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EVIDENCE SUBMITTED TO THE HOUSE OF LORDS SELECT COMMITTEE ON THE CONSTITUTION INQUIRY: SCOTTISH INDEPENDENCE: CONSTITUTIONAL IMPLICATIONS FOR THE REST OF THE UK

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Background

This paper is based upon oral evidence provided to the Committee by me on Wednesday 5 March 2014. In what follows I address each of the questions put to me in a call for evidence by the Committee.

Negotiations

1. What legal principles should govern negotiations for Scottish independence in the event of a “yes” vote?

It is more helpful in my view to think about *constitutional* principles rather than *legal* principles governing the negotiation process in the event of a Yes vote. This is because the legal authority of the UK constitution will, in relation to Scotland, have entered a state of limbo. The authority of its key doctrines, in particular Westminster sovereignty, will be widely considered within the Scottish body politic to be, if not in abeyance, then in a deeply unsettled state during this transitional period, and any attempt to assert legislative supremacy unilaterally from London, without the consent of the Scottish Parliament, could result in a constitutional crisis.

In other words, this question can only be answered meaningfully if we take full account of the changing constitutional landscape of the United Kingdom and Scotland in the event of a Yes vote. Such an outcome will require a radical readjustment of how we think about the application of the United Kingdom constitution to Scotland as it prepares to form a new state. Scotland will still be part of the United Kingdom, but the rule of recognition (i.e. the locus of constitutional sovereignty within Scotland) will be adjusting towards interim constitutional arrangements which will themselves anticipate a new Scottish state. The legitimacy of these interim arrangements will be underpinned not only by the process through which they are put

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in place – e.g. legislation of both the UK and Scottish Parliaments – but also, and arguably more saliently, by the referendum result expressing the sovereign will of the Scottish people and by the Edinburgh Agreement through which this result was accepted in advance by the UK Government. This situation is certainly complex but we cannot hope to short-circuit this complexity by turning mechanically to out-dated constitutional certainties. Parliamentary supremacy as the core constitutional doctrine of the United Kingdom will, insofar as it remains the rule of recognition of the state, still apply throughout the remainder of the United Kingdom (rUK). But at the same time, it is highly likely that a transitional constitutional platform will begin to pave the way to Scottish independence, and in this period the relationship between the institutions of Scottish government and Westminster will be uncertain, unsettled and evolving.

State sovereignty has both an external and an internal dimension. The former dimension will not see any change in Scotland's status during the transitional period, but the same cannot easily be said of the latter. External sovereignty concerns a state's distinctive international personality. Scotland would only acquire this upon becoming a state and being recognised as such by other states, and in joining international organisations, succeeding to international obligations etc. So for all intents and purposes, so far as other states are concerned, Scotland will be part of a sovereign UK until some declarative act is made by Scotland, the United Kingdom or both through which Scotland is announced to be independent and in search of recognition. The referendum result in itself will not change this status.

Internal sovereignty is, however, a grey area. While Scotland will remain part of the United Kingdom pending independence, the United Kingdom constitution will have undergone a considerable jolt; in effect the people of a constituent part will have rejected the sovereignty of that constitution. As I suggest, the doctrine which will come under most obvious scrutiny is that of Parliament's legislative supremacy. This claim bears a more detailed consideration. The parliamentary sovereignty doctrine already sits uncomfortably with a number of constitutional changes which have occurred since the United Kingdom's accession to the European Communities: for example, the Human Rights Act 1998 and the various pieces of legislation passed in the same year establishing devolution. Tensions between the doctrine of parliamentary supremacy and the reality of a heavily devolved state have also been recognised in the obiter comments of the UK's senior judiciary.¹ The constitution has also had to adjust to a situation in which a doctrine built upon a unitary conception of the state no longer reflects the reality of dispersed law-making powers throughout the state. For example, the Sewel convention now regulates how the Westminster Parliament legislates for Scotland in areas which relate to reserved matters, and this convention has been fully respected (and in turn it would seem, solidified) by the lengthy and politically contentious process by which the Scotland Act 2012 was passed.

