Scottish Parliament Devolution (Further Powers) Committee
Implementing the Smith Agreement: The UK Government's Draft Legislative Clauses

# The 'Permanence' Issue: A Question of Symbolism or Power?

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**Summary**

1. This written submission focuses on the constitutional implications of the draft legislative clauses to devolve further powers to the Scottish Parliament. In particular, it addresses the following questions: how do we, in practical terms, make the Scottish Parliament permanent? And what are the legal implications of permanence?

2. This paper argues that the issue of permanence has so far, amongst political parties and the media, been interpreted as a *symbolic* gesture that does little to actually change the constitutional status quo of devolution. Indeed, the overwhelming focus of political attention has, rightly, been on issues of taxation and welfare: substantive policies that are to be devolved to Scotland. However, in exploring what the implications of the Draft Clauses may be, we argue that the issue of permanence strikes at the heart of the Parliament's ability to be self-determining: permanence entrenches the *power* of the Scottish Parliament, and alters the legal framework of sovereignty.

3. However, the *practicalities* of how to make the Parliament permanent have been noticeably absent from the Vow, the Smith Report and Command Paper. To that end, we make some suggestions to alter the wording of the draft clauses, to include a clause stipulating that Scotland's devolved status (including its competences) can only be amended or repealed with the mutual consent of both Scotland and the UK. In practical terms, this may be achieved through obtaining qualified majorities for any relevant proposed changes to the terms of the Scotland Act in *both* the Scottish Parliament and the UK Parliament, to prevent either institution from acting unilaterally.

4. By amending the draft clauses in this manner, and entrenching the powers of the Parliament, Scotland would – in constitutional terms – become a de facto federacy. While this term is unfamiliar to many (we explain what it means below) in essence it means that *making the Scottish Parliament permanent would create a more federalised relationship between Scotland and the UK*. Under current legislation, the Scottish Parliament is clearly not permanent: it may be abolished by the UK Parliament at any point. By making the Scottish Parliament permanence's legally meaningful, this implies a self-limitation to the UK Parliament's sovereignty – whereby the self-limitation of the central-state is a basic feature of federal systems.

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5. We then discuss the implications of entrenching the permanence of the Scottish Parliament, with regard to any future attempts to alter or remove its competences by the UK Parliament. We use the case of European integration as an example.

**Interpretations of Permanence**

6. The issue of permanence appears to have touched a raw nerve in Scottish and UK political circles. The 'vow' taken by the leaders of the Conservative, Labour and Liberal Democrat parties in the lead-up to the independence referendum in September 2014 included, at the top of its list, a shared commitment to the effect that:

> *'The Scottish Parliament is permanent'*[3]

7. However, it was unclear at the time how this would be achieved and what the implications were for UK sovereignty. The final report of the Smith Commission on further devolution added an extra detail to the vow, recommending that:

> *'The Scottish Parliament will be made permanent in UK legislation […]* UK *legislation will state that the Scottish Parliament and Scottish Government are permanent institutions'*[4]

8. However, again, there were no guidelines on how to draft legislation to entrench such permanence in the Smith report. The draft clauses contained in the UK Command Paper changed the wording from the Smith report, to the following:

> *'A Scottish Parliament is recognised as a permanent part of the United Kingdom's constitutional arrangements'*[5]

9. Clause 1 of the proposed Scotland bill is widely seen to fall short of the Smith Commission's recommendations to make the Scottish Parliament permanent in UK legislation. This is because the emphasis has changed from *making* the Parliament permanent to *recognising* the permanence of the Parliament. These are two separate things. Clause 1 as it stands has no normative content, imposes no obligations at all, and has no legal effects. As Dr Mark Elliott stated in his written evidence to the House of Commons Political and Constitutional Reform Committee inquiry into the draft clauses,

> 'If UK legislation were to state that the Scottish Parliament was "recognised" as a permanent part of the UK's constitutional arrangements, no plausible legal argument could be made that the Scottish Parliament had thereby been "made" permanent'[6]

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[3] The Daily Record, 'The Vow', Tuesday September 16 2014.

[4] Smith Commission (2014) *Report of the Smith Commission for further devolution of powers to the Scottish Parliament* (Edinburgh: The Smith Commission), p5, p13.

