

Scotland Bill

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Re: Paragraph 18 of the Smith Commission Report

Introduction

This paper focuses on Paragraph 18 of the Smith Commission Report which is contained in the Introduction to Chapter 2 of that Report under the heading “Heads of Agreement: Introduction”. Paragraph 18 reads: “It is agreed that nothing in this report prevents Scotland becoming an independent country in the future should the people of Scotland so choose.”(1)

It is reasonable to infer that the agreement set out in Paragraph 18 relates to the choice of the people of Scotland made pursuant to a referendum. It is further reasonable to infer as a logical consequence that it must lie with the Scots electorate, as represented in the Scottish Parliament, as to whether or not a referendum is to be held on this issue. If that were not the case, and Paragraph 18 were sought to be interpreted to refer for example to a decision of the United Kingdom Government or Parliament as to whether or not a referendum might be held, the reference to the choice of the “people of Scotland” contained in Paragraph 18 would become meaningless.

The issue as to whether the Scottish Parliament should be permanently empowered to call a legally binding referendum was itself ventilated at the time when the Smith Commission was deliberating. (2) However although Paragraph 15 of the Smith Commission Report states that: “The UK government has undertaken to produce draft clauses implementing the consensus set out in this report” and although Paragraph 18 clearly resulted from a consensus, such a referendum holding power is not included within the three “pillars” identified in Paragraph 16 of that Report.

In an article published in December 2014 in *The Journal of the Law Society of Scotland* entitled: “The case that equality within the Union requires Scotland to have a permanent power to hold a legally binding independence referendum” (3), which forms the major part of the material which follows, I have pointed out that Paragraph 18 of the Smith Commission Report resonates with elements of the UK Government’s white paper, *Scotland in the Union: a partnership for good*, presented to Parliament in 1993 by the then Secretary of State for Scotland, now the Rt. Hon. Lord Lang of Monkton, DL. In his foreword to the white paper, the then Prime Minister John Major stated as to the Union: “That Union is almost 300 years old. As I have said before, no nation could be held irrevocably in a Union against its will.”

The white paper went on to assert at para 10.3: “And if the Union is to flourish in the future a more concerted recognition of Scotland’s status as a nation will be necessary. It should be a mark of Scotland’s self-confidence in her own status as a nation that she shares her sovereignty with the other parts of the United Kingdom. But the willingness to share that sovereignty must never be taken for granted.” (4)

Neither Paragraph 18 of the Smith Commission Report nor the 1993 white paper elaborate on the mechanism by which the “will” or “choice” of the Scottish people is to be expressed.

Partnership and symmetry

John Major’s statement as to the 1707 Union that “no nation could be held irrevocably in a Union against its will” is of course applicable from a jurisprudential point of view to England just as much as to Scotland. An attempt, supported by the Whigs but opposed by the Tories, to bring the Union to an end through Parliament, only narrowly failed in 1713. (5)

Although perhaps hypothetical from a political point of view, jurisprudential analysis requires one to consider what would be the position should it be desired to hold a referendum in England (including Wales for these purposes) with a view to securing England’s independence from Scotland. The topic becomes less purely hypothetical when one considers that a vote to provide for an “in-out” EU referendum could be carried in the UK Parliament at any time whether or not a majority of MPs representing Scotland – or indeed any MPs from Scots, Welsh or Northern Irish constituencies – were in favour. A close vote to retain EU membership in such a referendum in which, for example, a majority of the votes within Scotland were perceived to have tipped the balance in favour of remaining within the EU, could cause campaigners in favour of leaving the EU to come to regard England’s continuance of the Union with Scotland as a brake on their ambition.

