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Referendum on Scottish Independence

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Referendum on Scottish Independence

CHAPTER 1: INTRODUCTION

1. The Scottish National Party (SNP) won an overall majority of seats in the Scottish Parliament in the Scottish parliamentary elections of May 2011. The SNP's 2011 manifesto included the following commitment:

“Independence will only happen when the people in Scotland vote for it ... We think the people of Scotland should decide our nation's future in a democratic referendum ... We will, therefore, bring forward our Referendum Bill in this next Parliament. A yes vote will mean Scotland becomes an independent nation ...”¹

2. In the previous Parliament the SNP had formed a minority administration. The then Scottish Government published a Draft Referendum (Scotland) Bill in early 2010, but no Bill has been introduced into the Scottish Parliament.²
3. The UK Government published a consultation paper entitled *Scotland's Constitutional Future* on 10 January 2012³ (the consultation period will close on 9 March). The Scottish Government then published a consultation paper, entitled *Your Scotland, Your Referendum*, on 25 January 2012⁴ (the deadline for responses is 11 May).
4. The UK Government have accepted that the question of Scottish independence is one for the people of Scotland to determine. In their Preface to *Scotland's Constitutional Future*, the Prime Minister and Deputy Prime Minister wrote that:

“We want to keep the United Kingdom together. But we recognise that the Scottish Government holds the opposite view ... We will not stand in the way of a referendum on independence: the future of Scotland's place within the United Kingdom is for people in Scotland to vote on.”

In his Foreword to *Your Scotland, Your Referendum*, the First Minister wrote that:

“Scotland is not oppressed and we have no need to be liberated. Independence matters because we do not have the powers to reach our potential.”

5. The two Governments' respective consultation papers raise a variety of constitutional and legal issues, which cluster around two main points: the power to hold a referendum on Scottish independence and the nature and design of the referendum question. We consider these in turn.

¹ Scottish National Party Manifesto 2011, p 28.

(http://votesnp.com/campaigns/SNP_Manifesto_2011_lowRes.pdf).

² See: <http://www.scotland.gov.uk/Resource/Doc/303348/0095138.pdf>.

³ Cm 8203. An accompanying Ministerial Statement was made in the House of Commons by the Secretary of State for Scotland, the Rt Hon Michael Moore MP (HC Deb, 10 January 2012, cols 51–72) and was repeated in the House of Lords by the Advocate General for Scotland, the Rt Hon Lord Wallace of Tankerness (HL Deb, 10 January 2012, cols 61–72).

⁴ See: <http://www.scotland.gov.uk/Resource/0038/00386122.pdf>. An accompanying statement was made to the Scottish Parliament by the First Minister, the Rt Hon Alex Salmond MSP (Official Report, 25 January, cols 5603–21).

CHAPTER 2: LEGISLATIVE COMPETENCE

6. It is the policy of the Scottish Government (not of the UK Government) to hold a referendum on Scottish independence. However, the UK Government are of the clear view that neither the Scottish Government nor the Scottish Parliament possess the legal power to hold such a referendum. The UK Government's consultation paper reflects and reinforces this view, and the Advocate General for Scotland, the Rt Hon Lord Wallace of Tankerness QC, has since underscored it.⁵ The Scottish Government do not agree.⁶
7. The UK Government, recognising the SNP's political mandate, have proposed a way to enable the Scottish Government and Parliament to press ahead with a referendum on independence. The core proposal contained in *Scotland's Constitutional Future* is for an order to be made under section 30 of the Scotland Act 1998⁷ conferring on the Scottish Parliament the legal power to pass an Act providing for a referendum.⁸ A section 30 order may be made only if approved by both Houses of Parliament and by the Scottish Parliament.⁹ An alternative proposal is that the Scotland Bill could be amended so as to achieve the same result¹⁰. A further alternative is that the UK Parliament legislate directly on the matter. Of these options, the UK Government would prefer the section 30 route, not least because this is the route that would maximise the involvement of the Scottish Parliament. A draft section 30 order is appended to the UK Government's consultation paper.
8. The UK Government have not proposed a form of words for the question to be asked in any referendum. On the basis that a section 30 order can be agreed, the question that the Scottish Government have now proposed is: "Do you agree that Scotland should be an independent country?". The Scottish Government recognise that, unless the law is amended, the Scottish Parliament does not possess the power to legislate for a referendum asking this question.¹¹
9. If for any reason a section 30 order cannot be agreed, the Scottish Government have stated in *Your Scotland, Your Referendum* that they "will have the option of a referendum on the basis" that they set out in 2010.¹² Therefore, the question of legal competence will arise if no section 30 order can be agreed and the UK Parliament does not legislate (whether by means of the Scotland Bill or otherwise) for the competence of the Scottish Parliament to be appropriately extended.
10. On one view, the competence of the Scottish Parliament to legislate for a Scottish independence referendum may depend on the wording of the

