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The Referendum and After: Scotland's Constitutional Future

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1 INTRODUCTION

On 18 September 2014, the people of Scotland voted by 55% to 45% to remain in the United Kingdom, but this did not settle the question of Scotland's Constitutional Future or indeed that of the UK as a whole. Previous reports have considered developments in the governance of Scotland up to 2011.¹ This report tries to bring the story up to date (i.e., the end of November 2015).

The lead up to the referendum began with the elections of May 2007 for the Scottish Parliament. The Scottish National Party (SNP) was the largest party and formed a minority government. In August 2007, the SNP government started a 'national conversation' on Scotland's constitutional future.² In response, the opposition parties appointed the Commission on Scottish Devolution (the 'Calman Commission') in March 2008 to consider revision of the devolution settlement on the assumption that Scotland would remain in the UK. The final report of the Calman Commission made a number of proposals for revising the devolution settlement.³ These proposals were accepted by the UK government (then Labour), which promised to introduce a Bill to implement the Commission's recommendations after the 2010 UK elections. That produced a change of government, but the Conservative Liberal Democrat coalition renewed the commitment to further devolution and enacted the Scotland Act 2012. However, the most important changes – a new power to raise or lower income tax by up to 10 pence in the pound coupled with a reduction in the block grant to the Scottish Government⁴ – was not due to come into effect until April 2016.

In the meantime, the SNP, to the surprise of many, had won an absolute majority (69 out of 129 seats) at the Scottish Parliament election of 2011, able to form a single party majority government, the first since devolution, and a surprising development in view of the elections being conducted under the additional member system of proportional representation. The

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¹ The most recent report was T. Mullen, 'Devolution in Scotland: Increasing Autonomy?' 17 Eur. Pub. L. 399–414 (2011).

² *Choosing Scotland's Future: A National Conversation: Independence and responsibility in the modern world* Scottish Government (2007) available at: <http://www.gov.scot/Publications/2007/08/13103747/0>.

³ *Serving Scotland Better: Scotland and the United Kingdom in the 21st Century* (2009), available at: http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/15_06_09_calman.pdf.

⁴ This term refers to the annual Treasury grant, which supports devolved public spending in Scotland.

SNP's election manifesto had included a pledge to hold a referendum on independence, and it announced that it would proceed to do so. The Scottish and UK Governments reached an agreement on the terms on which a referendum would be held expressed in the Edinburgh Agreement of 15 October 2012.⁵ The referendum took place on 18 September 2014, but although the vote went against independence, it was already apparent that there would be significant change in the governance of Scotland.

A few days before the referendum, there was an important intervention in the campaign. The leaders of the three largest pro-union parties (Conservative, Labour and Liberal Democrat) made a vow together to the Scottish electorate that if the Scots were to vote to remain in the union, there would be devolution of 'extensive new powers' to the Scottish Parliament. The vow appeared on the front page of the *Daily Record* (the newspaper with the highest circulation in Scotland).⁶ The Prime Minister appointed Lord Smith of Kelvin, a member of the House of Lords to oversee the process of taking forward the promise of further devolution, with powers over tax, spending and welfare all to be agreed by November 2014 and draft legislation to be published by January 2015.⁷ Lord Smith chaired a commission, which held cross party talks (the Commission included two representatives each of the five political parties represented in the Scottish Parliament and a process of civic engagement). This resulted in a report agreed to by all the party representatives, which was published on 27 November 2014.⁸ The UK government published its response to the Smith Commission's report, which included draft Bill clauses on 25 January 2015,⁹ and the Scotland Bill 2015–2016 was introduced in the House of Commons on 28 May 2015.

Despite having lost the referendum, the position of the SNP was strengthened by the UK General election on 7 May 2015. The SNP took 50% of the vote (up from 19.9% at the 2010 election) and won 56 of the 59 Scottish constituencies in the UK Parliament.¹⁰ This result was truly astonishing; no party had ever won such a high proportion of Scottish seats. The main losers were the Labour party (whose share of the vote declined from 42% at the 2010 election to 24.3%) and the Liberal Democrat party (whose share of the vote declined from 18.9% at the 2010 election to 7.5%). The decline in the Conservative vote was not nearly as

⁵ Available at: <http://www.gov.scot/About/Government/concordats/Referendum-on-independence>.