English votes on English issues

One here enters realms which bring to mind by analogy the so-called “West Lothian question.” (6) The thinking behind the UK Government’s asymmetrical devolution programme which led to the establishment of the Welsh Assembly and the Parliament of Scotland emerges *inter alia* from evidence given by the then Justice Secretary, Jack Straw, to the Commons Justice Committee inquiry “Devolution: a decade on”, which reported in May 2009.(7)

In his evidence to the committee on 13 May 2008, Jack Straw stated at Q682: “The prior point about the so-called ‘West Lothian question’ is whether or not you accept that the United Kingdom’s makeup in terms of its component parts is asymmetrical because of the huge dominance of England in terms of resources and of population and actually the resilience of its economy as well. If you do as I do and accept that, in the end, *English Members can determine anything in the Union and, if we got together, we could completely dominate the Union if we wished, if we had a common purpose, as it were, against Scotland, Wales and Northern Ireland.*”(8)

What one may derive from the above, applying it to the question as to the power to hold an English referendum on the Union (or for that matter a UK referendum on the EU), is that England (with Wales), as Scotland’s partner in the Union, has never required to be equipped with a specific legal mechanism for holding a referendum on leaving the Union. Whereas Scotland’s block of MPs could always be outvoted in the House of Commons no matter the issue, and whether the issue were “English” or “Scottish”, MPs representing English constituencies could outvote the MPs of all the other component parts of the UK in the Parliament at Westminster. (9)

Fairness and the eye of the beholder

Devolution has nevertheless had the effect of reducing the number of Scots issues on which MPs representing English (and Welsh and Northern Irish) constituencies may normally vote. In whatever form Paragraph 22 of the Smith Commission Report concerning the Sewel Convention is eventually implemented, the Scottish Parliament will nevertheless remain a subordinate legislature under the sovereignty of the UK Parliament with its built in majority of Members representing English constituencies.

The complaint of unfairness to England which has led to renewed calls for “English votes on English issues” arises through the continuance of Scots MPs remaining eligible to vote on “English” issues where such issues affecting Scotland have been devolved to the Scots Parliament. A mirror issue in turn arises. If there is indeed unfairness to England in such circumstances, how is one to view MPs representing English (Welsh/Northern Irish) constituencies being eligible to vote (and outvote MPs representing Scots constituencies) on issues affecting Scotland which remain reserved to the UK Parliament?

We appear to be confronted with an anomaly

One is left at the end of the day with a rather anomalous situation as to the referendum power.

First, the UK Government asserted through its white paper in 1993 that Scotland is a sovereign nation in a continuing Union and could not be held in the Union against its will.

Secondly, the Smith Commission has affirmed that there is nothing in its Report to stop the people of Scotland choosing that Scotland should become an independent country.

Thirdly, Scotland’s partner in the Union is by virtue of its numerical superiority able, should it wish, to provide for an English (and Welsh) referendum on the Union without need of any of the votes of the members of the UK Parliament for Scots constituencies (or those of Wales and Northern Ireland either). In fact MPs from English constituencies could simply vote through legislation in the UK Parliament repealing the Acts of Union without holding a referendum at all.

Fourthly, and despite Scotland and its people’s supposed entitlement not to be kept in the Union against its or their will, its Parliament is seemingly regarded at present as dependent on the UK Government and Parliament empowering it on an *ad hoc* basis, on request from the Scottish Government, to legislate for a legally binding referendum in which the will of the Scottish electorate may be expressed.

Fifthly, it may be noted that statutory provision is already made for a legally binding referendum in Northern Ireland under s 1(1) of the Northern Ireland Act 1998, which states that: “It is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purposes of this section in accordance with Schedule 1.”(10)

An unequal “partnership”

It is difficult jurisprudentially to justify a situation as between “partners” in which the means to bring the Union to an end are available continuously *per se* to one partner, England, through its dominance of the UK Parliament, but are only available on an *ad hoc* basis to the other partner, Scotland, and with its “partner’s” permission.