⁵ For example in a speech delivered at the University of Glasgow on 20 January, the text of which is available online at http://www.oag.gov.uk/oag/CCC_FirstPage.jsp

⁶ *Your Scotland, Your Referendum*, *op. cit.*, paras 1.5–1.6.

⁷ The Scotland Act 1998 is the UK legislation which established devolution for Scotland. It created and empowered the Scottish Parliament and it sets out the limits to the Scottish Parliament's legislative competence.

⁸ There needs to be express statutory authority for any referendum to be held in the United Kingdom: there is no general power to hold referendums. Generic rules pertaining to referendums are contained in the Political Parties, Elections and Referendums Act 2000 (PPERA), but this Act contains no provision authorising any particular referendum to be held. See further on PERA below.

⁹ Scotland Act 1998, Sch 7. Under the Act this is known as "Type A" procedure.

¹⁰ The Scotland Bill, currently before the House, will (if enacted) amend the Scotland Act 1998 in a number of respects. We reported on the Bill earlier in this session: 17th Report (2010–12) (HL Paper 184).

¹¹ *Your Scotland, Your Referendum op. cit.*, para 1.12.

¹² *Ibid.*

referendum question. In 2010 the Scottish Government proposed a formulation asking whether voters agree with a proposal that the powers of the Scottish Parliament should be “extended to enable independence to be achieved”.¹³ In their 2012 consultation paper the Scottish Government assert that this formulation “was carefully phrased to comply with” the requirements of the Scotland Act 1998 and that “much independent legal opinion supports the Scottish Government’s view”.¹⁴ It is regrettable that the Scottish Government have not set out their legal position more fully.

11. In *Your Scotland, Your Referendum*, the Scottish Government explain that the Scottish Parliament “has the power to legislate for a referendum as long as that would not change any reserved law or relate to those aspects of the constitution which are reserved by the Scotland Act 1998”.¹⁵ Thus, the Scottish Government’s view appears to be that a referendum question asking whether the powers of the Scottish Parliament should be extended so as to enable independence to be achieved could be lawfully authorised by an Act of the Scottish Parliament, as such a question would not “relate to” a reserved matter. For reasons that we spell out below, this is an inaccurate interpretation of the law.
12. A referendum along these lines would not appear to be capable of delivering independence, even if it resulted in a “yes” vote. An affirmative answer to the question posed would deliver no more than a set of negotiations between the Scottish and UK Governments as to how the powers of the Scottish Parliament could be extended so as to enable the possibility of independence. It would seem to follow that any eventual move to independence would then require a second referendum. The two Governments’ current consultation papers each rest on the assumption that there will be only one referendum.

The rule of law

13. It is a fundamental principle of the constitution that, irrespective of any party’s political mandate to form a Government, all governments must act in accordance with and subject to the rule of law. That the Scottish National Party won an overall majority of seats in the Scottish Parliament in 2011 gives it a considerable political mandate to pursue its agenda of advocating independence for Scotland, but as the Scottish Government it must do so lawfully.
14. Likewise, the Scottish Parliament is a legislature that is subject to the rule of law. It is not a sovereign parliament and may make law only within the limits of its competence. Case law of the highest authority shows that, where it acts within its legal powers, the law will recognise and indeed give great weight to the democratic nature of the Scottish Parliament. Thus, where there is a legal challenge to the reasonableness or appropriateness of a provision of an Act of the Scottish Parliament, the courts will rule upon that challenge in the light of the fact that, as Lord Hope expressed it in the leading case, *AXA General Insurance v Lord Advocate*, “the elected members of [the] legislature ... are best placed to judge what is in the country’s best interests as a whole”.¹⁶

¹³ *Scotland’s Future: Draft Referendum (Scotland) Bill Consultation Paper*, *op. cit.*

¹⁴ *Your Scotland, Your Referendum op. cit.*, para 1.5. No citations are given by the Scottish Government.

