

A TIME TO LAY DOWN REFERENDUM RULES*

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There must be a sore temptation in some sulking Government quarters to regard the so-called "indecisive" Scottish referendum as an event which seriously discredits this particular method of popular consultation. The reason is that, unlike the 1975 Common Market referendum, this one committed the unforgiveable sin of giving the Government the answer they didn't want. Far from getting them off an awkward political hook, it has impaled Labour even more firmly than before.

This has been a severe caution to politicians about the unexpected perils of "asking the people". And, as a matter of fact, that warning applies just as much to future Conservative governments, however loudly the Tories may now be crowing about the way they imagine this particular poll has vindicated their trust in the permanence of the Union and the wisdom of the electors.

For, whether it is about complex constitutional matters like this, or about more sharply-focused issues like trade union rights, individual liberties or even penal reform (all of which have been suggested, from time to time, as subjects for consultative polls), the fact is that at the end of the day only governments can order referendums. What this one has shown is that governments can sometimes get it wrong.

Of course, it is perfectly possible to represent this poll as some kind of mystical vehicle of divine justice. Didn't Labour, after all, get exactly what they deserved? They were unable to agree about the Scottish Assembly proposals in Parliament. So they passed the parcel to the people. The people shook it, squeezed it, listened to it and promptly passed it back again.

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"I don't know what's in it either, mate. Here, you take it. Anyway, Tam says it's ticking."

In any case, should we necessarily be surprised that the people, having taken a bewildered lead from their confused elected representatives, should have produced such an appropriately ambivalent result? The debate in Parliament and the campaign itself had both been confusing enough, in all conscience, so why shouldn't the result reflect this?

On the "Yes" side, the crucial ambiguity, which continues to disfigure the parliamentary debate about what to do next, is how on earth Labour could seriously propose that a Scottish Assembly would strengthen the UK, when their main campaign allies, the Nationalists, said it was the first step to independence.

On the "No" side, the principal contradiction, which will contort discussion for just as long, is how on earth the Tories could seriously hint at a richer pot of gold at the end of another devolution rainbow, when most of them are quite clearly prepared to regard a "No" vote (even this minority one) as the absolute end of the matter.

The referendum was quite unable to resolve these inconsistencies. Indeed, it reinforced them. It did so because of its central defect: the fact that, whatever the original intention, the poll was very soon transformed from being a straightforward test of the popular acceptability of the Scotland Act, into an additional subterranean battle about the popular acceptability of the Government.

This shaped the tactics on both sides. It enabled the Tories to unite solidly behind the expectation that a "No" vote would cripple the government in its most vulnerable year. Labour managers encouraged this by assuming at the outset that the poll would be a convenient and final celebration of their party's regained ascendancy in Scotland, just before a General Election. In this, the referendum was simply an extension of the Scotland Act itself, which the Government had insisted on treating as a purely Labour party matter.

The message was clear enough. If Labour were going to be obliged to have this confounded Assembly, then by heavens they would make sure they shared with no one the credit for having delivered it. They proceeded in a manner which effectively excluded from any working relationship all those Conservatives, Liberals and Nationalists whose personality or machinery

could have helped them deliver the full potential "Yes" vote.

For the politicians the main lesson in all this is surely the clear demonstration of three dangers: the first is the danger of putting the Government's authority on the line through a referendum called on a specifically sectional issue; the second is the danger of doing so when the Government's own party has such internal doubts as to be incapable of providing enough troops on the day; and the final danger is in choosing a time for the poll when the result itself is put in hazard by the unpopular management of totally unrelated issues like — in this instance — pay policy and industrial relations.

For the rest of us — the two-thirds who voted both this time and last — the main lesson is surely the way the Scottish exercise has now confirmed what we may only have suspected in 1975: that we were not after all, as we may have fondly imagined, engaged in a solemn and historic consultation with our parliamentarians.

Only now is it possible to see the reality . . . that the device of the referendum is in fact little more than a shabby plaything of party politicians whose most spectacular facility throughout has been the perfectly dazzling display of fancy skating around some of the accepted conventions of British democracy.

It is this, much more than the Government's insufferable hand-wringing about the "inconclusive" result, which goes furthest towards discrediting the still-popular idea of the referendum as a useful and lasting part of the constitutional machinery of this country. Its validity will only be restored properly if we draw on the experience of this unsavoury Scottish poll to establish now some clear rules and firm understandings about the conduct of referendums in the future.

There are five quite specific respects in which Parliament badly needs to do itself and the rest of us a favour by thinking again about the non-existence of referendum rules, and about the propriety of those which have already been established through the "case law" of the two polls we have had so far. These are:

1. Timing

The Common Market poll established that the Government would dictate the timing of the poll, in much the same way as

they have prerogative to decide the date of a General Election at the most favourable moment in a five-year term. The Scottish exercise significantly modified that freedom.

