

# Scotland's Constitutional Future: The Legal Issues

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## **Preface**

This is a report of presentations made during two day long seminars addressing the legal issues surrounding current debates over Scotland's constitutional future. The first was held at Glasgow School of Law on 27 January 2012 and focused upon 'The Process of Constitutional Change', the second, at the Edinburgh Centre for Constitutional Law on 16 March 2012, addressed 'Inter-Governmental Relations and External Affairs'. The report also covers comments, questions and debate generated by participants.

The seminars brought together academics, policy-makers, including civil servants and government lawyers from the UK, Scottish, Northern Irish and Welsh governments, and the UK, Scottish and European parliaments, representatives of the legal profession in Scotland, representatives from the Electoral Commission in Scotland, and from the European Commission Office in Scotland. The seminars were conducted under the Chatham House rule and on this basis comments are not attributed directly to any speaker.

The key aim was to bring legal and policy expertise to bear on a range of technical but important questions relating to current constitutional discussions. A primary objective was to advance public debate by offering a comprehensive overview of the legal and constitutional issues involved in possible changes to the devolution settlement including independence for Scotland, thereby outlining in an accessible way the principal issues to policy-makers, researchers and citizens engaging in these processes and debates.

What follows is an account of the issues as they were presented and discussed. It tries to cover all of the substantial points raised but is not intended to be a fully comprehensive note of the proceedings.\*

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\* The authors gratefully acknowledge the assistance of Dr Kasey McCall Smith who took the minutes of both seminars. **NB:** this Report is a summary of the papers presented at the two seminars and the subsequent discussion. It does not represent the views of either of its authors.

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## **‘The Process of Constitutional Change’, Seminar One, Glasgow School of Law, Senate Room, Glasgow University, 27 January 2012**

The seminar focused upon the legal issues, and, in particular, matters of process, surrounding both the Scottish Government’s proposal for a referendum on independence for Scotland - ‘*Your Scotland, Your Referendum*’ (see also the UK Government’s consultation paper: ‘*Scotland’s Constitutional Future*’) - and upon parallel discussions within Scottish civil society concerning the possible extension of further devolved powers to the Scottish Parliament short of full independence.

### **Constitutional Change for Scotland: An Outline of the Issues**

In this session a broad overview of the issues involved in the constitutional change debate was offered, addressing comparative and historical perspectives on the issues both of process and substance facing Scotland and the wider United Kingdom in light of the referendum proposal. In substantive terms this session considered a number of different constitutional options, discussing these as independence, ‘independence-lite’ and further devolution.

Proceedings began by examining the constitutional background to the independence issue. Since the United Kingdom lacks a written, codified constitution, the rules governing how further change can be brought about are not clear and of course the UK, like most countries in the world, does not have a ‘secession clause’, setting out a constitutional path for the break-up of the state. There are, therefore, many areas in current debates where the constitution is silent and jurists must look for principles to apply in interpreting the constitution and the Scotland Act in particular, in order to fill these silences. But we must also appreciate that the issues at stake, even when framed in legal terms, are also very much political in nature; in other words, the legal and political dimensions of the debate are inextricably entwined and cannot be strictly separated.

#### *(i) Independence: what does it mean?*

Independence stands for the proposition that a new state will be created - a new, independent, sovereign Scotland. But the terms *independence* and *sovereignty* when analysed in detail are not self-explanatory; both need to be unpacked and the detail of what an independent Scotland would look like needs to be worked through.

Significant international law questions are raised by an independence proposal since the term independent statehood has a particular meaning in international law. Sovereignty, however, is a term that continues to confuse within the UK and beyond. Today at the international level there is a growing sense that the world is moving beyond a system of sovereign states, and that state sovereignty no longer invests, if it ever did, absolute authority in territorial states. Sovereignty claims are therefore contested and, it was argued, increasingly we need to think about complex territorial relationships in terms of shared, rather than absolute, sovereignty.

At the domestic level sovereignty in the Scottish context takes on a particular political and rhetorical dimension. In the late 1980s there was a process leading to the signing of the Claim of Right (1989) by leading elements of Scottish civil society, and endorsed by most of the parliamentary Labour and Liberal Democrat parties in Scotland. The Claim of Right included a commitment that sovereignty in Scotland is in the hands of the Scottish people but the complex relationship between legal and political commitments was highlighted by the White Paper preceding the Scotland Bill 1997-98, brought

forward by the Labour Government, which stated, in a seemingly contradictory way that, in another manifestation, sovereignty also lies with the Westminster Parliament. This raises complex questions as to whether we can separate the legal and political dimensions of sovereignty, or alternatively whether within the UK we are living the reality of 'shared sovereignty' based upon different understandings of the concept within one state and manifest in separate sovereign practices, perhaps emerging from different legal systems, but co-existing however uneasily within the same state. What we are left with is an elusive concept, shifting between substantive claims and political rhetoric, embodying different understandings and even different methodologies. The story of recent British history therefore is a lack of agreement on the meaning or locus of sovereignty; in this context, to attempt to arrive at one definitive concept is, it was argued, seemingly impossible and potentially self-defeating, threatening to make the very concept an empty principle.

European Union (EU) membership is the constant companion to any discussion of Scottish independence. Some commentators question whether an independent Scotland would be able to stay in the EU or would have to apply for new membership. On one view, this question is something of a red herring since, it is argued, some way would be found to accommodate Scotland within the EU; others disagree and contend that Scotland would need to apply for membership as a new state. Another issue is the precise terms upon which Scotland's membership of the EU would be realised and to what extent Scotland's relationship to the EU would be intertwined with or detached from that of the rest of the UK, for example, would Scotland be able to, and indeed would it wish to, keep the many opt-outs that the UK has negotiated, such as those on social policy, the Schengen Agreement, Economic and Monetary Union, and the area of freedom, security and justice? This raises the broader question of how an independent Scotland would seek to position itself within the EU and the extent to which it would support either an 'intergovernmental' or a 'supranational' vision for the future of Europe; secondly, whether in ideological terms it would favour respectively a more 'market Europe' or a more 'social Europe'; and thirdly, whether it would pursue a more 'Atlanticist' or 'European' orientation in its international relations. These are pressing issues facing a newly independent member of the EU, and include the over-arching question of whether, and if so how, to trade elements of sovereignty in exchange for the possibility of greater influence at the centre.

Another issue is the nature of small states in world markets. Small states may have some advantages in the international market economy as they have shorter lines of communication and more flexibility. Within the EU we are currently seeing how larger states can have difficulty adapting to large scale economic changes while smaller states are more adaptable (although Greece must be taken to be an exception at present). In an independent Scotland ideologically-based decisions may need to be made on whether or not to pursue a market-based economic strategy with financial deregulation and lower taxes with a view to attracting internal investment, Estonia is a good example; or alternatively the social democratic model, with higher taxes, high investment and high-spending to support society, in line with the Nordic model. These economic questions cannot be separated from debates about the constitutional future. If independence is to be a debate about how to create not only a more autonomous but also an economically viable future for Scotland, issues of proposed ideological trajectory must lead to debate about the types of constitutional powers, particularly the levels of autonomy on economic and fiscal policy, that are needed to pursue particular economic models.

(ii) *Another Option: 'Independence-Lite'*

The concept of 'independence-lite' was introduced as a sub-category of independence which can be defined in a number of ways including sovereignty-association, partnership, confederation or freely associated statehood, in other words the kind of model proposed by Quebec nationalists in referendums in 1980 and 1995. In this scenario, Scotland would become an independent state but would retain links to some key parts of the UK institutional structure.

The term 'social union' has been proposed in the Scottish context. Again this could take on a range of meanings. At one level it might involve free movement between Scotland and the rest of the UK. It was argued that this would not be problematic and is in any case consistent with and would be protected by EU freedom of movement rules, but more complex issues can arise in terms of social policy. Would there be a proposal to make social entitlements portable across the UK and Scotland, given that the complexity of current provision could mean that any new Scottish system would still possibly be tied to an over-arching UK system? For practical reasons it might be thought that some UK level social entitlements would survive even a move to independence; and the political and economic implications of this need to be worked through. There are parallels here with the EU model, where cross-European social entitlements have emerged and models are in place as to how levels of portability can be built in. Another factor is the shared labour markets which again would seem to favour a social union. The reality here, it was argued, could be said to be more one of autonomy than of independent statehood in the traditional sense.

Independence-lite also suggests retention of shared regulatory agencies and shared facilities in external relations, such as embassies in foreign states and common areas of foreign policy. While the logistics of a shared embassy are not difficult to work with, foreign policy would be more difficult to achieve. Although there could well be broad consensus on many issues, Scotland would likely have distinct views on several matters. The question of bilateral relationships would, therefore, also need to be addressed.

Other key features of independence-lite could include maintaining the pound sterling and common defence matters. The retention of sterling is not simply an issue of the currency in use, but would also raise important issues concerning a common monetary policy. Defence is extremely important to both Scotland and the wider UK and is complicated by the nuclear issue. The changes associated with independence-lite are, it was argued, imaginable and arguably could be achieved but there are many issues that need to be thought through. As with devolution max (below) the attitude of the rest of the UK to such a proposal would, of course, be extremely important.

(iii) *Devolution-max: what is it?*

Short of independence there are the options of further devolution and 'devolution-max'. In neither case would a new state be formed; the United Kingdom would retain its legal personality.

There is no one way to describe the option commonly called devolution-max. Taxation power is the main, and for some the only, crucial issue with devolution-max. One view is that Scotland would gain control over all taxation, including income tax, corporation tax and excise tax; essentially all taxes excluding VAT could be a competence of the Scottish Parliament. Another meaning takes the issue beyond taxation to embrace all powers except defence and foreign affairs. Devolution-max proposals also raise important issues concerning social security and the extent to which this would be decentralised. This has not been a point of significant focus hitherto but in light of

current plans for welfare reform at Westminster, which is having knock-on consequences for Scotland this will become a more prominent issue.

One possibility is that with devolution of many tax and related powers a distinct socio-economic setting would be created in Scotland. This could allow the instantiation of a more self-consciously social democratic model than the neo-liberal model which currently prevails within the UK centre. This in turn could have knock-on consequences in terms of a different understanding of a Scottish social citizenship with considerable political implications emerging from this. Such an approach could also have significant ramifications for public expenditure.

Representation in the EU must also be considered. In a devolution-max context, an enhanced role for Scotland in Europe would in effect necessitate an extra layer of decision-making since Scotland would be feeding into EU decision-making indirectly through Whitehall.

In process terms, intergovernmental relations would remain vital. Even if Scotland takes control of many tax and social security powers there would still be a need for detailed bilateral relations including many agreements regarding portability of benefits and on Scottish access to EU decision-making and UK policy on the EU. And all of these issues of course raise the question of how willing the rest of the UK would be to countenance such a degree of bilateralism and the complexities it would involve.

(iv) *Powers – what are the differences between independence and devolution-max?*

There are questions about how different independence-lite and devolution-max options actually are. Most of these questions surround the distribution of powers but the institutional dimension is also important. With an independence vote there would no longer be Scottish MPs in the UK Parliament, even if there were many shared authorities. Under devolution-max, Scottish MPs would be retained but significantly enhanced devolution could also make the West Lothian Question more acute. With more autonomy there would probably be demands for a further reduction in Scottish influence in London, such as fewer MPs.

One argument is that independence is crucially different from devolution-max because of the economic levers it would provide. However, a counter argument is that there needs also to be recognition that if a monetary union continues there would inevitably be fiscal pacts put in place which would circumscribe control over macro-economic policy under either an independence-lite or a devolution-max scenario, and in this way room for manoeuvre on economic policy would be reduced.

(v) *Public Opinion*

It was argued that public opinion does not appear to see a sharp line between independence and devolution-max. The public seems to be more interested in the substance of potentially devolved matters within a renegotiated relationship. Polls suggest that the public favours devolution-max but it is not an option that has been rehearsed very well or set out in detail. The public seems to favour fiscal devolution and this position has been consistent over time. There is however a strong degree of ambivalence concerning devolution of social provisions. There is a strong body of opinion that does not want wide social policy variation and the extent to which the public would favour the devolution of all social policy remains unclear. There is, it was argued, even less support for Scotland taking over defence policy.

(vi) *How should devolution-max be put to the public?*

In a sense independence is a straightforward issue to put to the public in a referendum, but, it was argued, devolution-max is potentially more difficult given that it would involve a re-worked union with variation in powers at the centre as well as within Scotland, and with potential knock-on consequences for the other devolved territories.

Precisely how a three option model is put to the public is challenging and there are important democratic considerations in framing the options, for example, to ensure that one model does not win by default. Whatever the result of a referendum what seems certain is that there will need to be negotiations between Scotland and the rest of the UK because both the details and implications of either independence or devolution-max would still have to be worked through.

There is also a strong argument that the interests of the rest of the UK including the other devolved territories must be taken seriously in any such proposal. There is already a system of bilateral agreements in the United Kingdom, UK-Wales, UK-Scotland, etc. and particularly when devolution-max is being considered, the interests and views of the rest of the UK in negotiating a new relationship will be crucial. On the whole, it was argued, the English population appears relaxed about both independence and devolution-max but there is the potential for views to change and for issues such as the West Lothian question to become more central. What the knock-on consequences would be for Wales and Northern Ireland is another important consideration that needs to be thought through.

### **Proposals for a Referendum: The Legal Issues**

The second session focused specifically on the legality of the referendum and upon the mechanics of the referendum proposal itself, addressing arguments concerning the competence of the Scottish Parliament to call a referendum and other legal issues implicated in this proposal. It then turned to the micro-management of the referendum and considered existing UK legislation on the designation of campaign organisations and the rules on funding and expenditure within referendums.

