The Government of Scotland in the Light of the Scotland Act

by

James Wilkie

The original version of this memorandum was written after the Scottish national referendum on 1 March 1979, which resulted in a clear majority in favour of implementing the 1978 Scotland Act for the re-establishment of the Scottish national legislature. It was intended to demonstrate that any tampering with a legitimate decision by the country's highest constitutional authority would be unconstitutional and invalid. Around 30 copies were sent to 10 Downing Street and to other senior political figures in Westminster. None of them acknowledged receipt or addressed the points made, and the newly elected Conservative government under Margaret Thatcher went through with the charade of "repealing" the Scotland Act in June of that year. The memorandum was therefore expanded and revised for a wider readership in the light of this blatantly unconstitutional action. The newly formed Scotland-UN Committee took it over and gave it mass distribution. The present text, apart from the correction of one or two errors, is that of the June 1979 version. The ideas it presents were subsequently developed in later papers, in particular the principle of the sovereignty of the people, which in Scotland had been lost from sight for several centuries.

1. The Background

There is no political topic that arouses more hysterical and irrational emotions than that of the parliamentary union between Scotland and England. The English attitude right to the present day is summed up in the announcement of the conclusion of the Treaty of Union by the Speaker of the last English House of Commons, when he "informed the House with satisfaction that they had catchd Scotland and would keep her fast". On the Scottish side, the angry polemics of Burns, Fergusson and others indicate the widespread detestation of the settlement among the population even generations after the union, when industrialisation and restructuring were at last beginning to make good the havoc it had wreaked in the Scottish economy by cutting the Scots off from their traditional European trading partners.

The Scottish negotiators had wanted a federal union, but the English side rejected this out of hand. The settlement that was finally adopted involved the establishment of a single and completely new United Kingdom legislature, while ensuring that the Scottish national institutions otherwise remained entrenched, independent and untouchable. For example, to this day Scottish constitutional law is in some respects markedly different from its English counterpart. It is therefore a complete fallacy to describe the United Kingdom as a "nation-state" or a "unitary state", neither of which it has ever been, or was ever intended to be. It is a curious and unique, if now archaic, multi-national political union, the most conspicuous feature of which is a common legislature attempting, with indifferent success, to legislate for two philosophically fundamentally different legal systems.

The more squalid aspects of the union negotiations, such as the massive bribery (Burns's "parcel of rogues in a nation") and the threat of a military invasion of Scotland if the union were not concluded are best passed over at this stage. The objective reasons, such as they were, for the structure that was finally adopted were very short-term considerations, despite which this structure has been maintained long after its original purpose has been served. Six years after the conclusion of the Treaty a motion was presented to the London Parliament to rescind the Acts of Union, with the unanimous support of the Scottish members, Whigs and Tories alike, who already regarded the Union as a failure. This motion was, however, defeated by the votes of the English majority – a foretaste of things to come.

In an age when the functions of government hardly affected the ordinary members of the population, arguments about the legislative structure may have been largely academic, but with the increasing and ongoing extension of government power to cover every aspect of people's everyday lives, the question regained an actuality which is quite independent of any consideration of the circumstances under which the Union was originally set up.

This process has gathered force inexorably since the middle of the 19th century, and since geographical conditions and the prior existence of distinctive Scottish institutions have always precluded any unified administration from London it has been necessary to develop a complete Scottish state administrative apparatus. There now exists, in fact, a whole tier of government in Scotland that is subject to no effective democratic control. In addition to a bureaucracy of 11,000 civil servants there are hundreds of non-accountable organisations (NGOs) exercising official functions, and the number of patronage appointments made by the Secretary of State for Scotland runs into thousands. Scottish questions are handled only once a month in the House of Commons, and the two Scottish committees there are completely incapable of keeping the Scottish state apparatus under adequate supervision, due to both distance and lack of time. The unsatisfactory nature of the situation can be judged from the ludicrous appointment under the 1960 Conservative administration of a Scottish Minister for Education and Industry, either of which functions alone would tax the abilities of the most gifted politician to the full.