A legislative amendment and a verbal promise extracted by the Assembly opponents ensured that this particular poll could not be held during the month immediately before or the three months immediately after a General Election. This helped to guarantee that the referendum became a secondary pawn in the primary manoeuvrings about the timing of an Election.

With almost eighteen months of Labour's term still to run, the opponents' amendment nevertheless made it impossible for the Government to make an immediate announcement about the timing of the referendum without also closing some of the early options for the all-important Election. For a critical period last summer, therefore, the date of the referendum had to be as uncertain and secret as that of the Election.

The way in which the referendum became inextricably bound up with the fate of the Government was a massive initial distraction from the debate about the issue of devolution itself. For future referendums the Government should announce the timing of the poll as part of the legislative package — much as was done, in fact, with the Common Market referendum.

2. *Threshold*

Both the Common Market and the Scottish referendums were "advisory". In theory Parliament retained the right to say that it would not consider itself bound by the result, however clear the majority. In practice, MPs did accept the straight 67-33% UK "Yes" majority on a 65% poll in 1975.

They broke new ground, however, with the Scottish poll by setting a voting threshold below which the Scottish Assembly scheme could not be considered entirely secure. If the "Yes" votes represented less than 40% of all those entitled to vote, then MPs would be given a chance to reject this year's straight 52-48% "Yes" majority on a 64% poll, and repeal the whole legislation.

This tricky little notion established two things. First, no matter how much MPs may protest the opposite, it did in fact breach the theory of the referendum as a purely advisory device. It not only instructed the Government on a specific course of action following a sub-40% "Yes" vote. In doing so it also

tacitly defined the mandate for implementation — for a "Yes" vote of more than 40% would clearly have had the moral force to bind Parliament, without the sour argument we are now having.

Secondly, it introduced an entirely new concept into British politics by ensuring that the final judgement of the result would take account of those who did not vote. On 1 March there were just as many abstainers as in 1975. But this time they have effectively been laid against the "Yes" total in a way which permits the Assembly opponents to proclaim, quite predictably, that 67% of the eligible voters did not want devolution. How many of them claim, by the same token, that 56% of eligible voters did not want the UK to stay in the Common Market?

There is a perfectly respectable case for inventing a yardstick to measure popular enthusiasm for a constitutional change of this sort — let us say two-thirds of those voting. There is absolutely no respectable argument for doing it in this way. It quite needlessly convulsed and embittered the campaign and damaged the prospect of reconciliation in the aftermath. Moreover, it set our electoral registration system a task for which it was never designed and for which it proved to be no match.

If MPs are ever tempted to play with this toy again, they will prevent it being regarded as a tawdry manipulation only by making two gestures: first, by ordering beforehand a comprehensive overhaul of our creaking and, in parts, rotten annual survey of eligible voters; and second, by insisting beforehand on a substantial increase in the scope and effectiveness of the postal franchise for the many thousands of voters whose disablement, illness and removal enforced their abstention when it really mattered.

3. *Information*

The Government made a serious error of judgement in not issuing a simple explanatory leaflet to all voters about the proposed change. This was done during the Common Market referendum. But on this occasion, the opponents of devolution threatened behind the scenes to withhold financial authority for the publication on the quite spurious grounds that it would be impossible to produce an unbiased description of the scheme.

The Government believed these threats and caved in. As

a result we are now being treated to febrile claims from the very people who were instrumental in preventing the distribution of such a leaflet, that voters did not understand the issues. In any future referendum, finance should be allowed for such a leaflet. Its "neutrality" could quite easily be guaranteed by an all-party committee.

4. *Broadcasting*

The Scottish campaign has left the normal understandings about Party Political Broadcasting (PPBS) in a total confusion. Tam Dalyell will not easily be forgiven for putting an elegant Etonian knee into the groin of Keir Hardie House, by persuading the Court of Session to ban the projected PPBs because they would have favoured the "Yes" side in a ratio of three-to-one.

Yet he had no alternative. Labour were determined to deny their influential "No" rebels the airtime which common fairness suggested they were entitled to have. The Court of Session ruling seems to have established that sponsored broadcasting during referendums should be sanctioned only on a strict "Yes-No" division, and not according to party interests.

That seems fair enough, but only if the ruling is now used to work out some clear new understandings about equality of access to sponsored broadcasting for future referendums.

5. *Money*

It is a simple fact that neither of the two British referendums have been regulated by any rules regarding finance. In normal elections, there are quite strict limitations on the amount of money that constituency organisations are permitted to spend to solicit votes. An election agent's accounts are open to legal challenge.

These requirements have not applied to the referendums. Even if it was impossible (which it is not) to ensure an upper limit of expenditure by both sides, it should certainly not be impossible to insist on the publication of campaign accounts.

It is, finally, a fair bet that not one single political finger will be raised in a serious effort to achieve any of these five reforms, as a means of rekindling the notion of fairness in the public's perception of the referendum device. By the time the next one comes round, the political circumstances will have changed — and so, you can be absolutely certain, will the rules.