(i) *The Competence of the Scottish Parliament to hold a referendum*

The second session began by focusing on the current debate concerning the competence of the Scottish Parliament (SP) to stage a referendum. The Scotland Act 1998 ('SA') makes no mention of referendums but it seems to be generally agreed that the SP is competent to hold referendums on devolved matters. Disagreement focuses on whether or not it has competence to hold a referendum, in particular an 'advisory' or 'consultative' referendum, on the subject of independence or further devolution.

By s29(2) of the Scotland Act 1998 (SA) a matter is outside the competence of the SP so far as *inter alia* 'it relates to reserved matters'. Reserved matters include the Union of the Kingdoms of Scotland and England (s. 30; Schedule 5 (1), part 1) and 'fiscal, economic and monetary policy, including ... taxes and excise duties ...' (Schedule 5 part II, para A1). Schedule 4 (4) further provides that the Scottish Parliament cannot itself modify the Scotland Act. It is therefore clear that the Scottish Parliament cannot claim legal authority under the Scotland Act to end the Union or accrue to itself further devolved powers. Any Bill introduced into the Scottish Parliament purporting to vest a referendum with the legal power automatically to effect such changes would seem clearly to fall beyond competence.

This leaves the question as to whether or not the Scottish Parliament has competence to hold any kind of referendum on the subject of independence or further devolution of governmental power. The UK Government (*Scotland's Constitutional Future*, CM 8203, January 2012) and a number of commentators have suggested that any such referendum would be beyond the competence of the Scottish Parliament as it would plainly relate to reserved matters, i.e. the Union of the Kingdoms of Scotland and England. Others disagree. One of the issues in this debate has been the distinction between an advisory and a binding (i.e. legally binding) referendum. Those who argue that the Scottish Parliament does not have competence to legislate for a referendum on independence tend to argue that the distinction between a legally binding and an advisory or non-binding referendum is irrelevant. Others point to the common usage of this distinction in the literature on referendums and to the distinction between referendums, the results of which have automatic legal effect, and those which create a political obligation to implement the choice of the voters. In the UK, we arguably saw a binding referendum model adopted in 1978-79 with the passage of legislation prior to the 1979 referendums which gave automatic effect to their outcomes; in this case the failure of the proposition in Scotland led to the automatic repeal of the Scotland Act 1978, the success of the proposition would have led to its automatic implementation without the need for further legislation. Given the principle of the sovereignty of Parliament, the UK Parliament could, of course, repeal such legislation even after a Yes vote in a referendum, but until it did so the result of the referendum would be legally binding as it was in 1979.

The debate over competence turns to a large extent upon the meaning of the phrase 'relates to' in s. 29(2)(b), SA. According to s. 29(3), SA 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.' Those who argue that a referendum (whether binding or not) would be beyond competence argue that this is so because any referendum seeking the views of voters on independence or further devolution of power would relate to reserved matters, i.e. the Union. Even if a referendum purported to be advisory or consultative, it would nonetheless be *ultra vires* because although not asserting a legal power to end the Union or acquire further powers, the ultimate aim would be to change the Union and the intended *political* effect would be to secure a mandate for negotiating this. Having regard to purpose and effect as required by s. 29(3), therefore, would suggest that any referendum legislation would be beyond competence.

These contrasting arguments were taken forward by considering how the purpose test in SA s. 29(3) had been interpreted in recent cases, most pertinently *Martin and Miller v HM Advocate* [2010] UKSC 10. Here the Supreme Court took a broad approach to the interpretation of the purpose test which is demonstrated by Lord Hope's judgment in particular:

...when consideration is being given to the 'purpose' of the provision, regard is to be had to its effect 'in all the circumstances'. One of the circumstances to which it is proper to have regard is the situation before the provision was enacted, which it was designed to address. Reports to and papers issued by the Scottish Ministers prior to the introduction of the Bill, explanatory notes to the Bill, the policy memorandum that accompanied it and statements by Ministers during the proceedings in the Scottish Parliament may all be taken into account in this assessment. (Lord Hope para 25)



Those who argue that a non-binding referendum, consulting the Scottish people on their constitutional preferences, would be *ultra vires* tend to refer to this judgment to support the argument that the purpose test in s. 29(3) refers to the *political* purpose and effect of a bill or act as well as the legislation's *legal* purpose and effect. Those who disagree argue that it must logically refer only to the legal purpose of any piece of legislation, or at least to the legal effect of the measure. The latter argument contends that an important distinction must be drawn between the political goals of a political party or government on the one hand and the legal intention behind a piece of legislation on the other. The legal purpose of the Referendum Bill as set out by the Scottish Government in the recently published draft Referendum Bill (see '*Your Scotland, Your Referendum*') is to seek 'the views of people in Scotland on a proposal about the way Scotland is governed.' The argument goes that the legal purpose of the legislation is therefore not to secure independence unilaterally, and hence can reasonably be read not to exceed competence. Furthermore, the legal 'effect' of such a referendum within the context of such a Bill or act would not be to secure independence or any further devolved powers. It was argued that the UK Government would be under no legal duty to enter into negotiations in light of the referendum result and by extension the legislation of the Scottish Parliament authorising it would have no legal effect.

A further argument put forward was that asking a court to determine the political purpose behind a statute would raise too many imponderables. It would require the court to identify one particular purpose uniting the various political actors supporting such a Bill, but more importantly, given that s. 29(2) requires that regard should be had to the *effect* of the Bill in all the circumstances, this would also require the court to predict the likelihood of success of such a political project not only in terms of the referendum result but presumably also in terms of post-referendum negotiations. In addition, it was argued that to invite a court to declare draft legislation unlawful, even though it did not have any automatic legal effect on the Union, on the basis that it did have an unlawful political purpose, would seem to draw the courts into a very difficult and highly politicised area of decision-making which might affect their authority.

Other issues that were discussed included what role, if any, s.101(2), SA should play in interpreting a referendum Bill before the Scottish Parliament. This provides that any provision of a Bill or an Act of the Scottish Parliament which could be read in such a way as to be outside competence is to be read as narrowly as is required for it to be within competence, if such a reading is possible, and is to have effect accordingly.

A broader issue was also raised concerning the constitutional status of the Scottish Parliament. It was asked whether in approaching the text of the Scotland Act it is necessary also to move beyond a narrow constructionist approach to the text in light of the emerging status of the Scotland Act as a 'constitutional statute'. Here debate focused on analogous case law and commentary on the Human Rights Act 1998, on the Northern Ireland Act 1998 (in particular on *Robinson v Sec of State for Northern Ireland* [2002] UKHL 32), and on other potentially relevant cases such as *Thoburn v Sunderland City Council* [2003] QB 151, *Jackson v Attorney General* [2005] UKHL 56, and *Axa General Insurance Limited and others v The Lord Advocate and others* [2011] UKSC 46. It was argued that in seeking to resolve legal issues concerning the referendum we need also to articulate more substantially the nature of the devolved settlement and its place within the constitution as a whole. Reference was made to *Axa* where Lord Hope in particular began to address the constitutional significance of the Scotland Act and the status of Acts of the Scottish Parliament and suggested that courts should intervene to review the legality of legislation 'if at all, only in the most exceptional circumstances' (Lord Hope para 49).

One participant suggested that there are three ways in which to explain the constitutional significance of the settlement embodied in the Scotland Act. One is that it merely encapsulates a delegation of authority from the UK Parliament whereby the Scottish Parliament is politically and legally subordinate to Westminster (the unitary state narrative). A second possibility is that devolution represents a move towards a quasi-federal constitution with the Scottish Parliament envisaged as the political equal of Westminster within its sphere of competence, but bound by the norms of the UK constitution as a whole (the federalist narrative). And a third sees devolution as a renegotiation of the terms of Union on the part of the sovereign Scottish people, and hence sees the Scottish Parliament as a legitimate representative of the Scottish people in the course of any further renegotiation in which the interests of the Union as a whole and of its various parts are put at issue (the union state narrative). The third model in particular suggests a much broader role for the Scottish Parliament in debating, and facilitating public deliberation on, questions about the future governance of Scotland. Others contested such a reading and argued that the Scottish Parliament's powers should be seen as delegated powers from Westminster.

The Canadian *Secession Reference* case from 1998 was also discussed. Here the Supreme Court of Canada turned to constitutional principles to supplement its understanding of the constitutional text in light of the issue at stake - a referendum in Quebec on 'sovereignty'. In light of the parallels between the issues at stake; significant developments in recent times in the judicially carried migration of constitutional norms; the attention paid to Canadian jurisprudence by British courts in recent years, particularly in the HRA context; and the shared constitutional traditions between the UK and Canada, it was argued that it is important to play close attention to this Opinion. One issue thrown up by this case is that politics inevitably interacts closely with law in referendum processes, raising the issue of sovereignty and popular claims to self-determination. In this respect it was argued that we are charting new constitutional waters in the United Kingdom and need to question whether the older certainties of constitutional formalism which may once have been sufficient to characterise the allocation of constitutional authority within a unitary United Kingdom are still as helpful in the post 1998 world of substantial constitutional change.

(ii) *Other legal issues surrounding the referendum: Regulation, the Role of the Electoral Commission, and the Question*

Regulation/Role of the Electoral Commission: Since Westminster has traditionally organised devolution referendums, it has also controlled issues such as eligibility to vote, the wording of the question, the date of the referendum etc. Regulation of these matters is provided for in the Political Parties, Elections and Referendums Act 2000 ('PPERA'). But since this only covers referendums organised by Westminster, there is something of a regulatory gap concerning a referendum organised by the devolved Scottish institutions. The Scottish Government consultation paper provides: 'The regulation and monitoring of the referendum campaign will be undertaken by the Electoral Commission which will also issue a range of guidance. The Commission will also report on the referendum process after it has been completed. In its responsibilities for this referendum the Commission will report to the Scottish Parliament.' (*Your Scotland, Your Referendum*, p6) There seemed to be broad consensus among participants that the Electoral Commission should regulate the referendum and that, if the referendum is to be organised by Act of the Scottish Parliament, the Commission should report to that body. The details of precisely what role the Electoral Commission will have and of the reporting system remain to be worked out.

The Question(s): The referendum question currently proposed by the Scottish Government - ‘Do you agree that Scotland should be an independent country?’ (*Your Scotland, Your Referendum*) - was discussed. There was some discussion of whether the question is fair. One objection raised is that the phrase ‘Do you agree’ may lead some voters to vote in a particular direction. It was also asked whether the term ‘independent state’ is in technical legal terms more accurate than ‘independent country’, but another view was that the latter makes more sense to voters. It was noted that the Council of Europe Venice Commission Code of Good Practice on Referendums sets out recommendations on clarity: ‘The question put to the vote must be clear; it must not be misleading; it must not suggest an answer; electors must be informed of the effects of the referendum; voters must be able to answer the questions asked solely by yes, no or a blank vote.’<sup>1</sup>

PPERA provides for independent oversight of the question to be asked in referendums organised by Westminster. By s. 104 of this Act the role of the Electoral Commission, having considered the wording of the referendum question, is to ‘publish a statement of any views of the Commission as to [its] intelligibility’. The Commission has interpreted its remit to include suggesting ‘alternative drafting or to offer suggestions on how a particular question and its preamble might be reframed.’<sup>2</sup> This is to be done as soon as practicable after the introduction of the Bill so that Parliament may take into account the Commission’s views during the passage of the Bill. A similar process applies to wording to be set out in secondary legislation.

The role of the Electoral Commission is also to ensure that for a question to be lawful it should be accessible to all voters and relatively easy to understand; it should also be clearly focused. The Electoral Commission has several guidelines to help explain these criteria. In particular, there should not be bias in the question, leading the voter in one direction or another. The view was expressed that such independent oversight of the question in advance of any referendum in Scotland is crucial to the fairness of the referendum.

Another issue is whether the ballot will contain two or more options. There was debate as to whether or not a multi-option ballot would be clear or fair. It was noted that there are various ways in which a referendum decision can be held with more than two options and that these need to be explored by those who propose having more than two options. One view was that the substantive implications of any option on the ballot should so far as possible be fully explained before any referendum. The notion of some kind of transferable vote among three options was criticised. Another proposal was for a gateway question: change or status quo, and a second offering two different models of change. Under this proposal, if the proposition of change achieved over 50% support in the first question then the result of the second question would become relevant. Participants spoke both for and against this proposal.

It was also noted that the issue of negotiations after a referendum remains to be worked through. How such negotiations would be conducted, and their possible conclusion, remain of course unknown. One view expressed at the seminar was that a second referendum should be held at the end of negotiations to validate their outcome.

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<sup>1</sup> European Commission for Democracy Through Law (Venice Commission), ‘Code of Good Practice on Referendums’ Study No 371/2006 (20 January 2009) COE Doc CDL-AD(2007)008rev, para I, 3.1.

<sup>2</sup> Electoral Commission, ‘Referendum on the UK Parliamentary Voting System: Report of Views of the Electoral Commission on the Proposed Referendum Question’ (Report, Electoral Commission 2010) (2010 Electoral Commission Report on Proposed Referendum Question), para 1.21.

Deliberative Democracy: It was argued that in the interests of democratic legitimacy it is important to engage the people as much as possible in debate over constitutional change in advance of the referendum. Given the time available should the proposed referendum take place in 2014, there is an opportunity to encourage popular deliberation particularly over the different options available for constitutional change, gauging the views of the people and involving those advocating or opposing particular models of constitutional change in explaining and defending their positions publicly.

Section 30 Order in Council: The view was expressed and widely endorsed that it would be preferable in political terms, whatever the correct answers to the disputed legal questions were, if an agreement could be reached between the two governments and parliaments to resolve the questions of competence and timing together. In particular, it was widely thought to be sensible for the two governments to reach agreement whereby the UK Government would agree to the Scottish Parliament organising the referendum in terms of an Order in Council under section 30, SA.