¹⁵ *Ibid.*

¹⁶ *AXA General Insurance v Lord Advocate* [2011] UKSC 46, para 49.

15. But cases decided in the First Division of the Inner House of the Court of Session confirm that this applies only where the Scottish Parliament has acted within the limits of its powers in the first place. In *Whaley v Watson* in 2000 Lord Prosser stated that:

“faced with the suggestion that the courts might ... [allow] the [Scottish] Parliament perhaps to exercise power beyond its legal limits, from a fear that enforcement of those limits might be seen as stopping Parliament from doing what it wanted to do, I am baffled: a defined Parliament is there to do not whatever it wants, but only what the law has empowered it to do ...”¹⁷

Likewise, in *Imperial Tobacco v Lord Advocate* in 2012, Lord Reed stated that the

“democratic legitimacy of the Scottish Parliament does not ... warrant a different approach to interpretation from that applicable to Acts of Parliament: statutes which are, of course, also passed by a representative and democratically elected Parliament. Nor does it impinge upon the fact that the power of the Scottish Parliament to legislate is limited by the Act of Parliament which established it. It is the function of the courts to interpret and apply those limits, when called upon to do so, so as to give effect to the intention of Parliament. In performing that function, the courts do not undermine democracy but protect it.”¹⁸

The Scotland Act 1998

16. The key provisions of the Scotland Act 1998 are section 29 and Schedule 5. So far as is relevant, they provide as follows:

Section 29

- (1) An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament.
- (2) A provision is outside that competence so far as any of the following paragraphs apply—

...

(b) it relates to reserved matters ...

- (3) For the purposes of this section, the question whether a provision of an Act of the Scottish Parliament relates to a reserved matter is to be determined ... by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances.

Schedule 5 Reserved matters

Part 1 General reservations

The Constitution

The following aspects of the constitution are reserved matters, that is—

...

(b) the Union of the Kingdoms of Scotland and England ...

¹⁷ *Whaley v Watson* 2000 SC 340, 2000 SLT 475.

¹⁸ *Imperial Tobacco v Lord Advocate* [2012] CSIH 9, para 58.

17. All parties accept that these provisions mean that the Scottish Parliament has no competence to legislate for independence. The UK Government consider that these provisions likewise mean that the Scottish Parliament has no competence to legislate for a referendum on independence. The Advocate General for Scotland has cited with approval a remark made by the then Secretary of State for Scotland (the late Rt Hon Donald Dewar MP) during the passage of the Bill that became the Scotland Act 1998: “A referendum that purported to pave the way for something that was ultra vires is itself ultra vires”.¹⁹ The Advocate General has said that, in the UK Government’s view, “a referendum ... *about* the Union would *relate to* the Union”²⁰ and would therefore be “not law” within the meaning of section 29. This view seems to us to be plainly correct.
18. This conclusion is fortified by section 29(3), which provides that whether a provision of an Act of the Scottish Parliament “relates to” a reserved matter is to be determined by reference to its “purpose”, having regard, among other things, to its “effect”. The purpose of the Scottish Government could not be clearer: they desire independence for Scotland and, as the SNP stated in its 2011 manifesto, a yes vote in any referendum on Scottish independence “will mean Scotland becomes an independent nation”.²¹ While it may be that, on a formal view, the political purpose of the SNP should properly be distinguished from the legal purpose of any Act of the Scottish Parliament (even one promoted by the majority SNP Government), case law shows that the courts will examine a broad range of background materials in order to distil the purpose of legislation, including “reports to and papers issued by the Scottish Ministers prior to the introduction” of a Bill, as well as explanatory notes, policy memoranda and the like.²² The SNP’s political purpose in introducing any Referendum (Scotland) Bill is therefore highly likely to be relevant to considering the legal purpose of that legislation.
19. The judgment of the First Division in the recent *Imperial Tobacco* case strongly supports this last point. Lord Reed said: “The focus is ... primarily upon why the provision has been enacted rather than upon what it does, although the latter is also relevant. The submission ... that neither the motive nor the policy of the legislature in enacting the measure is a relevant consideration must therefore be rejected.”²³ Likewise, Lord Brodie said that “What section 29(3) makes determinative is the purpose of the provision in question. That has to do with the legislative objective, as disclosed by the preparatory material ...”²⁴

Three possible counter-arguments

20. As noted above, the Scottish Government’s recent consultation paper does not go into as much legal detail on the question of legislative competence as the UK Government’s consultation paper. We do not know, therefore, exactly what the Scottish Government’s legal position is. However, we have

¹⁹ HC Deb, 12 May 1998, col 257.