The effect of this situation is that Scotland is run by a small and self-contained establishment, all personally known to each other, who simply appoint each other on to the various governing bodies which have been set up, sometimes with virtually absolute power to do anything they like in the name of the Secretary of State for Scotland, and all of them with a vested interest in preserving the status quo. Pet projects costing astronomical sums of the taxpayer's money are started, and extravagantly remunerated sinecures are created for the chosen few, with the minimum of democratic supervision. When a senior civil servant of the Scottish Office was convicted in an English court of accepting bribes running well into five figures, he stated several times with complete confidence that in Scotland he would never even have been brought to trial, let alone convicted. So interwoven is this net that there exists no effective form of redress, or even of investigation, in cases of abuse of power over much of the state's activities in Scotland.

The United Kingdom's legislative and supervisory structure, in its present form, is a relic of a bygone age that is totally inadequate for the task of coping with the recent extension of government power to every aspect of contemporary life. It is also unrepresentative. The Scottish party system and voting patterns are so radically different from those of England that a separate legislature would be justified on this ground alone. The present Secretary of State

for Scotland, who is not elected by the Scottish voters, but appointed by the British Prime Minister over their heads, holds his position on the strength of a party majority in another country, for in Scotland his party is in a minority with substantially fewer votes than the leading Scottish party. This in itself is a sign that the Scottish social structure is now developing away from the English one, that the Scots are increasingly falling back upon their primary Scottish identity in proportion as their British one diminishes, and it is now additionally necessary to provide a legislature as the focal point of this rapidly developing social grouping.

One can accept that the parliamentary union was brought about, albeit in dubious circumstances, at a time before the greatest advances in constitutional science had been made, and in particular before the development of modern federal systems, but this cannot excuse the fact that every attempt for almost one hundred years to bring Scotland's legislative structure up to the standards that are accepted as normal in all of our partner states in the Western world has been thwarted by opposition that is as irrational as it is arrogant.

From 1889 till 1979 no fewer than 34 bills and other formal measures were brought before the Westminster Parliament with the object of giving Scotland a national legislative Assembly to deal with internal affairs – a simple and reasonable proposal which would arouse no controversy in other states where federal government and divided sovereignty are known and understood concepts. These measures were supported by the Scottish Members of Parliament, over 80 per cent, and often over 90 per cent, of whom voted for the 20th century proposals that actually came to a vote in Parliament. Despite this, every one of these was either talked out by filibuster tactics or simply voted down by the huge English majority at Westminster in an atmosphere of contempt and derision for Scotland and all things Scottish.

These parliamentary attempts only reflected the feeling in the country as a whole. In the 1930s the "Daily Record" and the "Scottish Daily Express" both carried out a series of social surveys that showed a 23 to 1 majority of Scots in favour of having their own legislature. In 1950 a National Covenant requesting the setting up of a domestic legislature for Scotland was signed by well over two million voters – an enormous majority of those entitled to vote – but the British government refused even to accept the signature sheets, let alone take any action on the matter. Opinion polls in the last ten years have consistently returned figures of more than three quarters of Scots in favour of having their own legislature, the younger generation in particular being solidly for it.

This movement for Scottish self-government went parallel to, and was contemporary with, the similar movement for Irish home rule. In both cases the intention was to gain self-government for domestic matters only, there being no intention of separating from the United Kingdom, and it was only the blank refusal of Westminster to grant even this limited request, over many generations, which led both movements eventually to see complete independence as the only solution. The Irish, in frustration, resorted to force of arms to achieve their ends, while the Scots persisted with their attempts to attain self-government through peaceful means. The comparative results indicate conclusively that the British government have put a premium on violence, and that nothing is to be gained through democratic methods and peaceful change.