### **The Mechanics of a Referendum**

The detailed rules relating to the referendum, including voting registers, franchise, question oversight, donations, expenditure, transparency, and institutional oversight/conduct of the referendum were the next topic of discussion. It was argued that the democratic imperative in this regard, as with other process issues, is to set out micro-mechanics of the referendum in a fair way, particularly since failing to do so would undermine the entire legitimacy of the process and would inevitably leave lingering resentment following the referendum. This has been the experience in Canada following the 1980 referendum in Quebec on sovereignty-association. Here the federal government heavily outspent the Yes campaign despite the existence of an expenditure ceiling. Disputes over illicit spending also plagued the second Quebec referendum in 1995. Another example of how mechanics can influence the result of an election was the 2000 American presidential election where, despite adjudication by the US Supreme Court in *Bush v Gore* 531 U.S. (2000), questions of ballot design, counting procedures and voter registration in Florida left a shadow over the election result. This highlights the dangers of partisan and ad hoc control of the management of an electoral system and of the importance of external and objective regulation of elections and referendums.

The older British approach of ad hoc arrangements for referendums was replaced by PPERA which introduced a generic framework for the conduct of referendums. PPERA Part VII specifically deals with referendums, but the application of PPERA must nonetheless be triggered by a specific Act of Parliament (PPERA s. 101(2)) accompanied by secondary legislation for each referendum. Section 104, as discussed above, addresses the referendum question and the role of the Electoral Commission; s. 105 deals with 'Permitted Participants'; and s. 108 provides for 'designated organisations' to be created to lead the campaigns (there can be two or none). In the 2011 Welsh referendum, the failure of a 'No' campaign to emerge meant that there were no 'designated organisations'; compare with the 2011 electoral system referendum. The lead campaign groups ('DOs') receive substantial public funding (s. 110). Indeed, since the 1975 EEC referendum and in particular the 1998 Welsh referendum, the idea of public funding for both sides has become the expected standard in UK referendum practice. Were this model to be followed in a forthcoming Scottish referendum, we might expect there to be two campaigns in the Scottish referendum, each with access to

meaningful public support. PPERA further provides for financial controls, spending limits and publication controls.

Despite the detailed regulatory provisions in the Act, there are still some gaps and possible concerns about how well a referendum campaign is regulated under the Act. One issue is the print media in which expenditure control can be difficult and controversial (Parliamentary Voting Systems and Constituencies Act 2011, s. 87(2)). Thus, one difficult question is whether the regulations should be taken to include reporting costs, not simply advertising, as expenditure. In a referendum where the print media can be aligned to one side, as could foreseeably be the case in a Scottish independence referendum campaign, this could be a significant issue.

Another is *ex ante* disclosure. Disclosure of donations to political campaigns and candidates is, in PPERA's normal electoral scheme, made *ex ante* in relation to representative elections. This informs voters and others as to who is giving money to which campaigns. This provision does not apply in relation to referendums. The reasoning behind this is that the two designated organisations may not be political parties and so different disclosure rules are appropriate. As a matter of principle, the disclosure of such information in advance of a referendum ought to be a given. The example of the 2011 voting system referendum, where such disclosure took place on a voluntary basis, demonstrates that there is no practical bar either.

There is a general principle that donors are not anonymous, but the Electoral Commission is only given information about donors to central parties who donate £7500 or more. In other campaign finance systems, including the much maligned US one, the threshold is much lower - \$200 at the US Federal level. If there is a case for knowing who donors are, and this is generally agreed, disclosure thresholds should not be used as a loophole for secrecy. In a similar vein, in order to facilitate 'citizen disclosure/transparency' initiatives, the names and addresses of donors ought to be made public (and not only reported to the Electoral Commission as at present). Such obscurity makes collaborative online scrutiny – a staple of contemporary public discourse – impossible.

The local government electoral register is used for referendums (PPERA s. 2(1)(b)). But there are concerns about the completeness and accuracy of the current registers. The Electoral Commission has suggested that the registers capture only 82% of voters. There is currently a shift away from the Victorian system of household registration to individual registration. But individual registration could have an impact on the completeness of the registration which could lead to large numbers of those eligible to vote not being registered. In the interests of the legitimacy of the referendum, as of any electoral process, it is highly desirable that as complete a register of eligible voters as possible be compiled.

In relation to the proposal to extend the franchise for the referendum to those aged 16 and over, there is, according to the Electoral Commission, a large minority of 17-18 year-olds not registered. Before the referendum there would be a need to register 15 and 16 year-olds; some have argued that this would raise issues concerning child protection. It is desirable that the system of registration be improved and updated, particularly if this proposal is to be followed through.

The Electoral Commission plays a key role in the conduct of referendums, in at least two ways. As regards oversight of the question, the 'Commission shall consider the wording of the referendum question and shall publish a statement of any views of the

Commission as to the *intelligibility* of that question.’ (s.104(2) PPERA, emphasis added). The draft Bill and White Paper are, it was argued, far more equivocal on this issue. Given the pivotal role the Commission played in the 2011 Welsh referendum, there is, it was further argued, little reason not to follow the PPERA model. As regards the provision of public information, the issue of impartial bodies giving information about the referendum in the run-up to the vote can be extremely controversial. The provision of impartial, objective information in a way that is comprehensible to citizens with no detailed knowledge of the issues is essential if voters are to be engaged in the process in a deliberative way. Section 14 of the draft Referendum Bill provides that the Electoral Commission may issue information for voters about the referendum question and voting in the referendum. It was argued that it is far from clear however that the Commission would provide anything other than the most banal of information, if anything at all, given the political tightrope it would have to walk.

## **Post-Referendum Negotiations and Implementation**

This session examined *post-referendum negotiations and implementation*. It focused upon the hypothetical issues that would arise in the event of different referendum outcomes including a vote for independence or a vote for enhanced devolution and in particular the so-called ‘devolution-max’ model. The topics considered included defence, division of UK debt and other assets and liabilities, as well as different phases of implementation and constitutional restructuring.

### *(i) Possible Outcomes*

The possible outcomes of a referendum include (depending on the questions asked) votes for (i) independence, (ii) substantial extension of devolved powers or (iii) the status quo.

### *(ii) A vote for independence*

If a majority vote for Scotland to leave the UK and become an independent state it would appear that this would be clear political authority for the end of the Union. This would trigger a process of negotiation between the Scottish and UK Governments and the start of a process of state construction in Scotland.

### *(iii) The implications of independence*

The implications of independence would include repeal of the Acts of Union, and Scotland becoming an independent, sovereign state. With that legal personality Scotland would become subject to many international legal obligations and, it was argued, almost certainly a member of the European Union. The issue of whether entry would be automatic or whether Scotland would be treated as a fresh applicant and questions of succession to international obligations will be very important (these issues were addressed in Seminar Two, see below). Domestically, a written constitution would be required and a process of disaggregation of Scottish from UK institutions would take place.

The newly independent Scotland would be likely to have nearly all of the usual functions of a sovereign state including raising taxes, allocating public spending, defence and foreign relations. However, there is no absolute requirement for a state to have its own separate currency, although that would be an option. There would be room for cross-border cooperation with the rest of the UK on a range of issues depending upon agreement by both sides. There are things that the UK government would inevitably want to be settled, e.g. the division of existing defence assets. There are also

many things that an independent Scotland would want, e.g. continuation of the existing common travel area and transitional operation of state institutions, for example, tax and benefit administration. A high level of cross-border cooperation after independence would be desirable given that Scotland and the rest of the UK would continue to be part of the same island group and Scotland's only land barrier would be with England. Many of the issues - especially single market issues - would have an EU dimension which would constrain the range of possible outcomes. The rest of the UK would share some but not necessarily all of these interests.

(iv) *Independence - issues for negotiation*

Many issues would be subject to negotiation between Scotland and the rest of the UK in the event of a vote for independence, including defence, division of debt, assets and liabilities, currency and money. These are discussed in more detail in the following paragraphs. Other issues including borders and citizenship are discussed in the report of the second seminar (see below).

Defence: One issue is whether or not Scotland will have an independent defence force (IDF). The First Minister suggested in a statement on 19 January 2012 that there would be one and that perhaps one naval base, one air base and one mobile armed brigade would be sufficient for an independent Scotland. However, at this early stage, this should not be treated as a definitive prediction of the likely defence establishment.

If Scotland did have an IDF, there would need to be an agreement on the transfer of existing UK defence personnel to an independent defence force. It would be important to settle the question whether existing personnel would have the right to choose whether to remain part of the UK forces or to join any new Scottish force. Agreement would also be needed on the transfer of weapons and equipment to the IDF.

The most politically sensitive aspect of defence is the future of the nuclear deterrent as the SNP has committed to a nuclear-free Scotland. That would confront the desire of the UK to keep its submarine nuclear missile force and, therefore, the Clyde submarine bases. The key legal constraint is the Nuclear Non-proliferation Treaty (NPT) which, unless amended, would seem to prevent an independent Scotland from becoming a nuclear weapons state. The NPT would require the removal of nuclear weapons from Scotland unless the rest of the UK were to retain sole control of the weapons. This could be achieved by Scotland leasing the Clyde bases to the UK or existing bases could become UK sovereign base areas as in Cyprus (though this seems an unlikely scenario). These options would, of course, require that the new Scottish Government does not adopt the SNP's nuclear-free Scotland policy. The implications of the submarine nuclear missile force remaining in Scotland are not confined to the base areas themselves. The nuclear bases are supported by a substantial infrastructure and local support network (police dealing with demonstrations against nuclear weapons, development control and roads etc.) the future organisation of which would require discussion.

Division of UK debt, assets and liabilities: In the event of independence, the division of existing UK debt, assets and liabilities would have to be resolved, as would currency and monetary issues. There are default rules for debt and asset distribution in the Vienna Convention on the Succession of States in Respect of State Property, Archives and Debt 1978, but this treaty is not yet in force. There is also some customary international law on the issue but the basic rule is that the parties should try to settle matters by agreement. The division of assets and liabilities is, therefore, likely to be determined by negotiation rather than by the application of particular legal rules.

National Debt: One of the most important issues will be that of sharing the national debt. It was argued that it is politically unrealistic to suggest that Scotland should not take a share of the existing UK debt. It is very likely that the UK will insist on this and that a deal will have to be done. There are also external constraints and influences. The UK's current creditors will likely press for an outcome that maximises their prospects of repayment. There are complexities in splitting the debt as there are very many creditors holding UK debt. It might not be possible to force UK creditors to accept a transfer of the obligation to repay to the new Scottish state. However, the division of the debt could take several different forms. One possible approach would be for each debt instrument to be split at independence with fixed percentages due from each of the rest of the UK and Scotland. Another would be for the UK to remain liable for the full amount to the creditors, with Scotland assuming an obligation to pay its share to the rest of the UK.

Some argue that it would be in Scotland's interest to assume a share of the national debt, whatever the precise legal arrangements for repayment, as this would give it an opportunity to show its credit-worthiness which would affect the interest rates it would be charged for new borrowing. Although the UK currently has a AAA credit rating, there would be no guarantee that an independent Scotland would get the AAA rating. The oil income is one reason for creditors to be optimistic about Scotland's ability to repay debt, but Scotland has no independent credit history at present.

There are different ways in which Scotland's share of the national debt might be calculated. There are simple formulae, e.g. by population share (Scotland's share is proportionate to its share of UK population), by fiscal share (Scotland's share is proportionate to its share of gross UK revenue) or by wealth share (Scotland's share is proportionate to its share of UK GDP). Examples of more complex ways of calculating the debt share include multiple factor formulae such as that used in the case of the former USSR (it was based on GDP, imports, exports and population), liability and asset formulae (e.g. establishing a GDP share and adjusting it downwards to allow for the uneven distribution of assets within the UK) and historical benefit formulae (which would take account of both taxation and public spending in Scotland over a long period of time). It is likely that a simple formula would be used as the basis of calculation with adjustment for special factors such as Royal Bank of Scotland being owned largely by the UK Government and the level of financial support given to it.

Division of Assets: Whatever arrangements are made for the national debt, it will be necessary to divide existing government assets between Scotland and the rest of the UK. There are many types of assets to consider: territorial assets (roads, bridges, etc.); UK-wide assets (an air force base); territorial UK assets within the UK but for the benefit of the whole of the UK (e.g., Bank of England); overseas assets (bases abroad, potentially including territories or remaining Overseas Territories such as the Falkland Islands).

There are also various types of liabilities to consider, including pension liabilities and bank guarantees. The Royal Bank of Scotland (RBS), for example, is likely to feature in all of these. Once again, the division of liabilities would probably start with a simple formula that would be adjusted through the course of negotiations.

A number of more specific questions arise such as whether the same formula should be applied to divide assets and liabilities (e.g. population share or GDP share). The division of assets may be linked to the division of liabilities including the national debt. Immovable assets are likely to go to the state in which they are located with other assets



being shared according to the ‘appropriate’ formula. In arriving at the overall share, special factors like RBS are likely to be taken into account.

Currency: There are several critical economic issues, including which currency would be used in Scotland after independence. It will be essential to get these issues fully resolved. Integral to the currency/monetary question is who would be the lender of last resort after independence and whether there would be a Scottish central bank. It was argued that the financial markets would test a new country hard, especially if it was running at a deficit and was heavily dependent on oil revenues.

(v) *Negotiations and negotiators*

It was also argued that the composition of the negotiating teams would be important to the process of negotiation. It was further argued that although it might be assumed that the existing Scottish Government would automatically take this role, it is not self-evident that the party currently forming the Scottish Government would be the only potential provider of representatives for negotiations. One key issue is the role of the two parliaments in the process. Would they merely pass legislation to give effect to a deal already done between executive negotiators or would they be actively involved in the scrutiny of the negotiations? A further related issue is whether Scottish Members of the UK Parliament might have a specific and distinct role to play. Finally, once agreements have been concluded there is the question of implementing the outcomes. There would be many issues to negotiate and implementation would take time so there would have to be a plan for effective implementation of the agreements reached.