²⁰ Speech by the Advocate General delivered at the University of Glasgow on 20 January *op. cit.*; emphasis in the original.

²¹ See above, para 1.

²² *Martin v Most* [2010] UKSC 10, 2010 SC (UKSC) 40, per Lord Hope at para 25.

²³ *Imperial Tobacco v Lord Advocate* [2012] CSIH 9, para 122.

²⁴ *Ibid.*, para 202.

identified three possible counter-arguments to the legal position set out above. We set these out here, along with our reasons for concluding that they do not undermine the UK Government’s legal analysis.

The “effect” of an advisory referendum

21. The first possible counter-argument is that if the referendum question were to ask merely for the opinion of the Scottish electorate as to whether negotiations with the UK Government should commence with a view to securing independence, then such a referendum could not of itself have any legal “effect” (within the meaning of section 29(3)) on the reserved matter of the Union.²⁵ Its only effect would be to trigger inter-governmental negotiations—and to negotiate is not itself a reserved matter. There are several problems with this argument: not least that a referendum question along even these lines would “relate to” the reserved matter of the Union, especially considering that the avowed “purpose” of those proposing the referendum will be to secure a mandate to terminate the Union. Also, as we pointed out above, if the referendum question were framed in this way, this would not be sufficient to deliver independence: it would be sufficient only to deliver negotiations about independence.²⁶
22. Building on this last point, it might be contended that, if a referendum were incapable by itself of delivering independence, then it follows that it should not be construed as having the “effect” of relating to a reserved matter (and that it should accordingly be held to be within the legislative competence of the Scottish Parliament). This argument is seriously flawed, however, as it rests on a misapprehension as to the nature of referendums. Referendums in the UK are advisory (rather than binding) in the sense that Parliament remains sovereign: in exercising its sovereignty Parliament could legislate so as to override or ignore the result of a referendum. Whilst true as a matter of strict law, however, the fact should not be overlooked that something can be binding in the British constitutional order without it being legally required in the strictest sense. Referendums are not opinion polls: their purpose is not to test public opinion, but to make decisions. They are appeals directly to the people to make a decision that, for whatever reason, is felt to be more appropriately made by the public than by a legislature. As we observed in 2010 in our report on referendums and their place in the UK constitutional order, even where a referendum was legally only advisory, “it would be difficult for Parliament to ignore a decisive expression of public opinion”.²⁷
23. It follows that, **in our view, any referendum on Scottish independence would have both the purpose and the effect of making a decision that related to a reserved matter: namely, the Union.**

Section 101(2) of the Scotland Act

24. Section 101(2) of the Scotland Act 1998 provides that any provision of an Act of the Scottish Parliament “is to be read as narrowly as is required for it

²⁵ Variants of this argument have been expressed by Professor Stephen Tierney in the *Herald*, 11 January 2012, and by the late Professor Sir Neil MacCormick (one of the SNP’s leading figures in the late twentieth century) in (2000) 53 *Parliamentary Affairs* 721, at pp 725–6.

²⁶ See above, para 1.

²⁷ Constitution Committee, 12th Report (2009–10) *Referendums in the United Kingdom* (HL Paper 99), para 197.

to be within competence, if such a reading is possible ...” It might be argued that this provision should be used so as to bring within competence any provision of an Act of the Scottish Parliament concerning an independence referendum in respect of which there was any doubt as to vires.

25. However, section 101(2) comes into play only if it is possible to read a provision of an Act of the Scottish Parliament as being within legislative competence. For the reasons given above, our view is that such a reading is not possible in the case of an Act of the Scottish Parliament that purports to authorise a referendum on independence, in which case section 101(2) could play no role.²⁸
26. Further, as has recently been pointed out by the First Division,²⁹ section 101(2) applies only to the interpretation of provisions of Acts of the Scottish Parliament. It does not apply to the interpretation of provisions of the Scotland Act 1998 (which is an Act of the UK Parliament). Determining whether any Act of the Scottish Parliament concerning a Scottish independence referendum was within competence or not would in large measure be an exercise in the interpretation of section 29 of and Schedule 5 to the Scotland Act. In the performance of this exercise, section 101(2) could play no role: it does not permit the Court to “read down” the key terms of “relates to”, “purpose” and “effect”.³⁰

A “generous” and “purposive” interpretation?