This is effectively a legal imbalance which is capable of being perceived as constituting an unfairness which could, if the UK Government wished to demonstrate continued adherence to the spirit of the 1993 white paper, and indeed to the spirit of Paragraph 18 of the Smith Commission Report, easily be rectified (whether through the ongoing process related to the implementation of the Smith Commission Report or otherwise).

The above discussion provides a useful context within which to consider the complaint as to unfairness to England. Devolution has not reduced the built in majority which MPs representing English constituencies continue to hold in the UK Parliament. Quite the contrary it was as a result of the establishment of the Scottish Parliament that as from the UK general election of 2005, the number of MPs at Westminster representing Scots constituencies was reduced from 72 to 59. (11)

Conclusion

In so far as the permanent referendum holding power is concerned, the advantages of legal certainty and of jurisprudential equality as between partners, taken together with the spirit of Paragraph 18 of the Smith Commission Report, combine to form a logical and coherent case for empowering the Parliament of Scotland to legislate whenever it might see fit for a legally binding referendum upon independence. (12) In this way statements as to the “will” or “choice” of the Scottish people would be given meaning of a legal rather than of a purely theoretical or “cosmetic” nature, and any perception of an unfair imbalance as between the Union partners on this topic removed.

References

- (1) The full report may be accessed at: www.smith-commission.scot/smith-commission-report/
- (2) See www.bbc.co.uk/news/uk-scotland-scotland-politics-30023639 and www.bbc.co.uk/news/uk-scotland-30019858
- (3) It may be accessed at: <http://www.journalonline.co.uk/Magazine/59-12/1016739.aspx>
- (4) I refer to this white paper and other relevant matters in an article published in the *Juridical Review* 2014 (3), 165-176 entitled “The ‘State’, the ‘Crown’ and the Union of Scotland and England: Reflections on what might become the Sovereign’s ‘new clothes’”.
- (5) See Dicey and Rait, *Thoughts on the Union between England and Scotland* (1920), 298-300. See too for the draft bill before the House of Lords:
www.nationalarchives.gov.uk/pathways/citizenship/rise_parliament/uniting.htm
See also the *Juridical Review* article, footnote (4) above, at 167.
- (6) There is a very useful House of Commons library note (dated 2012) available on this issue which may be accessed at:
www.parliament.uk/business/publications/research/briefing-papers/SN02586/the-west-lothian-question
The March 2013 *Report of the McKay Commission on the Consequences of Devolution for the House of Commons* is accessible at:

www.futureukandscotland.ac.uk/sites/default/files/papers/McKay%20Commission.pdf

(7) See:

www.publications.parliament.uk/pa/cm200809/cmselect/cmjust/529/52902.htm

(8) Emphasis added. His full evidence may be accessed at:

www.publications.parliament.uk/pa/cm200809/cmselect/cmjust/529/8051301.htm

(9) The McKay Commission report does in fact identify “best practice for the UK Government to consult the devolved administrations before legislating on these topics”. See para 111 of the McKay Commission report, referred to at footnote (6) above. “Even in the case of topics that are not within devolved competence, however, devolution guidance continues to acknowledge the relevance of the underlying principle: by making it best practice for the UK Government to consult the devolved administrations before legislating on these topics”. Devolution Guidance Notes may be accessed at: www.gov.uk/government/publications/devolution-guidance-notes

(10) Schedule 1 may be accessed at www.legislation.gov.uk/ukpga/1998/47/schedule/1
See further the article cited at footnote 3 above, at 175-176.

(11) See as to “Scottish constituency cull”:

newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/1/hi/scotland/4093765.stm

(12) The order made in 2013 pursuant to which the referendum was held in 2014 may be accessed at www.legislation.gov.uk/uksi/2013/242/pdfs/uksi_20130242_en.pdf

The Seventh Report of the House of Lords Constitution Committee on “The Agreement on a referendum on independence for Scotland” contains interesting material on the s 30 order and may be accessed through www.publications.parliament.uk/pa/ld201213/ldselect/ldconst/62/6202.htm