It should be pointed out that both the Liberal and Labour movements have long records of verbal support for self-government in Scotland. Of the Scottish prime ministers of the UK, Gladstone in particular is remembered for his support for both Irish and Scottish home rule, while Ramsay MacDonald was an active member of the former Scottish Home Rule

Association, to which the Scottish Trade Union Congress was also affiliated. The Scottish Socialist pioneers like Keir Hardie were without exception strongly nationalist home-rulers.

It has been necessary to restate this background in order to destroy two myths that have been deliberately circulated. The first point is that the Scottish national movement is not something that has arisen overnight, that it has nothing to do with the recent discoveries of oil reserves in the portion of the North Sea which falls under the Scottish legal jurisdiction, and that it is not caused by any "temporary" economic difficulties the UK may be experiencing. The second point is that the Scotland Act of 1978, with which the remainder of this study is concerned, cannot be explained simply as a panic reaction by the Callaghan Labour government to rising nationalist pressure from Scotland, as will be demonstrated.

2. **The Scotland Act 1978**

During the enormous upsurge of the Scottish national movement over the last two decades, one (but only one) of its most conspicuous features has been the vast increase in the support for the Scottish National Party to almost one third of the total vote in the general election of October 1974. The minority Labour government of the time very properly took this as a mandate to implement their party's generations-old commitment to self-government for Scotland, and additionally for Wales. It should be pointed out, however, that any government of any political complexion would have been faced with the same obligation.

A first attempt was made with the Scotland and Wales Bill of 1976, a very unsatisfactory measure that gave the proposed Scottish Assembly a number of obviously grudged functions, and then took most of them back again through the schedules at the end. This, the 23rd formal Scottish home rule measure, was killed in the House of Commons in 1977, not on its merits, but on procedural grounds without any genuine discussion.

The Government tried once more to overcome parliamentary intransigence with two separate measures for Scotland and Wales. The Scotland Bill of 1978 was a little more satisfactory that its predecessor, but still with serious deficiencies, notably the failure to grant any revenue-raising powers. The story has been put about that this was a panic measure that was hastily tacked together for the purpose of holding on to the Labour Party's support in Scotland. The truth is that the civil servants who were responsible for drafting it had had several years to develop ideas on the subject, and that its more half-baked aspects were due rather to inter-departmental squabbling and to the disinclination, or downright refusal, of the overwhelmingly Conservative civil servants to part with any powers at all to a Scottish legislature. The Treasury still professed to be unable to devise a suitable method of raising revenue for the Assembly, although they had found no difficulty in doing this for the many Commonwealth states as they gained self-government. Civil servant mandarins were known to refer disparagingly to "the devolution exercise", an indication that they had no intention of ever allowing the project to reach the stage of being put into effect.

The Scotland Bill was, however, generally supported by the exasperated Scottish home rulers, not as an ideal, but simply as a means of getting something done at all, as an initial step that could be gradually improved in practice. Under considerable pressure from the Government and Scottish public opinion, Parliament eventually passed the Bill in a rather mauled condition. They really had no option but to do so, but the determination to stop the realisation of the (by now) Scotland Act was demonstrated by the inclusion of two blocking amendments, both of which will be discussed below.

One was that a referendum had to be held before the Act could be put into effect, the second being that if 40 per cent of the Scottish electorate did not vote in favour of the Act it should be referred back to Parliament with a motion for its repeal. At the same time, the Government was forbidden to use any public money to explain its case to the electorate. This effectively crippled the campaign in favour of the Act, while the largely Conservative elements who were responsible for writing into the Act those weaknesses that were designed to make the scheme as unattractive as possible to the Scottish voters conducted a ruthless and totally unscrupulous campaign (the source of whose enormous finances has never yet been revealed) to discredit it by any means on the grounds of those same weaknesses.

A similar situation arose in Wales but, while the insultingly threadbare Wales Act was rejected by the Welsh electorate, even as a beginning, the anti-devolution campaign in Scotland failed in its objective, and the Scotland Act was approved by a clear majority of the votes cast, although short of the arbitrary and unprecedented 40 per cent barrier. A general election intervened before the new Conservative government presented a motion to Parliament for the repeal of the Scotland Act, and by now having an overall majority at Westminster they had no difficulty in carrying the motion in the face of the opposition of the Labour Party and the Scottish Members of Parliament. This was the 34th time that a Scottish home rule measure had been thrown out by Westminster and, true to form, the huge English majority there once again contemptuously voted down the overwhelming majority of the Scottish MPs. The constitutional implications of the situation will be discussed in the following sections.