27. *Robinson v Secretary of State for Northern Ireland* concerned a dispute over the lawfulness of the election in November 2001 of the First Minister and Deputy First Minister of Northern Ireland.³¹ By a three-to-two majority, the Appellate Committee of the House of Lords ruled that the election was lawful. In reaching this conclusion the majority (Lords Bingham, Hoffmann and Millett) interpreted the relevant provisions of the Northern Ireland Act 1998 “generously and purposively” (as Lord Bingham described it) for the reason that the Act was “in effect a constitution”.³² As such, Lord Bingham ruled, it should be construed “bearing in mind the values which the constitutional provisions are intended to embody”.³³ The minority of Law Lords hearing the appeal (Lords Hutton and Hobhouse) took a stricter approach to the interpretation of the Northern Ireland Act and ruled that the November 2001 election of the First Minister and Deputy First Minister was unlawful.
28. If the Northern Ireland Act 1998 is of a particular constitutional character, which required it in *Robinson* to be interpreted generously and purposively, is the same not true of the Scotland Act 1998? An authoritative answer to this question has recently been given by the First Division: their answer was that the differences between the Scottish and Northern Irish legislative

²⁸ It is striking that section 101(2) has played next to no role in the case law to date on the legislative competence of the Scottish Parliament: see, for example, *Martin v Most* (*op. cit.*).

²⁹ *Imperial Tobacco v Lord Advocate* [2012] CSIH 9.

³⁰ As Lord Brodie expressed it in *Imperial Tobacco* (at para 183), “I see no basis for suggesting that the Scotland Act should be construed with a view to finding that a provision which has been enacted by the Scottish Parliament is within competence rather than outside it”.

³¹ *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32.

³² At para 11.

³³ *Ibid.*

frameworks are considerable. *Robinson* should not be taken out of context. The issue at stake in that case was whether devolved government could continue in Northern Ireland or whether it would once again be liable to be suspended. The constitutional “value” which Lord Bingham cited in support of his generous and purposive interpretation was that “it is in general desirable that the government should be carried on, that there be no governmental vacuum”.³⁴ And core to the majority’s ruling in *Robinson* was the fact that the Northern Ireland Act 1998 had been enacted “for the purpose of implementing” the Belfast Agreement. We note that these factors would be absent from any litigation challenging the legality of an Act of the Scottish Parliament that purported to authorise a referendum on independence. There would be no immediate question of devolution being suspended, no issue would arise as to “governmental vacuum”, and there is of course no equivalent in Scotland of the role that the Belfast Agreement has played in Northern Ireland.³⁵

29. Indeed, the First Division in *Imperial Tobacco* went further to distinguish the Northern Ireland position. Lord Reed ruled that “The Scotland Act is not a constitution, but an Act of Parliament”.³⁶ Lord Brodie agreed, adding that “the principle derived from *Robinson* that legislation should be interpreted generously and purposively ... is not readily applicable to resolving the issue of what has been devolved as opposed to what has been reserved”.³⁷ The First Division ruled that while a more generous and purposive approach to interpretation may be applicable to “the more open textured language” of a true constitution, the Scotland Act was “dense, detailed and precise” and should be interpreted neither expansively nor restrictively, but simply in accordance with the natural meaning of the language.³⁸ Generous and purposive interpretation may be suitable for constitutions that were otherwise hard to change, suggested Lord Reed, but was not called for with regard to Acts of Parliament which, like the Scotland Act, were straightforward to amend.³⁹ Further, even if a purposive interpretation were to be emphasised in any way, this would add little: the purpose of (the relevant provisions of) the Scotland Act was simply to divide legislative competence as between the Scottish and the UK Parliaments.⁴⁰

Conclusions on legislative competence

30. An authoritative determination of the legal issues analysed in this chapter could be given only by the courts. Having considered the matter in detail, **we are of the clear view that the legal analysis offered by the UK Government is correct. Without amendment, the Scotland Act 1998**

³⁴ *Ibid.*

³⁵ This last factor was emphasised by the Lord President at para 14 of his judgment in *Imperial Tobacco v Lord Advocate* [2012] CSIH 9.