[5] HM Government (2015) *Scotland in the United Kingdom. An enduring settlement* (London: HMSO), p92.

[6] Elliott, M. (2015) 'The Proposed Scotland Bill: The Constitutional Implications of Draft Clauses 1 & 2' Written Evidence submitted by Dr Mark Elliott to the House of Commons Political and Constitutional Reform Committee. 29 January, p3.

Thus, the current wording of the draft clauses, focusing on 'recognition', has no legal basis in UK law.

10. But of greater concern is the fact that, in none of the depictions of 'permanence' worded in the vow, the Smith Report or the Command Paper, were there any attempts to detail the practicalities of entrenching permanence in law. The draft clauses do not contain any provisions to render the Scottish parliament permanent, for instance by ensuring that the provisions contained within the Scotland Act cannot be abolished or amended unless certain conditions are met.

Put another way, there are no means to enforce permanence in the current wording.

**How to make the Parliament permanent**

11. So how might we entrench the permanence of the Scottish Parliament, to move beyond a merely symbolic statement that has no legal basis on no means of enforcement in UK law? And what are the practicalities of permanence?

12. In order to make the commitment to permanence legally meaningful, we suggest two changes to Clause 1 of the draft Scotland Bill. These are as follows:

a. Alter the wording 'A Scottish Parliament is recognised as a permanent part of the United Kingdom's constitutional arrangements' to the following:

*The Scottish Parliament is permanent, as hereby enacted.*

b. Second, an additional sentence should be added, stating:

*Section 1 of the Scotland Act [and those relevant provisions of the Scotland Act that deal with the legislative competences of the Scottish Parliament] may be amended or repealed, or exceptions to it may be made, only by mutually agreed and consistent decisions of the UK Parliament and the Scottish Parliament. The consent of each parliament is obtained through at least a two-thirds' majority of votes cast.*

[*Further thought would need to be given to which provisions in a new Scotland Act, other than clause 1, were of such fundamental status that they should be protected by the consent of each parliament by way of a two-thirds majority of its members.]

13. How does this new wording improve upon the current Draft Clauses?

**First**, stating that the Scottish Parliament is permanent (rather than being *recognised* as permanent) creates a constitutive basis to make a legal argument that the Parliament is permanent. At present, the wording is 'merely

declaratory of the supposed fact of the Scottish Parliament and Government's permanence'[7] - a permanence than does not actually exist in current law.

**Second**, by creating conditions under which the Scotland Act may be amended or repealed, or made exceptions to, creates conditions under which the permanence of the Scottish Parliament may be legally enforced.

**Third**, by requiring the mutual consent of both the Scottish Parliament and the UK Parliament means that one party cannot act unilaterally to change the relevant provisions of the Scotland Act. In particular, the UK Parliament will no longer have the (legal) right to abolish the Scottish Parliament, unless the Scottish Parliament itself agrees. Furthermore, the UK Parliament will not be able to amend the competences and powers of the Scottish Parliament, unless the Scottish Parliament agrees. This provides tighter protection for the Scottish Parliament than the Smith Commission proposal that the Sewel Convention be placed on a statutory footing. Finally, it implies that the Scottish Parliament cannot amend its status - in regard to significant changes in its legislative competences - without the agreement of the UK Parliament.

**Fourth,** by requiring a two-thirds majority (a 'super-majority') in both the UK Parliament and the Scottish Parliament to amend, repeal or make exceptions to the relevant provisions of the Scotland Act, this provides adequate safeguards to ensure that there is broad support in both houses of parliament for any proposed changes to the Scotland Act. It would be undesirable for a simple majority to be sufficient to change provisions of a fundamental constitutional nature in the Scotland Act, which would potentially enable a single party in government to effect wide-reaching constitutional changes. Instead, the requirement of a two-thirds majority requires cross-party support across both houses.

