizens."

bearing of arms. The White Paper does not deal with the possibility that those represented at the Convention might not be able to agree on a final document<sup>32</sup>. In that case Scotland would have to rely on the Constitutional Platform until agreement is reached and upon parliamentary supremacy, which the nationalists see as so much wanting. If agreement about the content of a draft constitution is reached, the matter of its entrenchment will arise. The White paper is silent on whether ratification by the Scottish Parliament would suffice or would a referendum be required. However, if the object of the exercise is to establish the sovereignty of the people in Scotland, and thus confine parliamentary power, the latter seems the more probable.

Students might be asked to consider what they would include in a model written constitution for a hypothetical new country<sup>33</sup>. Amongst questions to be discussed could be: How would the separation of powers between the executive, legislature and judiciary be safeguarded?; Should the European Convention on Human Rights be incorporated in whole or in part, or should other provisions specific to the country concerned be drafted?; Should social rights be included and if so should they be justiciable in the courts?; What should the balance be between rights in the constitution and in statute?; and under the constitution should treaties with other states be directly binding without the need to enact domestic legislation to give them effect. Further, attention might be directed to how the constitution might be amended. Should certain sections, be unchangeable? Should provisions dealing with procedure for constitutional revision or amendment themselves be alterable? For those parts capable of revision or amendment, what level of support would be necessary in parliament and in a referendum? (Students might be referred to the current debate in Japan about amending Section 9 of the Constitution.<sup>34</sup>). Students might be asked to consider who should draft a constitution and what they think of the Scottish Government's proposed constitutional convention and how genuinely representative of society it might be. They could be encouraged to investigate, and

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<sup>32</sup> Inability to agree matters, seen as fundamental by those who disagree, has prevented the introduction of a written constitution in Israel.

<sup>33</sup> It was reported to me that now for a number of years some public law teachers in Scottish universities, set students assignments and questions about what should be included in a constitution for an independent Scotland.

<sup>34</sup> This article states the "Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes" and that "land, sea, and air forces, as well as other war potential, will never be maintained." The necessity and practical extent of Article 9 has been debated in Japan since its enactment, particularly following the establishment in 1954, of the Japan Self - Defence Force, a *de facto* and now strong military, bigger than the British armed forces. The current Liberal Democratic Party Prime Minister, Mr Shinzo Abe, has expressed a desire to change, or at least re-interpret, Article 9 to permit collective defence strategies and to strengthen further Japan's military capabilities. His policy is vehemently opposed by others. See the *Guardian*, Wednesday, 5<sup>th</sup> February 2014, *Japan considers constitutional changes to enhance defence capacity*. Under Article 96 amendments to the constitution "shall be initiated by the Diet, through a concurring vote of two-thirds or more of all the members of each House and shall thereupon be submitted to the people for ratification, which shall require the affirmative vote of a majority of all votes cast thereon, at a special referendum or at such election as the Diet shall specify." The Constitution has not been amended since its implementation in 1947, although there have been movements led by the Liberal Democratic Party to make various amendments to it.

even join, a unique project set up at the London School of Economics<sup>35</sup>, "*Crowdsourcing a New Constitution*", to ask members of the public to participate in, advise on and eventually to draft a new UK constitution. If they wish they can join an expert panel and have their say on what should be included in the area in which they are interested.

Whether the Scottish Parliament would keep the present number of Members of the Scottish Parliament ("MSP") or whether this would be increased, partly to supply a larger number of ministers that might be required to manage additional powers and responsibilities formerly exercised by the UK government and also to undertake duties to constituents, currently performed by MPs, in relation to powers reserved to London but which would be transferred to Edinburgh, is not dealt with in the White paper. Also not addressed is whether a second chamber would be established, what its powers might be and if it would be elected or appointed and if so by whom and according to what criteria?

If it was to remain a single chamber, Scotland would join about half of the world's sovereign countries, including both the most populous, the Peoples Republic of China, and the least populous, the Vatican, who have unicameral assemblies.