Therefore, when thinking about the post Yes vote environment it is essential to take full account of the already significant existential challenges to Westminster sovereignty which devolution has brought about. In effect there will be two constitutional stories being played out at the same time. Adopting only one of these stories, some will seek to rely upon the orthodox account of Westminster sovereignty as an on-going legal fact. In relation to rUK this story is not without force. But an attempt to apply only this story to the status of Scotland following a Yes vote would be misconceived. By this account the legal backdrop to negotiations following a Yes vote will be one in which the two principal institutions of

¹ R (Jackson) v Attorney General [2005] UKHL 56.

devolved Scotland – the Scottish Government and Scottish Parliament - as creatures of the Scotland Act 1998, will continue to be regulated by this Act and by the Scotland Act 2012. These statutes are creatures of the Westminster Parliament and so the authority of the institutions of Scottish government is entirely circumscribed within the framework of Westminster sovereignty and will continue to be beholden to this principle until the day of independence.

However, it is important to note that Westminster's sovereignty is at its root a political and not a legal fact, and the legal principles which subordinate the institutions of Scottish government stem from this political fact. The difficulty is that it is precisely this political fact which will be fundamentally challenged by, and subject to change in consequence of, a Yes vote. People will have voted in a referendum, a referendum consented to by the UK Government and Parliament (through the section 30 Order that followed the Edinburgh Agreement), to supersede that political fact and to move to a new political fact of sovereignty – the sovereignty of an independent Scotland. Of course that latter political fact will itself be inchoate, not itself have reached its full reality simply by virtue of a Yes vote. The result then will be, as I say, something of a legal limbo between the date of a Yes vote and the date of independence. So far as the United Kingdom state will be concerned, and so far as the legal system of England and Wales will be concerned, the supremacy of Westminster will continue. In Scotland the situation will be more complex. Certainly the only guiding framework which will exist for the institutions of Scottish government and the Scottish courts after a Yes vote, at least prior to any constitutional platform that begins to transfer further powers to the Scottish institutions, will be the two Scotland Acts. No doubt these will continue to be respected and applied by political actors, including the courts. But arguably what will have changed, even before any constitutional platform is established, is the political fact of sovereignty which underpins the authority and legitimacy of these statutes. In other words Scotland will continue to be governed by the Scotland Acts, what will change is *why*. At the moment a strong case can be made that the 'why' question is answered thus: because they were created by Westminster and Westminster is sovereign over Scotland and its system of government. But following a Yes vote the answer may well be more contingent: because they are the only system in place until a constitutional platform paving the way to independence is established, but although they continue to form the framework for government, their authority is now contingent upon the evolving constitutional situation, and subordinate to any constitutional platform which now emerges by agreement of the two parliaments of the UK and Scotland.

It is against this backdrop that the Scottish Government would seek a constitutional platform to move further law-making powers to the Scottish Parliament and to give the Scottish institutions the power to start to build towards full statehood. And it is in this context very difficult to address which, if any, 'legal' principles will govern negotiations for Scottish independence in the event of a Yes vote.

This leads to several consequences for the constitutional landscape within which negotiations will take place.

i. The first is that negotiations towards independence will be mainly a political rather than a legal issue. For political scientists of course this is a given. For them constitutional politics is always primarily about political power played out in institutional settings which act to constrain political power to greater or lesser extents. But there is also a constitutional law dimension to the primacy of politics in certain situations. In the context of legal limbo,

politics will be, if not the only game in town, then perhaps the only one that can be played. We saw in relation to the Scottish Parliament's powers to hold a referendum that no-one wanted to go to court to test the boundaries of Scotland Act 1998 s29(3) and related provisions, because no one was clear about the legal answer to a question which posed fundamental questions concerning the nature and locus of supreme power within the United Kingdom constitution. The post-referendum period will be even more unsettled and will be one in which a resort to courts to determine the ground rules for negotiations will be a parlous venture for any side, particularly for the UK state which has most to lose if the verdict of judges is anything short of a ringing endorsement of constitutional orthodoxy.²

ii. The second is that in the absence of a clear legal framework, there is at least an intergovernmental agreement (the Edinburgh Agreement³ concluded on 15 October 2013) which provides an agreed starting point. This agreement came in the context of uncertainty and disagreement over the power of the Scottish Parliament to hold a referendum on independence per s29 of the Scotland Act 1998. Partly at least to avoid the risks entailed in a court action the two sides reached this political solution. In the Edinburgh Agreement the UK Government agreed that a section 30 Order would be created to ensure, for the avoidance of doubt, that the Scottish Parliament would have the legal power to hold a referendum on independence under certain conditions, as regulated by the Agreement and the Order.