14. A possible objection to the proposed re-wording of Draft clause 1 may be that it aims to entrench, or insulate from change, its provisions by means of procedures that would 'bind' future governments and parliaments (contrary to the traditional view of parliamentary sovereignty, whereby Westminster is unable to bind its successors). Three distinct arguments counter this possible objection:

15 a) As Lord Hope stated in the case of *R. (Jackson) v. Attorney General* [2005] UKHL, 'Parliamentary sovereignty is no longer, if it ever was, absolute. . . It is no longer right to say that its freedom to legislate admits of no qualification whatever.' For example, certain types of statutes, known as 'constitutional statutes' (this concept was affirmed by the Supreme Court in *BH v Lord Advocate* [2012] UKSC) such as the Human Rights Act 1998, or the Scotland Act 1998, are acknowledged as 'quasi-entrenched', in that they are capable only of express, and not implied repeal.

b) Further, in recent times entrenchment has played a part in UK Constitutional practice. There are precedents. For example, section 2 of the *Fixed-term Parliaments Act 2011* makes provision for early general elections, but only following a vote from

[7] Elliott, M. (2015) 'The Proposed Scotland Bill: The Constitutional Implications of Draft Clauses 1 & 2' Written Evidence submitted by Dr Mark Elliott to the House of Commons Political and Constitutional Reform Committee. 29 January, p3.

at least two-thirds of MPs. The *European Union Act 2011* stipulates that a whole area of parliamentary business – relating to extension of EU competence – may only be achieved if subject to approval by referendum. A possible further objection is that Parliament could still amend or repeal these Acts using normal legislative processes, for example in the case of the European Union Act 2011, without first holding a referendum. However, there are clear indications that this argument is no longer as reliable as it once was. For example, the UK Parliament has explicitly altered its law-making procedure in a binding manner by enacting the Parliament Acts 1911 and 1949, replacing the House of Lords' absolute legislative veto with a delaying power. In *R. (Jackson) v. Attorney General* [2005] UKHL, Lord Steyn stated:

> 'Parliament acting as ordinarily constituted may functionally redistribute legislative power in different ways. For example, Parliament could for specific purposes provide for a two-thirds majority in the House of Commons and the House of Lords. This would involve a redefinition of Parliament for specific purpose. Such redefinition could not be disregarded.'

c) Additionally, if the UK Parliament recognises the role of the Scottish Parliament in amending or repealing its own powers, this implies a renunciation of part of its sovereignty. This is not something new in UK legislation. For example, section 4 of the 1934 Statute of Westminster states that:

> 'No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.'

There have been numerous precedents of the UK Parliament renouncing part of its sovereignty, in the cases of postcolonial states, whereby the UK Parliament renounced part of its sovereignty over its former colonies, for instance in Anguilla, Antigua, Grenada, St Kitts and Nevis, St Lucia and St Vincent and the Grenadines.[8].

**Implications of Permanence**

16. If the proposed changes to the wording of Clause 1 were adopted, what would this mean in practical terms? Firstly, it would mean that Scotland would escape the constitutional uncertainty of having its devolved institutions revoked by the UK Parliament, which currently enjoys a hierarchical relationship with regard to Scotland.

17. Second, it implies that the Scottish Parliament's powers and competences cannot be unilaterally amended or revoked by the UK Parliament, which is also a current ability of the UK Parliament.

18. Third, it ensures that the Scottish Parliament has a legal right to propose or veto any future legislation to change its powers, competences or institutions; in this way it becomes full self-determining within the framework of the UK state.

[8] See Hepburn, E. (2015) 'Written Evidence by Dr Eve Hepburn to the Inquiry into Constitutional Implications of the Draft Scotland Clauses', submitted to the House of Commons Political and Constitutional Reform Committee, 6 February.

19. Taken together, then, these clauses would guarantee the permanence of the Scottish Parliament and ensure that any changes to Scotland's devolved status could only be made with the consent of both the UK and Scottish parliaments.

20. Scholars of constitutional politics and law would describe this model – of the Scottish Parliament having legally entrenched powers – as a *federacy* model. Federacy models shared many features with traditional 'federal' systems, in that the substate unit and a larger state are linked in a federal relationship in which the substate unit has constitutionally guaranteed autonomy. This, in federacies, the substate unit has a say over whether its powers may be amended or dissolved; this implies this it may also veto any changes it disagrees with. This feature is what entrenches the permanence of the substate autonomy in federal systems.

