

**THE DAY AFTER JUDGEMENT  
SCOTLAND AND THE UK AFTER THE  
REFERENDUM**

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## **Preface**

It has been a remarkable few years in Scottish and UK politics. I have regarded it as a privilege to play my part in the climactic events of recent years as a public servant, an academic, and more recently as a campaigner. The independence referendum campaign has been a truly extraordinary event. In terms of length and political engagement it has been unparalleled. I can think of nothing like it.

The question of Scotland's relationship to the United Kingdom has been a live one for all of my adult, and working, life. The question has now been asked, argued about in every family, pub and workplace across Scotland, and elsewhere in Britain, and finally decided. The process has tested, though not quite tested to destruction, the union between Scotland and the UK as a whole. That testing has, I think, made very clear what the union is, and what it is not. The whole country can emerge stronger as a result.

This pamphlet is not a memoir of the campaign, tempting though that is, but draws lessons from it to suggest what should happen now for Scotland and for the UK as a whole. It is in that sense a programme of action, and I hope the ideas in it will be taken forward. The views expressed here are entirely my own, and not those of any political party or campaign. But it would be wrong not to acknowledge the help and support I have had in putting some shape on my ideas from many people: in all political parties in Scotland, especially the politicians, campaigners and volunteers in the Better Together campaign, from former colleagues in the civil service, and from my colleagues in Nuffield College in Oxford, and in Glasgow University.

Most of all, I have to be grateful for the tolerance of my family and friends who have had to live with what became an all-consuming involvement in this most important, and fascinating, of political choices.

Jim Gallagher  
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## **Introduction**

The decision is made, and Scotland remains in the United Kingdom. So what happens now? Is it just back to business as usual?

This paper argues emphatically not. We can already see that things are changing. There is already legislation which enhances the powers of the Scottish Parliament, with new tax choices in 2015 and 2016. Plans have been set out by the main political parties to take this further and the government have announced how they will be developed and legislated for. But thereafter there may be a temptation simply to see a vote to stay in the UK as a rejection of nationalism and separatist ambitions, and therefore a relapse into a comfortable, if ill-understood, status quo.

This would be a mistake. In a purely political-tactical sense, nationalism may be rejected and nationalists disheartened, but neither the idea nor its proponents evaporate. They may regroup and re-present the question in another generation. In any event, they remain citizens with every right to be heard in Scottish public life. Such a reaction would however be a mistake for another fundamental reason: the referendum has held up a mirror to Scotland and to the wider United Kingdom, and given us an opportunity to understand what sort of state the UK is, and now gives the impetus to make its territorial nature clearer, fairer and more stable.

The main purpose of this pamphlet is to describe what we can see in that glass, albeit darkly. What is extraordinary, but little recognised, is that by having an independence referendum the UK has explicitly acknowledged the sovereignty of the people of Scotland. Scotland is a nation which can chose to leave the UK, and has chosen not to do so. The union is a voluntary one.

This gives us an image of the UK as a multinational state, consisting of more than one nation, with common institutions and separate ones, both deeply embedded. The framework in which that sovereignty has been shared with the rest of the United Kingdom is part of what I would call the UK's territorial constitution. It has partly been designed and partly grown. We can identify its underlying principles, but have to acknowledge that, like other products of evolution, it has grown into what works,

rather than what a tidy engineer would design. After the No vote it is an institution into whose principles the Scotland has opted, not for the first time, but for the first time in a democratic way.

But this decision gives the whole of the UK an opportunity to state, or restate, clearly the nature of the multinational union, to reconstitute it: define (and perhaps even codify) it better and to set out more explicitly what it means not just for Scotland but for Wales, in a different way for Northern Ireland and, especially, for England. Even in the few days since the vote we can see how significant the “English Question” has become.

**Section 2** of this pamphlet therefore gives an account of the UK as a union state, and in particular as a multinational union. It then sets out the principles underlying that union, largely from the perspective of Scotland, but also as they apply to Wales and in the different circumstances of Northern Ireland. This union is the UK's territorial constitution; just as the constitutions of federal states do, it should explain not just the shared national institutions but the territorial allocation of powers and responsibilities. Those can be understood through the lenses of economic relations, social solidarity and political institutions.

**Section 3** will describe how this territorial constitution is already changing, and how it should be “reconstituted”. In part this is simply making explicit things that have always been implicit, but which the referendum has brought to attention. But it also involves working out the implications of the principles of the territorial constitution not just for Scotland's position in the UK, but what reads across for Wales and Northern Ireland (and what does not) and the quite distinct implications for the dominant partner in the UK, England.

**Section 4** sets out what in consequence the UK must do, and what changes must be made at that level. The UK's approach must be both inclusive and magnanimous. At a minimum this means a much more explicit acknowledgement of the principles underlying the territorial constitution, and perhaps also its formal codification. It must also involve a much clearer and better defined understanding of what this means for England – which is now much more of a political idea than it was 10 years ago –

including how to deal with an infamous conundrum. West Lothian voted No and became a question again. The UK also needs to learn how to acknowledge and manage its own territorial constitution, rather than treat it as an afterthought.

**Section 5** focuses more narrowly on Scotland, and talks about the implications of the decision of the Scottish electorate, which must be treated as binding and enduring. The referendum has been both divisive and energising. The divisions may be felt for some time. Reconciliation requires more than a church service after the vote but some truth. The energies might, in some part, be harnessed to focus not on the (now decided) question of who we Scots are, but on the more challenging one of what sort of Scotland we want to have within the UK - what use do we want to make of the wide powers to be exercised in Edinburgh, and how can we do so alongside the powers exercised at a UK level. Steering political debate in this direction after 7 years of constitutional focus will not be easy. It will present opportunities and challenges for the political parties. None more than for the SNP, whose core proposition has been rejected by the voters. If they now choose to devote all their energies to pursuing it, Scotland faces a debilitating political future. There are also challenges for Scotland's domestic institutional framework, for which I make some concrete proposals.

**Section 6** draws together the conclusions and the actions that might be taken.

1707 was perhaps 'ane end of an auld sang'. Whatever it was, it was not democratic. The decision of 2014 cannot be more democratic, nor more Scottish. Legislation was promoted by a Scottish (Nationalist) government and passed in a Scottish Parliament. It provided for a referendum on as wide a franchise as possible, and has led to a vote, on an unprecedented turnout, which legitimates Scotland's place in the UK for the foreseeable future. It presents the opportunity for all who have been involved in the referendum process to act as if they are in the first days not just of a better Scotland but of a better United Kingdom.

## **Section 2: Understanding a Union State**

It has become almost trite to describe the United Kingdom as a union state. The treaty and Acts of Parliament which joined Scotland to England (and Wales) were the Treaty of 'union' and the Acts of 'union'. Legally, what would have been dissolved if Scotland had left the UK is the 'union of the kingdoms'. Those who oppose the creation of a separate Scottish state are often described as 'Unionists', a word of course carrying connotations historically more relevant to Ireland than to Scotland. In the academic literature a union state is rightly seen as one formed by the coming together of previous states but retaining some of the characteristics of the pre-union institutions. As John P Mackintosh argued, this exactly describes Scotland's relationship with England, but as James Mitchell has correctly observed, the UK is not the product of one union, but of several: it is not so much a union state as a 'state of unions'. The union with Wales and the union with Ireland are distinct in history and in time from the Scottish union. But the UK nevertheless has distinct Northern Irish and Welsh as well as Scottish institutions. It is more difficult to identify distinct English ones. That is something to return to.

### *Scottish Sovereignty*

What is not well understood, however, is what this description implies. It is not merely an interesting historical curiosity, a description of the process by which the territory of the United Kingdom was consolidated as, say, the territory of France was consolidated into today's hexagon. It has political, legal, and ultimately constitutional implications today. The most striking of these has been the (unhesitating) acknowledgement - by the UK state that the Scottish people could freely choose to leave. This extraordinary fact has been largely taken for granted. It contrasts markedly with, for example, the approach of the Spanish government in Madrid to the possibility of secession by autonomous communities in Catalonia or the Basque country. The argument there is about whether the people in these places can choose, and can do so on terms driven by their sub-state government. The central government regards the constitutional norm of the "indissoluble unity" of the Spanish nation as overriding.