⁶ <http://www.dailyrecord.co.uk/news/politics/david-cameron-ed-miliband-nick-4265992>.

⁷ <https://www.gov.uk/government/news/scottish-independence-referendum-statement-by-the-prime-minister>.

⁸ *Report of the Smith Commission for further devolution of powers to the Scottish Parliament*, available at: <https://www.smith-commission.scot/smith-commission-report/>.

⁹ *Scotland in the United Kingdom: An enduring settlement*, Cm 8990, available at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/397079/Scotland_EnduringSettlement_acc.pdf.

¹⁰ The Labour, Liberal and Conservative parties won one seat each.

dramatic, but at 14.9% it was the lowest proportion of the Scottish vote they had ever achieved at a general election.

The scale of change in Scottish Politics has, therefore been dramatic and the pace rapid. In these circumstances, the task of predicting future developments is even more difficult than usual. Other political developments add to the uncertainty. One of the outcomes of the referendum campaign has been a greater awareness of the territorial dimension of UK politics. Citizens in England are much more aware of, and concerned about, the potential impact on them of whatever arrangements are made for devolution to Scotland, Northern Ireland and Wales. Citizens in Wales and Northern Ireland have become more aware of, and concerned about, the implications for them of devolution to Scotland. As a result, what is on the agenda is not only change to the arrangements for devolved government in Scotland, Northern Ireland and Wales, but also changes to the institutions of central government to reflect better the major change in government that devolution amounts to. Finally, there is the question of Europe. The UK Government has promised a referendum on whether the UK should remain in the European Union and has also promised to introduce a UK Bill of Rights to reduce the influence of the Strasbourg Court in the UK. Both developments are opposed by the SNP which has argued that if the UK as whole votes to leave the EU, that would justify a second referendum on independence.

That is a brief summary of events. In the rest of this rapport, I will consider two issues about the referendum and its aftermath: the analysis of the vote and the current proposals for further devolution.

2 ANALYSIS OF THE VOTE¹¹

The referendum had a very high turnout, with 84.6% of the electorate voting, a higher proportion than at any UK General election since ... and much higher than at the 2010 general election. A total of 44.7% voted for independence and 55.3% to remain in the UK. It is instructive to examine the patterns of voting; the propensity to vote for or against independence varied according the personal characteristics of voters (socio-economic status, age, gender, place of birth and party affiliation) and geography.

The general tendency was for persons who were more affluent or in higher status groups to be less likely to vote for independence than those less advantaged. There was a small difference between men and women with men more likely to vote for independence. A higher

¹¹ See also T. Mullen, 'The Scottish Independence Referendum', *J. L. & Socy.* 41(4), 627–640 (2014).

proportion of older than younger voters voted against independence. Those born in Scotland were more likely to vote yes than those born outside Scotland, and the group least likely to vote for independence were those born elsewhere in the UK.

Party affiliation can be assessed by reference to how people voted in the 2011 elections to the Scottish Parliament. On that measure, around 80% of SNP supporters voted for independence, 43% of Liberal Democrat voters, 31% of Labour voters and 2% of Conservative voters. Whilst the relative enthusiasm for independence corresponds roughly with the long-term policy stances, it is noteworthy that a substantial minority of SNP supporters did not vote for independence, and a larger minority of Labour supporters voted for independence even though the Labour party had campaigned in favour of the union.

