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UK Constitutional Law Association

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Stephen Tierney: Is a Federal Britain Now Inevitable?



The [Smith Commission Report](#) issued today promises a restructuring of the United Kingdom which may prove to be more significant than the devolution settlement of 1997-98 itself; the acquisition of extensive tax and welfare powers would make Scotland one of the [most autonomous regions](#) in western Europe.

Notably the UK's economic and fiscal coherence has hitherto been a key factor in allowing the asymmetrical and ad hoc nature of devolution to embed itself without any great disruption to the constitutional structures of the central state. With the dismantling of this system it seems that a tipping point might well be reached for our lop-sided and messy system of territorial government. The Smith Commission proposals, if implemented, will have knock-on consequences for several fundamental features of the UK constitution: parliamentary supremacy, the idea of the House of Commons as a national chamber for Britain, possibly the nature and composition of the House of Lords, and the relative freedom of the UK Government in its dealings with the devolved executives. It is perhaps ironic therefore, but I believe also inevitable, that a process which was designed studiously to avoid the federal question will now bring federalism to the table as possibly the only medium term solution to the deep imbalances which will come with further, radical powers for the Scottish Parliament.

How Does Smith Raise the Federal Question?

Federalism has rarely been seen as an [attractive option](#) by the British political class, and its feasibility as a constitutional project for Britain is certainly [not beyond question](#). But some kind of federal solution will surely be needed to deal with two related issues: the extent to which Scotland's representation within the House of Commons, so far only marginally affected by devolution (reduced from 72 to 59 by way of the Scotland Act 1998 [as amended](#)), will appear ever more anomalous as the Scottish Parliament's powers expand; and the very real risk that as Scotland becomes ever more detached from Westminster, the Union will become largely irrelevant to many Scots. The latter is far more dangerous since it could well mean that Scottish independence is in the longer term now more rather than less likely. If this is true the unionist parties, which make up the majority of the Smith 'Commission' (which was in reality an inter-party bargaining group), risk seizing defeat from the jaws of referendum victory.

Viewed in this way it is not too dramatic to say that federalism may become the last throw of the dice for the Anglo-Scottish union: serving both to manage relations between a hollowed out central state and its nations/regions, and giving Scotland a sense of purpose in union as well as a sense of strength in autonomy.

I have discussed the inadequacy of the Smith process [elsewhere](#). I won't dwell on that issue here except to observe that once again, as in 1997-98, the UK has embarked upon a radical reorganisation of territorial authority on the hoof, formulating powers for Scotland without a broader conversation about what this will mean for the wider UK or for how Parliament functions.

But while from the perspective of 'winning' the referendum there was arguably a political imperative to set up Smith (see [The Vow](#)), this does not change the fact that the exclusion of the rest of the UK from its deliberations makes little sense. While independence is arguably a unilateral decision, further devolution for Scotland is not, and surely cannot be dealt with only by Scottish politicians determining simply what Scotland wants. The UK Government itself recognised this in 2012. It ruled out a multi-question referendum which would include a third option of 'devo-more' on the basis that further devolution would have to be discussed and negotiated across the UK; there was certainly sense to this. But on 18 September this was precisely the alternative to independence which was offered to voters. The Vow in effect meant that those voting No were not choosing the status quo but instead were signing a blank cheque for the as yet unformed Smith Commission.

Leaving process and principle to one side, the substantive consequence of this is that we have yet another asymmetrical process that promises to transfer more and more powers to the Scottish Parliament, making an already very lop-sided system of territorial decentralisation ever more so. On this basis the Smith report can only be a proposal. The UK Government will surely only agree to the increased powers for the Scottish Parliament it recommends if the whole package works to the advantage of the rest of the UK, for example by reducing or removing the perceived Scottish subsidies contained within the Barnett formula. The Smith Commission attempts to answer the Scottish question; but in doing so it in fact also raises the British question: how will the institutions of the British state adjust both to manage these new powers and to deal with the issue of fair representation across the state?