Not so in the UK. What the UK Government and Parliament did (whether all the actors involved were fully conscious of it or not) was to acknowledge that membership of the United Kingdom was a choice which the Scottish nation could make, and that the sovereign entity for this purpose was the Scottish people. Indeed during the referendum campaign the leaders of all three main UK political parties acknowledged this in a declaration about more powers. (There is of course a certain irony in this, in that one of the demands of Scottish nationalism is that the Scottish people should become sovereign: suddenly we discover they have been sovereign all along.) One can draw no conclusion from this but that the UK state sees Scotland as a nation, which could, if it chose, be a separate, independent nation. It chose in the referendum to remain part of that state, which must therefore consist of more than one nation.

### *A Multinational State: Myth and History*

The UK is therefore not just a union state, but it is a union of different nations which form a multinational state: a state consisting of more than one nation. Prof Michael Keating suggests a *plurinational* state, on the basis that there are competing claims to nationhood as well as different nations.

To assert this, however, is to deny one of the founding myths of Scottish nationalism. (I do not use "myth" offensively: a myth is a story we tell ourselves explain our nature and origins. All countries, and many institutions, have their myths. The question is always how much truth they contain, and how great their explanatory power is.) The nationalist myth is that the sturdy Scottish nation, sharing a monarch with its aggressive, hegemonising neighbour, was bullied and tricked into surrendering its sovereignty, sold out by its elite of the time, and absorbed into what became the UK. Only in the second half of the 20th century did patriotic Scots rediscover Scotland's identity, leading to the creation of a Scottish Parliament and now the opportunity of independence.

This myth lacks both historical accuracy and explanatory power. As the historian Colin Kidd has shown, union with England was a strategy contemplated in Scotland long before 1707. Scotland needed a plan for dealing with a larger and more powerful

neighbour, and the result of the 1707 treaty was not the ‘incorporating union’ which the English had hoped for (and some subsequently thought they had achieved). As Iain McLean has pointed out, the Scots negotiators were in a weak but not powerless position, and they secured things that mattered to them. At a time when religion mattered more than any other political issue, and Scotland and England had fought themselves to a standstill over which was the ‘one true Protestant religion’, the union recognised that there were two. Anglican and Erastian in England, Calvinist and proto-democratic in Scotland. It is easy to forget today how significant this was, and to the whole population. Almost no one, save a few of the elite, had any voice in the mediaeval Scottish Parliament. Almost everyone had some place in the church.

And at the same time, the domestic powers of the state consisted largely of the courts and the legal system. Those too were left unchanged by the union, and later it was only when Scots lawyers got themselves in front of the House of Lords that there was any appeal at all beyond Edinburgh in legal matters. As time went on, of course, the powers of the state became wider, and more and more domestic institutions were created to discharge these new functions – everything from education to agricultural improvement and the building of harbours. Typically, these new bodies were Scottish boards and commissions or government departments. What they were not, of course, in a pre-democratic age, was democratically accountable to the Scots.

So it is relatively easy to see in the 18th and 19th centuries the preservation and development of separate Scottish institutions, reflecting the fact that Scotland retained its own institutional identity post-1707 – even as it became more and more economically integrated with the rest of the UK and, of course, its colonies and Empire. The economic benefits Scotland took from Empire are of course well documented (most famously by Tom Devine). They are the results of economic integration – based on genuinely free trade – which, after the end of the dynastic wars of Jacobitism, promoted Scotland's breakneck commercial and industrial development. This continued economic integration remains a key aspect of the union into which Scots have opted. (Yet a further irony in the referendum debate was that even Scottish Nationalists wanted to remain part of the UK economic union, sharing the currency which is its most important practical expression.)

### *Economic Union*

The significance of economic union was heavily debated during the referendum. It starts, as the Scottish negotiators of 1707 did, with a commitment to genuinely free trade. Scotland was being excluded from English domestic and colonial markets. Today we simply take it for granted that Scottish firms can buy and sell across the whole UK without the slightest hindrance. Similarly individual Scots can take up jobs anywhere in the UK with a minimum of inconvenience. There is, in the jargon of the European Union, an absence of both tariff and non-tariff barriers. The UK is a genuine domestic market in a way in which, even after many years, the European single market is not. Europe still has big non-tariff barriers to trade, especially in services. A simple example would be the pensions industry – important for Scotland. Scottish companies have 90% of their customers elsewhere in the UK because there is no difficulty in selling pensions there. But they have very few customers in mainland Europe, where it is in practice necessary for them to set up local subsidiaries.

It is almost by definition that international borders, even when free trade agreements are in place, make trade more difficult. The empirical evidence for this is substantial, and it was one of the key economic arguments against separation – that ‘border effects’ cut trade and hence economic welfare. The UK government estimated that was worth, in the long run, £2000 a year to each Scottish household.

### *More Than Free Trade*

But economic union means more than that. It involves a single system of macroeconomic management, and, of course, a single currency.

Today, as an observed fact, Scotland is deeply integrated into the UK economy. There are many ways to see this. Goods and services, workers, and investment all flow across the Scotland-UK border without hindrance. The UK is by far Scotland’s biggest export market – nearly twice as big the rest of the world combined. Over 800,000 Scots live elsewhere in the UK. The economist Brian Ashcroft estimated that over one million jobs in Scotland were directly dependent on links with the UK.

Whatever the measures of economic integration are, the result is that Scotland and the rest of the UK today form a so-called optimal currency area. That is to say trade, capital and employment flows are unrestricted, and the economies respond similarly to external events, broadly moving together. As a result, having a single currency across these economies is possible, and it is likely to be stable. Whether that might have continued in the event of independence was a critical referendum argument. The best – completely non-partisan – analysis of this issue was given by the Governor of the Bank of England in a lecture in Edinburgh in June 2014. He pointed out that in order to be stable a single currency needed a fiscal union – so that the flows of government resources can, if necessary, compensate for imbalances in the private sector – and hence a sharing of political sovereignty. He estimated that a national authority with control over roughly 25% of GDP was necessary to ensure a stable currency union.

Obviously sustaining a well functioning economic union, including a currency and fiscal union, is one of the design principles for the UK's territorial constitution. Much of this is largely uncontroversial. Macroeconomic management and the law relating to business and trade will continue to be managed at a UK level in all circumstances short of independence. But the conditions necessary for a successful currency union also have important implications for the territorial constitution of the union. They set constraints on the amount of fiscal decentralisation which is consistent with economic integration.

### *The Social Union – Social Solidarity in the UK*

The most significant development of the 20th century, however, for the nature of the union was the gradual creation of the welfare state; from small beginnings under the Liberal government of Asquith at the start of the 20th century, to the huge expansion of welfare after the Second World War proposed in the Beveridge report and enacted by Attlee's Labour government. The redistributive aspects of welfare – taxation, old age pensions and benefits in cash – were almost wholly managed at a pan-UK level. The distributive aspects – services like education and health – were run and managed in Scotland, but with a legislative underpinning which embodied the same principles (free education and health notably) in all of Britain, and legislated for in Northern

Ireland too. This is very like the approach taken in most federal countries, certainly those which operate advanced welfare states. Almost universally, redistributive functions are carried out at the federal level, where the risk pool for illness and old age is bigger: and also because this form of social solidarity is both an expression of common citizenship and a way of creating it. (Famously, one of Bismarck's first priorities after creating the German Reich was to provide its workers with sickness and accident insurance and then an old age pension.)

### *Political Union*

The most obvious characteristic of political union is the outward facing nature of the UK state. The UK Parliament and government deal with defence and foreign affairs for the whole country. It is the UK which is the member state of the EU, the UK which has a seat on the UN Security Council, is a member of the G7 or G8 and so on. All of this is relatively straightforward, and the vote of No in the referendum confirms it beyond all doubt.

But political union has internal significance as well. It provides the legitimacy for the economic and fiscal unions. People throughout the UK elect members of Parliament not just to deal with foreign affairs but taxation too. They expect the UK government to manage the economy of the whole of the union. Political union also provides the legitimacy for sharing fiscal resources across the whole UK, most obviously and directly in social security. Pensions are paid to people wherever they are in the country, irrespective of local taxable capacity. Benefit payments in poor or depressed areas are funded by taxes transferred from better off ones. This applies not merely within Scotland or England, but across the nations of the UK. In the case of Scotland, fiscal transfers have in recent decades been outward rather than inward, if account is taken of North Sea oil. But today, some resources are being transferred into Scotland. In Wales and Northern Ireland for many decades fiscal transfers from the rest of the UK have supported pensions, benefits and public services, as the economies there have been weak. All this is right, but it is possible only because we share a political union. The contrast with the limited, temporary and conditional fiscal transfers inside the EU is marked. German taxpayers do not pay Greek pensions.

