Some Notes on the Scottish Government's Reference to the UK Supreme Court regarding the Proposed October 2023 Independence Referendum

Gareth Morgan - Version 2 5/10/22

Q1: What is the case about? Why is the Supreme Court involved?

A1: The Scottish Government has long had a policy of holding a further referendum on Scottish independence (Indyref2), once we were through the worst of the Covid pandemic. This has been raised repeatedly as an intention since the EU Referendum in 2016 when Scotland voted firmly to remain in the EU but the UK as a whole voted to leave.

However, the first Scottish independence referendum in 2014 (Indyref1) took place with a "Section 30 Order" from the Privy Council, following the 2012 Edinburgh Agreement between the then UK Prime Minister, David Cameron and the then Scottish First Minister, Alex Salmond. So, with Indyref1, it wasn't necessary to consider whether or not the Scottish Parliament under its own authority could legislate for such a referendum. The Order under section 30 of the Scotland Act 1998 gave explicit powers to the Parliament at Holyrood to pass legislation for an independence referendum.

Indyref1 thus went ahead on 18 September 2014 with the question *Should Scotland be an independent country?* The outcome was 55% "No" vote. (However, it should be noted that there was nothing in the Edinburgh Agreement or in the Section 30 Order about what would happen in the event of a "Yes" vote.)

Since the possibility of Indyref2 was first raised, the UK Government has repeatedly refused to recommend the Privy Council to grant a further Section 30 Order so that a further independence referendum could proceed with the same legal basis as in 2014.

However, many have argued (even from before Indyref1) that even under the law as it stands, with Scotland as part of the UK, the Scottish Parliament does not need explicit consent from the UK Government to hold a referendum seeking the views of the Scottish people on independence. Others have disagreed. It all depends on how one interprets certain provisions in the Scotland Act 1998.

In the circumstances, in June 2022, when Nicola Sturgeon advised the Scottish Parliament that the Scottish Government considered it was right to hold Indyref2 in October 2023, she asked the Lord Advocate, Dorothy Bain QC (now KC) (the Scottish Government's top legal officer) to use her powers to make an explicit "reference" to the UK Supreme Court (UKSC), asking the UKSC to determine whether passing a Bill for a fresh Scottish independence referendum would be within the powers of the Scottish Parliament.

This was a crucial first step as a Bill could not even be *introduced* for debate at Holyrood unless the law officers (normally the Lord Advocate herself for major legislation) could certify that in their opinion the Bill was within the Scottish Parliament's powers. An important provision in the Scotland Act 1998 (which established the Scottish Parliament) allows for such references to the UKSC to be made when the Lord Advocate is uncertain on a matter of law regarding the extent of the Parliament's devolved powers.

Q2: So what is the Court being asked to decide?

A2: In summary, the Lord Advocate is asking the UKSC to answer the question: *Does the provision of the proposed Scottish Independence Referendum Bill that provides that the*

question to be asked in a referendum would be "Should Scotland be an independent country?" relate to reserved matters?

The phrase "reserved matters" means those aspects of UK law which, even if they affect Scotland, have to be decided by Westminster, not by the Scottish Parliament. They include matters such as foreign policy and defence which have to be decided at UK level as long as Scotland is part of the union. The Scotland Act 1998 has a long list of reserved matters (Schedule 5 to the Act). However – very importantly – the Scottish Parliament is free to legislate on any matter affecting Scotland *unless* it falls within the definition of reserved matters.

The Scotland Act recognised that there might, at times, be disputes about the extent of the devolution powers and the Act gives powers to the UKSC to take decisions where it is unclear. (The UKSC is highest court in the UK – dealing with matters under Scots law as well as under the laws of England and Wales and of Northern Ireland.)

In this case the reference to the UKSC is made by the Lord Advocate herself under schedule 6 para 34 of the Scotland Act 1998. It is the first time this provision has been used. It is thus a legal decision – *not* a matter for UK Ministers – to decide whether the Scottish Parliament can legislate on a specific issue. In this case the issue under consideration is whether or not the Scottish Parliament can legislate for a referendum on the independence question.