The Edinburgh Agreement is primarily concerned with the holding of the referendum and not with post-referendum negotiations. However, it does offer some guidance as to how negotiations ought to proceed. Paragraph 30 of the Agreement⁴ commits both governments to work together constructively in the light of the outcome, whatever it is, in the best interests of the people of Scotland and of the rest of the United Kingdom in light of a legal and fair referendum producing a decisive and respected outcome. It seems we can certainly expect a legal and fair referendum. Since the Edinburgh Agreement was concluded the Scottish Parliament has passed two acts: the Scottish Independence (Franchise) Act 2013 and the Scottish Independence Referendum Act 2013, establishing a legal framework for the process of the referendum. These acts set detailed conditions for the referendum, and provide important roles for the Electoral Commission and the Electoral Management Board to ensure this legislation is properly implemented.⁵

It is also surely the case that, aside from the legislative requirements, there is also an ethical duty on both of the main campaign designated organisations and others involved in campaigning and reporting to abide fully by the spirit and letter of these rules. Such an

² The federal government in Canada had its fingers burned in this way in the Secession Reference (discussed below).

³ *Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland*, available at: <http://www.scotland.gov.uk/About/Government/concordats/Referendum-on-independence>

⁴ 'The UK and Scottish Governments are committed, through the Memorandum of Understanding between them and others, to working together on matters of mutual interest and to the principles of good communication and mutual respect. The two governments have reached this agreement in that spirit. They look forward to a referendum that is *legal and fair* producing a *decisive and respected outcome*. The two governments are committed to continue *to work together constructively* in the light of the outcome, whatever it is, in *the best interests of the people of Scotland and of the rest of the United Kingdom*.' [emphasis added]

⁵ Stephen Tierney, 'Using Electoral Law to Construct a Deliberative Referendum: Moving Beyond the Democratic Paradox', (2013) *Election Law Journal* 1-17.

undertaking was given by both Yes Scotland and Better Together in oral evidence to the Scottish Parliament Referendum Bill Committee.

Therefore, since the grounds are laid for a legal and fair referendum, we can reasonably expect both governments to respect the outcome as undertaken in the Edinburgh Agreement. The United Kingdom Government's intention to negotiate independence has recently been restated by a UK Government minister.⁶ It can also reasonably be assumed that despite the rhetoric of the referendum campaign it will be in the interests of the UK to build a constructive relationship with its near neighbour. But what does it mean that they will 'work constructively in the best interests of the people of Scotland and of the rest of the United Kingdom towards a negotiated agreement'?

iii. In light of what I have said a more helpful conceptualisation is to think about *constitutional* rather than *legal* principles as a framework applying to any negotiations.

In the context we are addressing this is a significant distinction. The Scottish institutions after independence may no longer accept the legal authority of the Westminster Parliament to legislate for Scotland on any issue without the consent of the Scottish Parliament. However, it is also clear that Scotland will still be part of the United Kingdom, functioning within one constitutional framework, albeit a deeply unsettled one.

To develop a set of constitutional principles would require two further steps. First, to establish a platform by which a set of principles might be agreed, and secondly to define these principles. Since the negotiation process will be a political one, I do not anticipate that these principles would be legally enforceable. They would rather act as a guide to encourage the negotiations to proceed along an agreed framework.

The search for constitutional principles to guide a process where the constitution is otherwise silent is not without precedent. An analogous – although certainly not identical - situation arose in Canada following Quebec's referendum on sovereignty in 1995. The Supreme Court of Canada was asked by the Canadian government to address several questions including whether Quebec had the right under the constitution of Canada to secede from Canada. The Court found that Quebec had no right to secede unilaterally but also concluded that in light of a clear vote on a clear question in favour of such an outcome by the people of Quebec voting in a referendum, then Quebec's partners in confederation (the federal government and the other provinces) would have a duty to negotiate secession in good faith. Such a right to negotiate secession is of course not to be found in the written constitution of Canada. Instead the Court fell back on unwritten principles which it identified from the Canadian constitutional tradition - federalism, democracy, the rule of law and constitutionalism, and minority rights. It stated that these must be considered together and that no one principle was more important than any other.

It is certainly important to note the differences between this process and the issue in the UK following a Yes vote. In the Canadian scenario these were principles which led the Court to conclude that Quebec could secede under certain circumstances, they were not primarily principles which would govern the negotiations to that end. However, it is clear that the Court

⁶ <http://www.scotsman.com/news/politics/top-stories/scottish-independence-uk-will-respect-yes-vote-1-3306378>

intended that they would also be applicable to that purpose, for example in issues over Quebec's borders, the status of indigenous peoples etc.⁷

This is of course a judicial articulation and there is no obvious reason why the courts of England or Scotland would be involved in setting any principles for the UK/Scotland process. But, as I suggest, the two governments together with the negotiating teams could themselves identify principles that would help inform deliberations.