These three aspects of the union – economic, social and political – hang together. It is not economically stable to have a currency union without a fiscal union. It is not possible to have a fiscal union without a political union to oversee it. But the fiscal union and political union provide both the resources and the legitimacy for a social union, for sharing across the territory of the union to provide social solidarity. This in turn strengthens the political union. For decades we have taken this for granted, but the issue has been thrown into a clear light by arguments of the referendum campaign. In the end, it is the fact of political union which enables us to have both a well-functioning economic union and a UK system of social solidarity.

It took the challenge of an independence referendum to force these issues into the open and make them explicit. The referendum has presented an opportunity to refresh this arrangement, and make the union clearer, more stable and fairer for the future. The union could do with a refresh. The rest of this pamphlet explains why and how to do this.

### **Section 3 Reconstituting the Union**

Scottish voters have decided to remain part of the UK; they have opted in to the union state just described. It might be argued, therefore, that nothing needs to change. This would be a mistake.

It would be a mistake for two reasons. First there is the political reality in Scotland that a substantial number of the population voted the other way. Some, no doubt, because of a principled commitment to nationalism, others, perhaps as numerous, expressing dissatisfaction with different aspects of British life – austerity, inequality, foreign policy etc. That should give all of those who support the union pause for thought. But it also needs to be understood that the Anglo-Scottish union has always changed and evolved. It was not set in stone in 1707, nor in 1999. It should now evolve further to accommodate these challenges.

#### *A Union which Evolves*

Evolution and change in the Anglo-Scottish union is nothing new. The union of 1707 preserved Scots law, but the development of commerce and industry in the 19th century demanded (often at the instance of Scottish companies) a uniform framework of commercial and company law. 1707 preserved, most importantly of all at the time, the Scottish church. But in the 1920s, the relationship between the Church of Scotland and the state was changed separating the two in a way which would have seemed strange indeed deeply objectionable in 1707. The most significant political change in the nature of the union was, of course, the creation of the Scottish Parliament in 1999, making the institutions of Scottish government democratically accountable in Scotland, and setting a legislature on top of the Scottish legal system. Arguably this was a long time coming, as it was no longer tenable in the 20th century to have such substantial institutions of government without direct democratic oversight.

Ten years after the creation of the Scottish Parliament, the Calman Commission reviewed its powers, and as a result it will gain new tax powers in 2015 and 2016. During the long referendum campaign each of the Unionist parties set up Commissions produced proposals to extend those powers further. Under the pressure

of the short campaign they produced a detailed and very swift plan for turning these into legislative form.

So the union is evolving further. Three ideas should guide its development. Two are already well established. First, development must be consistent with the principles which underlie the union – a single external face, a fully integrated economy, and a substantial degree of social solidarity. The changes already legislated for, and those proposed by the Unionist parties, are consistent with those principles. Secondly, within that framework, change does have to recognise the aspiration of a substantial number of Scottish voters for more autonomy. As was frequently noted during the independence debate, although a majority of Scots have never supported independence, a majority do want a more powerful Scottish Parliament. So long as it change is consistent with maintaining the union, as the majority of Scots want, there is no reason to reject it. (The principle of subsidiarity – decentralising unless there is a good reason to retain power at a higher level—is another way of expressing this. The third principle is what we have to remember that the union is not just about Scotland

#### *A Union not just about Scotland*

It was perhaps easy to forget in the heat of the Scottish debate that the UK consists of three different unions. Wales and Northern Ireland have their history, their aspirations and as much right to influence the constitution of the country. Although Welsh history differs from Scots, and Wales has had only limited institutional continuity in the thousand or more years since it was incorporated into an English polity, many of the issues and choices that face Welsh devolution today are exactly the same as for Scotland. What is the right range of powers, and to what extent is devolution a permanent and indissoluble feature of Welsh life under the UK's constitution? Just as in Scotland, devolution is entrenched by the votes of the Welsh people, initially perhaps tentatively but now increasingly firmly expressed. There is lively debate in Wales about the devolution settlement. What should the relationship between the Welsh legislature and Westminster be, and in particular what is the right default assumption about where powers should lie – in Wales, unless there's a good reason for it to be exercised at a UK level (as in in Scotland), or the other way around, as the present Welsh legislation provides? Should Wales have greater fiscal accountability,

and tax powers exercised in Cardiff? If so, how does that relate to the reality of the weaker Welsh economy and tax base, and the obvious need in Wales for fiscal transfers from elsewhere in the UK to support acceptable levels of public services.

Northern Ireland's story is of course very different again. It does however share one important characteristic with the Scottish union. The UK has long acknowledged that if the people of Northern Ireland wish to leave the union (and join the Republic of Ireland) they have the right to make that decision. In fact, because of the accidents of history the devolution settlement in Ireland has a formally wider range, and a different legal structure. And the devolution settlement is embedded in a wider set of institutions involving in particular the Republic of Ireland. As in Wales, change cannot be imposed in the form of a Scottish template, or on a timetable determined by Scottish needs. Nevertheless, if the UK is to have an acknowledged territorial dimension to its constitution it needs to be explicable for all the parts of the union.

Scotland's union with England has often been compared to sharing a bed with an elephant. You are constantly aware of it, but it does not need always to be conscious of you. As a result, the Scots have invested time and energy and concern in thinking about the union, but it has seldom been an issue of serious concern for the English. This is hardly surprising, given that England is ten times Scotland's size, and union was a Scottish strategy for dealing with it. It is perhaps as a result, therefore, that the various changes and developments in the union have been driven from Scotland, and focused on Scotland. They have had surprisingly little impact on the UK as a whole. Creating a Scottish Parliament and increasing its powers has been of very direct interest in Wales, and watched also from Northern Ireland. But the attitude in England is probably best described as one of benign neglect. Parliament at Westminster, in particular, has given birth, as it were, to three powerful legislatures but has hardly itself changed at all as a result.

In the wake of the Scottish decision to cement the union, the time has come, I argue, to refresh the union and to restate its nature and purpose not just for Scotland but for the UK as a whole. Union is the basis of the UK's territorial constitution, but it is poorly understood, undocumented (and *a fortiori* uncodified) and not fully or properly applied to all the nations of the union. The result of Scottish referendum has

created, in the jargon, a ‘constitutional moment’, that is to say a time of opportunity and change for our territorial constitution. We should not duck the chance.

### *Nations, States, and Federations*

This account of the United Kingdom as a ‘multinational union’ is subject to a number of challenges or criticisms. The first challenge is to suggest that the UK should take the idea more seriously, and become a fully federal state. Federalism is a well-established mode of government, which works successfully worldwide. If the UK consists of several nations each, it is argued, should have its own domestic government (like a US State or a German Land) and Parliament at Westminster should discharge federal functions – the functions of macroeconomic management, social solidarity and external relations. Instead, we have an apparently untidy system under which Westminster is both a state and the federal parliament, dealing with English domestic issues as well as UK issues.

Parliament at Westminster certainly discharges ‘federal’ functions for Scotland, Wales and Northern Ireland, and it very clearly discharges domestic functions for England. The fatal objection to strict federalism as a prescription, however, is the fundamental asymmetry of the United Kingdom. As long ago as the Royal Commission on the Constitution in the 1970’s, the argument was made that a single state in a federation consisting of 85% of the population would unbalance the federal system and make it unstable. The Parliament of England would look and feel very like the Parliament of the United Kingdom. The government of England would be at least as powerful as the government of the United Kingdom.

Additionally, the reality is that the people of England see Westminster as their Parliament, even if they are sometimes impatient of its federal nature. While there is undoubtedly demand for some change there is by no means any consensus that an English Parliament is the right answer to the question. An English Parliament, in my view, would be a recipe for the end of the United Kingdom. And even the Liberal Democrat party, which has long advocated “federalism” for the UK, does not support the idea of an English Parliament. Something does have to be done, but full, formal federalism is not the answer.