(vi) *Creating a new Scotland: Phases of Implementation*

As well as disentangling Scottish from UK government, Scotland would have to create a new system of government with new institutions. It will be necessary to decide whether the existing Scottish Government at the date of independence would simply become an interim national government responsible to the existing Parliament, and when the first post-independence elections would be. It would be necessary to prepare and adopt a Scottish constitution and make arrangements for its adoption, e.g. a referendum. The process of constitution drafting would require settling a number of important substantive questions about its content including the retention of the monarchy, the composition and structure of a new parliament (e.g. unicameral or bicameral), and protection of fundamental rights. A timetable would have to be set for elections to a new parliament and arrangements made for the *acquis* of existing laws.

Before all that, there would be a pre-separation phase of practical and legal preparations for independence. These would presumably include an act of the UK Parliament providing for independence, and legislation (perhaps passed by the Scottish Parliament) putting in place an interim constitution. There would be a legal assumption of statehood and international personality by Scotland, bringing with it international legal obligations.

There would be a transitional period during which the practical separation of Scottish and UK institutions would take place, e.g. at some point Scotland would stop sending MPs to Westminster. Plans would have to be made for the transfer of functions of existing UK bodies and services such as tax, social security, the major regulatory bodies and perhaps the BBC. The transitional period would inevitably continue for some time after independence during which some UK institutions would continue to operate in Scotland. It would almost certainly not be possible to complete the separation of public administration before the effective independence date.

(vii) *Nation 're'-building*

It was argued that there would be a need to '(re)build' the Scottish nation after a vote for independence. Scottish politics have historically been somewhat tribal, the campaign before an independence referendum may be divisive and the results may be close. It will be important, therefore, not to repeat the experience of some other newly independent countries, where divisions became entrenched post-independence. The Scottish political community and the country should not forever be divided by the referendum and attendant campaign.

There are specific and serious risks to avoid in the nation-building phase, including substantial population movement (with effects, for example, on pensions), corporate relations (e.g. financial institutions relocating), and social divisions. It was argued that people and institutions might move south of the border if the new state is perceived to provide a less stable environment. These issues, among others, underscore why nation-building is a very substantial task that is legal, political and social in nature. There must also be an inclusive constitution-building process. Political actors should commit to the proposition that regardless of people's support for or opposition to independence, an inclusive Scotland, welcoming to all, should be the goal of any constitution-making process. Furthermore, it was argued that the process must be designed in a way that does not incline citizens to regret any constitutional decision taken or to hope to change it when the ruling political party changes. There is a strong practical reason for this since an independence vote would be of seismic importance and no one should go into the vote thinking that it could be reversed even if another political party came to power following the referendum.

(viii) *The further devolution option*

The implications of more devolution as opposed to independence for post-referendum negotiations are less clear because of the variety of possible models. A maximal devolution option would involve devolving nearly all specific functions including taxing and spending powers. The UK Parliament & Government would retain only defence, foreign relations, currency and monetary policy and financial services regulation. Adopting such a model would change the nature of the Union and necessitate a variety of important changes in governance arrangements. An alternative, less radical, model of further devolution is that now set to be implemented by the Scotland Act 2012. It is not at this point clear which if any of the possible models of further devolution will be put forward in the next few years or what processes will be proposed to take these forward. The different models are discussed in more detail below (see 'Inter-Governmental Relations with the rest of the UK').

The maximal devolution option also raises the question whether it makes sense to have a referendum on further devolution of power. It was argued that referendums decide things: a vote on more devolution could be decisive if and only if those who have to deliver it agree to be bound by the outcome. A referendum on independence differs from one on further devolution because whilst the people of Scotland can exercise self-determination, they cannot require the rest of the UK to agree to other arrangements for UK governance whilst remaining in the Union. There cannot be a unilateral determination to change a bilateral relationship. So a referendum option inviting people to vote for more powers with no guarantee of their delivery may, it was argued, be seen as a device to exert political pressure rather than being a decisive referendum.

The same speaker argued that if the point is simply to determine relative levels of support for different models of centralisation or decentralisation in the UK/Scotland relationship, then a referendum is perhaps not the best device to use. Also, if the desire

is for further devolution, a referendum could be counter-productive. If there were a vote against independence there may be little leverage to be placed on the UK for devolution of further powers. Against this it was argued that a further devolution option ought to be on the ballot paper as it was an option with substantial popular support. These issues were discussed further at the second seminar.

One final issue raised was that a vote against independence, whether in support of the status quo or some form of further devolution, would also necessitate a realignment of Scottish domestic politics because the political conversation in Scotland would presumably shift substantially from the merits of independence to substantive policy questions raised by a reworked devolution model.

### **Legal Dimensions of the Economic and Financial Matters at Stake in Constitutional Change**

Presentations on the legal and constitutional dimensions of economic and financial matters completed the day's deliberations. These looked primarily at tax and spending issues with a focus on the implications of full fiscal autonomy under 'devolution-max'. This session concentrated on the option of further devolution of economic and financial powers rather than on the implications of full independence.

#### *(i) Existing devolved tax powers*

It was noted that the existing tax powers which have been devolved (possible variation up to 3 pence in the rate of income tax) have not been used. This seems to reflect a general opposition within the UK to tax variation and possible 'post-code lotteries' arising from such variation. This presents a paradox in that while there is widespread support for tax devolution, Scottish Governments have been unwilling to exercise the devolved tax powers that they already have. Also, the more responsibility the devolved entity has for its spending, the more accountability and formalization of the arrangement are required, and therefore the more guarantees that are needed. It is a psychological point in certain countries that taxes should not vary.

There is also a general trend away from smaller taxes partly due to EU regulation or because they are not cost effective. Therefore we see a trend towards big taxes, such as in the UK with income tax, VAT, corporation tax and national insurance contributions (even if the last of these is technically not considered a tax, it operates in the same plane). Due to the legal constraints on variation there is a large disparity between national organisations raising tax and what they actually spend. This situation can be reversed in many ways by, for example, devolution of expenditure responsibility or by forcing national governments to spend less. However, the disparity seems to be a fact of modern life. The issue was raised whether the question of fiscal autonomy is potentially a third question for the referendum. It was argued that a significant political factor behind the whole fiscal devolution debate is whether devolution-max is seen as a way to support the existing social democratic welfare state or as a way for Scotland to become a low tax jurisdiction.

It is important to remember that all states have massive internal redistribution schemes for redressing economic imbalances. Thus, the USA does this using Medicare and through the location of defence bases; Australia has the Commonwealth Grants Commission which attempts to achieve horizontal fiscal equalisation (HFE), and Germany also uses HFE amongst other methods. The question about whether a geographic area should 'pay its own way' is often contentious. Historically the UK has

engaged in substantial geographic equalisation but this is now increasingly questioned, partly as a result of a questioning of this policy within wealthier parts of the state. The most significant disparities are not those between Scotland and the rest of the UK. Scotland is one of the most prosperous regions of the UK, typically ranking third or fourth out of the UK's twelve regions. The most striking regional disparity is that between the South-East and the rest of the UK. In addition, there are wide disparities *within* regions. In Scotland itself there are examples of stark disparities. Aberdeen south and Edinburgh south have the highest income tax payments per capita in Scotland but the poorer people in those areas are some of the most socially deprived. If you have national benefits systems and national tax systems you will always find disparity which necessitates transfers. The fundamental political question, it was argued, is the level of aggregation at which these transfers actually matter.

This speaker also argued that there has been an increasing drive toward centralising tax powers across the world but at the same time a desire to devolve expenditure responsibilities; thus there is a lack of fiscal responsibility for people taking the decisions. Although, it was argued, there are many reasons why taxes should migrate to a higher level the problem becomes that politicians do not have any responsibility for raising the money they spend.

(ii) *Tax powers under devolution-max*

It was also contended by this speaker that the UK is fiscally centralised and this is unlikely to change. It is unrealistic to think that the UK is going to share fiscal macro-policy responsibility with Scotland. This links to corporation tax variation in Scotland and Northern Ireland, permitting these territories to decrease corporation tax. Would the UK Government tolerate competition on this issue from a devolved Scotland? If this were permitted the question would then become how to replace the revenue that is lost. In light of European Court judgments on tax it is hard to see how these issues would be handled in UK courts. Would a variable corporation tax be seen for example as tax revenue poaching under EU law? There is no clear picture as to what extent issues of tax variation might be open to a legal challenge.

Northern Ireland presents a comparable but different scenario about corporation tax variation where there are proposals to devolve such taxation to the Northern Ireland Assembly. The drive to lower corporation tax in Northern Ireland is in fact coming from the UK Government. Northern Ireland is less closely involved with England than is Scotland. It is not just a question of lost tax revenues, because if the revenues come back because of more economic activity this is seen as beneficial. But if they result in transfers that mean a loss for other parts of the UK, then this will not sit well with the Treasury. The Treasury, it was argued, would be much less relaxed about this threat in the context of Scotland, but on the other hand it was also argued it will be more politically difficult to stop Scotland from setting its own corporation tax level.

There are considerable dangers in the judicialisation of political decisions on budgetary decision-making. We see examples in the case of EU fiscal regulation and voluntary haircuts. It was argued that there has been a substitution of technocratic government for democratic government and for states to be told that they must change their constitutions at short notice. This is confusing as the point of constitutions was always for them to set the rules for politics and governance over the long term.

Devolution-max would have serious implications for the entire UK given the potential impact of devolved tax and fiscal matters such as corporation tax and the issue of North Sea oil. In the independence scenario there is less mutual obligation than in the context

of Scotland continuing as part of the UK. If independent, Scotland would eventually have to create its own tax administration, but a separate Scottish tax administration is unlikely in the event of devolution alone. But even in this context, changing the revenue system means changing the terms of the relationship with the UK.

There would also be issues of spending and the relationship to a national insurance contribution. At the moment there are enormous transfers of money, geographically, within the state. The issue would come up as to how much of this would continue, how much revenue Scotland would raise for itself, and how Scotland would contribute to joint services.

The geographical share of North Sea oil is a constant feature of the independence debate. While some claim that the geographical share of oil revenues would go to a heavily devolved Scotland others argue that the issue is not as simple as this and that the UK Government would not allow a devolved Scotland to keep all of the revenue. But, it was argued, an independent Scotland would be a completely different matter.

Also, if instead of independence there is further devolution of taxation, then a rethink of the discretionary allocation system through the Barnett formula would have to be looked at. It was argued that the informal tax systems that now exist should be regularised. Finally, it was observed that there was a lot of money available for public spending under the last Labour Government and arguably, to take one example, health expenditure in Scotland went up far too fast relative to the capacity of the system to absorb it. Now that excess of money has dried up. If the Scottish Parliament acquires powers to raise its own taxes any proposal to do so would depend upon persuading the people that there is some type of gain to offset the rise in taxes. It was argued that it is now very difficult to argue for tax variation in the UK or at least that the prevailing arguments seem to be to use tax variation in a downwards direction on the basis that this will pay for itself.

(iii) *Constitutional dimensions of economic and financial matters*

The final session also addressed the constitutional dimensions of economic and financial matters, concentrating on the implications of further devolution of economic and financial powers rather than full independence. It is difficult to analyse these issues as they are of course contingent on the extent of further devolution which is being addressed, and so far possible models remain undefined. Apart from that, there are potential difficulties with the 'devo-max' option. It assumes a willingness on the part of the UK Government to cooperate in producing such a model.

There are four key issues:

- division of competences;
- the implications for the machinery of government;
- equipping any new Scottish institutions to carry out their functions; and
- democratic control and accountability.

It was argued that the first and third are relatively straightforward; the second and fourth more problematic.

Division of competences: The current division of economic and financial competence is set out in Schedule 5 of the Scotland Act 1998 and includes fiscal, economic and monetary policy, including the issue and circulation of money, taxes and excise duties, government borrowing and lending, control over United Kingdom public expenditure, the exchange rate and the Bank of England, the currency, financial services and

financial markets regulation. The list could be altered to confer some of these functions on devolved government.

Implications for the machinery of government: The functions currently exercised by the Scottish Government correspond closely to those exercised by the Scottish Office before devolution. There are two institutional approaches to dividing competence; either to create new Scottish institutions such as a Scottish inland revenue, ministry of finance, office of budget responsibility etc. or continue to rely on the existing UK institutions. By the latter scenario some functions and institutions could remain at UK level, including, for example, HMRC, the Civil Aviation Authority, the Financial Services Authority, OFCOM and OFGAS. Continued reliance on such institutions raises the question of how to secure a Scottish voice in them and how to protect the interests of Scotland. It has been observed that since 1999 many UK institutions have not really adapted to the reality of a devolved Scotland.

It was asked how, therefore, do we address that problem? There are mechanisms already in place in the Scotland Act. Sections 88-90 allow for the existence of cross-border institutions and there are many of these. Section 89 allows for the adaptation of cross-border institutions to meet the needs of devolved government. Many new institutions have been set up since devolution to operate cross-border cooperation, e.g. in relation to the Food Standards Authority, National Consumer Council, etc. These involve the exercise of ministerial powers after consultation or with the agreement of the Scottish Ministers.

The Scottish Government & Parliament would have to decide which of these cross-border institutions they would want to continue, and negotiate on this basis. There are obvious questions about the fitness for purpose of the existing apparatus, not just in terms of protection of Scottish interests but also in terms of accountability and control of government. Current arrangements were devised against a different background to that of further devolution of economic and financial competence. One example is the importance of HMRC to any proposals for the Scottish rate of income tax. The Calman Commission recommended that there should be a 'direct line of sight' from the Scottish Ministers to HMRC. One approach would be for the Scottish Ministers to be consulted on the appointment of commissioners and to receive regular reports from them. However, the UK Government rejected the idea that the Scottish Ministers should be consulted. On the other hand, having rejected territorial representation with regard to HMRC there have been moves in that direction in relation to the BBC Trust and the Crown Estate.