³⁶ *Imperial Tobacco v Lord Advocate* [2012] CSIH 9, para 71.

³⁷ Lord Brodie at para 182.

³⁸ Lord Brodie at para 181; cf the Lord President at para 14.

³⁹ The section 30 order procedure shows just how easy it is to amend the division of competences enacted in the Scotland Act.

⁴⁰ The Lord President at para 14; cf Lord Brodie at para 182. In *Martin v Most* Lord Rodger amplified this point by stating that “the whole scheme of devolution is ... that the redistribution of powers should not impair but improve the government of the United Kingdom as a whole” (*Martin v Most*, above n 20, para 80).

confers no legislative power on the Scottish Parliament to pass an Act purporting to authorise a referendum about independence.

31. **We welcome the proposal that a section 30 order be made to confer on the Scottish Parliament clear competence to legislate for a referendum on Scottish independence.**

CHAPTER 3: THE REFERENDUM QUESTION

32. In this chapter we draw further on the findings of our 2010 report, *Referendums in the United Kingdom*.⁴¹ The report concluded that, “if referendums are to be used, they are most appropriately used in relation to fundamental constitutional issues”. Proposals “for any of the nations of the UK to secede from the Union” fell within this definition.⁴²

Fair and clear-cut

33. Our 2010 report reflected and reinforced the twin constitutional imperatives that referendums must be—and must be seen to be—fair and clear-cut.⁴³ We welcome the commitments made to this effect by both the UK Government and the Scottish Government in their respective consultation papers. In the words of the UK Government’s paper, *Scotland’s Constitutional Future*:

“... the referendum must be fair. For the referendum to be fair, the rules about the referendum and the oversight of the referendum must be manifestly and overtly above board ... The referendum must also be decisive.”⁴⁴

In the words of the Scottish Government’s paper, *Your Scotland, Your Referendum*:

“The referendum must be trusted and clear ... The referendum will meet the highest standards of fairness, transparency and propriety and deliver a decisive result.”⁴⁵

34. The people of Scotland are entitled to expect that all parties will be scrupulous to ensure the highest standards of fairness and clarity in any independence referendum. Basic democratic principle demands nothing less.
35. The stated preference of both Governments is for a single referendum question on whether or not the people of Scotland wish Scotland to become independent of the rest of the United Kingdom. In the words of *Scotland’s Constitutional Future*:

“The referendum must also be decisive. It is the UK Government’s view that for this to happen, there must be a single, straightforward question.”⁴⁶

In the words of *Your Scotland, Your Referendum*:

“The Scottish Government’s preference is for a short, direct question about independence.”⁴⁷

36. We welcome this. In our 2010 report, we recommended that “the presumption should be in favour of questions posing only two options for

⁴¹ *Op. cit.*

⁴² *Ibid*, para 94.

⁴³ *Ibid*, chapter 5.

⁴⁴ *Scotland’s Constitutional Future, op. cit.*, p 7.

⁴⁵ *Your Scotland, Your Referendum, op. cit.*, p 4.

⁴⁶ *Scotland’s Constitutional Future, op. cit.*, p 7. The draft section 30 Order provides: “There must be only one ballot paper at the referendum, and the ballot paper must give the voter a choice between only two responses.”

⁴⁷ *Your Scotland, Your Referendum, op. cit.*, p 5.

voters.”⁴⁸ The Coalition Government agreed with this, observing that “two options should generally be preferred, as this avoids ambiguous results and should help voter comprehension”.⁴⁹

37. **As advocated by both the UK and Scottish Governments, there should be a single referendum question on independence.**

“Devolution max”: a different constitutional outcome and process

38. The Scottish Government’s paper nevertheless holds out the possibility of including a second question in the referendum, on so-called “devolution max”. Noting that “there is support across Scotland ... for increased responsibilities for the Scottish Parliament short of independence”, the Scottish Government:

“is willing to include a question about further devolution on the lines of ‘devolution max’ if there is sufficient support for such a move.”⁵⁰