A more nuanced and sophisticated critique of the idea of a multinational union is Michael Keating's notion of a *plurinational* state. Not only is there more than one nation in the state but there are competing ideas of what nations subsist in the state. In Spain, for example, the Spanish nation is adhered to by many who do not recognise national status in the Basque country or Catalonia. This may describe the Scottish case less well than the Spanish. Obviously Scottish Nationalists regard Scotland as a nation; but it seems clear that many other Scots may do as well, even though they do not favour separation from the UK. There will be others who see Britain as the nation, and maybe the only nation, to which they belong. Not only is there more than one nation, but not everyone agrees what the nations are.

The UK is undoubtedly a state. From the point of view of external observers it may in practice be treated as a nation state, rather than as an assembly of nations sharing a state. Despite 15 years of devolution, which has made the multinational nature of the UK more explicit, the same view may be taken by many people in England, and many elsewhere in the UK. The art in constitutional design is to create structures which are sufficiently flexible to accommodate these ambiguities, and to continue to attract the consent of as many citizens as possible, in the UK's case acknowledging the competing visions as part of its asymmetry, perhaps most especially in the case of Northern Ireland.

### *Building the UK's Territorial Constitution*

Three things should be done to build or rebuild the territorial constitution

1. It must be "crystallised", that is to say written down in a well-defined way, probably a legal form, so that there is a clear, shared understanding of how the UK as a union works. We have to explain to both the Scots and the rest of the UK, notably the English, what they've got, what they are getting and what it all means.

2. This constitutional documentation (whatever legal form it takes) must embed the key principles of economic, social and political union; these must be reflected in both the legal framework and well-defined fiscal arrangements.
3. This constitutional framework must apply to all the nations of the UK, not merely to the relations between Scotland and England, and the same principles, amended as appropriate, must apply to Wales, Northern Ireland and – especially – England. Now that Scotland has given an answer, it's time to answer England's question too.

One of the UK's weaknesses as a union is that the territorial aspect of the Constitution is of abiding interest to Scots, as well as the Northern Irish and the Welsh, but has until very recently been largely ignored in English political discourse. (It has suited two sets of people to cling to the idea of Westminster as an Imperial Parliament, absolutely sovereign: a near extinct set of constitutional lawyers in England, and Scottish Nationalists on the lookout for a grievance.) The time has now come for the Scots think about the union less, but for the English to think about it more.

### *Writing the Constitution Down*

The United Kingdom famously has an unwritten constitution. This statement is of course not true. The UK constitution is written down in many places, Acts of Parliament, legal textbooks, court judgments and elsewhere such as legal writings (in one notorious example in an anonymous letter published in the correspondence columns of the Times newspaper). The constitution is not unwritten but uncodified. The territorial aspects of the constitution are mainly found in legislation, the Acts of Parliament setting up the Scottish Parliament, the Welsh Assembly and the Northern Ireland assembly and (historically) in the Acts of union as well. In that sense they are in part codified already. Knowledgeable observers might also look to parliamentary statements, such as those on the Sewel convention (dealing with Westminster's legislative powers in relation to devolved matters), and to procedural materials produced by governments and Parliaments.

These deal reasonably effectively with the detailed allocation of powers and responsibilities to legislatures and ministers. But because of their nature and history they do not deal with the founding principles of the territorial contribution, but more with the some of the practical realities. So, for example, the practical reality is that Parliament at Westminster does not legislate on devolved matters without the consent of the devolved legislatures; analogously, the convention has been established that the Scottish Parliament's powers are not amended without its consent. But this convention is to be found only in practice and Parliamentary statements. Similarly, the reality is that since the Scottish Parliament has been endorsed in two referendums by the Scottish people, it could not be abolished or have its powers curtailed without its own consent, or indeed the consent of the Scottish people. Additionally the reality is that UK taxes are used to support devolved public services, with at the least an implicit justification of meeting similar needs across the union, but this could be seen as an administrative procedure – a hangover from the world of a unitary government – rather than a constitutional principle.

Responsibility for dealing with the territorial constitution is unambiguously for the United Kingdom government and Parliament, but it must act in consultation with the devolved legislatures. The next section of this pamphlet makes proposals for what must be done, by whom, and when.

## **Section 4 What the UK Needs to do Now**

It is important for all in the political leadership of the UK to see the No vote in the referendum not so much as a victory over political opponents, though it is clearly that, but rather as the positive choice of Scottish people to opt in (once again, but this time on a fully democratic basis) to the UK as a multinational state. This is therefore an occasion for magnanimity, and an opportunity to include, rather than exclude, people from the next phase of political discussion. Most profoundly, as I have argued, it is an opportunity to look again at the way the nations of the UK are organised, and at our territorial constitution.

First of all, obviously, the UK must deliver on the promises made in the independence referendum to improve the Scottish devolution settlement. That is clearly the first task. All the political parties have affirmed that again since the vote. But addressing the long term priorities must begin at the same time. The result of the referendum must not lead to a lazy reversion to the previous approach.

### *Taking Forward the Scottish Devolution Settlement*

The task of taking forward the changes promised for the Scottish devolution settlement is relatively straightforward. A plan for doing so was announced during the referendum debate, and has now got under way. Lord Smith of Kelvin is convening a consultative process in as inclusive a way as possible to result in draft legislation based on the three party proposals to increase the Scottish Parliament's powers over tax and welfare. These proposals differ in detail but have substantial similarities. All accept the principles of economic and social union set out in this paper. Tax devolution should be concentrated on personal taxation, not risking economic distortion by taxing things like corporate profits which can be relocated at the click of a mouse. All parties propose further devolution of income tax, though Conservatives and Liberal Democrats go further than Labour propose. So more of income tax should be devolved. The UK welfare system is the key aspect of social citizenship and must therefore remain reserved, though there is scope for devolution of those cash benefits which are closely related to devolved services like housing benefit or attendance allowance. There is much loose talk of 'devo max'. No-one quite knows what this is.

For some nationalists it may be simply as much power as they can get devolved. There are things it cannot be, notably devolving everything bar foreign affairs and defence. That is simply a botched form of independence, and does not lead to a sustainable economic or social union. It is not sustainable economically as the conditions of fiscal sharing that support a stable currency union are not met. Nor does it meet the conditions of social solidarity implied in a common UK pension and welfare system.

In term of legislative process, the work which led to the Scotland Act 2012 provides the template for how to take these plans forward. Before the 2010 general election the three parties had differing plans to take forward the Calman Report, but consensus was built. Similarly, after the general election of 2015, the new government, of whatever political composition, will have a mandate to take forward changes, not merely from Scotland but from the whole UK, which is of course essential for changes to devolution within the UK. But the process needs to be careful and consensual: constitutional change is always more durable if delivered through consensus. It has these stages:

- Detailed work to flesh out the options. A Command paper is to summarise the options. In the first instance consensus amongst the Westminster parties is desirable. What is planned is the under Lord Smith's process is production of heads of agreement and then draft legislation. A main issue for discussion is just how much more of income tax should be devolved, whether that raises a "West Lothian question" in relation to tax, and whether there is any need to deal with worries about potential tax competition at the higher rates.
- There should also be full discussion with the Scottish government, with a view to seeking as much agreement from them as possible on the proposals before they are presented as legislation. Their challenge will be to accept the verdict of the referendum wholeheartedly and not to argue for a form of devolution that is inconsistent with continued union. In the immediate aftermath of the vote they do not seem yet to have accepted that.

- There then needs to be a legislative process in both Westminster and Holyrood, in which the proposals are debated both in principle and in detail in each Parliament, and the legislation presented for Royal Assent by the government only when the Scottish Parliament has confirmed that it is content.

All this will ensure that in the next Westminster Parliament, and the next term of the Scottish Parliament, additional tax and welfare powers will become available to Holyrood, and they can most probably be exercised in the light of the experience gained from making tax decisions under the Scotland Act 2012.

### *Recognising the Territorial Constitution*

That is the relatively easy part, because it follows an established pattern and relates directly to Scotland only. More challenging will be to accept the verdict of the referendum and cement Scotland into a wider UK constitutional framework. In other words, to write the UK's territorial constitution. There are three key elements of the territorial constitution:

- The special status of Scotland, Northern Ireland and Wales, and the permanence of their institutions within the UK
- explicit recognition of the place of England
- the purpose and principles of the union, expressed in its economic, social and political structures.

These key elements need to be expressed in legal form and in the fiscal arrangements. The most difficult is answering what has become the English Question, but first I consider the form of this constitution.