Equipping new Scottish institutions for their functions: The task of providing new institutions with new powers would involve substantial changes to the current scheme and might be technically complex but, it was argued, seems readily achievable. Transfer of powers could be achieved by amendment of the Scotland Act by an Act of the UK Parliament or by use of an Order in Council under s. 30, SA modifying the reserved matters.

Democratic supervision and control: Continuing reliance on UK institutions, as part of enhanced devolution, raises questions about control and accountability which have barely been addressed in existing institutions, much less the institutions that might, in future, replace them. Democratic supervision and control should be addressed in terms of their respective internal and external aspects. Internally, it was argued, Scotland already has strong fiscal and budgetary arrangements in place. Where the institutions are lacking is on the revenue side. The Scottish variable rate is authorised by resolution

of the Scottish Parliament, not by legislation. There are also no current arrangements on borrowing. It was further argued that the big challenges are on the UK cross-border side, assuming continuing reliance on the UK institutions. Conceptually the difficulty lies in the fact that the current institutions were devised for a unitary government exercising jurisdiction and were not geared up for thinking about accountability and control in an intergovernmental context. Another practical problem is that institutional arrangements currently take place under a veil of secrecy which may be highly functional from the view of the participants but is detrimental to effective parliamentary scrutiny. These issues of control and accountability of institutions need to be addressed by both Holyrood and Westminster.

It was not argued that every aspect of intergovernmental activity should be out in the open. In some instances the lack of transparency means that it is easier to gain compromise - it was argued that the fossil fuels experience is an example. The more pressing concern is the extent to which efforts are made to be open and transparent. Existing informal arrangements could be formalised. This could take the form of a legislative statement of a formula on principles for resource allocation or by setting up a more transparent process for dealing with resources. If there is going to be more devolution, in particular more tax devolution, then there may be a need for a UK quango that is going to have the power to oversee the accuracy of data. There must be some type of review mechanism.

A decade ago a House of Lords committee expressed surprise that matters of such importance to intergovernmental relations did not attract greater or more rigorous scrutiny at the devolved level and went on to suggest that the devolved legislatures might want to consider more systematic ways of scrutinising what the administrations do. Thus far, it was argued the Scottish Parliament has been relatively uninterested in what the Scottish Government does at the intergovernmental level. Also there is currently no avenue of cooperation between the Scottish and Westminster Parliaments. The Scottish Parliament seems to concentrate on what happens in Scotland and does not address the work of the UK Parliament to any great extent. It was argued that the prospects for such cooperation must be factored into the control and accountability discourse.

**‘Inter-Governmental Relations and External Affairs’, Seminar Two, Edinburgh  
Centre for Constitutional Law, Playfair Library, University of Edinburgh, 16  
March 2012**

**Inter-Governmental Relations with the rest of the UK**

The first session dealt with a range of issues including the effect of further changes to Scotland’s constitutional status on the rest of the UK, in particular arrangements for intergovernmental co-operation.

*(i) Definition of constitutional options*

It was argued that none of the political parties in Scotland have yet clearly defined the meaning of, or their respective preferences for, constitutional options for increasing autonomy short of independence. Current political debates appear to suggest at least four possible constitutional outcomes:

- The status quo
- ‘Devolution Plus’
- ‘Devolution Max’
- Independence

Status Quo: The very idea of the status quo is itself ambiguous. It can refer to the situation as it stands prior to any changes that follow from the recently passed Scotland Act 2012 or to devolution with the additional changes proposed by that Act. However, it ought to be understood that the current scheme is not a fixed set of arrangements as section 30 of the Scotland Act 1998 already allows for an extension of devolved competence by Order in Council.

Alternatively, if the status quo is presumed to incorporate the proposals in the Scotland Act 2012, the ability to change the devolution settlement without primary legislation will be taken further. Section 23 inserts a new section 80B into the Scotland Act 1998 which will enable Her Majesty, by Order in Council, to devolve *any* tax to Scotland. This is in addition to the provisions in the Act which seek to implement the Calman Commission’s proposals for a Scottish rate of income tax. It was argued that it might be hard, therefore, to distinguish the ‘status quo’ post-Scotland Act from ‘Devolution Plus’. It was also argued that the Scotland Act 2012 and its potential impact were not adequately understood in Scotland.

‘Devolution Plus’: The nature of this option has not been clearly specified by advocates of further devolution but to be meaningfully different from the status quo, it would have to entail the Scottish government having significant fiscal responsibility, e.g. responsibility for raising taxation to support at least 50% of devolved spending. It could also entail devolution of additional functions, e.g. some welfare benefits and broadcasting.

‘Devolution Max’: Again, the nature of this option has not yet been clearly specified. However, one model which has been much discussed would see the devolution of all functions except defence of the UK, foreign affairs, and the currency. It would give the Scottish government full fiscal autonomy, i.e. all taxation in Scotland would be set and collected by Scottish authorities and Scottish taxpayers would therefore pay the cost of all public services in Scotland (and make a contribution to the remaining UK functions).



Among other challenges it was argued that it would be difficult to devolve VAT. Devolution Max would therefore be an enormous change. It would devolve most of the tools of economic management to Scotland (although not the currency and related central bank functions) and mean an end to the UK-wide welfare state.

Independence: Under independence, the Scottish government would in principle take over all government functions exercised in Scotland, but it is more likely that joint arrangements would be made with the rest of the UK for certain matters, e.g. defence or aspects of it. The SNP also currently favours keeping Sterling as a common currency.

(ii) *Constitutional process and implementing Independence, Devo Max or Devo Plus*  
There was some discussion of the appropriate constitutional processes for achieving constitutional change. It was widely accepted that independence would require a referendum and that this should be a referendum in which only the Scottish people would vote. The process would then require consensus in negotiations between the UK and Scottish governments.

One speaker argued that implementing a Devo Max scheme would require a number of hurdles to be surmounted. First, there was the question of defining what was meant by Devo Max (see above) including the level of fiscal autonomy and the extent of functions to be devolved. A second hurdle is that, for the time being, this is a policy without a proponent; none of the political parties is currently advocating this policy. However, it was argued, this could easily change depending on political developments both before and possibly after an independence referendum.

Three further hurdles would have to be overcome: (1) A Devo Max scheme must be shown to be workable, coherent and plausible in economic theory; (2) The scheme must be deliverable (i.e. technically feasible) within the UK's governance structure; (3) The scheme must be seen to be in the interests of the rest of the UK as well as Scotland in order to be accepted by the rest of the UK.

As regards the first of these, questions like the currency and the exercise of central bank powers and UK Treasury powers would have to be addressed. This was a particularly pressing issue in light of the recent difficulties of the Eurozone. As to the second, implementing a scheme of full fiscal autonomy would, it was argued, be technically complex, difficult and potentially very costly. The costs of the changes to taxation in Part 3 of the current Scotland Bill (i.e. the operation of HM Revenue & Customs) have been estimated by the Regulatory Impact Assessment accompanying the Bill at £45 million up front and £4.5 million per year thereafter. However, a witness from the Institute of Chartered Accountants in Scotland giving evidence to the Scottish Parliament's Scotland Bill Committee estimated the up-front costs at possibly as much as £150 million pounds. By this argument the implementation of Devo Max could be very expensive.

In relation to the third, unlike the question of independence, Devo Max is a UK question because it would have immediate, direct and ongoing consequences for the entire UK. It would also have a greater impact on the rest of the UK than the existing devolution schemes have had, for example, the power to set a different rate of corporation tax could lead to tax competition, with it was argued, possibly negative consequences for the rest of the UK. These things must be addressed if the consent of the rest of the UK is to be secured. For these reasons a significant issue is whether Devo Max would be in the interests of the rest of the UK.

These questions have implications for constitutional process. Whilst successive UK governments have recognised that independence is a question for the Scottish people it does not necessarily follow that Devo Max should be dealt with in the same way. Thus while it may be appropriate to have a Scottish referendum on independence it was argued that it may not be appropriate to have a Scottish referendum on Devo Max since even if a majority in Scotland wants this it must be a joint decision of the entire UK.

The process chosen by the Scottish Government in its proposal for a referendum on independence is to have a referendum first, followed by negotiations, followed by delivery (assuming a Yes vote for independence). This process it was argued would be constitutionally inappropriate for Devo Max. All of the hurdles identified above must be overcome before a decision to go forward with Devo Max could fairly be taken. An alternative proposal put forward in the seminar for an appropriate process is (1) negotiations amongst the political parties in Scotland to agree the shape of the proposal; (2) if political agreement can be reached across the UK on the terms of the proposal, a referendum; (3) all people in the UK would be entitled to vote as all would be affected by Devo Max. By this same argument, a third option in the independence referendum, embracing Devo Max, would be inappropriate as a question on Devo Max would require that the hurdles mentioned above had first been surmounted.

An opposing view was that the arguments outlined above supporting Devo Max could also be applied to the Scotland Act 2012 yet that was not validated by a referendum either in Scotland or throughout the UK. In response, it was argued that the changes entailed by Devo Max would go well beyond those in the Scotland Act 2012 and in any event this Act was preceded by extensive consultation (Calman Commission, two white papers, extensive consideration by parliamentary committees in both Parliaments, etc.).

It was pointed out that the new taxes to be devolved to Scotland using the new section 80B (see Scotland Act 2012 s 23) could have important consequences for the rest of the UK. The current debates over Scotland's constitutional future were being followed closely in Wales and Northern Ireland. For example, the Commission on Devolution in Wales ('the Silk Commission'<sup>3</sup>) has been reviewing the financial and constitutional arrangements in Wales. It has been asked to review the case for the devolution of additional fiscal powers to the National Assembly for Wales. There has recently been an exchange of correspondence between the First Minister for Wales and the Secretary of State about the possible link in timetable for implementing the Silk Commission recommendations on fiscal devolution and the Scotland Act 2012. There was a clear sense expressed in the seminar that the other devolved territories of the UK have an interest in ongoing discussions concerning Scotland's constitutional future.

### *(iii) Intergovernmental relations*

Intergovernmental relations today: It was argued that intergovernmental relations (IGR) within the UK are rather attenuated and un-institutionalised compared with those in federal systems. The UK system continues to be extremely ad hoc and bilateral. The key institution is the Joint Ministerial Committee (JMC) which has annual plenary meetings, and also meets in domestic policy format (biannual meetings) and in EU format (four times a year or so), but, it was argued, the devolved administrations have been excluded from the Cabinet Office-UKREP planning meetings since 2007. There are also quadrilateral meetings of the finance ministers (twice a year) and meetings of agriculture ministers (10 times a year). Although there is a disputes resolution panel it

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<sup>3</sup> For details, see <http://commissionondevolutioninwales.independent.gov.uk/>

was argued however that the role of the Scotland (and Wales) Offices has become increasingly politicised and so they are less able to act as 'honest broker'.

It was also argued that at the UK government level the practices that could make the current system work effectively have not been absorbed. The result is that the atmosphere at meetings of the Joint Ministerial Committee (JMC) is highly politically charged which, it was further argued, makes the achievement of consensus challenging.

Intergovernmental relations after the Scotland Act 2012: The Scotland Act 2012 does little to alter the division of functions between the UK and Scotland. There is no devolution of major additional functions and nor does it propose major changes to arrangements for IGR. However the tax raising powers are significant; the key changes relating to fiscal powers are:

- The finance ministers' quadrilateral meeting is renamed JMC (Finance).
- There is a new bilateral ministerial-level body to manage operational matters involved in putting the Scotland Act changes in place. This is already meeting and difficulties are emerging.
- There is intended to be a 'clear line of sight' between HM Revenue & Customs (HMRC) and the Scottish Parliament to provide a degree of accountability to the latter (but, it was argued, this is highly attenuated).

The changes were summed up by one speaker as doing as little as conceivably possible to change the existing model of IGR. It was argued that the IGC arrangements need to go much further. There should be greater clarity about UK policy – not just a 'no detriment' approach but mechanisms found to give greater clout to inter-ministerial meetings. It was further argued that there needs also to be a Scottish appointment to the HMRC board to ensure that HMRC understands the nature of its shared obligations. Again it was argued that there needs to be scope to expand the arrangements to cover Wales if it gets greater financial autonomy following the Silk Commission.

Another argument put forward was that following passage of the Scotland Act 2012 the West Lothian question (WLQ) can no longer be avoided. The McKay Commission is working on the implications of this issue. If the Scotland Act 2012 provisions are implemented and the McKay Commission suggests 'English votes for English laws' in the UK Parliament (and this is adopted), that would require changes both in civil service procedures and parliamentary procedure. In Whitehall such a change would require an extensive restructuring of departmental understandings of the legislative process in terms of content and scope.

Intergovernmental relations under Devolution Plus: It was argued that Devolution Plus is potentially politically attractive for the unionist parties in England if Scottish tax payers appear to bear the tax burden of any higher spending in Scotland on the welfare state, including education, health, etc. This would reduce antagonism in England, particularly Southern England, to what is viewed by some voters as special treatment and better public services for Scotland.

It was further argued that it would be possible to devolve additional functions such as broadcasting in such a way as would enable a more apparently Scottish aspect to broadcasting, including a dedicated Scottish channel, without actually undermining the benefit of a UK-wide framework by structural alteration of the way the BBC works. There is a blueprint to hand in the report of the Scottish Broadcasting Commission set up by the Scottish Parliament during the last parliament (2007-2011).

Further devolution of welfare state functions would, it was argued, be more difficult. There are several possibilities: devolution of all welfare benefits to Scotland (but this is more commonly associated with Devo Max); devolution of ‘small benefits’ (such as attendance allowance and council tax benefit) which have previously caused problems in the interface with devolved functions; a ‘parallel track’ approach under which the Scottish Parliament would have freedom to provide benefits which might overlap with UK ones, but were financed from Scottish resources and administered by the Scottish Government; and a general power for the Scottish Parliament to ‘top up’ strands of the new universal credit to be implemented under the Welfare Reform Act 2012, but administered by a single agency as at present (the ‘piggy-back’ approach).