21. However, what distinguishes 'federacies' from other traditional federal models – such as Germany, Canada, Belgium or the USA – is that in federacies the autonomous institutions of a substate territory in an otherwise unitary state may be made permanent, *but without the necessity of dividing the rest of the state into separate substate political units*, and therefore 'federalizing' the rest of the country. In the present circumstances, it seems unlikely that the UK will undertake a more profound and radical process of federal reform across the entire territory, and thus the federacy model is more appropriate to understand Scotland's evolving status in the UK.

22. Stepan, Linz and Yadav (2011) offer a useful definition of a federacy[9]:

> 'a federacy is a political-administrative unit in an independent unitary state with exclusive power in certain areas, including some legislative power, constitutionally or quasi-constitutionally embedded, that cannot be changed unilaterally and whose inhabitants have full citizenship rights in the otherwise unitary state.'

23. In a federacy situation, similar to a devolved arrangement, substate units often enjoy substantial legislative autonomy over health, education, housing, economic development and so on, while the central-state government retains power over foreign affairs, defence, and currency. However, the act of making the autonomy of the substate unit permanent, which is the essential feature of federacies, means that the federacy arrangement "could not be unilaterally altered without exceptional majorities on both sides."[10] To that end, according to Stepan et al:

> "federacy arrangements would be much more binding on the central government of the unitary state than devolution or decentralisation. The latter two may be unilaterally reversed by parliamentary majorities, whereas a constitutionally embedded federacy can only be changed by mutual exceptional majorities."[11]

[9] Stepan, A., J. Linz, Y. Yadav (2011) *Crafting State-Nations: India and Other Multinational Democracies*. Baltimore: Johns Hopkins University Press.
[10] Stepan et al (2011), op cit, pp235-6.
[11] Stepan et al (2011), op cit, p236.

24. As examples, both Finland and Denmark have passed Autonomy Acts to constitutionally enshrine the self-governing powers of some of their sub-state units, including the Åland Islands, the Faroe Islands and Greenland. In each case, the central-state is unable to dissolve or alter the constitutional autonomy of the sub-state units without the agreement of the other party. Åland, the Faroes and Greenland can veto any competence transfer away from them and thus escape the constitutional uncertainty of their powers being abolished, which happens in the case of devolved states that endure a hierarchical relationship with the centre, such as Spain.[12]

**Implications of Scottish Permanence: the EU as a Case Study**

25. We would like to illustrate the implications of making the Scottish Parliament permanent, and ensuring that any relevant changes made to the Scotland Act would require consent from both the UK and Scottish Parliaments, through the use of a case study.

26. The case study is European integration: a process that has profound implications not only the competences of nation-states, but also for their substate units. Indeed, scholars have estimated that approximately 80% of devolved legislation in the Scottish Parliament is affected by EU directives and laws.

27. At present, if the UK Government were to commit itself to opting-in, or opting-out, of European common policies that would affect the competences of the Scottish Parliament, the Scottish Parliament currently has little legal basis to challenges these changes. The Scottish Parliament currently has a right to be informed about, and feed into UK policy on Europe, however it does not have a right to block any UK EU proposals that would significantly alter its competences. The EU is considered to be a matter of foreign affairs and thus reserved to the UK.

28. Furthermore, since it is states, rather than sub-state regions, that are EU members and signatories of EU treaties, it is the central government that represents the state in EU matters. However, in some EU member states, regions have obtained constitutional guarantees that ensure their ability to participate in the EU decision-making process if their exclusive powers are affected.

29. For example, the participation of Germany's 16 Länder in EU affairs is explicitly guaranteed by Article 23 of the German Constitution. Where the legislative or administrative competences of the Länder are at issue, they may participate in EU affairs through the Bundesrat, the second chamber of the German federal parliament in which the Länder governments are represented, whose view is binding on the federal government. In Austria, although the Bundesrat has a weaker role than its German equivalent, the Austrian Länder nonetheless were able to stipulate that their