Students could be asked to consider the advantages and disadvantages of unicameral and bi-cameral assemblies and the long running question of House of Lords reform.

The White Paper foresees the establishment of a Scottish Supreme Court in Edinburgh entirely separate from that in London, Students might be asked for their thoughts on what status decisions of the House of Lords and the UK Supreme Court made before Scottish independence might have in that new court and whether they would have any persuasive authority afterwards and similarly would Scottish cases still be persuasive in the courts of the rUK.

Students might want to think about whether Scottish secession would lead to demands for a written/codified constitution for the rest of the United Kingdom (" rUK "), in part to bolster the position of Wales and Northern Ireland against England, the much bigger and far more populated country<sup>36</sup>. Given the contested nature of Northern Ireland's position in the United Kingdom, this might only be possible if a

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<sup>35</sup> By the LSE's Institute of Public Affairs (IPA), the Department of Law, the LSE Public Policy Group and the LSE Democratic Audit. An inaugural public meeting held on the 8<sup>th</sup> October, 2013, with a panel consisting of David Blunkett, Richard Gordon, Carol Harlow and Lea Yp and chaired by Conor Gearty, was well attended by students from various colleges and subject disciplines. A podcast and video of the event may be obtained on [www.lse.ac.uk/public](http://www.lse.ac.uk/public) event.

<sup>36</sup> Students might, for historical interest, be reminded that this would not be the first, or indeed second, written constitution in England and Wales, Scotland and Ireland. Drafted by Major - General, John Lambert, and adopted in 1653, during the brief English Republic, the Instrument of Government was the first sovereign codified and written constitution in the English-speaking world. The *Instrument of Government* was replaced in May 1657 by England's second, and last, codified constitution, the Humble Petition and Advice. Of course since independence Ireland has had two constitutions: In 1937 the Constitution of Ireland replaced the Constitution of the Irish Free State, introduced in 1922.

provision contained the freedom to leave following a majority vote in a referendum. They might also be asked about what other provisions should be included in a new written constitution for the rUK and should a constitutional convention be established?

A no vote in the 2014 referendum will probably not result in the status quo being maintained but very likely in further devolution of powers from London to the Scottish government in Edinburgh, continuing what has been identified as a movement towards quasi-federalism, albeit of an asymmetrical kind. Such developments would be of obvious interest to teachers and students of public law.

The Scottish Labour Party announced the findings of its Devolution Commission in Edinburgh on March 18<sup>th</sup> this year. Amongst its proposals<sup>37</sup> were that the UK government should not be able to dissolve the Scottish Parliament, that it "*should become permanently entrenched and indissoluble*" and have control over the administration of its elections. Other proposals include: that the Scottish Parliament should raise about 40 percent of its budget; have greater tax raising powers, including increasing higher and additional income tax rates; take more responsibility for welfare spending; that the railways should become a devolved matter and that Scotland should have its own health and safety executive, employment tribunals, equalities legislation and consumer advocacy.<sup>38</sup>

Somewhat more radically, the previous Prime Minister, Mr Gordon Brown, in a speech delivered ten days earlier in Glasgow, and which was submitted to Labour's Devolution Commission, proposed six changes:

A new UK constitutional law to set out the purpose of the UK as pooling and sharing resources for the defence, security and well-being of the citizens of all four nations;

A constitutional guarantee of the permanence of the Scottish Parliament;

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<sup>37</sup> In the event of a no vote in the September 2014 referendum it is believed that these proposals will be included in Labour's manifesto for the British general election in 2015.

<sup>38</sup> The Labour Party also has plans for greater devolution of power from Whitehall to cities and counties in England to end what the leader of the opposition, Mr Edward Miliband, in a speech in Birmingham, on 8<sup>th</sup> April, 2014, called a "*century of centralisation*". They would involve at least doubling the level of devolved funding available to them over the next parliament and offering new powers over transport and housing infrastructure, the Work Programme, and apprenticeships and skills. It is also noteworthy that the Coalition government has agreed to give new powers to eight of England's largest cities and is in process of negotiating 'City Deals' with a further 20, based on fostering job creation, deregulation and business growth.

