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Constitutional Change – Without End?

Charlie Jeffery

The outcome of the Scottish independence referendum in September 2014 confirmed Scotland's continuing membership of the UK – at least for the time being. It did not take long after the referendum for some who had campaigned for Scottish independence to begin envisaging a second referendum. Indeed, in early 2015 all the political momentum in Scotland appeared to be with the pro-independence Scottish National Party. The SNP had more than tripled its membership to close to 100,000 since the referendum. It had managed a smooth transition from Alex Salmond's leadership to that of Nicola Sturgeon, the new Scottish First Minister. Its main rival in Scotland, the Labour Party, found itself in a rather different succession debate, sparked by Johann Lamont's resignation statement complaining about the lack of autonomy given by the party at Westminster to the party in Scotland.

Against this background, and even after the election of the higher profile figure of Jim Murphy as Lamont's successor, the SNP forged ahead in the opinion polls, not just in Scottish Parliament voting intention, but also in voting intention for the UK election in May 2015. Labour's traditional advantage in Westminster voting intention in Scotland appeared to have been swept away. Former Labour voters who had swung behind the independence cause in the referendum appeared with that to have loosened the bonds which had made Scotland a vital stronghold for Labour at Westminster and looked set to make the SNP Scotland's biggest party in the House of Commons.

All this helped produce a mood in the SNP that felt a mandate for a new referendum could be won rather sooner than the 'generation' Alex Salmond had imagined would need to elapse before a second independence vote. There was, perhaps, an element of hubris in that mood which overstated the curious sense of post-defeat honeymoon that the SNP enjoyed, amid Labour's disarray, after the referendum. There was also some of the characteristic insularity to which all sides in the Scottish constitutional debate can be prey, which failed to grasp that other parts of the UK – in particular England, but also Wales and Northern Ireland – were engaged in their own constitutional debates and that these also had the potential to reshape the union of nations that makes up the UK. It is not just in Scotland that challenges to the configuration of the UK's union are to be found.

Indeed we have seen a constitutional chain reaction unfold since September 2014 which has transformed the seemingly straightforward 'Yes-No' of the Scottish referendum into something more complex and unpredictable that spills over across the UK's internal boundaries. Wales and Northern Ireland figure in this at the margins. The Welsh debate about 'fair funding' often takes the higher levels of public funding per head in Scotland as its benchmark. And the proposal to devolve corporation tax in Northern Ireland is easily a rationale for demanding corporation tax devolution in Scotland. But the central issues are the separate debates that have unfolded in Scotland and England, and the way they interact with each other.

Scotland

The Scottish No in September 2014 was not an endorsement of the UK political system as is. The Scottish Social Attitudes Survey has shown that support for the status quo – that is a Scottish Parliament with the package of powers it can currently exercise – has ranged between 21-27 per cent over the last five years.¹ Most Scots want a more powerful Parliament, but are split between the options of independence or additional devolution.

In effect the referendum became a contest between those two options – and not between independence and the status quo – in its final two weeks. As the opinion polls closed to a dead heat two weeks before the referendum, the No side was forced to strengthen its commitment to additional devolution, culminating in 'The Vow' issued by David Cameron, Ed Miliband and Nick Clegg two days before the referendum on 16th September. That led to Cameron's announcement of Lord Smith's appointment to head a cross-party commission on additional devolution in his post-referendum statement on the morning of 19th September. And Lord Smith managed to corral the three pro-union parties plus the pro-independence SNP and Scottish Greens into producing an agreed set of recommendations on additional

devolution by the end of November. Those in turn became the basis of a draft bill published by the UK Government in late January 2014 and ready to be introduced to the legislative process after the UK election in May 2014. The core elements of the Smith proposals and the draft bill are fuller tax autonomy and the devolution of some aspects of welfare policy.

But it is not as simple as that. At the point of its publication the SNP, while ‘banking’ the additional powers set out in the Smith Commission report, also condemned them as not enough and falling far short of the extent of powers they felt had been implied by some of the lofty rhetoric (‘Home Rule’, ‘near-federalism’) around ‘The Vow’. And the SNP has kept the pressure up since. Emboldened by its opinion poll lead it sees some prospect of holding the balance of power at Westminster after the UK election and with that beefing up Smith in the direction of ‘devo-max’ as payment for propping up a possible Labour-led UK Government. ‘Devo-max’ for the uninitiated would mean a Scottish Parliament responsible for everything except defence, foreign affairs, currency and monetary policy.

Strikingly Labour’s response to the SNP opinion poll lead has been to compete on nationalist turf, trying to outdo the SNP in pursuing Scotland’s interests within the UK. In early February we even saw the curious constitutional concept of the ‘Vow-plus’ announced by former Prime Minister Gordon Brown in early February 2015, in which additional guarantees and clarifications were given around the welfare powers proposed by Smith. It is clear that this rapidly evolving understanding of what additional devolution means is not the product of clear-headed thinking based on identifiable constitutional principles. What we have seen is a process of constitution-making driven by opinion polls, with series of short-term tactical positions being taken and then abandoned as first the Yes side fleetingly pulled ahead in September 2014, and later as the SNP built its commanding lead in 2015 Westminster voting intention.

England

Where this tactical expediency will end is unclear – except that it now has deep resonance in the debate about how England should be governed. England has emerged as a political unit by default since the devolution reforms of the late 1990s. As the government of Wales, Northern Ireland and – in particular – Scotland has become embedded the absence of institutional recognition of England has stood out increasingly starkly. After the failure of Labour’s regionalisation reforms in the first half of the 2000s alternative options for recognising England as a whole emerged. While a Campaign for an English Parliament has remained a fringe force the Conservative Party has for over a decade, and with varying degrees of interest and commitment, shown an interest in English Votes on English Laws, or EVEL, the adoption of special procedures in the House of Commons for laws that affect England.