Note that a "reference" just means that the UKSC is being asked to answer a question. It does not mean a trial of anyone's actions or behaviour.

Q3: Isn't the calling of Indyref2 obviously a reserved matter?

A3: No – it's not – and that is the misunderstanding of many in the mainstream media and indeed some in the independence movement.

The Scotland Act states very clearly that matters relating to (i) the Union of the Kingdoms of Scotland and England and/or (ii) the Parliament of the United Kingdom are reserved. So there is no way under the current legislation that the Scottish Parliament could pass an Act (without the consent of Westminster) saying, for example, that "Scotland shall be an independent country from the start of next year".

But the Scotland Act says nothing about the calling of referendums, so in principle there is nothing to stop the Scottish Parliament legislating for a referendum on almost any issue. The First Minister has made clear that what is proposed in October 2023 is a *consultative referendum*. The very first clause of the draft Referendum Bill that the UKSC has been asked to consider says: *The purpose of this Act is to make provision for ascertaining the views of the people of Scotland on whether Scotland should be an independent country.*

This is like most referendums – including Indyref1 in 2014 and the EU Referendum in 2016 – neither of those led automatically to any particular outcome. In 2016, for example, it was completely unclear what sort of Brexit arrangements would follow if the UK voted to leave the EU: after the referendum result was known huge amounts of debate and legislation were needed before any key decisions were made.

The opposite of a consultative referendum is a *self-executing referendum*, where the referendum result automatically leads to certain steps. But in the case of Indyref2, on the basis proposed by the Bill, there is no certainty as to what would follow in the event that a

majority of the Scottish people vote "Yes": that would be a matter for further discussion between the Scottish and UK Governments at the time.

Q4: Who are the parties to the case?

A4: The reference to the UKSC has been made by the Lord Advocate, Dorothy Bain KC, on behalf of the Scottish Government. The reference is opposed by the UK Government – represented by the Advocate General (the UK's law officer for Scotland). The Scottish National Party (SNP) have also been given permission to "intervene" in the case – that is to present arguments that may help the Court decide, even though they are not formally a party in the case.

So there are three sets of lawyers involved: the Lord Advocate (who plans to argue her case in person) and her team, the Advocate General's UK Government legal team, and the SNP's legal team (although the SNP have only been given permission to make a written case, so the SNP's lawyers won't be directly addressing the Court).

Q5: When is the case taking place? Who are the judges? When will they decide?

A5: The case is being heard at the Supreme Court in London on Tuesday 11th and Wednesday 12th October 2022. It will be live streamed at www.supremecourt.uk so anyone can watch.

The hearing is the culmination of a long process – the written cases for the Lord Advocate and Advocate General were filed in the summer, and the SNP's case was published in late September. So the core arguments are all in the public domain for anyone to read.

The case will be heard and decided by five judges, known as Justices of the Supreme Court: Lord Reed (the current President of the UKSC and a Scots lawyer), Lord Lloyd-Jones, Lord Sales, Lord Stephens and Lady Rose. Lord Lloyd-Jones has a background in Wales and Lord Stephens in Northern Ireland, so it could be said that the devolved nations are well represented.

After the hearing on 11 & 12 October, the Justices will take time to reflect on the written arguments and the oral hearing, and will then issue their decision. They will explain their reasoning in a written judgment. Some suggest the decision could come as quickly as a couple of weeks later (in urgent cases the UKSC will sometimes make decisions very quickly); others suggest it could be early 2023 before they make a decision. Much depends on the legal complexity of the issues (though this case has one key question, so in that sense it is less complex than many cases that get to the UKSC). It will also depend on the extent to which the five Justices agree or disagree with each other.

Q6: What are the Scottish Government's arguments in the case?

A6: The Lord Advocate, on behalf of the Scottish Government, is asking the UKSC to decide whether or not the proposed Referendum Bill would be within the competence of the Scottish Parliament, or whether it relates to reserved matters.