39. Notwithstanding the fact that the UK Government’s consultation is concerned only with independence, it clearly would be a mistake to proceed as if the debate on Scotland’s constitutional future were a debate simply between “independence” and “the status quo”. Some polling data⁵¹ suggest that there may indeed be substantial interest in Scotland in extending the devolved powers of the Scottish Parliament beyond those contained in the current Scotland Bill.⁵² Devolution, after all, can be seen as “a process, not an event”.⁵³
40. As envisaged by the Scottish Government, “devolution max” would go well beyond the present Scotland Bill to include—or at least to approach—full fiscal autonomy.⁵⁴ There is nonetheless a profound difference between “devolution max” and independence. They are distinct constitutional outcomes: in respect of one, Scotland remains in the United Kingdom, in respect of the other, it does not.
41. **We agree with the UK Government that including a “devolution max” option in an independence referendum would conflate “two entirely separate constitutional issues”.**⁵⁵ We note that this was not the case with the two questions in the 1997 Scottish referendum (on establishment of the Scottish Parliament and whether the Parliament should have tax-raising powers), or indeed with international precedents such as the two-question referendums in New Zealand in 1993 and 2011 on change to, and choice of, the parliamentary electoral system.

⁴⁸ *Op. cit.*, para 159.

⁴⁹ Constitution Committee, 4th Report (2010–11) *Government Response to the Report on Referendums in the United Kingdom* (HL Paper 34), p 11.

⁵⁰ *Your Scotland, Your Referendum*, *op. cit.*, para 1.26.

⁵¹ As reported for example in *The Scotsman*, 16 January 2012.

⁵² The Scotland Bill would implement the bulk of the recommendations contained in the report of the (Calman) Commission on Scottish Devolution, *Serving Scotland Better* (June 2009). See Constitution Committee 17th Report (2010–12) *Scotland Bill* (HL Paper 184).

⁵³ Rt Hon Ron Davies MP, *Devolution: A Process Not an Event* (Institute of Welsh Affairs, 1999).

⁵⁴ Scottish Government White Paper, *Your Scotland, Your Voice* (November 2009), chapter 2.

⁵⁵ *Scotland’s Constitutional Future*, *op. cit.*, p 19. In oral evidence to the Committee on 1 February 2012, the Deputy Prime Minister, the Rt Hon Nick Clegg MP, spoke of “mixing apples and pears”: <http://www.parliament.uk/documents/lords-committees/constitution/DPM/corrCNST010212ev1.pdf>

42. The preferred process of the Scottish Government is referendum first and negotiations with the UK Government second. *Your Scotland, Your Referendum* states that:
- “the Scottish Government will set out full details of the offer to the people of Scotland in a comprehensive white paper on independence. This will be published following Royal Assent to the Referendum Bill, expected in November 2013 ... Following a vote for independence, the Scottish Parliament and Government would carry forward the people’s will. This would involve negotiations with the UK Government [dealing] with the terms of independence as well as with the arrangements for the transition ... May 2016 will see the election of the next Scottish Parliament which would become the Parliament of an independent Scotland.”⁵⁶
43. The UK Government have raised no objection to this chronology of the possible route to independence. The Scottish Government’s commitment to publish a white paper ahead of the referendum campaign follows the precedent set by the UK Government in the 1997 referendum about a Scottish Parliament.⁵⁷
44. The different constitutional outcome of “devolution max” requires a distinct constitutional process for its achievement. As illustrated by the potential for competing tax regimes within the United Kingdom, such an arrangement for one member of the Union would necessarily have real, deep and immediate consequences for the other members and for the Union as a whole. Properly to secure the legitimate interests of each and all, proposals as to “devolution max” would first have to be developed through intergovernmental negotiations conducted, not just bilaterally with the UK Government, but on an inclusive, multilateral basis across the Union state.⁵⁸
45. **Whereas both the UK Government and the Scottish Government have recognised that independence is a Scottish question, “devolution max” is not. Proper constitutional process requires that negotiations involving all parts of the United Kingdom precede any referendum on an agreed scheme of “devolution max.”**

The role of the Electoral Commission

46. As noted above,⁵⁹ the Scottish Government’s consultation paper sets out a proposed ballot paper with the following question:
- “Do you agree that Scotland should be an independent country?”
47. We note the concerns expressed about the fairness of this question not only by political opponents⁶⁰ but also by respected pollsters.⁶¹ For example, questions asking whether a voter agrees may bias results towards agreement.
48. The wording of referendum questions is one of the matters dealt with by Part VII of the Political Parties, Elections and Referendums Act 2000 (PPERA).

