ARE WE IN THE RIGHT PROCESS?

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INTRO

- No: odd and perhaps even unique process

- Pathway constraints on 'getting to' debates about foundational constitutional issues

- Some critical issues

PROCESS TO DATE:

- **May 2011**
  - The Scottish National Party is re-elected with a majority of seats in the Scottish Parliament
- **October 2012**
  - The UK and Scottish Governments sign the 'Edinburgh Agreement', setting out the terms of a draft Order under section 30 of the Scotland Act 1998 to confer express power on the Scottish Parliament to authorise a referendum on independence.
  - **December 2012**
    - The Scottish Parliament approves the draft section 30 Order.
  - **January 2013**
    - The House of Commons and House of Lords approve the draft section 30 Order.
  - **February**
    - The Privy Council formally approves the order conferring power on the Scottish Parliament to authorise the referendum - the Scotland Act 1998 (Modification of Schedule 5) Order 2013.
- March 2013: Scottish Government and UK Government publish documents which begin to deal with future process

PATHWAYS OF DISEMPOWERMENT

- Legalism (constitutional substance through process)
- Executive deal-making (constitutionalism as pacting)
- Creation of a binary choice for non-binary decision
- Abstract decision (sovereignty, change)
- False decision? (ghost of third question)
  - Internal sovereignty
  - External sovereignty

FUTURE PROCESS: SCOTTISH GOVT

- Scottish Government
 - Vote (no later than 30 December 2014)
- Constitutional Platform (post December 2014)
  - UK Elections 7 May 2015
- Elections to new Scottish Parliament (Scottish Government in place) (5 May 2016)
- Constitutional Convention (post May 2016)
  - EU referendum (by end of 2017)?
- New Written Constitution (some time later)

- New pathway and dangers of continuing pathway?

FUTURE PROCESS: UK GOVT

UK Government

- Not set out a process

    (Unless people in Scotland choose otherwise, the UK Government will continue to be one of Scotland's two governments and cannot enter into discussions that would require it to act solely in the interests of one part of the UK. Moreover, the Scottish Government has no mandate from people in Scotland to negotiate the terms of independence unless and until they obtain one in the referendum. (Paragraph 2.43, Scotland Analysis)

- No timetable commitment

    (While the Scottish Government has indicated that its preferred timetable would be for negotiations to conclude and a new state to be established by March 2016, it is not possible to predict now the outcome of the negotiations, nor how long they would take. (Paragraph 2.39, Scotland Analysis)

FRAMING OF QUESTIONS BY GOVERNMENTS

- Three critical relationships

  - Within Scotland

  - Between Scotland and rest of the UK

  - Scotland and rest of world

- Or five?

  - Within rUK and between rUK and world

WITHIN SCOTLAND

- Scottish Government
  - Symbolically – dual British/Scottish identity: either or both
  - Key symbols of 'British-ness' still in place – monarchy and pound (!)
  - Defining nature of National Identity ('civic nationalism' with value element)

    "a thriving and successful European country, reflecting Scottish values of fairness and opportunity, and promoting prosperity and social cohesion" (Scotland's Future, 2013)
  - No change or only 'nice' change

WITHIN SCOTLAND

- UK Government

  - 'better together' – two identities better than one or one and a half

  - devolution gives sufficient power to control relationships within Scotland and is 'flexible'

BETWEEN SCOTLAND AND UK

- ◉ Scottish Government

  - ▪ Levers of power and Scottish government ('economy, welfare and international relations)

- ◉ UK Government

  - ▪ Reduced influence (Scotland is 'good for the UK'), inefficiency (Guaranteeing the security of people in Scotland and the whole of the UK, providing significant economic opportunity, representing their interests in the world and allowing resources and risks to be shared effectively. (Paragraph 1.18))