### *The Legal Form of the Territorial Constitution: Defects to be Addressed*

At the moment the devolution legislation for Scotland, Wales and Northern Ireland in effect forms the UK's territorial constitution. One can argue that the Acts of Union of 1707 are also part of it. This legislation achieves much. It empowers the devolved institutions, and it expressly reserves to the UK the powers which deliver the benefits

of the union – notably key economic powers, and (with a wrinkle in respect of Northern Ireland) social solidarity through the social security system. As constitutional legislation, however, the present provision suffers from a number of defects.

The first defect is in a sense purely presentational. It is that these provisions, although they are acknowledged to be constitutional in nature, have the look and feel of what one might call ‘ordinary’ acts of parliament. No one any longer takes seriously Dicey’s jibe that the Act of Union was no different in kind from the Dentists Act, but you would not know it to look at them.

The second defect is that the legislation is piecemeal. Although the legislation achieves broadly the same purposes for Scotland, Wales and Northern Ireland, it is separate, scattered across the statute book, and tells no coherent story about the nature and status of the relationship between the devolved institutions and the people they represent, and the UK as a whole and its institutions. It is emphatically not necessary for the devolution settlement in each country to be the same. There are important reasons for differences – for example in the special status of Northern Ireland, compared to Wales and Scotland. But it is reasonable to consider whether differences which have arisen purely for reasons of history need to be sustained. For example the devolution settlement for Scotland works by defining what is reserved, and needs to be dealt with at the union level, but the devolution settlement for Wales operates in a different way. Should indeed some or all of the devolution legislation be consolidated together?

The third defect is more substantial. The political, indeed the constitutional, reality is that devolution is a permanent and irreversible part of the UK's constitution. The UK has long acknowledged, and has legislated to acknowledge, that Northern Ireland if it wishes may leave the UK and become part of the Republic of Ireland. That is a fundamental constitutional fact, and of huge political importance. Northern Ireland’s settlement is also part of a wider package involving, in the jargon of the Good Friday agreement, North-South as well as East West elements. Similarly by acknowledging, without hesitation, that the Scottish people exercised a sovereign choice about whether to leave the United Kingdom, the special status of Scotland is beyond

question. In each of Wales, Scotland and Northern Ireland, devolved government has been entrenched by the will of the people expressed in referendums. In Scotland's case, more especially, not only has devolution been assented to, separation has been rejected. Additionally, Westminster has recognised since 1999 that the devolved legislatures have primacy within their own competence. It does not, and should not, legislate on these matters except with their consent. (It often makes practical sense to do so.) At the moment, however, this is simply a practice, which has hardened into a constitutional convention. During the referendum campaign, all three UK political parties explicitly acknowledged that the status of the Parliament was permanent and devolution irreversible. The time has surely come for these facts to be given suitable statutory recognition in constitutional legislation. *Mutatis mutandis*, the same principles surely apply to Wales and (in a rather different way) to Northern Ireland?

### *The English Question*

There is however one other substantial and glaring defect in the territorial constitution for the UK. There is no recognition whatsoever of England. If the UK is a multinational state, a voluntary union of nations, then England is one of those nations. At present, in legal terms, it is not even a jurisdiction. In recent years, England has, as demonstrated by the Future of England Surveys, become much more aware of itself as a political entity. People now distinguish their English and British identities. This has followed devolution; and it has been thrown into very sharp relief by the prospect of independence. It is therefore time to answer this question too.

The key insight, however, is that in constitutional terms Westminster is England's Parliament and the UK government is England's government. To plan for something else – such as full, formal federalism with an English Parliament and government - is to plan to end the union. The UK is a profoundly asymmetric state, with three small members and one much larger. The smaller nations of the union need the sort of special protections that constitutions provide to minorities; and devolution delivers that. But England nevertheless needs political expression of its own. Each part of the union should have devolution of a kind and degree which is consistent with the maintenance of the union. Because England is the overwhelming majority of the union, devolution for it like Scotland's or Wales' would not be consistent with

continued union. Full, formal federalism would spell the end of the UK, but we can move as close to federalism as is possible in a state where one nation makes up 85% of the total population. Because Westminster is England's Parliament, the obvious way to do this is through parliamentary mechanisms. A number of detailed proposals have been made, essentially to remind the government of the United Kingdom that it is the government of England also, and should be obliged to heed English opinion especially when legislating for England only. I have written elsewhere of this, and indeed the proposals I made were largely adopted in the recommendations of the McKay Commission appointed by the present government. In essence, legislation which relates to England only needs to have parliamentary stages in which only English MP's participate. The procedures need to allow English voices to be heard, but not to split the government into separate UK and English administrations (this puts another obvious constraint on the scope for tax devolution). The McKay plan delivers that. Those changes, or changes like them, need to be made, and made in a way in which they can be seen to be part of the Constitution of the United Kingdom. All parties need to accept that reality, even though it may be unpalatable and make governing the UK more complex and challenging for a government that cannot secure an overall majority in England. The fact is that if the UK is to continue, its government will also be the government of England, and must be and be seen to be ready to listen to English voices. It might be that explicit legislative provision is the best way to do that. Whatever the mechanism, it is clear that in the wake of the referendum result and the plans for more devolution there is real demand from English MP's for progress on this issue.

That is not the only thing to be done about the distribution of power and wealth in the United Kingdom, and in particular in England. The real geographical division in the UK, as has often been noted, is between the North and South. The south and east of the country have become more and more distinct from the rest of the country as they operate in a globalised commercial and financial world, increasingly separate from the rest of the UK. Scottish Nationalists have emphasised that difference, but it has at least as much relevance to the majority of the population of England as it does to Scotland. Ironically – in a debate replete with ironies – Scotland is economically more like the south of the country than the north. Scotland's gross domestic product per

head, even excluding North Sea oil, is closer to the south and east of England than the north and west, and certainly than Wales and Northern Ireland.

Two challenges derive from this, largely beyond the scope of this paper. The first is finding effective measures of regional economic development which can operate throughout the United Kingdom. Regional development agencies, now abolished, were an attempt to address this need. What were essentially supply-side regional economic policies (spending on training, factory building etc) were another. Substantial infrastructure investment and improving transport links between the north and south of the country are a further attempted solution. So is relocation of public sector activity, such as the BBC to Salford, or in previous decades the Overseas Development Administration (as it then was) to East Kilbride. But in truth, no government has yet identified enough successful policy tools.

Successful economic development strategies may also be linked, however, to political decentralisation. Many in the English regions, for example, look with envy on Scotland because it has political power which can be used for economic development purposes. These are not, however, the legislative powers of a Parliament but the executive powers of government, and there is no reason why much more substantial executive powers cannot be decentralised to different parts of England. All governments promise to do this, but none has yet successfully delivered real decentralisation. It might be that the mechanism of the city-region with substantial economic development powers is the best. Other models may work better in different places. IPPR North's *Decentralisation Decade* programme makes proposals for devolution within England. The lesson from the territorial constitution as it applies to Scotland, Wales and Northern Ireland is that different solutions for different parts of the country may well be appropriate – why not give Kent the powers of a County Palatine, and the Birmingham city-region similar capacity to develop its own regional economy? And that has to include fiscal powers - the scope to raise and spend money.

The final and highly significant defect in the legislative framework which makes up our territorial constitution is that it is virtually silent on fiscal issues. Of course the legislation sets out the tax powers which the devolved administrations can exercise, and this sets the framework in some senses. But the other key element of what in other countries is described as “fiscal federalism”, the sharing of resources across the UK as a whole, is left simply to administrative action. Of course that action is in fact highly structured and carefully set out in publications by HM Treasury. The key mechanism is the use of the Barnett formula. During the referendum debate, the commitment of the main UK parties to the Barnett formula was explicitly affirmed. The important principle behind the Barnett formula, however, is not the arithmetic. It is that it is the responsibility of the union government to decide how to split the UK’s income between expenditure on devolved services and on reserved services. Only the UK government can make decisions about reserved services such as social security and defence, but when it is allocating resources to services for England which are devolved elsewhere in the UK, it needs a principle which both delivers a fair share of those resources to each part of the UK, and does so without interfering with the discretion of the devolved administrations. While it is far from perfect, the Barnett formula delivers that today.