Federalising Britain: Correcting the 'Representation Deficit'

There is much confusion about what federalism is, partly because of a failure to distinguish 'federation', which is often used to provide a very strict definition of the institutional nature of a federal state, from 'federalism' which is a much more flexible term, capturing what [Daniel Elazar](#) calls the inter-related 'self-rule' and 'shared rule' dimensions of territorial relations within a state.

From this perspective we can see the lop-sidedness of UK devolution as being all about the grant of 'self-rule' with very little focus upon 'shared rule'; dispersing power to the Scotland, Wales and Northern Ireland without also binding them closely within the institutional structures of the central state. This is in effect a [representation deficit](#) and Smith indicates that steps must be taken to avoid devolution falling further into the black as it were. The radical levels of tax devolution which Smith presages must be accompanied by a reimagining of the place of regions and nations within the decision-making bodies of the central state. This is needed both to correct unfairness within the system (for example a now more stark West Lothian issue) and to stem the pathology of a slow descent towards independence which might result from a system that offers detachment without any correlating integration.

Here are four questions which must now be answered after Smith:

- Can further devolution be proposed only for Scotland, without provoking decentralisation across the UK?

An issue that accompanies the lop-sidedness of devolution is its strong asymmetry; what I have called double asymmetry: only some parts of the state are devolved, and those which are have very different models of government.

Each of these two features is likely to change. There are now proposals for strong devolution for Manchester. Attempts by the Blair government to promote a regionalist agenda fell flat but a new agenda, focused also on cities, which promises powers over areas such as housing, transport and economic development might be bolstered also by representation for English cities and regions in a revamped House of Lords (discussed below). Another incentive for regional powers could well be the sense that a Scottish Parliament with tax powers might use these to gain different forms of competitive advantage which should be countered within English regions. There is no mention of English devolution in Smith but it is now on the agenda.

If the powers of the Scottish Parliament increase, Wales will no doubt lobby for further competences if the current trajectory of Wales tracking Scotland's growing autonomy continues. Federalism does not require symmetry, but in the past ten years we have seen Welsh devolution move closer to the Scottish model and this trend could well continue.

- Can powers be taken away from Westminster with no impact on how Westminster is composed or how it operates?

Immediately after the referendum David Cameron tied new powers for Scotland to a concomitant recalibration of the powers of Scottish MPs at Westminster. This was shot down immediately by the Labour Party and the Prime Minister back-tracked. But it appears increasingly that this was a tactical retreat. The West Lothian question cannot be avoided; apart from anything else it will be an issue at the General Election next year. This need not mean an English Parliament but it will require a revision of the role of Scottish MPs at Westminster, perhaps along the lines of the McKay recommendations.

Another proposal, which would go some way to deal with the representation deficit, is reform of the House of Lords. Ed Miliband in his speech to the Labour Party conference in September 2014 suggested a new chamber of the nations and regions of the UK. This idea was earlier advanced by Gordon Brown. This would only be feasible if accompanied by meaningful devolution to English regions and cities and again it is not mentioned in Smith. But such a reformed chamber could offer a genuinely union-focused institution at the centre of the state, pushing back against the relentlessly fissiparous trajectory which Smith alone might otherwise deliver.

- Can the Scottish Parliament become one of the most powerful sub-state legislatures in the Western world with no formalisation of the competence limits between it and Westminster?

Another dimension typical of a federal system is that both the central and regional tiers of government have constitutionally-delineated spheres of operation. The reassertion of parliamentary supremacy in, for example, the Scotland Act is another way in which the UK has hitherto looked non-federal. But Smith now proposes that the Scottish Parliament be made 'permanent' (para 21). Such a move would presumably also extend to the prohibition of removal of its powers without the Scottish Parliament's consent: Smith confirms that the Sewel convention will be put on a statutory footing.