What then might these principles be? This is of course a subject that would need much more detailed consideration, but we can distinguish between substantive starting points or preconditions on the one hand and procedural principles on the other. In general I would consider the former to be unhelpful and perhaps not realistic. I do, however, think that a set of procedural guiding principles could be very useful. These could reasonably include:

- good faith,
- respect for the outcome of the referendum,
- an inclusive approach to participation, embracing the interests of all nations and territories of the United Kingdom,
- transparency,
- accountability (to the two parliaments respectively),
- mutual cooperation,
- full respect for, and consideration of, the position of all parties to negotiation,
- reciprocity,
- respect for the interests of the peoples of Scotland and the UK.

As this last point suggests, it could also be explicitly agreed that both sides will, so far as possible, work together constructively to help secure the best interests of the peoples of *both* Scotland and of the rest of the United Kingdom. In other words, although each side is principally acting for the peoples of rUK and Scotland respectively, they ought to try to deliver an agreement in the best interests of both given that so many mutual interests are at stake.

It is clearly in the best interests of the future relations of the two states that the birth of an independent Scotland, if it is to occur, does so without rancour and against a backdrop of harmonious relations between the two states. The fraught process that led to Ireland's independence should be a warning to both sides to work in a spirit of cooperation and mutual good will. The Edinburgh Agreement has gone a considerable way to achieving this. A fair and democratic referendum should also help secure this outcome. It seems reasonable and preferable that the negotiations be conducted in the same spirit.

2. Is the timetable of independence by 24 March 2016 realistic?

What impact would the timing of the UK general election in May 2015 have on any independence negotiations?

I am not in a position to assess definitively whether negotiations with the rest of the UK could be completed by March 2016. I would, however, refer to a number of contingencies which will make this more or less likely.

⁷ Reference re Secession of Quebec, [1998] 2 S.C.R. 217.

The first is the possibility of laying the groundwork in advance. The obvious solution to a lot of uncertainty would be agreement between the two governments on a range of issues ahead of the referendum. The Electoral Commission recommended ‘that both Governments should agree a joint position, if possible, so that voters have access to agreed information about what would follow the referendum. The alternative - two different explanations – could cause confusion for voters rather than make things clearer.’⁸

But it would seem that this is not going to happen for political reasons.⁹

A second factor is the nature of the negotiations. In light of the undertaking by both governments to work constructively in the negotiation process then I certainly would not say that it could not be done. I also note that Professor James Crawford, has, based upon his experience of the moves to independence of other territories, said the timetable ‘seems realistic’.¹⁰ Others have taken a different view. But it is important that we distinguish the reality of negotiations following the *fait accompli* of a Yes vote from what is now being presented as either best or worst case scenarios; that we distinguish the attitude of the different sides in the heat of a referendum campaign from the cold reality of independence negotiations. Of course it could be that the UK side will decide to say no to all or most of the Scottish government’s proposals. On the other hand, it may be that the goal becomes one of achieving good relations and the most integrated relationship possible following independence; we simply don’t know and it does not serve the voter well to pretend that we do. The feasibility of the timetable is dependent therefore upon how willing each side is to reach agreement and to work cooperatively to do so.

A third issue is whether some questions could still remain unsettled until after independence. This is not uncommon in independence negotiations as we saw over the border issue in Ireland in the 1921-22 process. But this begs the question: which issues would have to be settled by independence day and which could be delivered on later?

A fourth factor is the 2015 election. I note the Committee has already taken evidence in relation to this. There are a number of factors here. The first is the possibility of a change of government which assumes office with a different negotiating position and strategy. Another possible contingency would be a Labour Government dependent for its majority upon Scottish MPs: would it be keen to draw out negotiations? I can’t speculate further, but can only state these as possible scenarios.

But there is also the possibility that from the beginning, at UK level, there will be cross-party consensus on the issues at stake as there is at the moment in the alliance of the three main UK parties in Better Together. This could lead to a negotiating team encompassing members of different parties and also members from Wales and Northern Ireland, leading to a pan-rUK negotiating position. I return to this at Question 3 below.

⁸ Electoral Commission, ‘Referendum on independence for Scotland: Advice of the Electoral Commission on the proposed referendum question’, *op. cit.*, paras 5.41-5.44

⁹ S. Tierney, ‘Why is Scottish Independence Unclear?’ U.K. Const. L. Blog (25th February 2014) (available at: <http://ukconstitutionallaw.org/>).