Any of these would require extensive changes including extension of devolved powers and changes to IGR. There would have to be appropriate arrangements for making UK agencies such as Jobcentre Plus accountable to Holyrood, inter-ministerial liaison, and acceptance by the UK Government that there are restraints on the nature of changes it can introduce, and how and when to introduce them.

Substantial tax devolution would take time to implement. Some types of tax devolution could be set up within three years, e.g. devolution of personal income tax, assigning VAT receipts and most land taxes. Devolving Capital Gains Tax on land or corporation tax would take much longer – probably 5-8 years.

Greater fiscal devolution will raise questions such as who should collect taxes. It was argued that there are strong arguments for a single UK collection agency (simplicity for tax payers, minimising administrative costs) but this would be a major change for HMRC. HMRC would have to become a multi-government agency serving both UK and Scottish Governments and Parliaments. It could no longer, it was argued, be simply a creature of the UK Government and subordinate to the UK Treasury. There would have to be new audit arrangements. There would also need to be a fundamental shift in the way the Treasury works. If grant funding of devolved public services remained substantial, there would be a need for a new and impartial decision-maker - not simply HM Treasury - for the allocation of grants for territorial spending.

Devolution-Max: The IGR implications of Devo Max depend upon its precise contours. However, full fiscal autonomy might imply:

- Creation of a separate Scottish Customs & Revenue service for tax collection;
- Rules (and agreements with rest of UK) to cater for cross-border businesses, both for PAYE and employers’ NICs, and corporation tax;
- Tax policy co-ordination agreements with the rest of the UK;
- Agreement about Scottish input to UK macro-economic management.

There could be great political difficulties in implementing the further fiscal devolution involved in Devo Max. It was argued that the UK Government is unlikely to devolve tax powers which could then be used by the Scottish Government to engage in tax competition. This suggests that they would not permit substantial tax devolution without some type of tax policy coordination agreement. Another potential area of difficulty in practice would be the interface between fiscal and macro-economic policy management. There are always tough policy decisions to be made at the macro-economic level that impact upon devolved government and its policy aims. In that context it would not be very long before a devolved Scotland began to make demands for formal input to

macro-economic decision-making, e.g. a seat on the Monetary Policy Committee of the Bank of England. It was asked, would that be readily conceded?

There could also be serious tensions around EU policy. It was argued that much more thought would have to be given to how EU policy would be made in these circumstances and how the UK would protect itself from liability if Scotland, within its devolved areas of competence, were to breach EU law.

Devo Max would still entail a large degree of interaction between ‘Scottish’ and UK authorities. Much of that would relate to highly controversial matters of policy, or ones of considerable importance to ‘Scotland’. Also, under Devo Max the introduction of ‘English votes for English laws’ in the UK Parliament would, it was argued, become unavoidable, and this would create its own difficulties. MPs for Scottish constituencies would effectively only be part-time but would still be voting on important matters. So IGR would become much more complex. However, there may be decreasing resources to manage them and to provide for officials and politicians with knowledge of key policy areas on both sides of border. It was argued that on these bases Devo Max is highly likely to be very unstable as a result.

Independence: Independence is in theory the option that results in Scotland having the least contact with the UK and being most free to make its own choices. However, even the current government’s proposals involve considerable co-operation with and links to the rest of the UK. They include the idea of a ‘social union’ (the content of which is still to be explained), a common currency/monetary union, and possibly common provision of low-level practical services e.g. Ordnance Survey, Driver Vehicle Licensing Agency (DVLA), and some defence and customs issues involving co-operation of services and provision for Scots serving in the UK armed forces.

By one account the key question here is whether the rest of the UK is willing and able to make the necessary adjustments. Possible obstacles to agreement include their impacts on other parts of the UK including Wales & Northern Ireland, Conservative backbench irritation/indifference toward Scotland and possible failure of key parts of Whitehall to adapt (HMRC, Treasury), since it was argued, the latter have made little adaptation so far to the devolved arrangements.

Any plausible outcome to the debates over Scotland’s constitutional future is going to trigger a significant upheaval in intergovernmental relations. Broadly speaking, the greater the scope of Scottish self government, the more important that interaction will be for both governments, in a general political sense and in their ability to deliver policies in areas for which they’re responsible. The low level of real intergovernmental cooperation so far has been possible because the stakes have been low for both parties, though more important for devolved government than for UK government. As the stakes become higher, so the risks to both sides become higher.

## **Citizens’ Rights**

The following paragraphs summarise the presentation made by one of the speakers. It was suggested that in addressing citizens’ rights we have to consider both those human rights which have constitutional legal protection e.g. under the Human Rights Act 1998, and other citizens’ rights (social justice rights) which are protected only by ‘ordinary’ law.

The key questions are:

- Is there to be a UK/territorial-wide ‘floor’ on human rights and social justice entitlements?
- Is there to be a UK-wide ‘ceiling’ on human rights and social justice entitlements?
- What are the institutional mechanisms that will control either the floor or the ceiling with respect to Scotland in the context of different options for Scotland’s future (independence, Devo Plus, Devo Max or the status quo)?

(i) *The current situation*

The UK’s international commitment to the ECHR is supported not just by the *vires* controls in the devolution legislation but also by the UK Government’s efforts to ensure that the devolved governments abide by the UK’s international obligations.

The Human Rights Act applies to all public bodies in the UK but there are differentiated equality duties across the UK. In Northern Ireland there is a very substantive equality duty where an impact assessment mechanism is in place as part of the Northern Ireland Act 1998 and where violation of the equality duty is *ultra vires*. The Equality Act 2010 (applying to England, Scotland and Wales) allows for differentiated equality duties but Scotland, while legislating to extend and define the public bodies to which the Act applies, has not taken up the opportunity to legislate substantively in this area. Wales on the other hand has used the provisions to create a more robust impact assessment scheme which now looks more like the Northern Ireland scheme – plans, impact assessment, and procurement.

There is evidence that human rights impact assessment is becoming more important as a way of extending devolved human rights regimes, and Wales, for example, has produced an elaborate children and young persons measure which is really an indirect way of ‘incorporating’ the UN Convention on the Rights of the Child via impact assessment. Scotland seems to be following suit with a planned Children and Young person’s measure, although in some respects the mechanism is weaker than that in Wales.

As regards social justice rights, there is nothing directly comparable to the Human Rights Act and the general framework for protection of ECHR rights. However, these rights are recognised in various other ways. Social and economic rights are recognised in international treaties, similarly, there are arguments that some socio-economic commitments have the status of constitutional principle, or are constrained by constitutional principles in ways that influence the legislative process (cf. the House of Lords Constitution Committee’s arguments that the Health and Social Care Bill (now the Health and Social Care Act 2012) contravened a constitutional principle of accountability by severing the relationship between the health care budget and ministerial responsibility for delivery of health care). Thus international equality duties can be given legal effect.

The right to free health care is a key element of the welfare state but it is a devolved matter so there are differences in provision across the UK. Likewise, education has been a key element of the welfare state. Here differentiation has already become contentious given the differing approaches to university fees.

Social security is a reserved matter for Scotland and Wales but is fully devolved in Northern Ireland. However, the ‘parity principle’, given statutory recognition by section

87 of the Northern Ireland Act 1998, requires the UK and the Northern Ireland governments to cooperate with a view to ensuring a common welfare benefit system.

Some tensions have developed already. The Northern Ireland Government does not wish to implement the social security reforms in the Welfare Reform Act 2012, and while the 'parity principle' was probably first envisaged as creating a floor for Northern Ireland in common with the UK, the question now is whether it is becoming a ceiling, meaning that Northern Irish welfare provisions should drop to remain in parity with those in England and Wales. In this context we should also note the refusal of the Scottish Parliament to pass the legislative consent motion for the Welfare Reform Act 2012, and its decision to legislate itself for consequential changes to devolved issues. However, the statutory equality duties and the need for equality impact assessment and rights 'proofing' may create potential for those in devolved territories to litigate with respect to how cuts are delivered, and this in turn, rather than being entirely unwelcome, may give devolved governments some leverage with the centre.

It was suggested that some of these tensions have immediate practical consequences such as how to report to international human rights treaty bodies on the coalition Government's planned public spending cuts. UK government representatives may be unwilling to highlight 'enhanced' protections put in place by devolved governments (such as the equality measure of the Welsh Children's initiative) because England doesn't want to commit to this. At the same time the devolved government may wish to highlight a measure to show how well they implement the relevant treaty obligation. There is, therefore, debate amongst NGOs and ministers as to which ministers should be present within international treaty bodies to report and what they will be allowed to say.

*(ii) Are the current arrangements unravelling?*

It was argued that, whatever opportunities for divergence that further devolution or independence might open up, the current arrangements regarding citizens' rights are already unravelling, and that three different questions can be asked: how does devolution unravel current arrangements? how does the unravelling of the current arrangements implicate devolution? and how is the debate over rights changing as the 'floor' drops and the devolved 'floor' becomes a 'ceiling'?

It was argued that if one steps outside of the current debate over Scotland's future, it is unclear whether the current human and social rights status quo is stable and whether the common UK welfare state which has been assumed to exist since the late 1940s is or can be maintained anyway. So, we cannot sketch out a Devo Plus or Devo Max vision of citizens' rights unless we first understand the current situation.

One development, it was argued, is that the ECHR and the Human Rights Act have come under sustained attack from some quarters. The UK Government has taken a two-pronged approach to weakening the current level of protection for ECHR rights. The first is internal – the proposal for a UK Bill of Rights and the setting up of the UK Bill of Rights Commission which, from the Conservative party point of view, was part of a project of limiting rights. The second prong is external – the attempt to persuade other members of the Council of Europe to limit the right of individual petition to the European Court of Human Rights (cf. a statement by Dominic Grieve and the Brighton Declaration). It is unclear how far these developments will go.

However, devolution complications have emerged as the unknown quantity in the UK Bill of rights debate. It is clear that any change to the domestic mechanisms for ECHR protection involves revision of the devolution legislation. That then would require

substantial negotiations between UK and devolved governments. However, there are particular political sensitivities to the rights debate in Northern Ireland that are not present in England from where the pressure to reform the mechanisms has primarily come.

On the social justice side, it was argued that the status quo is not stable here either, as a range of reforms are in effect dismantling what were traditionally key UK-wide social commitments.

*(iii) NHS Reform*

It was argued that the reforms to the NHS proposed in or associated with the Health and Social Care Act 2012 provide an excellent case study of the UK welfare state unravelling. It is unclear what the NHS in England will look like after full implementation, but the proposed reforms could dramatically alter NHS provision meaning that without any action in Scotland, Wales or Northern Ireland, a central plank of the welfare state will cease to be a common UK citizenship right.

The key elements of the reforms are:

- The Secretary of state is currently responsible for public health and has a duty ‘to promote a comprehensive service’ but this will be replaced by a duty to act with a view to ‘securing’ a comprehensive service, which is quite a different thing.
- It is unclear to what extent judicial review will be available to enforce this duty because the Secretary of State’s duty will actually be severed from provision of services which will be the responsibility of others.
- It is unclear whether EU and WTO competition rules will apply. If they do, it would have a huge impact on delivery of devolved services in the other territories of the UK.
- Primary Care Trusts and Strategic Health Authorities are to be replaced by general practice Clinical Commissioning Groups with
  - Discretionary powers to define entitlement to NHS provision and change patients’ CCGs,
  - Duty to arrange health service provision applies to the enrolled population – not geographic but drawn from patient lists, with the possibility to abolish practice boundaries and competition for patients across the whole country,
  - Power to commission private providers,
  - No clear definition of responsibility for un-enrolled people, although a mechanism for compensating commissioners and providers for these unspecified responsibilities, and
  - A new section 3(1A) states: ‘Regulations may provide that [duty to provide care] does not apply (a) in relation of persons of a prescribed description (which may include a description framed by reference to the primary medical series with which the persons are provided) (b) in prescribed circumstances.’ Explanatory notes to the bill suggest that the power will be used to exclude ‘people who are resident in Scotland but registered with a practice that is a member of a CCG’, and possibly ‘temporary residents’. Potentially, residents of Northern Ireland and Wales will also be affected. This could adversely affect those in Wales and Scotland living near the border with England, currently enrolled with a GP practice in England, in accessing the commissioning consortium.



The reforms are likely to lead to much greater fragmentation of the NHS than currently exists and would have major implications for cross-border access to health care. Currently, the Scottish Government negotiates with public health bodies in England. In future, they will be negotiating with a wider range of bodies including private companies and providers who have no geographic or absolute obligation to provide certain services.

There are also implications in these changes for the block grants to devolved governments. If NHS spending in England is cut or redefined in terms of whether it is public expenditure, that funding deficiency will be passed on to the devolved governments via the Barnett formula which is contingent upon changes in public expenditure in England.

*(iv) Citizens' rights under independence*

In some ways, it was argued, the consequences for citizens' rights are easier to predict in a situation of independence. There will almost certainly be a written constitution for Scotland and constitutional protection for fundamental rights. Questions include whether Scotland would simply continue to apply the UK Human Rights Act or replace it with indigenous provision, whether the ECHR rights would have the same level of legal protection in domestic law or a higher level of constitutional protection, and whether social and economic rights would be given constitutional protection. Independence would also raise the issue of the final court of appeal which could be either a new Scottish Supreme Court or even the Judicial Committee of the Privy Council (if Scotland stays in the Commonwealth).

