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Stephen Tierney: Leaving Westminster: Constitutional Supremacy in an Independent Scotland

Posted on June 27 2014

On 16 June the Scottish Government unveiled its [Scottish Independence Bill](#) in an [address by Nicola Sturgeon](#), Deputy First Minister of Scotland, to the [Edinburgh Centre for Constitutional Law](#).

The referendum on independence for Scotland will be held on 18 September this year and commentators have been waiting for a detailed elaboration of the constitutional steps that would be taken by the Scottish Government in the event of a Yes vote by the people. The Scottish Independence Bill ('the Bill') sets out an interim constitution which, it is intended, will be passed by the Scottish Parliament to take effect on Independence Day (scheduled for 24 March 2016), and also paves the way for the drafting of a permanent constitution by a constitutional convention which will probably commence work later that year.

In a related [post](#) one member of my research team has looked at the transitional arrangements necessary to bring these changes about. In this piece I will set out the background to the proposal, look at the terms of the proposed interim constitution contained within the Bill, and consider the process by which a permanent constitution might be drafted. I will conclude by asking whether highly elaborate and detailed constitutions are really needed in a healthy parliamentary democracy, or whether in fact an independent Scotland would be better served by maintaining the advantages of the Westminster model, trusting in an open political process in which important decisions are left to parliament or to citizens acting directly in referendums.

The story so far

The Scottish Government reached [agreement](#) with the UK Government in October 2012 on the principle that Scotland can hold a referendum on independence. This was endorsed by way of [secondary legislation](#) and, consequently, the Scottish Parliament passed into law two bills establishing the [franchise](#) for the referendum and the [broader process rules](#).

Furthermore, the Bill builds upon an earlier declaration of the Scottish Government's constitutional ambitions. In November 2013 the Scottish Government published its White Paper, [Scotland's Future](#), which stated that an independent Scotland will have a [new written constitution](#). This paper announced that Westminster parliamentary supremacy would be replaced with the principle of popular sovereignty, a commitment reiterated in the Bill (section 2): 'In Scotland, the people are sovereign'. It is however anticipated that this sovereignty will manifest itself in a highly elaborate written constitution as a result of which the powers of the Scottish Parliament will be substantially curtailed.

Is the [Scottish Independence Bill](#) significant?

The Bill is notable for setting out both the substantive terms of the interim constitution and the process by which a permanent written constitution will be drafted following the Scottish Parliament elections in May [2016](#). The proposal is of course only for an *interim* constitution. It would take effect on 'Independence Day' in March 2016 (s1) but would continue in force only until a permanent written constitution for the State 'is agreed by or on behalf of the people of Scotland' (s4). We also need to contextualize this since it is a long way from taking effect. First, there would need to be a Yes vote in the referendum which current opinion polls do not suggest is likely. Secondly, the Bill is being offered up for consultation, so even its draft form is not set in stone. Thirdly, the passage of the Bill by the Scottish Parliament prior to independence would require legislation or at the very least a s30 Order in Council under the Scotland Act 1998, transferring the necessary powers to the Scottish Parliament. And fourthly, in being passed into law by the Scottish Parliament, the Bill could again be significantly amended.

But if the 'Yes Scotland' campaign is victorious in September the draft Bill will no doubt be the blueprint for the early years of Scottish independence. The Scottish Government, with a majority in the Scottish Parliament and with the momentum of a referendum victory, will doubtless get its way in the parliament after September. Secondly, although intended only as an interim measure, there may well be path dependency whereby a number of its provisions eventually find their way into a permanent constitutional document (the Scottish Government expressly anticipates this – [Explanatory Notes](#) p64).

The Interim Constitution: a bridge from parliamentary to constitutional supremacy?

There is no attempt in the [Bill](#) to put all of its provisions beyond the ordinary legislative process; the interim constitution is on its face open to repeal or amendment by ordinary act of the Scottish Parliament.

It is anticipated that in due course there will be a permanent written constitution in which the supremacy of that constitution over the powers of the Scottish Parliament is expressly declared. But until then, during the interim constitutional period, the Scottish Parliament will operate through a regime of self-imposed legislative restrictions in a limited number of areas. Most notably the Bill seeks to maintain the current provision contained in s29(2)(d) of the Scotland Act 1998 whereby the laws of the Parliament can be struck down on the grounds of incompatibility with Convention Rights (see the [Bill](#) ss 26 and 27). It is also anticipated that the Bill will 'sit alongside... a refreshed and rewritten Scotland Act' ([Explanatory Notes](#) p50), which will no doubt reiterate the human rights restriction, and will integrate the Human Rights Act 1998 into this renewed Scotland Act (partly through the principle of continuity of laws – the Bill, s34). We should also note s 24 which provides 'Scots law is of no effect so far as it is inconsistent with EU law'. Therefore, although Schedule 5 of the Scotland Act will be repealed, freeing the Scottish Parliament from the constraints of those matters currently reserved to the Westminster Parliament, the interim constitution is intended to re-impose restrictions on the competence of the parliament, from the inside as it were.