While a Commission set up to look at EVEL (the McKay Commission) reported in 2013, there appeared little appetite for action – that is until 19 September 2014, when David Cameron flanked his announcement about the Smith Commission with a commitment to introduce EVEL. In one sense he had good reason to do so. Status quo political arrangements in England (being governed by laws passed by all MPs in the House of Commons) is about as popular as the status quo in Scotland: in varying question permutations the Future of England Survey, which has now been carried out regularly since 2011, has found support for the status quo never to reach 30 per cent and typically to hover around the 25 per cent mark. And among all the alternative options – stronger local government, city-regions or regional assemblies and an English Parliament – EVEL has always been the most popular.ⁱⁱ

But it is doubtful that Cameron was thinking in that way when announcing his conversion to EVEL. Rather more significant was a tactical move against Labour, as EVEL would negate Labour’s traditional strength in Scotland and make it more difficult for Labour to win a stable UK-wide majority. The same logic applies of course if the SNP wins big in Scotland in May 2015; if EVEL were introduced SNP votes would weigh less in creating a majority for a possible Labour-led government. With one MP and little prospect of adding much, if anything to that total, the Conservatives of course have no Westminster strength to lose as a result of EVEL.

Probably more significant than anti-Labour tactic was a need to ward off dissent within the Conservative Party in England. A number of influential voices – including Boris Johnson, John Redwood and Andrew Tyrie – posed the question before and after the Scottish referendum why Scotland should get additional

powers while England remained unrecognised. Concern that the party was not ‘standing up for England’ also ran the risk of leaking votes to UKIP, to all intents and purposes an English nationalist party. For this mix of tactical reasons William Hague was charged with drawing up proposals for EVEL just as Lord Smith was to lead the process of recommending more powers for the Scottish Parliament.

Hague’s process led to a range of proposals for different forms of EVEL being published in December with one of them singled out as the Conservative Party’s preference in early February 2015. That preference was to be the basis for a Conservative manifesto commitment for May 2015 and was justified – as the initial idea had been by Cameron on 19 September – as a necessary counterpart of additional devolution in Scotland. Constitutional change in Scotland and England were entwined in the Conservative imagination. But just as the Smith proposals were widely seen as incoherent and expedient, so are Hague’s on EVEL. Hague’s is a tactical position taken for short term advantage, with little thought about the (considerable) complexity of implementing EVEL in practice.

Change at the UK Level

So the 2015 UK election is set to see constitutional issues loom large in both Scotland and England, with pressure for change in Scotland reinforcing arguments for change in England. Both those logics of change in turn impact on the UK’s central political institutions. Tax and welfare devolution for Scotland add complexity to a situation in which before, by and large, the areas of responsibility of the Scottish Parliament were clearly demarcated from those of the UK Parliament. So, for example, the Scottish Parliament was (and is) responsible for almost all aspects of health policy and pre-tertiary education in Scotland and the UK for hardly any.

Tax and welfare, by contrast, will become areas of shared responsibility should the Smith proposals be implemented. Smith’s tax devolution will require new and complex intergovernmental relationships in fiscal policy (some of which were already under development as a consequence of the 2012 Scotland Act which brought an initial tranche of tax powers). Welfare devolution will require equally complex intergovernmental coordination between London and Holyrood. At the same time EVEL could transform the operation of the UK Parliament, especially if EVEL prompts a tighter framing of legislation by its territorial reach and defines a large body of law as England-only. Some UK Government departments – like Health and Education – would become even more explicitly English than they are now at the same time as others – like the Treasury and the Department of Work and Pensions – would become enmeshed in new intergovernmental relationships with their Scottish equivalents.

These would not be especially logical outcomes and would not appear to suggest strong prospects of enduring stability. They would be the product of tactical expediency, and would no doubt be positions to be abandoned if new tactical expediency so demanded. As the dust settles after the next UK election, the words used by Paul Cairney at the start of this Special Issue to describe the outcome of the Scottish referendum may well apply then just as well, and presage yet further change: ‘the result was not decisive and did not settle the matter’.ⁱⁱⁱ

ⁱ Curtice, John (2013), *The Score at Halftime: Trends in Support for Independence*. Edinburgh: Scotcen, p.3, at <http://www.natcen.ac.uk/media/270726/SSA-13-The-Score-At-Half-Time.pdf>; Eichhorn, Jan and Paterson, Lindsay (2014), *Who is Still Wavering? Turnout and the Undecided*. Edinburgh: Scotcen, p. 4, at <http://www.natcen.ac.uk/media/563073/ssa-2014-turnout-and-education.pdf>.

ⁱⁱ Wyn Jones, Richard, Guy Lodge, Charlie Jeffery, Glenn Gottfried, Ailsa Henderson and Daniel Wincott (2013) *England and its two unions: The anatomy of a nation and its discontents*. London: IPPR, pp. 13-14, at http://www.ippr.org/assets/media/images/media/files/publication/2013/07/england-two-unions_Jul2013_11003.pdf; Jeffery, Charlie, Richard Wyn Jones, Ailsa Henderson, Roger Scully and Guy Lodge (2014) *Taking England Seriously: The New English Politics*. Edinburgh: Centre for Constitutional Change, pp. 18-19, at http://www.futureukandscotland.ac.uk/sites/default/files/news/Taking%20England%20Seriously_The%20New%20English%20Politics.pdf.

ⁱⁱⁱ Paul Cairney, ‘The Scottish Independence Referendum: What are the implications of a No Vote?’, *Political Quarterly* **THIS ISSUE**.