On the social justice side there would be a number of issues:

- Decisions would have to be made about the level of public services and how they would be financed.
- The practical complexity of unravelling current integrated provision for social security benefits would raise its head, as discussed from day one.
- EU law imposes many restrictions by guaranteeing EU rights such as freedom of movement for workers. Paradoxically, independence would give Scotland less autonomy in some policy areas, e.g. it would not be possible to charge fees to English students while giving free education to Scottish students.
- Decisions would have to be made about the extent (if any) of continuation of welfare state inter-connections across the UK – e.g. cross border access to hospitals and healthcare, but this would be dependent on ongoing good will and continuing negotiation.
- This negotiation would be complicated in unforeseeable ways by privatization e.g. in the NHS, or welfare cuts.
- Residence questions may become more important and fraught in various contexts because of differentiated provision.
- A number of these concerns therefore cut across the 'soft border' rhetoric even with the best of wills.

*(v) Devolution Plus/Max*

Many questions also arise on the Devo Max and Devo Plus options:

Again, we can ask whether (if rights protection were devolved) Scotland would simply continue to apply the UK Human Rights Act or replace it with indigenous provision.

The options for the court hierarchy would include retaining the UK Supreme Court. What is more difficult to predict is whether the 'anti-HRA' sentiment will lead to changes in the current UK human rights settlement. If it does, the question would be (if rights protection were devolved) whether Scotland would go along with any watering down or maintain or enhance the level of rights protection.

This issue of the level of public spending on social justice rights, and how taxation would be deployed to finance it, would be a key question. This would be affected by the precise nature of the new devolution settlement including the extent of legal competence and fiscal autonomy. The extent of the reworking of the welfare state, particularly social security benefits and the NHS in England, would be a further factor affecting Scotland's choices. There is also the question of the logistical difficulties posed by unravelling hitherto integrated systems for providing public services and it is hard to predict how this will affect access to public services in practice.

Further devolution creates the possibility of a different balance between UK-wide cohesion versus territorially differentiated provision of public services, but the unravelling of the common approach and the changes in the level of provision already set in train by the UK Government might also increase the demand for greater devolution as voters on the periphery see cherished public services under threat from the centre.

In the discussion following the paper, it was suggested that, if the Calman Commission was right in suggesting that the welfare state is the 'glue that is holding the union together', one of the major threats to the union is coming not from political development in the devolved territories but from the centre in the form of the coalition government's policies on health, benefits and public spending, and that the coalition's constitutional strategy was inadequately aligned with its social policy strategy. It was further suggested that it was the pursuit of Thatcherism which had fragmented Scottish and Welsh identification with the UK and with policies decided at Westminster without regard to the political preferences of voters in Scotland and Wales, thus creating much more problematic territorial politics within the UK. It was argued that many Conservative politicians had not yet learned this lesson. The apparent attempt by the coalition to reshape society created problems for the union. The apparent preference of the people of Scotland for broadly social democratic welfare provision could not be delivered at the reduced resource levels presupposed by the coalition's 'Big Society' idea. Greater fiscal autonomy might help to reduce this tension.

A final point sought to tie the issue of fiscal autonomy to the social rights issue. It was suggested that although there are technical and political difficulties in further fiscal autonomy, we should not assume that it is not feasible. There is a lot of literature on how fiscal devolution could work. Also, it is important to see that the Scotland Act 2012 will change things. It was argued that too little emphasis has been placed on the financial consequences of this Act and how they had the potential to create instability. When these changes are added to the consequential effects of changes in the public sector services in other parts of the UK which would result from the Barnett formula, there was considerable potential for politically risky developments in public finances.

## **Scotland, the UK and Europe: Accession to and Participation in the European Union, the Council of Europe and the ECHR**

The seminar next addressed the issue of Scotland's place in Europe in the event of independence, including membership of the EU and Council of Europe. It considered whether there are implications for the way the UK participates in European institutions arising from greater autonomy for Scotland within the Union.

One issue in the event of independent statehood for Scotland is whether Scotland and/or the rest of the UK (rUK) would succeed to the UK's current membership of the EU. One issue is the extent to which the UK is already engaged in EU institutions and the extent of existing UK obligations within the EU. It was argued that the continued membership of rUK could be a requirement for rUK agreeing to any constitutional path to Scottish independence.

As for Scotland there seem to be two possible models: a succession model and a secession model. By the former Scotland would also inherit the treaty obligations of the UK at the date of independence in a way similar to the break up of the USSR. There is considerable state practice to show that states will treat small as well as large territories emerging from a dissolved state as successors to the dissolving state's rights and obligations under international law.

By the secession model Scotland would be treated as an entirely new entity, free from the UK's treaty obligations and organisational memberships. The break up of the SFRY does not offer much guidance since it was so acrimonious. But even here Croatia and Slovenia chose to be succession states to the former SFRY's international obligations, and this was accepted internationally. It was argued that it seems highly likely that Scotland would also succeed to the UK's international rights and obligations particularly as it is very unlikely that the continuing UK would argue against such a succession. This would, however, still leave those rights and obligations which rUK would insist would fall exclusively to rUK, such as membership of the United Nations Security Council and sovereign claims over the UK's Overseas Territories. Succession states must apply for membership to the UN but in practice this should not be difficult for Scotland. (It was argued that the same political considerations that would, in this speaker's view, lead to continued membership of rUK in the EU would surely apply to ensure in effect the continued membership of rUK in the UN, including the UNSC, and other treaty based organisations.)

The situation in relation to membership by an independent Scotland of the EU is, it was argued, unknown. The break-up of an existing Member State would be an unprecedented event. One issue is recognition. Would Scotland be recognised by existing Member States? It was argued that the Greenland situation offers little guidance. Greenland separated from Denmark but it did not wish to remain in the European Communities. The rest of Denmark remained without any difficulties.

Art 2, para. 5 of the Treaty on European Union commits the EU to 'the strict observance and development of international law'. Therefore international law may offer some guidance. Since we have no precedent in EU law, it was argued that the best practice of international law should be applied by the EU. Again the successor state principle could well allow both entities to succeed to EU membership on the existing UK terms and conditions. In this case Scotland would succeed to UK protocols to the TEU and the TFEU and the UK's opt-outs on EMU and other matters, including on JHA matters, the Charter on Social Rights etc. One argument that has been put forward elsewhere is that

Scotland should succeed to the UK's membership because citizens of an independent Scotland have rights under the EU by virtue of their UK citizenship and these rights cannot be taken away. There was considerable scepticism expressed as to how convincing this argument is. The counter argument was made that the rights of the citizen are not so powerful that the ECJ would give precedence to these over rights and obligations of state membership. This would effectively be to say that the citizens of a Member State could not decide by majority to withdraw from the EU because that would adversely affect their own rights and those of other citizens who enjoy the benefits of the state's EU membership. But, it was argued, EU citizenship is based primarily on membership by the state and not simply upon residence in what is currently the territory of the EU.

But the issue of citizenship does point to the existing degree of Scottish integration within the EU which might lead to a broader political willingness to maintain the existing membership of Scotland and rUK within the EU. It was argued that this also highlights just how integrated the UK is within the EU. Debates since the Lisbon Treaty about how states could withdraw from the EU and the enormous practical difficulties they would face point to the likelihood, and the desirability for all concerned, of the continuing membership of Scotland and rUK in the EU.

On the other hand, it was argued, there could be an issue for Scotland in gaining recognition as a new state from other EU Member States which are themselves concerned about the territorial aspirations of sub-state nations, in which case the recognition by these states, and the allaying of their concerns about any possible domino effect stemming from Scotland's independent membership of the EU, would need to be dealt with diplomatically. The issue of membership and recognition are therefore very much political. It was argued that if there is the will within the EU and its Member States then there do not seem to be major legal impediments to both rUK and Scotland succeeding to membership. How the EU institutions themselves work also needs to be considered. The past 20 years has seen a considerable shift towards co-decision making and a strengthening of the Parliament at the expense of the Council. And enlargement has diluted the role of any one country, meaning that the power to veto, for example, Scottish membership, could be considerably diluted in political terms at least.

The foregoing represents the view that the transition to EU membership by both rUK and Scotland would most likely be straightforward. However, another view was put that neither Scotland nor rUK would, as a matter of law, succeed to membership of the EU and that the political issues could be more complex than is sometimes argued. The United Kingdom of Great Britain and Northern Ireland is currently a member of the EU, there is no state called 'the rest of the UK' nor one called 'Scotland' that has signed the EU treaties. Also precedents from international law are of limited relevance because the EU is a unique international organisation and Member States confer upon it a large amount of internal competence. That competence is exercised by a number of institutional organs which are again unique. There is nothing in the Treaty that provide for the splitting of a current Member State into more than one free-standing independent state.

In this respect it was argued that Greenland should be seen as a different case. The EU felt able to relinquish Greenland and it was allowed to leave the EU. There was no treaty provision at that time that allowed for secession of a Member State, let alone part of a Member State. Nevertheless it was done and done quickly. The substantive part of the Treaty was barely one page of text and there was consensus that the result was easy to achieve. The lesson here is that where there is political will the necessary adjustments

can be made relatively quickly. But that doesn't mean there are no formalities. There is no example of a state dividing itself into two states and staying in and there is no provision in the Treaty to deal with such an event. Much then will depend upon the political atmosphere and the political will of key actors and here, it was argued, things may be difficult.

The argument was put that accession for both rUK and Scotland will be necessary under Article 49 of the Treaty. Article 49 involves an application to the Council which then consults the Commission, with the matter then going to the Parliament. Art 49 finishes: 'the conditions of admission... shall be the subject of an agreement between the Member States and the Applicant States... and it shall be submitted for ratification to all of the Member States in accordance with their constitutional arrangement.'

The view was expressed that it is probable that the EU institutions would characterise these changes in the UK constitutional arrangement as a withdrawal by the UK under Art 50, requiring accession by two new states under Article 49. On any view of the consequences of Scottish independence there will be matters that require amendment of the Treaty such as changing the number of Scottish MEPs. This and other matters would need a treaty change. In short, two new accession treaties, one for Scotland and one for rUK, would be needed.

The unique nature of the EU as a far more integrated international association than anyone has ever seen makes accession very different from that in relation to, for example, the UN Charter or the North Atlantic Treaty. For that reason in particular, under its own rules you could have a different situation even if every other member agreed that as a matter of general international law the rUK continued as the UK. In other words rUK could succeed to other treaties and membership of other international organisations but the EU would still be free to set its own membership rules and to refuse accession.

It was also argued that since a treaty will be needed in any case to deal with the structural questions about the Commission, judges and votes within the European Council, etc. the whole process of treaty ratification could be difficult for both rUK and Scotland. It is no longer a question of whether you have the agreement of the 27 Member States, it becomes a question of whether you can survive the process of approval of all Member States.

Looking at Scotland in particular one issue that would need to be dealt with would be the number of MEPs that Scotland would have. At present Scotland has considerably fewer than a comparable independent Member State. To negotiate a larger number may require a form of accession process even under a broader succession model. Scotland would also be entitled to a Commissioner and a judge on the ECJ. Scotland, by this argument, would also not be guaranteed the opt outs and budget rebate negotiated by the UK, subject to the argument above that Scottish citizens should not be subject to any diminution of their current status.

The view was expressed that there is no realistic possibility of the EU denying Scotland membership of the EU but the opportunity would be taken by other Member States to remove the rebate, and possibly some opt outs, in relation to Scotland and perhaps if possible in relation to rUK. The argument which contends that both Scotland and rUK would need to apply for membership under Article 49 also suggests that the UK opt-out on EMU, on the rebate in the European budget and the UK's compliance with the Schengen Convention may all be revisited by the EU. However Scotland could have

some negotiating strength in relation to the common fisheries policy and could use this to secure other goals. In any case, it was argued, there will have to be a negotiation with the European institutions and the other members of the EU.

Other participants questioned the idea that rUK would not be treated as the successor state to the UK within the EU despite the EU's right to set its own membership rules. One participant in the question and answer session took the view that it is difficult to see how the rest of the EU could characterise, as a legal proposition, the situation where the larger part of the UK as it is currently constituted, seeking to remain a member of the EU, would be treated as having undergone a de facto withdrawal under Art 50. Also in political terms it is hard to think that it would be in the best interests of the other members of the EU to go down that road as it seems that they could lose the rest of the UK as a member of the Union should the people of rUK vote against accession in a referendum.

Another participant suggested that if we look at other international organisations, like the UN or Council of Europe, it seems extremely unlikely both as a matter of law and politics that the rest of the UK would be treated other than as a continuation of the UK. Many of the states of those organisations are of course members of the EU. It was argued that it is inconsistent to say that the remaining members of the EU would treat rUK, for example, as a continuation of the UK in the Council of Europe but not in the EU.

One other point raised was that it is not impossible that these issues could find their way before the ECJ. It is difficult to see how such a case could be raised, on what grounds or by whom, but the very possibility of the Court adjudicating on the implications for the EU of Scottish independence should not be discounted.

In discussion there was some disagreement over the likely attitude of other member states to Scotland staying out of the Eurozone. The treaties do not require that Member States participate in EMU. It was pointed out this has been required of every new member since 1995, but others thought that it was unlikely that the other Member States would insist on Scotland entering the Eurozone in negotiations over membership. A further point made in that regard was whether Scotland's position would be seen as different from other new members since Scotland would be joining 'from the inside' rather than the outside.

There also needs to be consideration of what institutional arrangements an independent Scotland would need to put in place to facilitate membership of the EU. The view was expressed that the regulatory nature of the EU requires serious consideration and that an independent Scotland would have to establish, not necessarily a separate currency, but a central bank, a financial services regulator, a telecommunications regulatory agency and an energy regulator. The national financial services authorities would need to have significant powers since they would be required to implement European financial policy, particularly in light of the current reform process.

