

# THE CONDUCT OF THE SCOTTISH INDEPENDENCE REFERENDUM:

## Why voting on the final deal makes more sense

By Nigel Smith

September 2011

**Nigel Smith** - chaired the cross party campaign for a Yes vote in the Scottish Devolution referendum in 1997, advised the Yes campaign in the Northern Ireland referendum in 1998 and chaired the UK Euro No campaign from 2002 to 2004. In the latter role, he worked with the Electoral Commission for two years interpreting PPERA in preparation for the Euro referendum and then beyond its abandonment in June 2003 to the conduct of the NE Regional Assembly referendum in November 2004.

Since then he has visited referendums and initiatives in many countries including Switzerland, the US - notably California and Colorado and several of the EU Accession referendums. He has taken a special interest in how broadcasting balance is achieved during referendums talking to experts in UK, Ireland, Switzerland and Denmark.

He served on the Wilson Committee reviewing the fairness of the BBC's coverage of the EU. He has extensive contacts among practitioners & academics working in IR around the World.

When Michael Moore, Scotland Secretary, declared there should be two separate referendums to decide Scottish Independence he was nearer modern practice of constitutional referendums than perhaps he knew.

His suggestion was promptly put down by Nick Clegg reminding us that in Britain, referendums exist as a tool of governments. Despite the UK's considerable use of them, no independent procedure for their conduct exists, only precedents and sometimes conflicting precedents at that. The vacuum explains the tussle between the Scottish and British Governments over procedure and their freedom to collude on the worst possible option - one single pre-negotiation referendum.

In Switzerland, the World's leading referendum democracy, there would be at least two sequential referendums to decide so important an issue. In the US, a Federal Commission has recommended a two stage referendum be used to decide the long contested constitutional status of Puerto Rico. New Zealand has just used two stage referendums for a second time next year.

These countries are forcing public scrutiny into their process before a referendum is held on the final proposal. We should be careful before dismissing this as 'referenditis'. Their various approaches are more likely to establish a stable outcome than voting on an issue before it is negotiated.

There can be little doubt that two separate referendums, the first enabling inter-government negotiations to start between London and Edinburgh, the second held perhaps a year later, ratifying or rejecting the final deal, would be a measured way of dealing with a demand that has arisen peacefully from a democratic process. Although both governments could easily promote two referendums there is no sign that this is being considered. Unionists calculate probably correctly, that two sequential referendums would marginally increase the SNP first vote.

And if the SNP Commission had been truly independent, would it really have preferred a single referendum on a unilateral proposal to one on the final agreement between two Governments? If Denmark held a referendum after its Independence negotiations with Greenland and the UK held one after the Good Friday Agreement, why can't this be done in Scotland?

If not two referendums, could the two Governments strike a deal to hold the single referendum after the final agreement has been negotiated? At worst the work of a few civil servants would be wasted if Independence was rejected.

The Scottish People will vote once and only once, on a SNP White paper containing the opening negotiating position of the Scottish Government. Voters will not be asked to vote on the final outcome when much may have changed, more issues discovered that were overlooked or omitted, the transition effects on sections of society better understood and much of the 'arcane' detail and costs of cross-border arrangements will have been disclosed.

That is the current SNP proposal now supported by the British government.

Rather like asking the people of Northern Ireland to vote on the Good Friday Agreement with all its cross border arrangements *before* it was negotiated *not afterwards* as they actually did in the 1998 referendum. There are few lessons we can take from the post-conflict referendum in Northern Ireland but this is certainly one of them.

Instead of putting Scotland's one hundred and forty year old referendum history at the leading edge of the World's referendum practice, the SNP have misread the Independence referendums held in 20th century as established practice unbothered by their only partial relevance to modern Scotland.

For many of last century's independence referendums had an element of ethnic, economic or religious oppression sometimes actual conflict. What was sought above all was a clean break and as quickly as possible. These referendums were as much about liberty as good governance.

What the SNP will put before the Scottish people is a plan for the better governance of Scotland though some kind of free association, fiscal independence or Independence lite. But with its detailed cross border arrangements, it will break new ground in the affairs of nations making it very different from those earlier clean break referendums of the 20th century.

In a modern democracy, the SNP ought to be seeking not just the authority to negotiate but the full hearted ratification of the final deal by the people.

## **Justifying a single pre-negotiation referendum**

Beneath the headline issues for negotiation like tax and Trident lies a host of other details from public pensions, social security, common regulation and shared services of all sorts, from UK Regulatory bodies to cultural assets like the BBC and the galleries as well as transitional arrangements affecting millions of people. A 300 year old Union contains much detail at least some of which will prove controversial. Remember how in 1997, we were assured that a Supreme Court for Scottish Law was an 'arcane' detail.