As Scottish tax devolution grows, the proportion of devolved spending supported by transferred UK resources (ie grant) will become smaller. In that sense the effect of the Barnett formula is less significant. But it should not be assumed that the objective of devolution is to make it as small as possible. Any devolved funding system strikes a balance between autonomy and accountability on the one hand, and equity on the other. Different federal states strike the balance in different ways. (The US for example is willing to tolerate wide variations in living conditions across the nations of the union. Australia by contrast operates an elaborate system of equalisation. Canada is somewhere in between.) The Union which has been defended in this referendum campaign is one with a commitment to social solidarity, so that the level of public services in each nation does not depend solely on the tax revenues raised there. That implies a substantial degree of fiscal sharing – and the plans to be put into practice envisage grant making up about 40-50% of the Scottish Parliament’s present budget: more like Canada than like either the US or Australia.

What is needed in constitutional terms, however, is a clear statement of these underlying principles. The principle that the UK government ingathers taxes, and uses them both for reserved services and to ensure that there is a fair level of resources available across the whole UK for devolved services which are not their responsibility in Scotland and Wales or Northern Ireland. What constitutes a fair level can no doubt be argued (and usually is), but resources must be sufficient to ensure the key elements of the social union, perhaps in the simplest terms free healthcare and education, alongside reserved, directly provided, Social Security.

A way needs to be found to express this clearly and to give it some legal form, though not so tightly drafted as to make it practically impossible to operate the system effectively. The present statutory provisions, however, which simply say "*the Secretary of State may from time to time make such payments as he may determine*" are clearly an inadequate way of explaining how the UK does and should share out its resources. The administrative publications by HM Treasury on how the formula works are helpful, but are no more than descriptions. It might be that there could be statutory provision setting out very broad principles indeed, and a funding code agreed with the devolved administrations.

### *Recognising the Territorial Constitution: Taking Change Forward*

The principles of the territorial constitution are, therefore, a relatively easy to state, and might well gain general assent. But they are in legal technical terms quite difficult to deliver, because the UK does not have a codified constitution into which they can simply be inserted. Instead, the doctrine of parliamentary sovereignty can be seen to imply that any such constitutional legislation could be arbitrarily amended. This is not of course the reality. (In practice the rule of parliamentary sovereignty simply operates as a rule of recognition: legislation which has received Royal Assent after being passed by Parliament is good law.) There is also the difficulty that two of the elements of the territorial constitution are ones which have traditionally not been dealt with through the medium of primary legislation – the parliamentary changes which are necessary to give effect to heeding English opinion, and the structure of fiscal

federalism which gives effect to the social solidarity which is a key element of the union.

No legal technical problems are however beyond solution. It is not the purpose of this paper to define the solution in detail, though primary legislation seems to be the most appropriate, and possibly only, route. One possibility would be for the government, with the agreement of the other parties and the devolved administrations, to charge a suitable group of legal experts with the task of finding the best way to express all this in legal technical terms. It might be that this task could be given to the Law Commissions which serve the different parts of the UK working together, which would depoliticise the process very helpfully. Alternatively, a specially created Commission, perhaps led by a present or former member of the Supreme Court, could be given the job. This idea has already been floated by the First Minister of Wales, Carwyn Jones. Whatever the means, the work needs to be got underway.

### *Managing the Territorial Constitution*

Acknowledging that the UK has a territorial constitution, and codifying it so far as possible to make it clear and unambiguous will be a very helpful step. But such a constitution also needs to be managed, and managed by and for the UK as a whole.

Federal countries take this for granted. Canada, for example, has a department and Minister for Intergovernmental Affairs at the centre of government and a Secretariat which deals with constitutional and legal issues relating to the federation and Canadian unity. In the UK, although we have well developed legal mechanisms for managing the competence boundary between the different legislatures, intergovernmental processes have been ad hoc and often bilateral. The so-called territorial departments of the United Kingdom government, the Scotland Office, the Wales Office and the Northern Ireland Office are very small. The Northern Ireland Office has shrunk markedly since the devolution of policing and justice, but is still the biggest of them. The Scotland and Wales Offices, though they each support a Secretary of State, are tiny departments which are simply too small to discharge their responsibilities which they ought to have.

Additionally, having different territorial departments and Secretaries of State encourages a piecemeal approach rather than any coherent picture of the UK as an entity. Not a union, but a series of quite different unions. This is both unwise, in purely tactical terms, but also mistaken. Of course people in Scotland, Wales and Northern Ireland may value having their own Secretary of State at the Cabinet table, and it would be possible for that to continue. But the time has surely come for a substantial institution of government whose job it is to manage all devolved relationships, and to place them in the context of the UK as a whole, and indeed to be responsible for the unity of the UK.

In practical terms this might mean three ministers but one with overall responsibility for the union. Most important would be a powerful government department supporting the politicians responsible. There are some other relationships which could, for convenience, be managed by such an institution as well (perhaps relationships with the Channel Islands and the Isle of Man, which are not part the UK, but have some similar characteristics). The interesting choice is whether this responsibility should be combined with the responsibility for constitutional issues more generally, or with responsibility for English legal or local government issues. I favour the former, for two reasons. First, constitutional issues, if thought about at all, have in the past been combined with the management of the England and Wales legal system, through the office of Lord Chancellor. This encourages too narrow an Anglocentric view of the constitution of the whole UK. Secondly, the management of decentralisation in England (which must surely be a priority for any government) is related much more closely to English local government, and dealing with that relationship is a huge task on its own.

There is however one other aspect of managing the territorial constitution. Secretaries of State for Scotland and Wales always face the risk of political competition with the First Minister of those countries. They are either in the same or opposing political parties. (Northern Ireland obviously is different because the party system is not the same as the rest of the UK.) It's hard to say which sort of competition is actually more painful. One is public, the other (usually) private. Either way, it can be unhelpful to the management of intergovernmental relationships.

This raises one intriguing possibility. In the endless conversations about the reform of the House of Lords, attention usually focuses on how it should be composed. It would be better to begin by thinking what it was for, and one function a reformed House of Lords could properly discharge is oversight of the UK's territorial nature. This would mean that the House of Lords would take a particular responsibility for scrutinising the operation of the territorial constitution, something which a second chamber does (of course in very different ways) in other, Federal, countries. But this is obviously connected with change in the make up of the House of Lords itself to be more legitimate and perhaps geographically representative. That idea needs a whole other pamphlet but if it was the plan, then the Secretary of State responsible for these matters could with advantage be a member of the House of Lords.

## **Section 5 What Scotland Needs to Do**

Just as it would be a mistake for the United Kingdom to see a No vote in the referendum as the end of a distraction and revert to business as usual, so it would be deeply disappointing if Scottish politics fell back into its pre-referendum mode. The constitution has been the dominant issue in Scottish politics for a very long time, and the question of independence has overwhelmed all other issues in political debate since the SNP was elected in 2007, and has been the only topic given any attention since 2011.

### *Time to Move On*

Now, after the referendum, it is time to move on. The question of independence is settled. Scotland has decided to remain a nation embedded in a wider union; and the powers which can be exercised, and the choices which can be made within Scotland itself are largely settled or soon will be. The big challenge is not to talk about where the power should be exercised or by whom, but what should be done with it. What sort of Scotland do we indeed want, and what can we do to bring it about? What choices should be made about laws, public services, and (now) taxes? Where do we stand on the big question of the balance between the state and the private sector? Do we want to have higher taxes and public spending than the rest of the UK, or for that matter lower taxes? What are the best ways to use the powers of government to deal with questions of economic growth and social justice? In essence, what are we going to do with the devolved powers we have and are getting, and how do Holyrood politicians work with the UK level of government for the common good? It is time to take responsibility, and with tax powers, that means some very real responsibility.

Even the most dogged nationalist must realise that much of the Yes vote in the referendum was a vote of protest against any number of things – from austerity to inequality to political culture. On its own, independence would have struggled to address any of these, and would have made some, like austerity, worse. The challenge is now to make real progress on such issues – and to recognise that there are choices to be made between them. With income tax powers the Scottish Parliament will have the choice to redistribute resources, and with influence over welfare – for example

controlling housing benefit – it will have tools previously denied it to affect inequality. The challenge will be to take responsibility as well as power.

There is of course more constitutional work to be done. In the short term, the priority will be working with the UK government to deliver more powers for the Scottish Parliament, to widen its choices further. In the medium term, again working with the UK, Scotland needs to play its part in refreshing the territorial constitution of the union. I make one detailed proposal for that below. But we cannot have a continuing, interminable, conversation about why we can do nothing because someone else exercises control.

