

# Scotland: If Not Independence Then a Federacy?

Written by Eve Hepburn

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EVE HEPBURN, DEC 5 2014

A great deal of analysis has gone into why Scotland voted 'no' to separating from the UK, in a referendum on independence held on 18 September 2014, by 55% to 45%. In a series of sophisticated public attitudes surveys, colleagues at the University of Edinburgh revealed that voters were strongly motivated by consideration of the 'risks' associated with independence, in particular the financial risks. This may be understandable in a period of economic uncertainty following the deepest downturn in post-war history.

Yet another, complementary reason may be the impact of a tumultuous series of events that took place in the last two weeks of the campaigns. In an effort to stem the tide of the pro-independence campaign, which put 'yes' voters ahead of 'no' voters for the first time in the polls (at 51:49, respectively), the leaders of the three main UK political parties sprinted up to Scotland to make their case for the Union. In doing so, David Cameron (Cons), Nick Clegg (LibDem), and Ed Miliband (Labour) jointly committed themselves to 'extensive new powers' for Scotland. Their 'vow' was published on the front page of one of Scotland's largest daily newspapers.

### Changing the Constitutional Goalposts

By making their vow at the last minute, the pro-Union 'Better Together' camp substantially changed the political goalposts of the debate (and also incurred much wrath for potentially flouting campaign rules by introducing new information *after* many Scots had voted by post). Rather than a clear and simple 'yes versus no' vote on independence, which was enshrined in the Edinburgh Agreement that set out the legal basis of the referendum in 2012, the BT camp had now shifted the debate to 'yes versus *something else*'. But what that 'something else' was, for the future of Scotland and the UK, remained conspicuously unclear when the vow was made.

At the time, some UK and Scottish political leaders took the 'vow' to mean a form of enhanced devolution, or 'devo-plus', that would set the UK on the road to federalism. Indeed, for former Prime Minister Gordon Brown, who delivered a last-minute 'barnstorming' speech defending the Union (and whom many have credited for swaying undecideds and winning the referendum), the future of the UK was clear: it would be a federal one. He wasn't the only one endorsing the 'f-word' in the last few days of the campaigns; other members of the Labour, Conservative, and Liberal Democratic parties were also advocating the federal principle (if not a federation) for a newly conceived United Kingdom based on shared sovereignty.

### Beyond the Smith Report

Now that the Smith Commission has reported, which was established in the wake of the referendum to review more powers for Scotland, are we any closer to understanding what that 'something else' implied in the vow was? Are we closer to the federal vision that Brown and others conceived as an alternative to independence?

The Smith report gives us some nuggets to begin re-thinking the nature of the Scottish-UK union. Figuring largely is the enhanced form of self-rule that Scotland would enjoy if the Smith recommendations were implemented. In particular, Scotland would gain increased fiscal autonomy through control of income tax rates, air passenger duty, and VAT. Also at the centre of debates are the limited new welfare powers that would be granted to Scotland, such as disability allowance and attendance allowance (amounting to less than 15% of Scottish welfare spending). So far,

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so relatively predictable: Smith has in many ways opted for the lowest common denominator of agreement between parties on the incremental enhancement of devolution.

### A Federal UK?

So what of the federal principle; of shared sovereignty and not just self-determination? There are some indications in the Smith Report of the need to formalise intergovernmental relations in the UK, for instance by strengthening Joint Ministerial Councils and giving Scotland an opportunity to represent the UK in meetings of the EU Council of Ministers.

But what of *shared rule*: the 'yang' to the 'yin' of self-rule in federal systems? Here, the picture is less convincing. There were no references in the Smith Report to the enshrinement of Scotland's participation in UK decision-making, for instance through the creation of a second chamber. (Although the future composition of the UK legislature is also currently the subject of a government enquiry, as to whether to enhance English self-rule through 'English Votes for English Laws' in the UK Parliament, there have been few debates on reforming the House of Lords.) And there were no references to the constitutional entrenchment of Scotland's powers so that Scotland has a direct say in competence (re)allocation – another distinguishing feature of federalism. As a result, some scholars have called Smith a far cry from federalism.

Seemingly, the creation of a UK federation was not the 'something else' implied in the vow made by UK leaders to defuse support for secession. Instead, the Smith Report, and subsequent statements made by the Secretary of Scotland Alistair Carmichael, imply that Scotland may come to resemble a different 'f-word' in the battery of federal systems identified by leading scholar Ronald Watts (1999), and one that is much less known in UK political circles: a federacy.