As a lawyer with a duty to raise all relevant arguments for the Court, she first sets out the historical background to the Union of the Kingdoms of Scotland and England as agreed in the 1707 Treaty of Union and a number of subsequent developments – in particular the Scotland Act 1998 which established the Scottish Parliament and Scottish Ministers – and the further changes in 2012 and 2016.

She accepts that the "subject matter" of the proposed referendum concerns the Union. She notes, however, that earlier UKSC decisions on devolution issues have concluded that an issue

has to have more than a "loose and consequential" link to a reserved matter before it is outside the powers of the Scottish Parliament – though she accepts that the Court may consider such a link exists in this proposal. She also accepts that many MSPs may see such a referendum as being part of a path to independence.

But she then sets out the converse arguments as to why the proposed referendum legislation does *not* relate to the reserved matter of the Union – and hence why the Scottish Parliament should be able to legislate for the referendum without needing consent from Westminster.

Most fundamentally she points out that the *effect* of a "Yes" outcome would not, of itself, affect the Union, given that it is purely a consultative referendum. She cites previous cases where the Court concluded that there must be a "direct" and "sufficiently close" connection to a reserved matter in order to be outside the powers of the Scottish Parliament. She argues that the Court cannot take into account the subjective aspirations of MSPs in terms of what they hope will be the consequences of a "Yes" vote, as those aspirations are not part of the referendum legislation.

She stresses again that it is a purely consultative referendum that simply ascertains the will of the Scottish people – there is no direct consequence for the Union.

Q7: And what does the UK Government say to this?

A7: The Advocate General, on behalf of the UK Government, first tries to persuade the UKSC not to accept the reference at all – i.e. not to answer the question that the Lord Advocate has asked.

He argues that because the Lord Advocate is asking the UKSC to make a decision on a draft Bill (which could potentially be amended before being passed), it is a purely hypothetical question and the Supreme Court should refuse to make a decision. He quotes extensively from the case brought in 2021 by the independence campaigner Martin Keatings asking the Inner House of the (Scottish) Court of Session to decide on the legality of a similar hypothetical Bill, where the Court declined to make a ruling. (However, that case was based on broad concepts of a possible Bill suggested by an individual, as opposed to the current reference which concerns a specific proposed Bill from the Scottish Government.)

In essence, says the Advocate General, the Lord Advocate should make up her own mind about the Bill's legality and not waste the time of the Supreme Court.

Nevertheless, if the Court agrees that it should accept the reference and make a substantive decision on the question that the Lord Advocate has presented, the Advocate General calls for the Court to answer with a firm "Yes". He is asking the Court to decide: "Yes – the proposed Bill most certainly *does* relate to reserved matters (and hence is outside the powers of the Scottish Parliament)."

Much of the rest of his case seems to argue that it is obvious that the UK Parliament never intended the Scottish Parliament to be able to call an independence referendum, and he totally rejects the Lord Advocate's case that it is purely a consultative referendum with no explicit consequences for the Union. He says it is clear that the political motivation behind the Bill (if passed) would be to create a path towards independence. He states in various ways that it is perfectly obvious that a referendum with the question *Should Scotland be an independent country?* relates to the reserved matter of the Union.

Q8: And does the SNP have any different arguments?

A8: The SNP's arguments focus on the need to interpret the Scotland Act 1998 within the context of the right of all peoples to self-determination.

They stress (with the Lord Advocate) that the proposed referendum would not directly alter the Union. They go on to argue that if the UKSC were to decide that the Scottish Government could not even *consult* the Scottish people on important matters regarding the future of the nation, it would drive a sledge hammer through the democratic concept of self-determination as enshrined in the UN Charter.

They quote from submissions made by the UK Government to the UN's International Court of Justice in relation to other countries such as Kosovo, where the UK was strongly arguing for the principle of self-determination. They say: "The United Kingdom therefore recognises the fundamental right of a people to self- determination and understands that discrete peoples within a State may determine, as is their right, that they no longer wish to form part of that State." They present arguments showing that Scotland is certainly "a people" within this understanding.