As for geography, in only four of Scotland's thirty-two local authority areas was there a majority for independence. These were the cities of Dundee and Glasgow, West Dunbartonshire and North Lanarkshire. In a fifth area, Inverclyde, the vote was almost evenly split with 49.9% voting for independence. These areas are all located in the central belt and have relatively high levels of poverty and deprivation compared to the rest of the country. The correlation between relative deprivation and voting for independence was even more marked in polling data based on smaller units of analysis which suggested that in the 20% of the most deprived areas in Scotland, around 60% voted for independence. This apparent correlation between affluence and voting decisions was also apparent in surveys of individual voters.

The local authority areas which voted most strongly against independence were those nearest England (Scottish Borders, Dumfries and Galloway) and those furthest from the central belt (the Orkney and Shetland Islands).

Analysing all the data, it appears that the most pronounced differences between voters were those of age and relative affluence, and this helps to explain the geographical pattern with the most deprived areas being the most pro-independence. But knowing what the characteristics of voters were does not tell us why they voted as they did.

Although the margin of victory was clear, it was for supporters of the union too narrow for comfort, there remains a very real possibility that the UK will break-up in the foreseeable future, a possibility confirmed by the SNP's success at the 2015 general election. In that context, both the substance of the proposals for devolution and the process through which they are being developed may be crucial to the survival of the UK as a single state.

For the UK government and for the UK political parties, the objective of the reform process is to stabilize the union. Scotland is to be given more autonomy within the union to

persuade it to stay in the union. Of course, the SNP and many Scots do not share the aim. Whether the aim succeeds will depend on many factors, but one important factor is that a key participant in the reform process – the SNP/Scottish Government – does not support the ultimate aim. For it, further devolution is a stepping stone to independence. This rapport attempts to explain and analyse the reform proposals and the reform process, and to consider some of the implications for the future of Scotland and the UK.

3 PROPOSALS FOR FURTHER DEVOLUTION: THE PROCESS

If the ultimate objective of reform is to stabilize the union, there are two major concerns about the current process; that it is too fast and that it is insufficiently comprehensive.¹² The Smith Commission completed its work in a little over two months. The UK Government produced its detailed proposals for the Scotland Bill only two months after that, and the Bill was introduced in the House of Commons after a further three months. Whilst there is clearly pressure arising from public expectation to deliver further devolution swiftly, given the importance and the complexity of the changes, such a rapid process creates the risk that the implications of the changes proposed may not be fully understood or the possible effects appreciated.

The other concern is that constitutional reform is not being pursued in a holistic manner. There is a clear need to rethink the UK constitution as whole, or at least its territorial dimension. The UK's constitution and governance structure have always been asymmetrical. There is nothing wrong with asymmetry per se. Asymmetrical government was a consequence of the UK's history circumstances and it made sense in its context. But whilst neither logic nor rationality requires the governing institutions of a state to be organized symmetrically, there are limits to the extent and forms of asymmetry which are workable, and if asymmetry comes to be perceived as inappropriate by the population, then that perception needs to be addressed in some way. The devolved schemes of government introduced in 1999 added greatly to that asymmetry of the UK's governance arrangements. The schemes of devolved government for Scotland, Wales and Northern Ireland were different one from another, and there was no devolution for England; the UK Parliament doubled up as an English Parliament. Since 1999, increasing notice has been taken of the asymmetry by the

¹² See, e.g. R. Hazell (ed.), *Devolution and the Future of the Union*, The Constitution Unit (April 2015), available at: <https://www.ucl.ac.uk/constitution-unit/publications/tabs/unit-publications/163.pdf/>.

population at large, particularly in England and political parties, and it has been apparent for several years that the continuing popular assent to that asymmetry in all parts of the UK can no longer be assumed. The fact of devolution in Scotland and its consequences (real or imagined) have become of increasing concern to citizens in the rest of the UK.

The offer of further decentralization to Scotland clearly makes more pressing the questions of what powers devolved government in Wales and Northern Ireland ought to have and of whether and in what form there should be decentralization of power in England. The other pressing question is what should be done about central government. It is not an exaggeration to say that central government in the UK has carried on largely as if devolution had not happened. There have been no substantial changes in the way that the UK Parliament or UK departments operate to accommodate the changes to the governance of Scotland, Wales and Northern Ireland. There have certainly been some changes in institutions and processes but for the most part these have not been reactions to devolution.