3. **The 40 Per Cent Rule**

A rule stipulating a minimum level of support before constitutional change can take place is in principle reasonable, but a decision to impose such a rule would have to apply in all such changes. Furthermore, being itself, in terms of the UK constitutional situation, a fundamental constitutional change, such a decision would be subject to approval by the electorate. The motion to impose a barrier of 40 per cent of the electorate before implementation of the Scotland Act was in fact passed only by Parliament – by 166 votes against 151 in a half empty House of Commons – supported by 27 per cent of all Members of Parliament!

The full iniquity of this barrier will not be obvious to those unacquainted with the British electoral system, which sets out to ensure that all eligible voters are included, in the process of which it tolerates a large number of other inaccuracies. In a country with no compulsory registration of residence (unlike most European states) the register was inevitably inaccurate to an average of 10 to 20 per cent, rising to 40 per cent in some areas where major developments had taken place. This, together with sickness, senility, holiday absence, double registration of students, nurses, etc., and other factors, made the 40 per cent barrier for all practical purposes an almost insuperable one – as it was meant to be. The Scotland Act was approved by a clear 52 per cent of those voting, but these represented only 33 per cent of the names on the register of voters.

For all practical purposes (with slight qualifications) the effect of the rule was that anyone who did not vote was considered to have voted against the Act, and this was brutally confirmed during the repeal debate in the House of Commons, when it was the main plank, indeed the only one, in the Conservative government's case for the "repeal" of the Act. A double-registered No voter had two negative votes without leaving his house, while a double-

registered Yes voter found his active Yes vote cancelled by his passive and unwanted No vote (double-registered voters are allowed to vote only once). A number of erroneously-entered American students already back in their homeland were unaware that they had cast votes against the Scottish Assembly, as were the large number of Scots who had conveniently died since the register had been compiled. The endless catalogue of similar anomalies filled the columns of the Scottish newspapers for months on end. At the time of writing an office-bearer (from his name apparently English) of the Conservative Party in Scotland was awaiting trial before a Scottish court on a charge of falsifying the electoral roll by deliberately registering a large number of false names in the period before the election.

The parliamentary opposition, in the main Conservative, to the Scotland Act were well aware of this situation; it was pointed out repeatedly for months on end, despite which they refused to consider removing this barrier or altering it to a more reasonable form. They were also well aware that this barrier was applied uniquely and exclusively to the Scotland Act, which involved no transfer of sovereignty whatever, and was therefore in no sense whatever a "major constitutional change", as Conservative election propaganda asserted. The proposals contained in the Scotland Act could not be compared with the magnitude of the constitutional change that took place with British accession to the European Economic Communities. The contrast with the conditions under which the EC referendum in June 1975 was carried through is therefore all-important.

On that occasion a simple majority of those voting decided an issue of the gravest constitutional importance, involving a genuine and massive transfer of sovereignty to the European organisations, for of course EC law was thereafter superior to any provisions of Scottish, English or Northern Irish law. What would have been an appropriate barrier percentage of the electorate for a step of such far-reaching importance – 50, 60, 70 per cent of more? The constitutionally significant fact is that this was not done, and that this definitive and binding precedent was set on the basis of a simple majority of those who actually cast votes in the referendum. This automatically renders the reference of the Scotland Act back to Parliament on the basis of the 40 per cent rule unconstitutional, null and void. The two referendums are far too close in time for anyone to argue that circumstances had in any way changed to justify the innovation in the case of the Scotland Act.