### The Federacy Model

Federacies are a bit of a well-kept secret in studies of constitutional systems. There are about twenty of them existing in the world today, but they receive a minimal amount of attention (especially when compared to their 'big sister' federations) in the academic literature. This may be because federacies tend to constitute quite small, though distinct populations, and many of them are islands.

In a federacy arrangement, a substate unit can enjoy the benefits of association with the state, but at the same time is able to retain substantial autonomy and self-government (Elazar, 1987). In other words, there is considerable *self-rule*, but much less *shared-rule* than envisaged in federations. Stepan, Linz, and Yadav (2011) provide us with a helpful definition:

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.

### Entrenching the Scottish Parliament

So the Smith Report certainly provides Scotland with enhanced self-rule, which is a cornerstone of federacies. But what of the second distinguishing feature: constitutionally embedded autonomy for the sub-state unit which guarantees a non-hierarchical form of 'partnership' with the central-state? This is where a recent announcement from the UK Secretary of State for Scotland makes things interesting.

In response to the UK party leaders' joint pledge to 'make the Scottish Parliament permanent', Alistair Carmichael said that the permanence of the Scottish Parliament could be constitutionally entrenched through an Autonomy Act that contained a Charter of Autonomy for Scotland. Carmichael drew on the example of the Autonomy Acts employed to regulate the UK's relationship with its former colonies.

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However, Carmichael might have also looked to other contemporary EU states to see how such an arrangement might work. Both Finland and Denmark have passed Autonomy Acts to constitutionally enshrine the self-governing powers of some of their sub-state nations and regions, 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 revoked, as so happens in the case of devolved states which endure a hierarchical relationship with the centre, which is Scotland's current status in the UK state (see Hepburn, 2012).

## The Pros and Cons of Federacies

So where does this leave Scotland? Is a federacy arrangement an attractive alternative to independence or indeed the status quo? Certainly, the entrenchment of extensive self-rule – whereby Scotland would have powers over all domestic matters whilst the UK would remain responsible for foreign affairs, defence, and currency – may be an appealing proposition to many Scots seeking 'devo-max'. It would stabilise Scotland's status within the UK, as it could only be dissolved by mutual agreement. Furthermore, it would enable the devolution of a much larger area of (welfare) powers as currently proposed by Smith. Indeed, my colleagues at Edinburgh have found, through a recent public attitudes poll, that 63% of Scots support the full devolution of both taxes and welfare benefits.

However, there are also disadvantages of federacies. In particular, there is only limited shared rule, whereby substate units have little influence over central-state decision-making. Given Scotland's history throughout the post-war period of enjoying informal influence within Whitehall (in a trade-off for formal autonomy), would being cut off from decision-making in London be a conceivable option?

When conducting research in the Åland Islands in 2010, I discovered that there was little appetite amongst the islanders for more shared-rule or representation in Finland (see Hepburn, 2014). In this particular federacy, the most important thing was their constitutionally guaranteed self-rule. However, there was also frustration of Åland's weak voice in the development of Finland's EU policy, which had a direct bearing on Åland's domestic competences. If Scotland were to go down the federacy route, then, constitutional lawyers would have to return to the age-old academic debate about whether or not Europe – which is seen as increasingly important to Scotland across a wide range of policy areas – can be viewed as a part of its domestic competences.

## The Future of the UK and Europe

All of this may become irrelevant, however, if the UK votes to leave the European Union in a proposed referendum in 2017. If this takes place, it is England – not Scotland – that may have a lot to learn from the federacy model. In 1985, the Danish federacy of Greenland withdrew from the (then) European Economic Community (EEC), whilst the rest of Denmark retained its membership.

It is not implausible, given current public attitudes in Europe, to imagine a scenario in which the majority of people in England voted to leave the EU while the rest of the country – including Scotland, Wales, and Northern Ireland (which all have more pro-European publics) – voted to stay in. Most commentators have agreed that the result would still be a British exit from Europe (or a Brexit), given England's disproportionately large population. But give a thought to a different federacy-inspired example, whereby England could adopt the Greenland model of leaving the EU, while the rest of the UK outside England could retain EU membership. Now that would be a feat of constitutional acrobatics that would endow the UK with the most innovative governance arrangements in the world.

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