The question of what additional powers should be given to Scotland is plainly linked to the questions of what should be the nature and degree of decentralization in all parts of the UK and how the central state institutions should be structured. Up till now, these have been kept separate. Each time since 1999 that a significant modification to one of the devolution schemes has been made that has been a matter for negotiation between the UK Government and that territory and debates about reform of Parliament or central government have often failed to take account of the implications of devolution. In the aftermath of the referendum, a clear link was made. In his speech the day after the referendum, the Prime Minister said that ‘a new and fair settlement for Scotland should be accompanied by a new and fair settlement that applies to all parts of our United Kingdom’ and the question of English votes for English laws – the so-called West Lothian question – required a decisive answer. Moreover, ‘all this must take place in tandem with, and at the same pace as, the settlement for Scotland’. The suggestion that all constitutional changes had to proceed at the same pace was later retracted. Nonetheless, the House of Commons voted on 22 October 2015 to adopt new standing orders whereby only English MPs would decide whether to enact legislation that would apply to England only. So, although the link between different aspects of the territorial aspect of UK government has been made by the PM, there is little evidence so far that the necessary ‘joined-up thinking’ is being done within the UK Government. The proposals are proceeding along separate tracks with no process which attempts to provide an overview. The result may be that major changes are made to the UK constitution, which do not prove to be a workable and durable response to the problem of how to accommodate national diversity whilst still

maintaining a stable union. This risk is increased by the fact that the current UK government is not attempting to proceed by consensus even amongst those parties which support the union. If the current processes produce new arrangements which are broadly perceived as unfair to one or more of the constituent nations of the UK, or as an attempt to gain partisan advantage for one party or are simply unworkable in practice, that will make the break-up of the UK more rather than less likely.

4 PROPOSALS FOR FURTHER DEVOLUTION: THE SUBSTANCE

In this section of the rapport, I consider the substantive powers that will be devolved. The report of the Smith Commission grouped the recommendations for further devolution agreed by the political parties into three main areas (referred to in the report as ‘pillars’): these being constitutional structure, additional functions and financing devolved government.

The main proposals were as follows:

Constitutional structure

- UK legislation should state that the Scottish Parliament and Scottish Government are permanent institutions;
- The Sewel Convention should be put on a statutory footing;
- The Scottish Parliament should have all powers in relation to elections to the Scottish Parliament (subject to the need for two-thirds majority to pass legislation affecting the franchise, the electoral system or the number of members for the Scottish Parliament);
- The SP should power to make decisions about all matters relating to the arrangements and operations of the Scottish Parliament and Scottish Government;
- Revised arrangements for inter-governmental relations (i.e., amongst the UK government and the devolved governments).

Additional functions

The Scottish Parliament should have devolved to it:

- powers over selected social security benefits (including housing benefit,¹³ and benefits for carers, disabled people and those who are ill);
- power to create new social security benefits, provided they are within devolved responsibility (e.g., new housing-related benefits) and to top-up benefits which remain reserved to the UK government (e.g., jobseekers allowance);
- abortion;
- powers over the management and operation of all reserved tribunals (e.g., employment and social security tribunals) but not the substantive law applied by these tribunals;
- limited additional transport powers;
- licensing of onshore oil and gas extraction (but not offshore).

¹³ Strictly speaking, the proposal is to devolve the housing support element of universal credit, a new means tested benefit which will replace several current means tested benefits including housing benefit.