There are various ways in which this could be done. One is of course a self-conscious reconstitution of the state – reforming the state's rule of recognition around a new foundational document: a Liberal Democrat report has called for 'a declaration of federal union'. But this is surely unnecessary. Some arrangement analogous to the European Communities Act 1972, but building in more explicit self-limitations on Parliament's powers, would no doubt satisfy those who want guarantees of Scottish home rule, without dealing with the *kompetenz-kompetenz* issue which is still left open post-*Factortame*. This seems to be what Smith envisages in providing that its permanence will be guaranteed by 'UK legislation' (para 21). Another related way to do this would be through a new Act of Union or Acts of Union passed in parallel by the two parliaments. Technically it could be argued that each could be open to repeal (s37 of the Scotland Act 1998 would need to be taken into account), but by another reckoning such a double endorsement could take on an unsettled constitutional status as did the 1706/07 Acts, at least as viewed within the Scottish legal system. Smith also refers to the 'sovereign right of the people of Scotland to determine the form of government best suited to their needs' (para 20); again, if any such reference were to be included in the preamble of a new statute, this would add considerable weight to the constitutional status of legislation designed to 'entrench' the Scottish Parliament.

- Can a territory enjoying such a delegation of powers continue to interact with Whitehall on the basis of informal and discretionary arrangements?

Another area which has been lacking is any formalisation in the ways in which sub-state executives interact with the UK government. So far devolution has worked through very informal arrangements through the Joint Ministerial Committee system, supported by Memoranda of Understanding and supplementary 'concordats'. If the Scottish Parliament is empowered to set radically different fiscal and welfare priorities this could put great strain on the system and some form of formalisation may well be needed. This is recognised firmly by Smith. Lord Smith himself in his foreword to the Report asserts that 'weak inter-governmental working... needs to be fixed. Both Governments need to work together to create a more productive, robust, visible and transparent relationship.' This is fleshed out in Pillar 1 of the Report which calls for the 'urgent' reform of the JMC and a new Memorandum of Understanding to formalise inter-governmental (and inter-parliamentary) relations and open them up to 'much stronger and more transparent parliamentary scrutiny' (para 30). The proposals extend also to the area of UK relations with the EU. Smith recommends that Scottish Ministers be 'fully involved' in agreeing the UK position in EU negotiations relating to devolved policy matters, that they be consulted before final UK negotiating positions relating to devolved policy matters are fixed, and that devolved administration ministers be allowed to speak on behalf of the UK in Brussels in certain circumstances (para 31).

These measures could also help resolve the representation deficit by again giving Scottish (and surely the other sub-state governments) a clearly demarcated say in setting central government policy priorities in areas of shared concern. Certain issues could be unpalatable for some, for example giving the regions effective veto powers in relation to certain matters, perhaps exercised through the reformed second chamber (a measure that would require amendment to the Parliament Acts). But powers of this kind may be needed to give the union a real sense of meaning to those on the periphery.

Federalism: Feasible Within our Unwritten System?

To conclude, the federal idea is a more open canvas than the term 'federation' would suggest. It is flexible and open to a range of institutional

possibilities; arguably it does not even require full-blown codification through a new foundational document. Indeed, it seems to me that the UK has been on a federal trajectory at least since 1998 and that Smith can be seen as another stage, albeit a dramatic one, on this incremental journey. But a number of important changes do seem likely to accompany a significantly strengthened Scottish Parliament. For example, we may well see a demand for regionalism in England, a recalibration of the House of Commons, and possibly also radical reform to the House of Lords. Efforts to make the Scottish Parliament permanent will take on a federal perspective, seeming to limit Westminster's supremacy in this sphere at least; if this occurs a concomitant formalisation of respective executive powers also seems likely as Smith suggests.

Such reforms would both extend and crystallise the 'self-rule' dimension of a federalising UK while also offering institutional corrections to the representation deficit. Whether all of this will create a stronger sense of partnership and a renewed sense of belonging to a common union we simply don't know, but without such a broader set of reforms the Smith process may well further unsettle the union it was intended to save.

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4 comments on "Stephen Tierney: Is a Federal Britain Now Inevitable?"

[imhowarth](#)

November 28, 2014



Reblogged this on [Mooseington Press](#) and commented:

This is a really good article looking at the the potential impacts of devo-max as outlined in the Smith Commission proposals for the future of Scottish devolution. The concept of a reconstituted House of Lords as a House of the Regions is in my opinion a key one if the Union is to be strengthened rather than weakened by the Smith Commission Proposals.

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