A new division of powers between Scotland and Westminster that gives Holyrood more powers in employment, health, transport and economic regeneration;

A new tax sharing agreement that balances the commitment of the UK to pool and share its resources with the need for accountability to the electors in all the places where money is spent;

New power-sharing partnerships to address shared problems on poverty, unemployment, housing need and the environment;

And a "*radical*" transfer of powers downwards from Westminster and Edinburgh to local communities.

It is submitted that the kind of profound constitutional change sought by Mr Brown could only take place in the context of a written constitution for the United Kingdom, a project that it was known he was interested in when Prime Minister.

In March 2013, Ms Ruth Davidson, the leader of the Scottish Conservatives, set up a commission, headed by Lord Strathclyde, the former leader of the House of Lords, to examine the possibility of further devolution. It will publish a report and recommendations later this year and before the referendum.

Speaking at the Scottish Conservative Spring conference in Edinburgh on 14<sup>th</sup> March, 2014, the present Prime Minister, Mr David Cameron said that increasing the Scottish parliament's powers to raise and set taxes was "*the right thing to do*" and *would not be a consolation prize for Mr Salmond's nationalist government in the event of a no vote in September*".

In a report entitled *Federalism : the best future for Scotland*, the Scottish Liberal Democrat Home Rule and Community Commission, chaired by Sir Menzies Campbell, set out the case for an overtly, rather than quasi, federal United Kingdom involving repeal of the Act of Union between Scotland and England and its replacement by a declaration of federalism. Each of the four constituent countries would have an assembly to manage matters not dealt with at a federal level<sup>39</sup>.

Such an arrangement would necessitate a federal constitution and constitutions for each home nation. From a country with an un-codified constitution Britain would

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<sup>39</sup> In the concluding chapter of her history, *Acts of Union and Disunion*, Profile Books, 2014, Linda Colley also suggests advantages of a move to a federalised state with an assembly for England, located in the north of England, in addition to those in Northern Ireland, Scotland and Wales and a written/codified constitution, or at least a Charter of Confederation, setting out the powers of each and that of the United Kingdom government.

ultimately be transformed to one that has five written constitutions: Considerably more work for draftsmen and draftswomen, lawyers and judges, who would be involved in disputes about their interpretation and jurisdictional competence, raising the question whether a separate constitutional court would be necessary, and for teachers and students of public law!

In conclusion I would agree with *Stephen Tierney Professor of Constitutional Theory at the University of Edinburgh*<sup>40</sup>, whose writing are so helpful and illuminating in this area, that, *The challenge for voters in Scotland*, (and I would add public law teachers and students) is a broad one: *it concerns how they understand the very meaning of statehood and sovereignty in today's Europe. The reality today is that any new state emerging from within the EU and intending to remain within the EU will, by definition, instantiate a novel form of statehood which delivers independence but not separation. This, a unique state of affairs, is the factor which poses the deepest analytical challenges to political actors, to constitutional theorists and practitioners, and, since a referendum is the mechanism assigned to determine such an outcome, ultimately to voters.*

Steps to divorce two countries united for over three hundred years will be watched keenly by other countries in the European Union with nationalist secessionist movements<sup>41</sup> and beyond including the Ukraine, with an active secessionist movement amongst its Russian speaking citizens in the east, Canada, with its strong links to Britain, powerful Quebec separatist movement and referendums on Quebec independence, in 1980 and 1995, when it was rejected by the narrowest of margins<sup>42</sup>, Africa ( Ethiopia alone has six separatist movements) , Asia and Oceania where separatism also increasingly abounds.

If a bare majority of those permitted the franchise vote for Scotland to withdraw from the United Kingdom the consequences will be numerous and far -reaching, perhaps more than is popularly appreciated. Just one would be the birth and growth of constitutional law in a new state. Students and teachers of public law in the continuing United Kingdom and in Scotland w be able to draw comparisons with a

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<sup>40</sup> 'Why is Scottish Independence Unclear?' U.K. Const. L. Blog (25<sup>th</sup> February 2014) (available at: <http://ukconstitutionallaw.org/>).