Yet Nick Clegg sought to justify the single pre-negotiation referendum by saying that the voters didn't need to be bothered by the 'arcane' detail and should vote on the broad principle. But he knows only too well that while we may vote in broad principle, we are governed in detail. And if there was a scrutiny phase before the final vote only those arcane details identified as controversial would be carried into the referendum campaign informing not obscuring the broad principle at stake.

For their part, the SNP point to the 1997 devolution referendum as an example of voting on a proposal (from the Scottish Convention) and not on the final outcome. The difference is the Labour Party negotiated it in Opposition then became the Government able to use its

landslide majority to ram the agreement through Parliament largely as negotiated. The SNP can never be in this position so their White Paper is bound to evolve during negotiations. They are not comparable examples.

And if the landslide majority of 1997 had been used to increase the powers devolved to Scotland, post legislative devolution might have been very different from the original proposal and just the same argument for a vote on the final deal would have justifiably arisen.

## **Why have the two Governments colluded on one pre-negotiation referendum?**

The SNP will make their White paper as attractive as possible and if they win are free to adjust it after the referendum. The Unionists have made a similar calculation that a pre-negotiation referendum gives them the greatest opportunity to misrepresent the SNP proposals. With both sides wishing to retain the maximum flexibility with the 'facts', the task of the media, especially the broadcasters who have a special role in referendums, will be made significantly harder.

However by agreeing to a single pre-negotiation referendum, the Unionists have found themselves in a fix over the ballot paper question. The SNP White paper may be countered by one from the Coalition but as this referendum is in essence seeking authority to negotiate with the UK, the question must be about the SNP White Paper. The Coalition should be wary of forcing an inaccurate question onto the ballot paper as there are examples of referendums where voters see through such tactics.

These difficulties largely fall away with either a second referendum or a single post negotiation referendum because the question would be a simple accept or reject the jointly negotiated agreement.

The SNP White paper will look "positive". It may not be easily characterised as the "Breakup of Britain". If the Coalition repeat Labour's negative 1999 campaign "Divorce is a messy business" in a grand cross-party version without adding a strong positive element, the referendum would prove too close to call.

For Unionists, a single pre-negotiation referendum is a very high risk, all or nothing strategy.

## **The avoidable complication of a multi-option referendum**

The SNP have indicated their willingness to hold a multi-option referendum instead of a binary one on their White Paper.

Both sides should avoid a multi-option referendum because they don't work for major issues. The problem is not the design of the ballot paper or the counting of votes for which

the SNP have proposed an acceptable method if it is stringently applied. Multi-option means multiple campaigns and multiple arguments that media and voters find too difficult to handle. It is a standard wrecking tactic in US referendums for one side to attempt to confuse the voters by inserting a third option onto the ballot paper.

The SNP cite the 1997 referendum, as a multi-option referendum. Technically it was but there were only two campaigns and 9 out of 10 voters treated it as binary (Yes/No) referendum. In practice, it was a binary referendum.

There is a more subtle point.

Independence was never going to be on the ballot paper in 1997 but it could easily have featured in the campaign as an off ballot 'third option'. The SNP were scrupulous in keeping Independence out of the debate thereby contributing to the decisive outcome, a contribution for which the SNP have been given insufficient credit. The point is that they did their best in 1997 to give Devolution a clear run as a binary referendum. Both sides should do the same with Independence and leave other options for another day.

## **The danger of combining the referendum with an Election**

Nick Clegg's thoughtless combination of the AV referendum with recent Elections has come back to haunt him. Alex Salmond, Scotland's First Minister was very critical of the combination at the time so it is surprising to see him quoted in the *Toronto Globe & Mail* (4/6/2011) as prepared to hold the Independence referendum at the same time as the 2016 Scottish General election because, he said, it would conflict his opponents referendum campaign. The Independence referendum must be a standalone political event: to do otherwise would be plainly partisan.

## **Conclusion**

The Information flow during a referendum campaign is critical to a stable decision. At the moment both Governments appear set on a making this as hard as possible for the voters and the media with a pre-negotiation, multi-option referendum held at the same time as a General election. It could only be worse if the UK were to foist an artificial question onto the ballot paper. As things stand, this is the worst possible way to decide the future of Scotland and the UK.

Michael Moore was right after all. The post-negotiation referendum should be reinstated - either by the Coalition or by the SNP. Voting on the final deal just makes more sense.

Nigel Smith

21/9/2011