There was also the issue of how long the process towards Scottish membership would take. Again this is uncharted territory. If the rUK and Scotland are in agreement it might be envisaged that the new arrangements could be resolved more quickly but failing this and/or if other Member States object to the proposals and if the ECJ got involved, it was argued the process could take years. In short, any new legal or treaty process would depend on the smoothness of the political process and perhaps upon how prepared the EU presidency was to take a lead in moving the issue forward.

As to implementation of EU obligations, one view was that this should not be a difficult matter because by virtue of paragraph 7.2 of schedule 5 of the Scotland Act 1998 the Scottish Government is already responsible for implementing EU obligations that pertain to Scotland, a provision that reflects what was happening prior to devolution within the Scottish Office. So the Scottish Government already has administrators and lawyers working out what Scotland has to do in order to implement EU obligations. There is currently cooperation between UK departments and Scottish departments on this but it cannot be assumed this facility will continue.

The level of uncertainty concerning an independent Scotland's status in Europe led one participant to argue the case for a second referendum following negotiations after the first referendum, when all of the issues are clearer.

#### *Devo Max*

Any increased level of devolution short of independence would not affect Scotland's current status within the EU or any other international organisation. Any increased representation for Scotland would depend upon internal negotiation with the UK government. A process towards further devolution could well lead to a reappraisal as to how well intergovernmental arrangements and concordats agreed in the early phase of devolution are in fact working in the coordination of the UK's EU policy. The view was also expressed that the respective entitlements of the devolved territories to play a role in UK representation within the UK should be put on a statutory footing.

The more devolution Scotland has, the greater the need to reconcile Scottish policies now devolved with EU obligations and the more EU obligations will touch on devolved matters. So if Scotland has enhanced devolution it arguably raises a need for greater input into UK wide European policy-making processes. There is also an argument for an enhanced role for Scotland within the UK's representation in Europe given that more and more issues potentially affect the powers of the Scottish Parliament. Other sub-state parliaments across Europe tend to expect a stronger role than the Scottish Parliament has.

### **Implications of Statehood: International Obligations and Implementation of International and European Law**

The seminar next addressed the implications of statehood for Scotland in relation to general international law, the rights and obligations of statehood, succession to treaty obligations, membership of international organisations (UN, WTO), and continental shelf delimitation (relevant to oil and gas reserves).

The emergence of an independent Scotland would potentially give rise to a number of questions which in analogous situations other states and international actors/organisations have addressed. This part of the seminar addressed the following questions: what international legal rules, if any, regulate the emergence of a new state and what institution, if any, applies the rules such as they are, to the emergence of a new state?; what are the rules of state succession?; what does general international law have to say about the participation of new states in international organisations?; and finally, in relation to the succession of states to maritime delimitation, how may maritime entitlements be determined?

(i) *The emergence of a new state*

The ICJ in 2010 adopted the advisory opinion on Kosovo in which the majority said that international law (IL) does not prohibit a community from declaring itself independent from its parent or host state. Dissenting opinion in the case disagreed citing territorial integrity and arguing that international law prohibits secession. But it can be argued that the law of territorial integrity deals with the relationships between states, not how internal state matters arising out of a single municipal order are dealt with.

Some states also argued that there is in fact a right in IL to secession. The Netherlands referred to it as the ultimate remedy, when all other options have failed and there is no prospect of another solution under the national/domestic legal order to which an oppressed community belongs. The Court however did not address this argument for a right to 'remedial secession' because it did not concern itself in detail with general issues of IL given that the opinion was on the specific issue of Kosovo.

The Supreme Court of Canada (SCC) is the other major tribunal to have addressed statehood. In 1998 it was asked about a unilateral secession from Canada by Quebec with one question concerned with the legality of such a move under IL. The court took the view that IL contains neither a right of secession nor the explicit denial of such a right. The Court went on to say that the denial of the right to unilateral secession is, to some extent, implicit in the exceptional circumstances which are required for secession to be permitted. And beyond these exceptional circumstances, which involve serious levels of oppression of a community, where unilateral secession would be incompatible with the domestic constitution, international law is likely to accept that conclusion.

Under exceptional circumstances the right to self determination might protect unilateral secession even as against the national law rules. But this would not be the case under the Canadian constitution where the mechanism for the protection of human rights function reliably and constitutional mechanisms are robust. The SCC concluded that Quebec did not meet the threshold.

It seems clear that Scotland does not have a legal right to secede under international law, but nor, as the ICJ in the Kosovo case suggests, is a declaration of independence illegal.

(ii) *What international institutions (if any) exist generally to deal with the emergence of a new state?*

There is no specific international, centralised legal institution to determine claims to recognition as a new state. Instead, the recognition of new states has only been addressed by states on an individual basis acting through diplomatic practice. This is therefore a decentralised practice. There is however much doctrine within IL and some judicial opinion on recognition. The main recurring question concerns whether there are any juridical rules that contain or restrict when a state may or may not recognise a new state. The SCC addressed this, suggesting that whether third states would recognise Quebec after a unilateral secession could depend on the domestic legality of the act. In other words, actors in the international community could be expected to have some regard for the domestic law of Canada. If an independent Scotland emerges it seems likely this will be as the result of a negotiated agreement with the UK government which would avoid the situation envisaged by the SCC.

The generally held view is that recognition is a uniquely political act largely if not entirely at the discretion of states. Yet there have been attempts to subject recognition to legal rules. The European Communities in 1991 attempted to regulate the recognition of



Yugoslav successor states by establishing Guidelines on the Recognition of New States. This established criteria that ought to guide states in recognising new states emerging from both the SFRY and the USSR. There is a strong argument that Scotland would fully comply with these criteria which revolved largely around a democratic system of government with constitutional guarantees for human rights and minority rights. Another guide is Art 41 of the ILC draft articles on state responsibility, which prohibits recognition of states which are in breach of a peremptory norm of IL. Again Scotland would be highly unlikely to fall into this category.

*(iii) State Succession*

Even after a state has attained universal recognition a host of serious legal questions remain. Succession is the situation where one state replaces another state in the international legal responsibility for territory. If Scotland were to become independent then it would replace the UK in responsibility for the territory that is Scotland.

State succession has been addressed by two major drafting projects of the International Law Commission of the UN: the Vienna Convention on Succession of States in respect of State Property and Archives 1978 (not in force) and the Vienna Convention on Succession of States in respect of Treaties 1978 (the 1978 Convention). Neither of these is widely subscribed to by states but nevertheless, they reflect the considered view of the ILC.

Art 34 of the 1978 Convention reflects a presumption in favour of the continuity and stability of treaty relations but this continuity is displaced by contrary agreement of the states involved. Thus treaties in force for the UK would presumptively remain in force for Scotland. An exception would be if any agreement were reached which would be incompatible with the object and purpose of the treaty or radically change the operation of the treaty.

The burden is on the new state to determine if there is any degree of incompatibility in the new arrangements with the treaty or which might radically change the function of the treaty. Other states can also take the view that such incompatibility exists.

It is not only multilateral treaties which need to be addressed but also bilateral treaties particularly those that confer rights on individuals (such as bilateral investment treaties) which can create rights of standing before international investment tribunals. In a succession of states situation for Scotland there are two other types of treaties to consider: treaties whereby the UK agrees to take part in an international organisation and treaties where the UK has agreed with other states as to the delimitation of maritime boundaries and other maritime matters.

*(iv) International Organisations*

As a matter of general international law, there is no rule regarding the admission of new states. Each international organisation has its own rules for membership. The main example, the UN Charter, provides the rules and the procedures for admission in Article 4 of the UN Charter. The 1978 Convention also contains rules on this issue but these do not override an organisation's specific provisions for each constituent instrument. Thus, as a matter of general international law, a successor state may not participate automatically in an international organisation unless the organisation's rules specifically provide for such. In many, if not most, cases this would mean applying for new membership.

If the rUK is treated as the successor state in relation to membership of international organisations then an independent Scotland would have to seek admission on its own terms.

(v) *What does IL have to say about international maritime delimitation?*

The seminar addressed two issues: the question of existing delimitation between the UK and third states and the prospective delimitation between the UK and Scotland. A principle of central importance is the stability of international regimes governing the use of territory and related resources. Art 11 of the 1978 Convention provides that a succession of states does not as such affect a boundary established by a treaty or obligations and rights established by a treaty and related to the regime of the boundary. Art 12 widens the principle to include 'other territorial regimes'. The ICJ in the *Danube River* case considered this provision and came to the view that this was a provision reflecting general international law. The Danube case arose from a Czech/Hungarian treaty concerning the construction of a dam on the Danube. The Court determined that the obligations that the treaty placed upon Czechoslovakia were binding upon Slovakia at the date of independence. Assuming the principle extends to maritime issues, the delimitations of the UK existing at the time of succession would bind the new state(s).

The appearance of a new state would also present new issues of delimitation between Scotland and the UK. It was suggested that, where new delimitation lines would have to be drawn, different parties would have different views as to what constitutes an equitable line. Issues of considerable complexity would arise, particularly with the west coast where third state interests would come into play. This is a matter that would require extensive review.

There is a mechanism that could be used to settle these issues. Under Article 287 of the UN Convention on the Law of the Sea (UNCLOS) the UK has designated the ICJ as the organ competent to settle disputes over the application of the Convention or to determine delimitation issues. The UK has also expressed a willingness by agreement to go to the International Tribunal on the Law of the Sea to deal with delimitation disputes. Although there are subject matter exclusions, the UK has accepted the justiciability of most maritime issues. Therefore if Scotland succeeded to the UK in UNCLOS there would be a complementarity of substance and procedures and the parties could go to either forum to settle these issues if no agreement could be reached. These contentious dispute settlement procedures only apply once there has been a genuine attempt to negotiate. The view was expressed that there would probably be a comprehensive agreement to deal with delimitation issues so as to avoid going to contentious proceedings.

Finally, in connection with delimitation, the issue of entitlement to Overseas Territories of the UK could arise. These are quite extensive entitlements and will become more economically important as the exclusive economic zones (EEZs) are increasingly exploited. The law offers no general rule on how Overseas Territories are to be treated in the event of a state succession. A possible outcome would be exclusive retention of the rights to these territories by the rUK. Scotland could well object and look for an alternative arrangement. Cognate responses have been adopted by two and three state groups in the past to deal with external territories. For example, there was something like this with respect to the UK, Australia and New Zealand in respect of the Republic of Nauru. So some kind of condominium arrangement between rUK and Scotland could be feasible. One issue is that a number of UK territories are Non-Self Governing Territories as defined by the UN and consequently they hold special rights under Chapter XI of the UN Charter. It is therefore far from clear that a succession of states in

the territory of the United Kingdom would automatically entail the continuation of the existing colonial relationships, or that a revision of those relationships would be a matter only for the rUK and independent Scotland.

As far as land boundaries go the issue, it was argued, is much simpler. The land boundaries of a state that undergoes a succession are to be respected and will be the existing boundaries of the pre-secession state. This is clear from African decolonisation, territorial disputes in Latin America, and in the break-up of the SFRY where republican boundaries were maintained. This leads to a number of other issues that would need to be resolved, for example: ownership of overseas property, including embassies etc.; rules on nationality and citizenship etc.

One final issue concerns process, in particular whether the issues of state succession could be settled before a referendum or at least before any move to independent statehood. This would mean that these things could be agreed under the UK's constitutional system. To do these things after Scotland became independent would turn municipal, constitutional questions into international questions, under the auspices of IL. This, it was argued, seems less desirable since the international law rules on state succession are not highly developed. There is also no institutional apparatus to deal with succession problems and any new institution or institutions established to deal with these matters would need considerable time to resolve them. It would also be unrealistic to assume that negotiation would settle every matter. Thus the parties would need to agree to a dispute settlement mechanism. This, in turn, would require an agreement as to the details of such a mechanism. The two sides would need to agree, for example, to the choice of substantive law, designated decision makers and dispute settlement procedure. And this is again an area where international law provides only very general rules at best. A perfectly amicable succession does not mean that it will be without friction. It would still be a legal and institutional challenge of considerable scale.

## **Final Session**

Certain points additional to those covered above were raised in the final session. One was the importance of a mechanism to facilitate a conversation with the other interested parties with whom Scotland will continue to have a relationship whether within the UK or the EU. Whilst it was natural the people in Scotland would discuss things in terms of what Scotland 'wants' or the best 'deal' for Scotland, the Scots were not in a position simply to impose a preferred solution for their future role in/relationships with the UK and the EU.

There was some discussion of whether current debates were too Scotland-focussed and whether the focus of discussion should be broadened to consider developments in the other devolved areas, and the possible effects of independence on Wales and Northern Ireland. Thus, it was suggested that in Wales the mood appeared to be that Wales does not want Scotland to leave the Union, a key reason being that Scotland serves as an important counterweight to England within the UK. If Scotland left the Union, Wales would be an even smaller part of what was left. It was thought that Scotland might want a greater degree of autonomy in the UK but Wales had a strong interest in that and needed to be involved in discussion about that. It was suggested that discussions should go on not only in Scotland and about Scotland but also, in other areas of the UK about how the UK as a state currently made up of four different entities should move forward.

Another participant commented that, whilst the current debate is very Scotland-focused, we should not be surprised at this. There have long been distinct constitutional narratives going on within the different parts of the UK. This may be most obvious in Northern Ireland and in Scotland but there are also debates taking place in England that take no account whatsoever of the fact of devolution to other parts of the UK. A related point was that the fact of devolution is forcing us to question what the common core is, but even discussions of the common core play out differently in different parts of the UK.

Pursuing that theme – the difficulty of getting a UK-wide debate - it was suggested that it was difficult to state a Northern Ireland viewpoint on the UK's constitutional future. There is a power-sharing government in which the participants have different outlooks and have complicated and difficult relationships with their supporters.

Participants also discussed the issue of many people having multiple political identities, and the importance, notwithstanding that Scottish identity seems to be more important politically than it was twenty years ago, of the debate not polarising around single identity politics.