Financing devolved government

- Income tax would become a shared tax. The Scottish Parliament should have power to set the rates of income tax and the thresholds at which it is these are paid for the income of Scottish taxpayers (other than income from savings and dividends). All other aspects of Income Tax will remain reserved to the UK Parliament (e.g., the personal allowance and tax reliefs);
- the Barnett formula would continue to be used to calculate the amount of the annual block grant from the UK Treasury to support Scottish Public expenditure but the amount will be reduced to reflect the additional powers devolved over income tax;
- the power to charge tax on air passengers leaving Scottish airports should be devolved;
- the power to tax commercial exploitation of aggregate should be devolved;
- the receipts raised in Scotland by the first 10 percentage points of the standard rate of Value Added Tax (VAT) should be assigned to the Scottish Government's budget but VAT itself should remain reserved; and
- all other taxes would remain reserved including National Insurance, Inheritance Tax, Capital Gains Tax Corporation Tax and taxation of oil and gas receipts.

5 SCOTLAND BILL 2015–2016

The Scotland Bill 2015–2016 attempts to implement the Smith Commission's report. There has been considerable acrimonious dispute over whether the Bill fully delivers the additional powers promised by the Smith Commission, with not only the SNP¹⁴ but also a former Labour Prime Minister of the UK complaining that the Bill does not implement the Smith Commission in full.¹⁵ There is no space to conduct a detailed evaluation of this controversy. It seems to me that, whilst there is room to disagree on points of detail, the Bill does broadly deliver what was recommended by the Smith Commission and will result in what is by international standards a very high degree of sub-state financial and policy-making autonomy.¹⁶ Whether the Bill's provisions taken together will resolve the current constitutional uncertainty and in what direction is a separate question.

I will comment briefly on each of the three 'pillars' beginning with the proposals on the constitutional status of devolved government.

5.1 CONSTITUTIONAL STATUS

The vow made by the three party leaders before the referendum included the statement 'we are agreed that the Scottish Parliament is permanent ...' Whilst this was clearly a political commitment to maintain the Scottish Parliament, it is unclear whether it was meant to signify

¹⁴ See, e.g. 'Mundell must strengthen Scotland Bill', available at: <http://www.snp.org/media-centre/news/2015/sep/mundell-must-strengthen-scotland-bill>.

¹⁵ See, 'David Cameron risks "double betrayal" of Scotland, says Gordon Brown' Guardian online, 08 Oct. 2015, available at: <http://www.theguardian.com/uk-news/2015/oct/08/david-cameron-risks-double-betrayal-scotland-gordon-brown>.

¹⁶ See, e.g. R. Hazell (ed.), *Devolution and the Future of the Union* (above).

a commitment to change the legal status of devolved government. Paragraph 21 of The Smith Commission Report said that ‘UK legislation will state that the Scottish Parliament and Government are permanent institutions’. This statement is open to a variety of interpretations.

It could be read as recommending: (a) that legislation would be passed which would make the Scottish Parliament and Scottish Government permanent institutions as a matter of law, i.e., that they were constitutionally entrenched, or (b) as recommending that such a statement would be included in an Act of Parliament without any implication as to its legal effects. Presumably, this lack of clarity is explained by the need to find a form of words that all five political parties could agree to. However, this ambiguity would inevitably make it difficult to decide whether any subsequent legislation fulfilled the Commission’s recommendation.¹⁷

Clause 1 of the Scotland Bill as originally introduced stated that ‘A Scottish Parliament is recognized as a permanent part of the United Kingdom’s constitutional arrangements.’ It also stated that ‘A Scottish Government is recognized as a permanent part of the United Kingdom’s constitutional arrangements.’

If enacted, this provision will not have the effect of making either the Scottish Parliament or the Scottish Government permanent as a matter of law. The first reason for doubting whether it has this effect is the peculiar language. The use of the phrase ‘is recognized’ seems more appropriate for a statement of fact. It is not clear, therefore, whether a court would treat it as a *normative* statement capable of being given legal effect. The second reason is the principle of the sovereignty of Parliament. On the orthodox view of sovereignty, any statement that the Scottish Parliament is a permanent institution would not bind a future Parliament which could simply repeal it. In the original Bill no attempt was made to entrench the provision, e.g., by requiring an enhanced majority in either House as a condition of passing a Bill abolishing the SP, or a popular referendum before abolition could be put into effect. However, by the time the Bill reached the House of Lords, an amendment had been made requiring approval in a popular referendum before the SP could be abolished. It is certainly open to question whether a court would give effect to such provisions by holding that a Bill purporting to abolish the SP without satisfying these requirements was invalid, but the possibility cannot be ruled out in our evolving constitutions. The inclusion of the referendum requirements does at least indicate that a serious attempt is being made to make