- ◉ Comment

  - ▪ curiously without substance except in generalizations
  - ▪ Hard to put substance first: neither side has incentive to audit how much can be achieved within their least preferred option (also limits articulation of exactly why powers are needed)
  - ▪ Mutual disinclination to appeal to identity-based nationalism (neuters main ground on which these debates are fought elsewhere)
  - ▪ To extent that structure is not articulated, appeal rests on commitments to 'styles and policies of government'

BETWEEN SCOTLAND AND REST OF WORLD

- A Scotland with a new place in the world as an independent nation, participating fully in Europe and the community of nations, on the basis of equality, responsibility and friendship (no nuclear weapons, no undemocratic wars)

versus

- A Scotland with no automatic status or entitlements to any international organizations and a weak repository of 'soft power'(at best)

(UK Government document: "seeks to answer the crucial legal question as to whether the formation of a new Scottish state means the creation of two new states, or whether the existing UK would carry on with England, Wales and Northern Ireland. Much depends on the answer to this question")

RUK CONSEQUENCES

- Triggers an internal 'constitutional' crisis: London v rrUK?

- Requires an external re-positioning rUK within world
  - Reduction in 'hard power'?
  - Re-opens other 'belonging' issues (Ireland, Gibraltar, Falklands, post-colonial justice?)

NO VOTE CONSEQUENCES

- No commitment to 'more' devolution. British document 'hints' (?) – devolution is 'flexible'

- No commitment to 'no more referenda' or time period before next one, and no idea of what other powers might be sought
    - Cf. Northern Ireland, Section 1 NI Act 1998, and sections 1 and 3, Schedule 1:

    - 1. . . . subject to paragraph 3, the Secretary of State shall exercise the power under paragraph 1 if at any time it appears likely to him that a majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland.

    - 3. The Secretary of State shall not make an order under paragraph 1 earlier than seven years after the holding of a previous poll under this Schedule.

CONTEMPORARY SECESSIONS

- Mutually agreed secession
  - Ethiopia-Eritrea, 1993
  - Czechoslovakia, 1993
  - Serbia-Montenegro, 2006

- Post-cold war dissolution (involving identity disputes against backdrop of conflict/authoritarianism)
  - USSR, 1991-2
  - Former Yugoslavia, 1990-1995
  - (Czechoslovakia, Serbia-Montenegro, and Kosovo – delayed dissolution?)

- Committed to as part of a peace process (internationally mediated,)
  - Sudan / South Sudan, 2011
  - Indonesia / East Timor, 2002
- Quebec/Canada and Catalonia/Spain

CONTEMPORARY CONSTITUTION-MAKING PROCESSES

- Consequent on mediated secession to put in place rule of law government in place of authoritarian (South Sudan, East Timor) Consequent on mediated peace agreement to put in place rule of law government in place of authoritarian / exclusive (South Africa, Philippines, Fiji, Colombia)

- Consequent on some sense of 'crisis' prompting radical democratic renewal – Iceland 2012, Ireland 2013 (note electoral reform, Netherlands, British Colombia and Ontario)

UNIQUE DIMENSIONS:

- Peaceful secession

- By mutual consent, but not mutually sought

- Governed by entirely domestic process (no 'underwriter' of negotiations)

- Constitution-making process, as pragmatic rather than born out of crisis over identity or values

SOME CRITICAL ISSUES

- Symbolism of citizenship and belonging: 'nationhood'
- Separation and Sharing – UK/Scotland
  - What underwrites sharing – values, identity or pragmatism?
  - Technology of sharing, borders as zones, cross border cooperation (Joint committees, cross-border bodies, East/West infrastructure, Joint Charter of Rights)
- Values for the society (rights, good government, global interdependence)
  - Inclusive participation (and how inclusive?)
  - Rights model
- What is the social democratic commitment: social contract?
  - Wealth-creation as prioritised as necessary to social rights (weaker rights provisions?)
  - Balancing act between wealth-creation and social rights (policy realm?)
  - Prioritization of fairness (structural rights basis)
- Soft power v hard power