

## **The British Constitution and Post-Referendum Scotland: A Personal Comment**

**Aileen McHarg, Professor of Public Law, University of Strathclyde**

The three years leading up to the independence referendum was the most exhilarating and exhausting period of my academic career. It was a hugely busy time: attending, organising and speaking at events; reading and writing about the implications of referendum; trying to keep up with the voluminous literature; and engaging in discussion, both on- and off-line. But it was an immense privilege to be able to observe and participate in such a momentous constitutional debate; an extraordinary learning experience both as regards the current governance of Scotland and the possibilities for change; and a wonderful opportunity to forge new connections within academia and beyond.

It was also sometimes an uncomfortable experience, raising the question of how and where to draw the line between participation in the constitutional debate as an academic observer and as a citizen with a vote to cast and strong feelings on the subject. Some academics seemed untroubled by any such conflict, apparently perfectly happy to use their academic credentials to promote their political beliefs. For myself, though, I found it difficult to reconcile the demands of academic engagement and transparency, on the one hand, with the expectations of academic detachment and even-handedness, on the other. It was only relatively late in the process that I publicly declared my support for the Yes campaign. By that stage my desire as a citizen to do what I could to promote the cause had overcome my fear as an academic of reputational damage from abandoning an avowedly neutral stance. But even so, I was careful to avoid (I hope) claiming greater expertise than I actually possessed, and unwilling to defend positions that I did not believe to be justifiable. I also remained acutely conscious of the limited contribution to the debate that *legal* academics could make. Certainly, there were legal issues to be addressed on the path to independence, but the idea that there was a legal case to be made either for or against independence struck me as particularly absurd. The choice to be made was an irreducibly political one, and any legal difficulties (for instance, as regards an independent Scotland's membership of the European Union) were also likely to be resolved politically.

That said, it was ultimately impossible to divorce my personal and professional responses to the referendum. Having started out undecided on the referendum question, my gradual shift towards support for independence was to a large extent informed by my analysis of the problematic nature of Scotland's current constitutional position – as a minority nation within a state which struggles to make sense of its multi-national nature – and my inability to see a satisfactory solution to it short of independence. Indeed, far from resolving the question of Scotland's constitutional future, my sense is that the independence referendum has served to intensify constitutional dissatisfaction within Scotland (and beyond) and made it harder to resolve. Not only did the fact of the referendum endorse the idea of Scotland as a self-determining political unit, but the largely negative terms in which the No campaign was conducted did little to build a positive defence of the United Kingdom as a state.

Although the referendum ultimately produced a clear victory for the No campaign, it does not – three months later – feel like a defeat for the independence cause. On the contrary, the 45% Yes vote was a significant achievement given that the level of support for independence was consistently around 25% to 30% at the beginning of the campaign. Moreover, since 18 September, there has

been an extraordinary surge in support for pro-independence parties, and recent opinion polls show increased support for independence. Constitutional questions continue to dominate public debate in Scotland, and Scottish and UK politics remain considerably disengaged. In these circumstances, it seems to be a major challenge to rebuild the legitimacy of the UK state in Scotland, and to find a lasting constitutional settlement that will satisfy public opinion in Scotland, without (further) alienating public opinion elsewhere in the UK.

The No vote in the referendum does not, of course, mean that there will be no constitutional change. One of the ironies of the campaign was that – having ruled out a second question on further devolution as being constitutionally inappropriate – the Unionist parties found themselves obliged to promise that a No vote did not mean a vote for the *status quo*. Thus, immediately after the referendum, the UK government set up the Smith Commission to consider further powers for the Scottish Parliament, as well as launching a process to consider the implications of devolution for the governance of England. Separate processes for reforming devolution in Wales and Northern Ireland are also underway. However, it is hard to be optimistic about the long-term implications of these reform initiatives.

One problem is that the processes are highly disjointed. Asymmetry has been a persistent feature of devolution in the UK; each devolution settlement (and the lack of it in England) has developed separately, in response to the distinctive needs and desires of the national unit in question. While this is understandable, and in many ways desirable, the implications for the UK as a whole are potentially highly problematic. This is because there is no sense of an overall constitutional re-settlement. There has been no explicit rethinking of the nature of the state to accommodate its multi-layered and increasingly differentiated system of government, while the fragmentation of the devolution process(es) means that the focus is on the distinctive governance needs of the constituent parts of the state, rather than on what binds them together. The lack of any coherent reimagining of the territorial constitution also makes it less likely that the individual reform processes will succeed. Without some broad equivalence in the governance arrangements in all four constituent nations the so-called ‘West Lothian Question’ – the question why MPs from devolved nations should vote on English-only matters in the UK Parliament – is impossible to resolve satisfactorily, and is therefore likely to remain a source of resentment. Similarly, without abandoning the theory of the unlimited sovereignty of the Westminster Parliament, the Smith Commission’s recommendation that the Scottish Parliament be made permanent and the Sewel Convention (the principle that the UK Parliament will not exercise its legal power to legislate on devolved matters without the consent of the relevant devolved legislature) made legally binding is impossible to guarantee, again risking constitutional discontent. Asymmetry also creates apparent anomalies, and therefore an inbuilt tendency to instability, as each devolved nation seeks to catch up with the most powerful. For instance, there may be good reasons why the UK government has agreed to devolve corporation tax to Northern Ireland, yet the Smith Commission has ruled out its devolution to Scotland, but it may be difficult to convince a Scottish public with an appetite for extensive autonomy that this is anything other than contradictory.

As far as the proposals for further devolution to Scotland are concerned, the recommendations made by the Smith Commission are generous from some perspectives. They go beyond what any of the Unionist parties had proposed before the referendum and, if implemented, will make the Scottish Parliament one of the most powerful sub-national legislatures in the world. Nevertheless, it

seems unlikely that the proposals will satisfy Scottish demands for autonomy. This risk is exacerbated by the fact that Commission report itself – produced in unseemly haste through a process of inter-party bargaining – has no coherent story to tell about how and why powers should be divided between the Scottish and UK levels. Like much of the referendum debate, the report is outcome driven: powers are recommended for devolution to enable the Scottish Parliament to achieve particular policy outcomes rather than on any principled basis. This again creates anomalies and is likely to lead to tensions in future, as the constraints on the Scottish Parliament’s legislative freedom become apparent. The élite-dominated, rushed, and exclusively Scottish nature of the process also leaves the implementation of the proposals after the 2015 General Election vulnerable to attack both from those (such as some English MPs) who would prefer less radical reform (or even none at all) and from those (such as a potentially enlarged group of SNP MPs) who would prefer more.

However, perhaps the greatest problem with the Smith Commission proposals, assuming they are implemented, is that any further increase in the powers of the Scottish Parliament, bringing with it additional policy differentiation between Scotland and the rest of the UK, risks simply reinforcing the sense that Scotland is semi-detached from the UK. The strong probability, in my opinion, is that, far from creating a lasting constitutional settlement, post-referendum reform of devolution in Scotland will prove merely to be another step on the road to eventual independence. Such an outcome is not inevitable, but to avert it would require a far more radical change in the constitutional arrangements and territorial politics of the UK than is, or seems likely to be, on offer. If only incremental and piecemeal reform is possible, then the question is not if, but when and in what circumstances another independence referendum will take place.