¹⁷ For detailed analysis of the Scotland Bill draft clause and discussion of whether it fully implements the Smith Commission’s recommendation, see Devolution (Further Powers) Committee, *New Powers for Scotland: An Interim Report on the Smith Commission and the UK Government’s Proposals*, SP Paper 720 3rd Report, Session 4 (2015), 14 May 2015, 11–14, available at: http://www.scottish.parliament.uk/S4_ScotlandBillCommittee/Reports/dfpr-15-03w-rev.pdf.

the SP and the SG permanent features of the constitution. It is also important to note that a statutory provision may have political as well as legal effects. It might be argued that the enactment of such a provision would have strong symbolic force and would make it politically more difficult for a future UK Government to propose, or a future UK Parliament to enact, abolition of the SP or SG. In this way, the provision would have real political value. A sceptic might doubt whether the provision would actually have this benefit as it would merely reinforce what has already become established as a principle underpinning the UK's constitutional order, namely that it is for the Scottish people to determine their form of government, including, if they so choose, by leaving the UK. However, if the promise of a referendum were not kept that would almost certainly cause political uproar, so it does seem as if the revised permanence clause might make some political difference.

Clause 2 of the Bill as originally introduced states that '... it is recognized that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament'.¹⁸ This is intended to implement the Smith Commission's recommendation that the Sewel Convention should be put on a statutory footing. Again, the intention behind the Commission's statement was unclear. Did the Smith Commission mean that the principle of the convention – that the UK Parliament will not normally legislate on devolved matters without the consent of the Scottish Parliament – should become legally binding or merely that it should be written down in an Act of Parliament? The wording of the clause fulfils the second function (i.e., it expresses the principle of the convention) up to a point, although it fails to make it clear that the convention covers not only UK legislation on devolved matters, but also extends to legislation altering the Scottish Parliament's legislative competence and the executive competence of Scottish Ministers. However, it seems doubtful if it imposes any legally enforceable constraint on the powers of the UK Parliament. Section 28(7) of the Scotland states that the UK Parliament retains power to legislate for Scotland and the Bill does not seek to amend that provision. It is conceivable that the clause is intended to mean that an exercise of legislative power by the UK Parliament without the consent of the Scottish Parliament would be open to challenge under some circumstances but if that were the intention there are far more obvious ways in which to draft a clause, e.g., simply stating 'the Parliament of the United Kingdom may

¹⁸ For detailed analysis of this draft clause and discussion of whether it fully implements the Smith Commission's recommendation, see the Report of the Devolution (Further Powers) Committee above, 15–17.

legislate with regard to devolved matters without the consent of the Scottish Parliament only in exceptional circumstances'. Accordingly, the Bill continues the original fudge.

Whilst the enactment of provisions with uncertain legal effects (or none) may be irritating to constitutional lawyers, it may not have major adverse political consequences. No UK government is, in any likely political scenario, going to try to abolish the Scottish Parliament against the will of the Scottish people, so if the new permanence clause is not in fact a legally enforceable guarantee of devolved government that does not make the continuation of devolved government precarious in fact. A different worry might have been that a perceived failure to fulfil the promise might cause resentment which could weaken the union, but whilst there will be temptation for the SNP to make political capital out of any supposed failure to implement the Smith Commission proposals, it is doubtful if the issues raised by these clauses will be of great interest to the general public. Their concern is likely to focus more on what additional powers are given to the SP and SG.

5.2 ADDITIONAL FUNCTIONAL COMPETENCE

Apart from these constitutional provisions, the Bill does two things: confers additional functional competences on the Scottish Parliament and Government, and extends their financial competence and responsibility.