The SNP also state "The entire purpose of devolution was to empower the devolved nations and not to disempower them."

They argue furthermore that just because a certain issue is reserved does not mean the Scottish Parliament cannot pass *any* legislation in that sphere even of a consultative nature. They give the example of internet services which are a reserved matter, but point out that no one suggests this means the Scottish Parliament cannot consult people about proposals to upgrade internet access in Scotland.

Q9: What are the possible outcomes?

A9: This is a fairly clear-cut case, and the UKSC really has a choice of three possible decisions.

The first possibility – as the UK Government seeks – is that the Court could decline to accept the reference on the grounds that the question is purely hypothetical, or that the Lord Advocate should be left to decide for herself. The UK Government initially wanted the question of whether the UKSC should accept the reference to be considered as a separate issue, but Lord Reed as President of the Supreme Court ordered that all issues should be considered together.

If the Court were to decline the reference it would mean a continuation of the current uncertainties, which seems to be the UK Government's preferred outcome. But whatever the Lord Advocate then decided about the Bill would almost certainly lead to further legal challenges – and previous UKSC cases cited by the Lord Advocate have confirmed that where a legal issue cannot be decided by the Scottish Parliament it is right for the Court to make a decision. So, given that the Supreme Court is usually keen to make definitive decisions rather than provoke masses of further litigation the Justices may feel that the reference should be accepted – if so, they will need to give an answer to the question asked.

The second possible outcome is a clear "Yes" to the Lord Advocate's question – in other words the UKSC could rule that the Referendum Bill manifestly does affect the Union and is therefore prohibited legislation for the Scottish Parliament as it would be dealing with reserved matters.

The third outcome, which is what independence supporters firmly seek, is a "No" decision from the Supreme Court – a conclusion that the proposed Referendum Bill is indeed a purely consultative exercise in ascertaining the view of the Scottish people, that does not in itself relate to reserved matters, and so the Scottish Parliament has the power to proceed.

(Note: The way the Lord Advocate's question is posed means that pro-independence "Yes" supporters in Scotland are hoping for a "No" decision from the Court, and "No" voters are generally seeking a "Yes" decision.)

Q10: What happens next?

A10: Once the UKSC decision is known – possibly as soon as early November – there are huge consequences for those on all sides.

If the Supreme Court decides that the Referendum Bill can proceed, it seems clear that it will be passed by the Scottish Parliament and that Indyref2 will take place on 19 October 2023 as proposed. However, independence supporters need to bear in mind that it will be a purely consultative referendum "to ascertain the views of the people of Scotland" – in theory the UK Government could simply choose to ignore the outcome. Of course, there is a strong argument based on precedence that governments cannot just ignore the results of referendums. But any argument that the UK Government *must* respect the referendum result goes against the legal argument that it is purely an exercise in *ascertaining views* on independence. Alternatively, some suggest that if the UKSC decides that the Bill can proceed, the UK Government might, after all, be persuaded to agree a Section 30 Order, allowing a referendum to proceed with Westminster's consent – though inevitably this would come with conditions.

However, if the Court decides that the Bill would *not* be within the powers of the Scottish Parliament it would effectively be saying that the Scottish Government *cannot even consult the Scottish people* (at least not by means of a referendum) on questions that relate to reserved matters. But this would mark a huge change to devolution as currently understood, so the Court may be very reluctant to take this approach. It would likely mean, for example, that even a referendum to gather views on an issue such as extending Scottish social security to cover benefits that are currently controlled at UK level would be outside the powers of the Scottish Parliament. Many perfectly normal consultations by the Scottish Government could become illegal if they were seeking views on any matters that are currently reserved.

If the Court declines the reference, the current uncertainties will continue. No doubt the First Minister will hope that the Presiding Officer and law officers will then take the decision that the Bill can proceed given that the UKSC hasn't explicitly rejected it. But if the Bill is then passed, further legal challenges are certain to follow.