The consequences of doing so would be debilitating, culturally and economically; instead of taking charge of Scotland's destiny, we would once again dissipate our energies in agonising about our identity. It is time to move on from that. The verdict of the people must be respected. The suggestion put about by some nationalists immediately after the vote that the next Scottish Parliament should simply disregard the decision of the referendum and demand independence anyway is profoundly undemocratic, but can hopefully be put down to the heat of the moment.

### *Energy and Division*

This referendum has been both energising and divisive for Scottish society. Energising because many people have been drawn into political debate who previously have been distant from it. The potential of political institutions to bring about change, and the argument about what those changes should be, has been recognised in a way not previously seen. This surely a good thing. Divisive, because people have been forced to make a choice, and it was not a choice most of them sought. Bear in mind that the referendum was in no sense a response to overwhelming demand from the Scottish people that they had to choose in 2014. It happened only because the SNP won a majority in Holyrood in 2011 – something no one, least of all the SNP, expected. The process of making the choice also been divisive. Much of the debate has been courteous, though seldom uplifting or entertaining. It has been unusually well-informed, with truckloads of academic analysis. But there has been unpleasantness at times, and divisions between friends and amongst families. It was perhaps inevitable

that some Yes campaigners would try to present the choice as against or for Scotland, rather than about two different visions of Scotland. It was perhaps unavoidable that the No campaign would spend great deal time talking about risks; but the Yes campaign spent most of the final months talking about what was wrong with the UK. The result of the campaign seems to have been to have divided into Scotland into a minority of people who have become persuaded that independence is a solution for all social problems (in every poll there was an extraordinary correlation between people who supported independence and people who believed it would make Scotland both richer and fairer) and everyone else. The majority believed neither of those things, and did not support independence. It is very striking that polling showed a majority of Yes voters believed the campaign was a positive experience in which they could speak their minds. No voters by contrast felt accordingly to polling evidence unable to speak out. intimidated and fearful of the consequences. They now feel not triumph but relief. The independence project has divided Scotland down the middle – and that division will not be healed unless those who initiated it accept their share in the responsibility to their fellow citizens.

### *Harnessing Energy*

But the process has nevertheless been energising. Now it is over, perhaps those drawn into it will withdraw from the political arena again. Much of the undoubted energy on the Yes side has been from people who have seen the hope that political action can bring about changes in society. They were however led to believe that one political change would serve for all – the simple act of independence would bring about economic growth, social justice, and so on. The truth is that politics matters hugely but is not like that. It involves choices, uncertainties, and the constraints of not just a globalised economy, but the values and aspirations of the population themselves. And Scots are not so different from people elsewhere in the UK. So bringing about real change can be painful and difficult and a hard grind, rather than saying a magic word. That may be less immediately attractive to some. Nevertheless people on both sides have joined in a political process because they have realised, in a way which perhaps they did not before, that political choice does matter. The challenge for Scotland, as a nation, is to sustain some of that commitment, but not divided on Yes/No lines. That

argument has passed, and other choices now have to be made. One way of doing so is for the political parties to capture their interest.

### *Challenges for the Political Parties*

When devolution came along in 1999, legislation, and taxpayers' money, created a new Parliament, a new devolved government and a range of government institutions. But it could not create or strengthen Scotland's political parties. They just spread themselves a bit thinner across two Parliaments rather than one. Scotland has not been immune from the trend of disengagement from politics and reducing party membership that affects the whole UK. So at a time when we were asking more of our political parties – and, with the proportional representation system, building part of our constitution on them, they were getting weaker. 15 years later, this new interest in the possibility that politics might matter creates both opportunities and challenges for the parties.

New people have stepped into the political arena. The opportunity is primarily to keep them there, draw them into more traditional political life, and harness their enthusiasm. After a No vote, there is a big opportunity for the pro-union parties, but in the run-up to the UK general election the attention might be elsewhere. Potential members and enthusiasts might be lost to them if they do not act quickly.

The challenge is greater for the SNP, but maybe so is the opportunity. The Scottish people have rejected their core message, and they will need a period of introspection, perhaps, before deciding on their future. No one would expect principled nationalists to ditch their commitment, and there is a risk that the divisiveness of the campaign will simply have confirmed some people in the view that only creating a separate state can bring about change. But the SNP now need a new story and a new approach. Will it be enough simply to present as a party of competent administration, or a party which will always look after Scotland's as opposed to anyone else's interest? Or can it continue to be a party which describes itself as social democratic but also pursues right of centre policies like business tax cuts? Perhaps it will choose one side or the other of that argument – challenging either Labour or the Conservatives. Its opportunity lies amongst the people who have been enthused by the campaign: can

they be persuaded that politics still matters? A week after the referendum is too soon to expect that approach to have emerged. It will be the strategic issue for the SNP's new leader.

### *Dealing with Division*

We cannot ignore the divisive effects of the referendum. Passions were aroused. Arguments were made, and sometimes personalised; in the later stages of the campaign there was some ugliness. Chanting demonstrations outside the BBC were an unhealthy sign. Obligations obviously fall on everyone to deal with the fallout from this. The main obligation on Yes supporters is, despite great disappointment, to accept the verdict and agree to work within the new framework. To make devolution work, rather than see it as a stepping stone. The SNP need to take a lead in that, and both their rhetoric and their political strategy will colour Scottish life. If it is to press ahead with the independence project regardless of the decision, then we can look forward to a dispiriting and divisive political future. Endless argument, not real progress. The first signal will be how the SNP engage with the devolution process now under way run by Lord Smith. If it is simply to demand all powers be devolved except foreign affairs and defence, that will be a sign that they have not yet accepted reality.

Similar, perhaps greater, obligations however fall on those (of us) whose arguments have prevailed. It will be tempting to treat this as a political victory, and a partisan triumph over the SNP, notably over its departing leader – a skilled politician, maybe, but a divisive figure. After the immediate rejoicing, however, the obligation is one of magnanimity, and inclusiveness. Magnanimity in recognising the sincerity of those who voted Yes, and that their aspirations were legitimate, even though rejected; inclusiveness in ensuring they have a voice in further constitutional development, and in the policy choices which face Scottish society.

Good intentions, however, may not be enough. Institutions matter. Just as the UK needs to make institutional changes to manage the union, the Scottish polity needs some new institutions to facilitate and improve Scottish debate, and to involve people across the constitutional divide in both constitutional and non-constitutional policy

development. These are challenges not for individual parties, but for the Scottish polity as a whole.

One particular piece of fallout needs to be properly addressed. Whatever the proprieties, the fact that the resources of devolved government have been applied to promote the cause of independence has caused questions to be raised about whether the permanent civil service has in some way become politicised. Civil servants on both sides of the governmental divide have been working, as they should, with commitment and enthusiasm to deliver of the policies of their ministers. But in the Scotland the perception amongst opposition politicians has arisen, justly or unjustly, that the government machine has been suborned to a nationalist project. Even if that is unjust, it is an impression that must be addressed, as civil servants have to be able to command the confidence of alternative Ministers. And it seems clear that during the referendum process different ways of working have developed inside the Scottish government for Ministers, political advisors and civil servants. In any event the time may have come for a review of how the civil service operates in a devolved framework. Such a review should take account of the experience of the referendum, when two governments were on different sides: but it should also ask whether 15 years after the start of devolution, when officials carried their assumptions, culture and values from the UK to the devolved level, it is not time for a new look at how these relationships are managed.

### *Challenges for Scotland as a Polity*

The challenges however go beyond public officials and the politicians. They relate to Scotland as a polity. By the Scottish polity I mean Scotland as a political system, or more precisely as a devolved political system doing both politics and public policy making. The interesting question is not just what kind of policies should be pursued, but how are our agendas set, proposals made, ideas created? In short how good are we at the business of public policy-making and how good a political system are we? The answer is, not very good. Innovative Scottish policies do exist but they are not numerous. Too much of our public policy is either a copying of, or a deliberate reaction against, policies proposed elsewhere in the UK. This is in part because Scotland still lacks this a solid infrastructure of policy debate, think tanks and the

space for good-quality informal discussion of public policy in a properly political way, rather than merely as part of public management. And after 15 years of devolution, how good a Parliament do we think the Scottish Parliament is? What lessons can be drawn from the way in which the Parliament – designed for minority or coalition government– has behaved during a period of majority, albeit an exceptional period of constitutional turmoil? But more than that – not just how well designed are its procedures, but what is the quality of argument and indeed of the people in it? What can we do to make it better?