⁵⁶ *Your Scotland, Your Referendum*, *op. cit.*, paras 1.15, 4.1, 4.5.

⁵⁷ Scotland’s Parliament, Cm 3658, 1997.

⁵⁸ Perhaps using existing constitutional machinery in the form of the Joint Ministerial Committee.

⁵⁹ Para 8.

⁶⁰ Including in the House of Lords: see for example HL Deb 26 January 2012 cols 1161–97.

⁶¹ As reported for example in *The Scotsman*, 27 January 2012.

Under section 104 of that Act the UK Electoral Commission must consider the Government's proposed wording and publish a statement of its views as to the intelligibility of the question; the minister is not obliged to adopt this advice. Our 2010 report recommended a strengthening of the Commission's powers by giving it a statutory responsibility to formulate referendum questions which would then be presented to Parliament for approval.⁶² The Coalition Government did not accept this recommendation, saying that the arrangements provided in PPERA were adequate.⁶³ **We regard the role of the Electoral Commission in reviewing the wording of referendum questions as an important constitutional check on executive power, one that clearly facilitates proper parliamentary scrutiny.**

49. As an independent, expert and standing body, the Electoral Commission is best-placed to apply and elaborate the "intelligibility" criterion through evidence-based analysis and so promote fairness. Its aim "is to look at a proposed question from the perspective of voters"; the question "should present the options to voters clearly, simply and neutrally".⁶⁴ We note that, in the case of the 2010 referendum on full legislative powers for Wales, the proposed question was redrafted in accordance with the Commission's recommendations.⁶⁵ Further illustrating the importance of the role, the Commission recently recommended changes to referendum questions on local authority governance proposed by the UK Government.⁶⁶
50. PPERA applies to referendums authorised by an Act of the UK Parliament; without further provision, it would not apply to an independence referendum authorised by an Act of the Scottish Parliament. The UK Government's consultation (and draft section 30 order) envisages the Electoral Commission overseeing any referendum on Scottish independence (the Commission has an office in Edinburgh and a Commissioner with specific responsibility for Scotland). Rightly however, the Commission would report not to the UK Parliament, but to the Scottish Parliament (as the legislator of the referendum Act).⁶⁷ The Scottish Government's paper suggests a more limited role for the Electoral Commission in regulating an independence referendum. In particular, while putting the proposed wording out to consultation, it does not specify that the Commission should perform its normal statutory role of formally reviewing a proposed referendum question for intelligibility.⁶⁸
51. We draw attention to the *Code of Good Practice on Referendums* adopted by the Venice Commission, the Council of Europe's advisory body on constitutional matters.⁶⁹ This provides authoritative guidance on the relevant international

⁶² *Referendums in the United Kingdom, op. cit.*, para 154.

⁶³ *Government Response to the Report on Referendums in the United Kingdom, op. cit.*, p 10.

⁶⁴ Electoral Commission, *Our approach to assessing the intelligibility of referendum questions*; available at: http://www.electoralcommission.org.uk/_data/assets/pdf_file/0005/82625/Referendum-Question-statement-final.pdf

⁶⁵ Electoral Commission, *Referendum on law-making powers of the National Assembly for Wales* (September 2010); National Assembly for Wales Referendum (Assembly Act Provisions) (Referendum Question, Date of Referendum, Etc.) Order 2010.

⁶⁶ Electoral Commission, *Referendums on local authority governance in England* (October 2011).

⁶⁷ *Scotland's Constitutional Future, op. cit.*, pp 15–16.

⁶⁸ The Scottish Government had suggested in its 2010 Draft Referendum (Scotland) Bill that a bespoke Scottish Referendum Commission be established by Act of the Scottish Parliament to regulate the referendum campaign.

⁶⁹ European Commission for Democracy through Law (Venice Commission), *Code of Good Practice on Referendums* (2007).

standards and, as such, we would expect it to inform the design and conduct of any referendum on Scottish independence. The Code states:

“The question put to the vote must be clear; it must not be misleading; it must not suggest an answer ...”⁷⁰

52. **There is a compelling case for having the Electoral Commission publicly report on the intelligibility of a proposed referendum question on Scottish independence.**

⁷⁰ *Ibid*, para 3.1.c.