Extending functional competence was not a straightforward matter. The original transfer of power in 1999 was relatively smooth because of the history of administrative devolution which preceded it. The Scottish Office – a territorial department of the UK Government – had held responsibility for many of the functions of government in Scotland including education, housing, health, agriculture and fisheries, criminal and civil law. In effect, the new Scottish Executive (later renamed the Scottish Government) took over the responsibilities of the Scottish Office with most civil servants remaining in post. The new Parliament was given legislative functions in broadly those areas of policy. So, once the principle of devolution had been accepted, there were no major disputes about which powers should be devolved.

There was no such ready-made principle which could be used to decide the appropriate extent of further devolution, nor was there a consensus amongst the political parties as to what the powers would be. Nor was this simply a division between the nationalist parties (the SNP and the Green party) and the rest. Even the pro-union parties did not agree about the desirable extent of devolution. However, whatever powers were conferred, it was necessary that they be substantial in order to keep the promise that had been made before the referendum. The agreement that Smith Commission eventually reached was a political

compromise; it was what each political party was prepared to agree to rather than what any of them wanted.

It is useful to compare the Smith proposals with those of the Calman Commission. The Calman Commission, appointed by the UK government in response to the SNP becoming the largest party in 2007, was essentially a vehicle for the pro-union parties to see off the nationalist threat by agreeing what additional powers should be devolved. The Calman Commission's report published in 2009 recommended significant new powers over taxation.¹⁹ The proposals had been enacted in the Scotland Act 2012, but the most significant proposal (greater power to vary income tax) had not yet come into effect by the time of the referendum. However, the proposals for extending legislative competence over new functions were extremely modest (regulation of airguns, and power to set drink-driving limits and the national speed limit). In the political circumstances following the referendum, to repeat such a modest approach would not have been possible; the Smith Commission had to offer something much more substantial and it has offered greater tax-raising powers (coupled with a corresponding reduction in the annual block grant to support public spending).

Aside from 'essentially' centralized functions such as defence and foreign relations, two main rationales have been used to justify the reservation of functions to the UK Government; the single market rationale and the social solidarity rationale. The single market rationale is that the whole of the UK should function as an integrated market for goods and services. That in turn requires harmonization of the laws affecting that market as differences on those laws might act as an impediment to the integration of the market. That explains the reservation of macro-economic policy, the currency and most taxation, employment law, competition law and many forms of regulation including the regulation of utilities. The social solidarity rationale has been used to justify the reservation of the major public services comprised in the modern welfare state including social security benefits and pensions. For the Calman Commission, the UK welfare state was a scheme of shared citizenship which presupposed social solidarity. It rejected substantial devolution of social security for that reason. In fact, two major public services have long been devolved – health and education. The Commission did not think that this weakened the social solidarity rationale as the devolution of health and education in 1999 reflected the pre-existing administrative devolution of those functions, and the basic principles of delivery (free healthcare at the point of need and universal provision of school education were uniform across the UK).

¹⁹ *Serving Scotland Better*. Part 3.

The most significant new powers are those over welfare benefits. If enacted, the Scotland Bill will devolve legislative power over housing benefit, benefits for carers, disabled people and those who are ill, and power to create new social security benefits within the area of devolved responsibility (e.g., new housing-related benefits) and to top-up benefits which remain reserved to the UK government (e.g., the SP could increase the rate of jobseekers allowance, the principal benefit for the unemployed).

The proposals for devolution of welfare are potentially problematic. There is the problem of maintaining cohesion. Up till now, social security has been treated as a fully integrated system, in which each benefit contributes to the goals of the system (e.g., preventing poverty and maintaining work incentives). One example of this is 'passporting', the process whereby qualifying for one benefit leads to qualifying for others. Thus, eligibility for income-based jobseekers allowance (an out-of-work benefit) and child tax credit (an in-work benefit) both trigger eligibility for maximum housing benefit, i.e., covering the whole eligible rent. Administration is also fully integrated with all benefits being administered by the Department of Work and Pensions.