### *Some Practical Proposals*

Just as independence was not a magic wand to sort out politics and public policy, there's no magic wand to make devolution work better either. But there are things that could be done. We should invest more resources in the institutions that surround and support the core parts of our devolved democracy, the government and the Parliament, and recognise more explicitly that they are part of a wider constitutional set up. A devolved parliament does not live in a vacuum, but relates to levels of government at the local and UK levels.

Here are two concrete proposals. Both would provide space and opportunity not merely to develop Scottish public policy, but for engagement across the Yes/No divide so that people can work together to make the settlement which the people have chosen work as well as possible.

The first is how the constitutional future of Scotland should be taken forward in Scotland. It is no longer good enough for this to be an issue taken forward in a divided way between the main parties: the core choice is now settled. The UK government has to take a lead, as described in the previous section, but the devolved Scottish polity must engage strongly too, and promote Scotland's interest. And the UK should help the Scottish political system to play its part. The work to be led by Lord Smith of Kelvin to draw up the devolution plans is a good start, but for the longer term, I propose that the UK government should endow a new Scottish Constitutional Foundation whose remit would be to consult and engage across Scottish society to develop Scotland's constitutional position within the UK in as inclusive and

consensual way as possible. The body should be endowed, so as to be at arms length from government, but could also receive funding from both the UK and the Scottish governments. It should be overseen by a body of trustees, some nominated by the main political parties, but neutrally chaired, perhaps by a senior legal, business or academic figure. Its remit should extend in the first instance until around 2020, to work in parallel with the UK's territorial constitutional development.

But our main challenge is to work not on the constitution but on how to use the powers we have in Scotland and are going to get. How can we refresh devolved democracy to make it work better and work within the UK constitution? How do we work across different levels of government cooperatively, not competitively? Maybe there is a lesson to be taken from the reconstruction of democracy in Germany after the Second World War (from a much worse place, of course). As well as the robust Federal Constitution, there were also created foundations close to the main political parties to provide a space for debate and argument and challenge. In the UK and the US this role is discharged by think tanks. Should we try to create something similar in Scotland? It is unrealistic to expect this from private, business or trade union funding, and we should not be ashamed to say that it is in the public interest to put taxpayers' money behind supporting democratic debate and engagement. As an alternative to freestanding foundations in Scotland, it might be better to enter into contractual arrangements with UK think tanks to operate arm's-length bodies devoted to Scottish affairs. This would leverage their expertise, and help ensure that Scottish policy debate was not too inward looking. It might also provide an opportunity to retain the interest and commitment of some of those who have been energised by the referendum campaign, and give Scottish politicians and those who wish to contribute to politics the chance to learn how to engage themselves. There is no training for politics, perhaps, but all politicians need to learn somehow. Providing that opportunity can only improve the quality of our political debate and ultimately our public policy. If this were done the funding would have to be overseen and managed on a nonpartisan and cross-party basis, perhaps overseen by parliamentarians from both Holyrood and Westminster.

## **Section 6 Conclusions**

The referendum has been a time of decision, a day of judgement on the question of independence. It was a choice between two different futures for Scotland. A future as a separate state, or a future as a nation within a larger state, with increased devolved powers. Now that the choice has been made to remain in the UK, this pamphlet sets out what should happen next.

### *The Nature of the Decision*

The Scottish people have decided against independence. That option has been ruled out, certainly for the foreseeable future - according to the First Minister for a generation or even a lifetime. How long is that? The average age of mothers at birth in Scotland is about 30. So one might hope that the issue of independence will not reappear for decision by the Scottish people until around 2044. But this was nevertheless a vote for change, for devolution within the United Kingdom, but also for more of it. What was on offer during the campaign was more devolution under the Scotland Act 2012, and more beyond that.

### *Change in the United Kingdom*

So change is inevitable. Indeed it would be a serious error if the UK were to conclude that the vote meant the country and the government could revert to business as usual. Things have changed, and changed for the better in that the status of the UK as a union has been democratically confirmed. First of all, there are the commitments made during the campaign to go beyond the Scotland Act 2012. These have to be put into effect. This is relatively straightforward, and a delivery plan has been set out. Agreement on the full detail of the plans is needed across the parties (in particular on just how much more income tax is to be devolved) and then the Westminster legislation need the endorsement of the Scottish Parliament as well. The template for legislating is how the Scotland Act 2012 was put into effect. The challenge for the Scottish government will be to engage constructively in this process.

A more complex task will be to take the opportunity of reconstituting the union, building the UK's territorial constitution. This is something the UK has always had, but never properly acknowledged. It needs both updating and restating. Updating to acknowledge formally and explicitly that the union is a voluntary one of which devolved institutions are a permanent part, entrenched by the votes of people in Scotland, Wales and Northern Ireland; and updating most crucially to reflect not just the place of those countries but the reality that England has a constitutional existence also, to be expressed in parliamentary procedures to deal with English legislation. Now that Scotland has answered the question put to it, the very different English Question needs an answer too. All of this needs to be drawn together and codified, and a suitable constitutional commission of legal experts could be tasked with the technical work. Having done so, the UK needs to understand that such a constitution needs to be managed, not ignored, and managed for the long run. The best way to do this is to create a substantial department of government to replace the present tiny territorial offices; and it might be that its work should be closely overseen by the House of Lords, especially if that body itself became more territorially representative.

### *Change in Scotland*

Now Scotland's constitutional future has been decided, change is needed in Scottish political debate. The referendum has been both divisive and energising. The division is easy to see, and may take time to heal. There will be disappointment, perhaps grief. People will need some time to come to terms with the fact of defeat. But they also need to acknowledge their responsibilities, and the feelings of fear and relief of those on the other side. Reconciliation is necessary, but can only proceed on the basis of honesty. Obligations fall on both sides – to accept the result, and to be magnanimous in victory. Working on a common project of developing the constitutional settlement in a consensual way might present an opportunity to move on, but only if the result is genuinely accepted by both sides. The approach taken by the SNP leadership will be critical here, but the inclusiveness shown by other parties will matter as well. Crowing is to be avoided, but so is defiance. The energy has drawn people towards politics; the challenge is to keep some of them there, especially those who have been led to believe that one decision could substitute for all of the difficult choices and trade-offs in real politics and public policy. This presents both an opportunity and a challenge for all the

political parties, but most for all for the SNP who have to decide how to reconcile themselves to the voters' verdict.

For the Scottish polity more widely, after nearly seven years of constitutional focus, proper discussion of domestic policy is long overdue. Of course the Scottish political system must make its contribution to the constitutional changes in the UK that will happen. But more is needed. How should the Scottish Parliament and Ministers use the powers they have and will get, and at least as important, how can they operate successfully within the UK framework that the Scottish people have chosen? The truth is that – especially after years of constitutional wrangling – the Scottish polity is weak. Its capacity to generate and discuss policy ideas and options is limited; its outlook remains narrow, and often consensual to the point of blandness. Its politicians have little chance to learn and develop, and party policies with them. Devolution created a constitutional skeleton, but not the flesh of a functioning polity. It needs to be strengthened by investment in policy making and debate outside of government on both constitutional and day-to-day issues. On the former, the UK government might endow a new Scottish constitutional foundation to develop Scotland's place in the UK, in the line with the vote. On the latter, public money might be invested to strengthen the capacity of the Scottish polity to have an engaged policy making process. One way to do that would be to enter into contractual relationships with major UK think tanks to provide a presence in Scotland to help develop and debate policy ideas, to provide opportunities for debate and discussion, and indeed for politicians to learn and develop. Such arrangements should be overseen by committees of Scottish parliamentarians from both levels of government so that they can be seen to be politically unbiased. Additionally, there may be merit in holding a review of how the civil service in Scotland works, in the light of the experience of the independence referendum, to address concerns that it may be seen to have been politicised by an unusually divisive issue; but also to see whether there are lessons about how policy can best be made in a devolved Scotland.

The independence referendum has been a truly extraordinary event. It has caused Scotland to look at itself in a way that no nation, perhaps, has ever had the chance to do. Much can be learned from the process. This is the day after judgement: Scotland

has chosen to remain in the United Kingdom, and all involved have an obligation to act as if they are in not just the first days of a better Scotland, but of a better United Kingdom as well.