In technical terms the model will be of interest to Westminster commentators because it suggests a period of half-way transition from the Westminster model. The [Explanatory Notes](#) p60 make clear that there will be no 'hard amendment formula' in the interim arrangements. The status of the interim constitution will be preserved in part by a 'certification system' whereby a minister or MSP introducing a bill to parliament would declare if the new act would amend the existing interim constitution. The planned Scottish Supreme Court (see below) could not declare such amendments to be unconstitutional but could strike down the laws of the Scottish Parliament if incompatible with EU law or Convention rights.

This is a complex set of arrangements and after independence the status of the interim constitution will no doubt be addressed by the new Scottish Supreme Court (see below). It would be interesting to observe how the court would make sense of this quasi-entrenchment of rights and EU law in a system where the interim constitution itself is not entrenched. If the Scottish Parliament did act incompatibly with Convention Rights or EU law, in a fully self-conscious way, would a court consider this to be unconstitutional or would it treat ss 26 and 27 as self-imposed restrictions which the parliament of an independent Scotland is free to amend at will?

A permanent constitution for Scotland: entrenching policy?

One should be skeptical of course of the very idea of a '[permanent](#)' constitution. But whereas some countries do change constitutions frequently, in the post-war West constitutions have enjoyed more stability than in earlier times and in other parts of the world. We can assume then that a 'permanent' constitution for Scotland may indeed be a document of considerable durability.

One notable aspect of the Scottish Government's proposal is the desire to entrench within a permanent constitution so many issues which are in effect policy preferences.

In its 2013 [White Paper](#) the Scottish Government offered a fairly extensive list of what it thinks the constitution should contain. These have continued to be central to its vision for independence and a number of them appear in the interim draft constitution contained in the [Bill](#). For example:

1. equality of opportunity and entitlement to live free of discrimination and prejudice (see also the Bill s28 – although there is no specific reference in s28 to prejudice)
2. entitlement to public services and to a standard of living that, as a minimum, secures dignity and self-respect and provides the opportunity for people to realize their full potential both as individuals and as members of wider society (not in the Bill)
3. protection of the environment and the sustainable use of Scotland's natural resources to embed Scotland's commitment to sustainable development and tackling climate change (the Bill ss 32 and 33)
4. a ban on nuclear weapons being based in Scotland (the Bill s23 contains a commitment to 'pursue negotiations with a view to securing... the safe and expeditious removal from the territory of Scotland of nuclear weapons based there'.)
5. controls on the use of military force and a role for an independent Scottish Parliament in approving and monitoring its use (no specific reference in the Bill but s19, as well as committing Scotland to respecting international law, extends this also to promoting peace, justice and security)
6. the existence and status of local government (the Bill s17)
7. rights in relation to healthcare, welfare and pensions (not in the Bill)
8. children's rights (a duty on the Scottish Government to promote the well-being of children in Scotland – the Bill s29)
9. rights concerning other social and economic matters, such as the right to education and a Youth Guarantee on employment, education or training (not in the Bill)

It is notable that in the [White Paper](#) there was no commitment that a number of the proposed rights, such as the opportunity of education, training or employment and rights to welfare support and health care would be legally enforceable by courts but rather the more open-ended suggestion that they will be 'questions of social justice at the forefront of the work of Scotland's Parliament, government and public institutions.' Notably, these rights do not find their way into the Bill at all. But they may well reappear following the consultation process, or may find their way into a permanent constitution. In such an event, enforceability will be an issue, with a debate likely as to whether and how these are to be in any way legally actionable.

The Bill also declares that Scotland is a 'constitutional monarchy' (s7) and 'the Queen in Head of State' (s9). In the [White Paper](#) it was added that Scotland would remain a constitutional monarchy 'for as long as the people of Scotland wish us to be so'. This suggests that the head of state issue could be revisited in the process of drafting the permanent constitution. With the commitment in the Bill to popular sovereignty we might expect a debate about the compatibility of these different commitments.

Sovereignty of the Judiciary

The [Bill](#) also provides that the existing high courts, the Court of Session and High Court of Justiciary, will be in their respective areas of competence 'the Supreme Court of Scotland' (s14).

It is interesting that the current court system will continue. The Bill suggests that judges will be given fundamental powers including, in a permanent constitution, the power to review acts of the Scottish Parliament on a wide range of issues. Since judges will become very important political actors in an independent Scotland there will no doubt also be consideration as to whether a new, specialist constitutional court might be needed and also an enquiry into how judges are [appointed](#).