There is a further complication here. The EC referendum implicitly modified the articles of union between Scotland and England. There are actually two Acts of Union with similar but not identical wording, the English Act not being cognisable in a Scottish court and vice versa. This means that the referendum cannot be held to have been carried out on an all-United Kingdom basis. The Act to which the Scottish Parliament assented did not envisage any further level of representation other than the new United Kingdom Parliament, nor did it foresee any further transfer of sovereignty on the massive scale which occurred with accession to the European Communities. Furthermore, it contained safeguards for Scotland, such as that no alteration can be made in large areas of Scots law unless it can be shown that such alteration would be for "the evident utility of the subjects within Scotland". This, of course, would create havoc with the application of numerous EC directives within Scotland.

In June 1975 a simply majority consisting of 35 per cent of the Scottish electorate voted to modify the union settlement in favour of the Treaties of Rome, in order to permit Scotland's accession to the EC as part of the United Kingdom. In March 1979 a simple majority consisting of 33 per cent of the Scottish electorate voted in favour of setting up a Scottish legislative Assembly, a measure of much less constitutional importance.

In June 1979 the Parliament at Westminster threw the whole situation back into the melting pot by ruling that such percentages of the electorate voting in favour were not high enough to justify constitutional change, which in effect cancels Scotland's part-membership of the EC.

The situation is clearly illogical, even ridiculous, and well illustrates the utter shambles that is all that remains of the semi-mythical British constitution. The truth of the matter under discussion is that the vested interests, like the Conservative Party's paymasters, who exercise control over the Westminster puppets were in favour of EC entry and against Scottish self-government, and in the course of getting their way little trivialities like the popular will and the rule of law could go to the devil. Anarchy would not be too strong a word to describe the situation.

One way of tidying up the situation would be to hold another referendum in Scotland on EC membership. It can safely be predicted that the result of that would be an overwhelming negative vote, especially after the recent EC elections, which were in effect boycotted by all except Conservative voters, with some representatives to the European Parliament being elected by about 12 per cent of the electorate.

It might be safer to take the alternative course, namely, of holding that, on the basis of the best of all definitive and binding precedents, the 40 per cent rule, with its consequent reference of the devolution question back to Parliament and "repeal" of the Scotland Act, was from the beginning unconstitutional, null and void, especially since the "repeal" can be held to be unconstitutional on a number of additional grounds.

One way of bringing matters to a head would be to bring it before the Court of Justice of the European Communities, whose judges are all experienced in constitutional matters and have no emotional involvement in the situation. It should not be too difficult to stage a refusal to implement some EC directive, on the ground of its conflict with Scots law or that it was not "for the evident utility of the subjects within Scotland", and quoting the EC referendum as justification. This would force the Court, willy-nilly, either to cancel Scotland's membership of the EC, or implicitly to declare the "repeal" of the Scotland Act to be null and void.

4. The Referendum Campaign

Expert observers of the 1975 EC referendum are generally agreed that the biggest factor that produced the positive result was the enormous funds available to the Yes campaign and the relative poverty of the opponents of British membership. It was a victory for financial power, not political reason, and this irrespective of the merits of the case. The people responsible have discovered to their delight the effectiveness of this formula, that public opinion can be manipulated by financial power, and having virtual control over the present government through their funding of the Conservative Party, they have no reason to fear any statutory restriction of their activities. This "success formula" was tried again during the Assembly referendum in March 1979, when it was observed that the largely Conservative vested interests who flooded Scotland with money to finance the gigantic No campaign were, by and large, the same campaign organisation that carried through the equally massive and well-financed Yes campaign in the EC poll (and who presumably would have regarded a simple majority of one vote as adequate for their purposes on that occasion).

The No campaign was therefore largely Conservative in disguise, other prominent figures being in the main isolated figures at variance with the views of their own organisations. Unable to stop Scottish self-government in Parliament, they transferred their campaign to the well-prepared battleground of the public relations field. In consequence, if the organisation and voting system of the Assembly referendum failed to come up to any standard consistent with what is commonly described as "democracy", then this is doubly true of the conduct of the campaign itself.