¹⁰ <http://www.theguardian.com/politics/scottish-independence-blog/2013/feb/11/nicolasturgeon-scotland-treaties-legal>

A fifth issue is that there will no doubt be an attempt on the part of the Scottish Government and the Scottish negotiating team to synchronise the emergence of Scottish independence with Scottish membership of the European Union. If so, then much will depend upon how negotiations on the latter front proceed. It is of course possible that the international dimension could also be worked through later – membership of international organisations, succession to treaties etc.

3. Who would negotiate for the remainder of the UK and to whom should they be accountable?

This would be a matter for the United Kingdom Government to determine in a way overseen presumably by the Westminster Parliament. There are different scenarios as to the personnel who would negotiate. One possibility is that only the two governments would negotiate with each other and would be accountable to their respective Parliaments for the outcome.

This seems unlikely from the Scottish side. In the White Paper (para 2.7) the Scottish Government announced that it ‘will invite representatives from the other parties in the Scottish Parliament, together with representatives of Scottish civic society, to join the Government in negotiating the independence settlement.’

Related to this, Andrew Wilson a former SNP MSP, has suggested the involvement of former first ministers of Scotland and former Secretaries of State from the Conservative, Labour and Liberal Democrat parties could be included in the negotiating team.¹¹

In the same way, as noted above, a cross-party approach at UK level could also be adopted, perhaps involving the appointment of high level officials to conduct the negotiations together with senior figures from the three main parties represented in Parliament, plus representation from Wales and Northern Ireland.

I should state that I am not recommending such options, merely noting that alternatives to a government-government process do exist.

4. What role if any should Scottish MPs have in negotiations or in holding negotiators to account, and in any vote on a resulting settlement?

This is a matter for the Westminster Parliament to determine. Clearly the *legal* status of such MPs would not change in light of a Yes vote, they would still be members of Parliament on the same terms as any others. The issue is whether there will be a widespread assumption that their *constitutional* status has changed, which should result in a new delineation of their role.

There would seem to be a strong argument that Scottish MPs, facing an agreement in which they would no longer play any role in the UK Parliament, should not take part in negotiations on behalf of the UK which will set the framework for the ongoing constitutional arrangements for the UK. Some measure of informal recusal from any negotiating role and from voting on any settlement could be worked out. Whether such MPs might play a role in the Scottish negotiating team is another matter.

5. Should the negotiating teams be held directly accountable by the public?

¹¹ <http://www.snp.org/media-centre/news/2013/oct/andrew-wilson-donaldson-lecture>

The Edinburgh Agreement makes no reference to any process other than an intergovernmental negotiation between the two governments. It is very rare in this type of situation for the seceding territory to hold a second referendum on the outcome of negotiations, or for the continuing state to hold a referendum on the issue.

The Scottish Government has not announced any plan to hold a second referendum in Scotland. Although rare, the idea of such a second referendum is not entirely without precedent. The 1980 referendum question on sovereignty in Quebec involved an undertaking to hold a second referendum on the outcome of negotiations.

There is also no proposal to hold a referendum in rUK on the outcome of negotiations. Voters at UK level will, however, have the opportunity to speak indirectly about the negotiating process in the 2015 election.

Although further referendums are unusual, it could also be argued that the appropriateness of further direct engagement by the peoples of rUK and Scotland might depend upon the eventual outcome of negotiations. In the event that an agreement is reached which involves significant areas of shared services or elements of union which require shared institutions etc. - in other words a situation that will involve extensive constitutional changes at rUK level and which results in a model of independence significantly different from that envisaged in the Scottish Government's White Paper - then it might well be argued that further referendums in rUK and Scotland would be appropriate to approve such changes.

6. What would happen if the two negotiating teams could not reach agreement on an issue?

This is an unlikely scenario, I expect both sides will negotiate until they reach agreement. It may also be that some matters which are either contested or complex will be left open to further negotiation after the date of Scottish independence.

In the unlikely event of a collapse in the negotiators then there is the possibility of a unilateral declaration of independence by Scotland. This possibility has rarely been considered within the independence debate and is clearly not envisaged in the White Paper. As suggested in answer to question 5 it would seem that in the absence of speedy agreement that negotiations will continue until a conclusion satisfactory to both sides is reached.

Were a UDI it to come about it would raise a new set of issues regarding both the process and the terms of separation between Scotland and the UK, at which point international law would provide some guidance as to the default position, and for Scotland's status internationally.¹² This would leave a significant number of undecided issues and would not, it seems, be in the interests of Scotland or rUK.