[12] For more information on the constitutional status of federacies, see Hepburn, E. (2012) 'Recrafting Sovereignty: Lessons from Small Island Autonomies?' in A. Gagnon and M. Keating (eds) *Political Autonomy and Divided Societies: Imagining Democratic Alternatives in Complex Settings* (Basingstoke: Palgrave Macmillan); Hepburn, E. (2014) Forging Autonomy in a Unitary State: the Aland Islands in Finland', Comparative European Politics, 12, 468-467; and Watts, R. (1998) 'Federalism, federal political systems and federations', *Annual Review of Political Science*, Vol. 1: pp117-37. . For more information specifically on the constitutional legal relationship between Denmark and its two island federacies, please see the Home Rule Act of the Faroe Islands (1948) and the Greenland Home Rule Act (1978); and for Åland's relationship with Finland, see the Act of the Autonomy of Åland (1991).

consent to EU membership in January 1995 was conditional on a guaranteed legal status for on their participatory role in EU matters.

30. In the UK, in the absence of federal constitutional provisions securing the position of sub-state governments at EU level, it would be necessary to adopt legislation and tighten the existing concordats and memoranda of understanding between the UK and Scottish Government in order to protect the Scottish competences affected by EU law and to detail the working practicalities for EU policy making. Existing arrangements fail to do this sufficiently adequately.

31. If the Scottish Parliament were to be made permanent, and it was given a right to protect its competences (through requiring mutual consent for any change), then it would have a legal basis to halt any UK policies on Europe (or indeed, any other international treaties) that would affect its competences.

32. An example of this occurring in a different case was when Finland entered negotiations for EU membership, and put this to a referendum in 1995. Because joining the European Union would have a profound impact on the competences of the Åland Islands – which enjoys federacy status in Finland – Åland had a legal right to halt Finnish EU membership if it did not agree with the terms. In the end, Åland held a referendum on EU membership, which succeeded, and accession went ahead. However, if the referendum had failed in Åland, and the federacy had objected to joining the EU, Åland might have blocked Finland's EU membership (or it might have been able to negotiate an opt-out of membership – as in Greenland).

33. An alternative case study is that of Greenland, a federacy in Denmark. In 1973 Denmark joined the European Community. Later that decade, Greenland was granted a federacy status through the Greenland Home Rule Act (1978), which gave it extensive autonomy and a permanent legal basis. Upon achieving home rule, Greenland held a referendum to leave the EC due to popular concerns about European fishing regulations and their harmful impact on Greenland fishing rights, and the EEC ban on seal skin products. The referendum passed and Greenland withdrew from the EEC while the rest of Denmark retained membership.

34. There are a couple of issues to draw out of these examples. First, if the UK proposed to radically alter its relationship with the European Union – as is currently being proposed by the UK Government – then the Scottish Parliament could potentially veto any changes proposed by the UK Parliament that had a profound impact on its competences. These could include any changes resulting from the withdrawal of EU membership, which would have a significant impact on the competences of the Parliament. Likewise, if the Scottish Parliament were truly made permanent, then it would also have a right to block any opt-ins to European or other international treaties that would result in the amendment of its competences.

**Conclusion**

35. If the UK Government is sincere in its commitment to making the Scottish Parliament permanent, then this permanence should be legally meaningful rather than 'legally vacuous' as has been described by leading legal scholars. It would mean that the devolved Scottish parliament has control over its competences and powers, and

that these cannot be adjusted or removed from the Parliament without its consent. This paper has outlined some proposals to give flesh to the meaning of 'permanence'. It has suggested amending some of the language in Clause 1 of the draft Scotland Bill to move it from being a symbolic declaratory statement that has no legal weight or recognition in current UK law, to making it legally meaningful and enforceable. This includes removing the power of the UK Parliament to unilaterally dissolve the devolved institutions of Scotland, and giving the Scottish Parliament a legal voice to propose, approve or veto any changes to its status or competences.

36. The proposed re-wording has also included a new provision that any changes to the Scotland Act must require mutual consent from both the UK and Scottish Parliaments, giving the Scottish Parliament greater control over its destiny and ensuring a form of equal partnership between Scotland and the UK that is characteristic of federal-type arrangements. There are legal precedents for the UK Parliament renouncing a degree of its sovereignty, including the renunciation of a certain amount of its sovereignty to the EU and to the UK's former colonies. It would not be unthinkable to apply the same self-limitations with regard to Scotland.

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