<sup>41</sup> The list includes in: Spain, Catalonia and Basque; Cyprus, Turkish Republic of Northern Cyprus; Belgium, Flanders; Czech Republic, Moravia; Finland, Aland and Sami; Germany, Baravia; Netherlands, Frisia; Poland, Upper Silesia; ; Portugal, Madeira and the Azores; and Sweden , Sami and Scania.

<sup>42</sup> Only 51% of those who voted opposed the proposition.



very different system on the island they share as semi- detached, and hopefully amicable, neighbours. The topicality of Scottish independence may help to stimulate and enliven student interest in public law, for which individual levels of enthusiasm vary from high to low.

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## Appendix One.

### Referendums held in the United Kingdom since 1973.

Referendum	Question	Answer Format	Result	Legislative basis
"Border poll" Northern Ireland March 1973	Do you want Northern Ireland to remain part of the United Kingdom?  Or  Do you want Northern Ireland to be joined with the Republic of Ireland outside the United Kingdom?	Tick box  Tick box	Northern Ireland remained part of the United Kingdom.	Northern Ireland (Border Poll) Act 1972
Membership of the European Community UK June 1975	Do you think that the United Kingdom should stay in the European Community (the Common Market)?	Tick YES box or NO box	The UK remained in the European Community.	Referendum Act 1975
Devolution to Scotland March 1979	Do you want the provisions of the Scotland Act 1978 to be put into effect?	Tick YES box or NO box	Devolution did not proceed as the requirement that 40 per cent of the electorate had to vote "Yes" was not met	Scotland Act 1978
Devolution to Wales March 1979	Do you want the provisions of the Wales Act 1978 to be put into effect?	Tick YES box or NO box	Devolution did not proceed.	Wales Act 1978

Referendum	Question		Result	Legislative basis
Devolution to Scotland  September 1997	I agree that there should be a Scottish Parliament  or  I do not agree that there should be a Scottish Parliament.	Tick box  Tick box	The Scottish Parliament was established.	Referendums (Scotland and Wales) Act 1997
	I agree that a Scottish Parliament should have tax-varying powers  or  I do not agree that a Scottish Parliament should have tax-varying powers.	Tick box  Tick box	The Scottish Parliament was given tax-raising powers.	
Devolution Wales  September 1997	I agree that there should be a Welsh Assembly  or  I do not agree that there should be a Welsh Assembly.	Tick box  Tick box	The Welsh Assembly was established.	Referendums (Scotland and Wales) Act 1997
Greater London Authority London  May 1998	Are you in favour of the Government's proposals for a Greater London Authority, made up of an elected mayor and a separately elected assembly	Tick YES box or NO box	The Greater London Authority was established.	Greater London Authority (Referendum) Act 1998

Referendum	Question		Result	Legislative basis
Belfast Agreement Northern Ireland  May 1998	Do you support the Agreement reached at the Multi-Party Talks in Northern Ireland and set out in Command Paper 3883?	Tick YES box or NO box	Community consent for continuation of the Northern Ireland peace process on the basis of the Belfast Agreement was given.	Northern Ireland (Entry to Negotiations etc) Act 1996
Elected Regional Assembly North East of England	Should there be an elected assembly for the North East region?	Tick YES box or NO	The Elected Regional Assembly for the North East was not established.	Regional Assemblies (Preparations) Act 2003

November 2004		box		
Legislative powers of the Welsh Assembly March 2011	Do you want the Assembly now to be able to make laws on all matters in the 20 subject areas it has powers for?	Tick YES box or NO box	The Assembly now has these powers	Government of Wales Act 2006
Electoral Reform May 2012	At present, the UK uses the "first past the post" system to elect MPs to the House of Commons. Should the "alternative vote" system be used instead?	Tick YES box or NO box	The parliamentary voting system was not changed	Parliamentary Voting System and Constituencies Act 2011