The UK Parliament

7. What would be the status of the 59 MPs for Scottish constituencies in 2015–16?

¹² S. Tierney, 'Legal Issues Surrounding the Referendum on Independence for Scotland', (2013) *European Constitutional Law Review* 359-390.

What impact might this have on the 2015–2020 Parliament?

As discussed above, under current arrangements the legal status of the MPs from Scotland would not change. But there would no doubt be discussion concerning their appropriate constitutional role following the 2015 general election, particularly in relation to legislation applying only to rUK. This would intensify the West Lothian question. There would be pressure for these MPs not to participate in the passage of such legislation. There are potentially tricky political dimensions here, for example if a majority Labour government after 2015 was dependent upon these seats for its majority.

There would also need to be consideration given to terminating the office of these MPs upon the assumption of independence by Scotland if this happens in 2016. Again clearly if such MPs are elected and are then removed from Parliament in 2016 this would, for example, have serious implications for any UK government dependent upon these MPs for a majority.

These issues would no doubt be addressed by the UK government and Parliament concurrently with negotiations towards interim constitutional arrangements for Scotland.

Legislation

8. What measures would be needed (e.g. legislation) to allow negotiations to take place?

The Scottish Government would no doubt consider a Yes vote as a mandate to negotiate, as presumably would the UK Government. In addition, if further authority were needed, each side could rely upon the Edinburgh Agreement as a mandate to commence negotiations.

It does not seem that legislation would be needed to facilitate such a process per se, although it would make sense for both parliaments to pass paving legislation, appointing negotiating teams, setting the respective remits for such negotiations, and setting out principles to guide the negotiators. An agreement to pass parallel legislation through the two parliaments providing an agreed framework for negotiations, would also make sense. In this way the paving legislation would ensure that each side to the negotiations would proceed with a direct mandate from its respective parliament.

9. What legislation would be required at Westminster to achieve independence for Scotland?

The Scottish Government envisages that on independence day the Scottish Parliament will assume the role of parliament for an independent Scotland. Legislation by Westminster would not be formally necessary. If there is a negotiated agreement on the terms of independence the Scottish Government could seek international recognition on this basis. However, in the event of a negotiated agreement the Westminster Parliament would presumably pass legislation formally recognising that agreement and Scotland's independent status. This could also serve to acknowledge that Scotland no longer forms part of the United Kingdom.

Monarchy

10. What impact might Scottish independence have on the monarchy?
Would an independent Scotland need a governor-general?

The Scottish Government White Paper intends that the Queen will remain head of state of an independence Scotland. It seems that this would certainly be the case at least until a new constitution was promulgated for Scotland.

The White Paper provides that, following the elections of May 2016, a constitutional convention will be established to 'prepare the written constitution'. The Scottish Government's intention is that this body would have real determining power. That the Scottish Government can only 'propose [certain matters] for consideration' by the constitutional convention suggests that the convention will have control over the inclusion or exclusion of all of the Government's constitutional goals set out in the White Paper, including the personality of the head of state.

If an independent Scotland is to be a constitutional monarchy then, depending upon what if any constitutional roles the monarch would agree to perform, it would seem prudent for some office to be located in Scotland. Such an office would not require to carry the title 'governor-general'.

Assets and liabilities, and shared services

11. What legal principles should apply to negotiations on the apportionment of assets and liabilities that are currently UK-wide?

Please see comments in answer to Question 1 above.

12. What are the constitutional implications of maintaining services shared between Scotland and the rest of the UK?

To whom would services that are currently UK-run be accountable if shared with an independent Scotland?

Clearly we could be entering new constitutional terrain if there is to be agreement on the sharing of services and assets etc. This question therefore raises a larger issue, namely the heavily integrated nature of the modern nation-state and the web of international relations which bind states within Europe. As the details of the Scottish Government's proposed model of independence emerge, for example in relation to the currency and certain social services, what is envisaged is in fact the continuation of important relationships with the UK as well as new and close relations with international partners.

The reality today is that any new state emerging from within the EU and intending to remain within the EU will, by definition, take on a novel form of statehood which delivers independence but not separation. This unique state of affairs in the birth of new states is the factor which poses the deepest analytical challenges to political actors, to constitutional theorists and practitioners, and to voters.

If rUK were to agree to the sharing of services with an independent Scotland, then each Government would be responsible to their respective Parliaments in respect of such services. But there would also be needed for joint or share institutions to manage these.