The Administration of benefits will clearly become more complex as a result. More importantly, the devolution of welfare benefits may cause problems of policy coherence because instead of social security policy being made solely by the UK government, it will in future be made by two governments which may pursue conflicting policy objectives. The aims of future measures taken by the Scottish government may be undermined by changes made to reserved aspects of social security made in pursuant different objectives. Currently, the Scottish political parties (other than the Conservative party) profess a different vision for social security than the UK Conservative government with the former emphasizing the maintaining of living standards and reducing inequality through generous levels of benefit whilst the latter emphasizes raising living standards through getting more people into work and raising wages, and intends to add a further GBP 12 billion of cuts in social security spending to those already made by the coalition government during 2010–2015. Whilst the new powers are intended to allow Scotland to take a different approach to social security, it is not clear that it will be possible to do so in practice. More fundamentally, if the Calman Commission was correct in its analysis that the welfare state is crucial to creating and reinforcing a sense of common citizenship, then substantial devolution in this area risks weakening the ties of common citizenship.

In fact, this is the dilemma that at least for supporters of the union underlies this whole process. Substantial further devolution appears to be necessary to persuade most Scots that

they ought to remain within the union, yet it also risks loosening the remaining ties that bind the union together. Emotional perceptions of national identity no longer serve to support the union; there has been a long-term decline in the proportion of the population professing a primarily British or equally British and Scottish identity as opposed to a primarily Scottish identity. Interest-based reasons for sticking together – such as the pooling of risks in the welfare state – have become more important to preserving the nation, but more devolution inevitably reduces the significance of those reasons. Add to that the fact that devolution has enhanced the distinctiveness of the Scottish political sphere and that further devolution will continue to do so, and the long-term threat to the viability of the UK state is obvious.

5.3 FINANCING DEVOLVED GOVERNMENT

There is no doubt that the Bill delivers greater financial autonomy. As a result, future Scottish Governments will have both a wider range of substantive policy-making responsibility and greater freedom to make taxing and spending decisions. However, these comments refer to legal autonomy. Whether the new structure gives Scottish Governments greater practical freedom to make policy choices is a separate question. Some policies have only limited implications for public expenditure. Both the legislation banning the advertising of tobacco products at the point of sale and the sale of tobacco from vending machines and the legislation imposing a minimum price for the sale of alcohol were important public health measures which required no additional public spending. However, many possible new policies would require substantial additional public expenditure which would have to be financed by cutting spending on existing programmes or by raising taxes. Both might be politically difficult.

Of course, national governments face exactly this dilemma, but they have more financial tools at their disposal. Currently, the UK government can choose from the full range of taxes to support public spending and because it also controls social security it can offset any adverse effects on tax increases on particular groups by adjusting other taxes and /or adjusting benefits. The Scottish Government will have far less flexibility as it will control only one major source of revenue tax – income tax (and only part of that tax) and only some social security benefits. Therefore, introducing policies, which might in themselves be popular (e.g. more generous benefits) might have consequences for the population that were themselves very unpopular. Income tax is the most visible tax and it has become increasingly hard for political parties to contemplate increasing it. One possible consequence is that a future Scottish Government might find it difficult to finance policies which diverge greatly

from those currently being pursued by the UK government. We might, therefore, find that greater legal autonomy does not lead to distinctively Scottish policies. That circumstance might lead to cynicism about the value of enhanced devolution which in turn might fuel scepticism about the benefits of remaining in the UK

6 CONCLUSION

This rapport had provided a brief analysis of the vote at the referendum and an overview of the proposals for further devolution which are currently being considered. Whilst the Bill may be amended it is very unlikely that any major changes will be made before it is enacted. Devolved government in Scotland will, therefore, have the powers set out in the Bill. However, if there is certainty about the future legal position, there is considerable uncertainty about the political future and whether the new framework for devolved governance and the process which is being followed to create it will help to hasten or to prevent the break-up of the UK.