If it comes to drafting a permanent constitution it should also be noted that there are also other options available for constitutional review, such as a review committee of Parliament which could advise that draft legislation might be counter to constitutional principles, Parliament then retaining power to accept or reject this advice. The notion that judicial review of legislation is the automatic default option is highly questionable.

Drafting the Constitution: A Scottish Constitutional Convention?

The [White Paper](#) provides that, following the elections of May 2016, a constitutional convention will be established to 'prepare the written constitution'. This commitment is stated more firmly in the Bill (s33): 'The Scottish Parliament must, as soon as possible after Independence Day, make provision by Act of the Parliament for the establishment of an independent Constitutional Convention to be charged with the task of drawing up a written constitution for agreement by or on behalf of the people of Scotland.' One small point is that 'as soon as possible' could

be read to mean before the parliamentary elections scheduled for May 2016. From the [Explanatory Notes](#) one must assume this is not the intention of this provision since it would contradict the stated intention of the Scottish Government that it would be for the post-May 2016 Parliament to appoint the Convention.

The White Paper did not offer much detail as to the design of this convention, except that it would be 'open, participative and inclusive' and that the new constitution 'should be designed by the people of Scotland, for the people of Scotland'. The [Bill](#) also leaves the membership of the convention and its operational rules for the Scottish Parliament to determine, including 'the procedure by which the written constitution prepared by the Convention is to be agreed by or on behalf of the people.' (s33). In other words, we don't know yet if a referendum will be used to ratify a permanent constitution for Scotland.

The duty to establish a convention is a legally binding commitment within the Bill but since the Bill is open to repeal in the same way as any other act of the Scottish Parliament it will not in fact prevent the Scottish Parliament should it later wish, by way of legislation, to delay this process or amend how a new constitution is to be brought about. Again the response of the Scottish Supreme Court to such legislation would be interesting.

The [Bill](#) and its explanatory notes don't offer any detailed view as to what the convention should look like, but we know from the [White Paper](#) that the Scottish Government has been looking at 'international best practice' and the practical experience of other countries such as citizen-led assemblies and constitutional conventions British Columbia (2004), the Netherlands (2006), Ontario (2007) and Iceland (2010). This raises the question: will the process really be a popular and meaningful engagement with citizens, or will it be a largely elite-led event? Will in fact the new constitution be drafted by elites – politicians, civic society organisations, business interests, trade unions and local authorities? The [Explanatory Notes](#) attached to the Bill point towards a broad approach to civil society engagement. But there are significant democratic risks associated with constitutional conventions in relation to representation and accountability. There is also the problem of such processes being dominated by the most vocal elements of civil society who can use the process to embed their own particular policy preferences in the constitution which may not have the support of a plurality of citizens. In short, any move towards a permanent written constitution should be worked out very carefully to ensure that the process is genuinely democratic, popular and deliberative.

Inclusion of all parties?

The parties which constitute the 'Better Together' organisation – campaigning to keep Scotland in the UK – tend not to comment on the prospect of a post-independence constitution largely because they do not want to entertain publicly the prospect of a Yes vote. However, it is likely that all parties in Scotland will develop their own constitutional agendas in the event that Scots do indeed vote for independence.

The timetable set out in both the White Paper and the Bill makes clear that there will be time for this to take place. The constitutional convention will in all probability not be established until after the Scottish parliamentary election in May 2016. Parties will no doubt run in that election with manifesto plans for the constitutional process, setting out whether or not they agree with the constitutional convention route, and stating their respective preferences in relation to constitutional content. And indeed it may well be that one or more of the parties which are currently campaigning for a No vote will in fact be in government to oversee the move towards a new constitution.

Rejecting the Westminster Model: throwing baby out with the bathwater?

It seems sensible that an independent Scotland should have a written constitution to replace the Scotland Acts of 1998 and 2012. The powers and responsibilities of the main institutions of government and of the judiciary will require to be defined. But I have two main concerns. The first is to do with process. Drafting a new constitution should involve as much engagement with the general public as possible, so that the process is genuinely popular rather than elite-driven. The interim constitution is a government-crafted device and may well shape the scope of the deliberations to be undertaken by the convention. The convention itself should, therefore, be designed very carefully if it is to be genuinely deliberative and representative.

Secondly, I am in general very skeptical of written constitutions which are highly detailed not only in setting out the institutional arrangements for the state but in prescribing a set of values, for reasons I have set out [elsewhere](#). In the event of independence, a constitution will be needed, but why not start with a more modest document that provides for a head of state and sets out the powers of the Scottish Parliament and Scottish Government, the court structure, and local government? This would then leave it up to the people to exercise their newly gained independence through their parliament, allowing them to make the decisions they want, and from time to time to change their minds about these decisions should they wish to do so in an open and flexible way. And for big decisions there is of course the referendum; if it is appropriate to use direct democracy to determine the independence question why not use it for other major decisions which Scots will make in the future?

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