The Yes side found itself starved of money. As already explained, the Government was forbidden by parliamentary decision to use any public money to explain the Act to the electorate. Not even a leaflet was issued to describe what it was all about, unlike the EC referendum, when considerable quantities of public money were used for this purpose with no complaints from the protagonists of British membership.

The sources of the "Scotland Says No" campaign's enormous funds have been kept a closely guarded secret. It has been claimed that it was financed largely by commercial and industrial companies with interests in Scotland. The very scale of the operation makes it highly improbable that it was financed from Scottish sources, and in fact no published statement of accounts by any Scottish-registered company to date is known to show any contribution to this fund. To what extent, therefore, was it financed from outside Scotland, by interests whose accounts are maintained in London, for example? Were, for instance, any of the oil companies involved in it?

It is, of course, possible to present company accounts in such a manner that secret contributions by the directors for political purposes not approved (and most probably disapproved) by the shareholders can be well hidden from the eyes of auditors and shareholders alike. The question must also be asked regarding the extent to which the campaign was financed by companies in which the state has an interest by way of shareholding, grant, subsidy or otherwise. It would not require much of an adjustment to ensure that the company did not lose by its contribution, nor in all probability is this the only way in which dirty money from public sources could be laundered for such a purpose.

The Yes campaign was simply swamped by these financial resources – something that would never have been permitted during an election campaign. There was practically nothing but the No campaign's posters to be seen from one end of Scotland to the other, and the mass media were utilised to the full. It was a publicity drive of almost unprecedented unscrupulousness, in which not only meaningless paroles ("Assembly means separatism") but also every conceivable form of inaccuracy and deliberate misrepresentation ("creating an extra tier of government") were used in order to swing the result. Attempts to bring the discussion onto an objective and reasoned basis were evaded, and half a dozen primitive and unsubstantiated assertions were hammered into the voters' minds over a period of weeks.

The No campaign was not merely negative. Innumerable statements were made by the Scottish Conservatives to the effect that a No vote was not a vote against self-government or devolution as such, but only against the unsatisfactory Scotland Act, whereas the Conservative leadership made it clear after referendum and election that not even the Yes majority was going to induce them to grant any slightest degree of legislative power to Scotland.

The tenor of the campaign run by many honest members of the Conservative Party in Scotland was to the effect of "Vote No to the Scotland Act so that a Conservative government can give you a better scheme". This latter tactic was highlighted by the last-minute television appearance by Lord Home, the former Prime Minister who was highly respected in Scotland for his integrity. Home directly advised the people to vote No so that the Conservatives could introduce a stronger plan. He mentioned specifically the lack of revenue-raising power and proportional representation in the Scotland Act, implying thereby a commitment by the Conservatives to set up a Scottish legislature that would be satisfactory in both of these respects. The effect was widespread and considerable.

The frightening thing about this catalogue of dishonesty is not so much the evidence of the breakdown of moral standards in British public life (that has been clear for a long time) as the fact that it did have a marked effect on public opinion, that it proved that the popular will really can be manipulated in a manner that is reputed to be the prerogative of the communist states. Public opinion polls for months previously had been predicting an enormous majority among the Scottish voters in favour of implementing the Scotland Act, and the polls have in recent times proved to be very accurate in their forecasts. The referendum campaign ran for about two months, with the huge and professional No campaign carrying everything before it, to the extent that the polls in the last two weeks or so revealed that the Yes majority had been considerably whittled down by the brainwashing. Just as pernicious was the confusion and doubt that it sowed in many Scots minds where once there had been certainty, and to which a large proportion of the abstentions from voting can be safely attributed. As an exercise in democracy it would have done little credit to a banana republic, let alone to a supposedly politically mature state.

It is a testimony to the strength of the Scottish demand for self-government that this campaign failed completely in its objective, which was to obtain the rejection of the Scotland Act by the Scottish people, and by implication the rejection of any other form of home rule. The result of the referendum was a clear and adequate majority in favour of the implementation of the Act, which according to the principles established in the EC referendum is the unqualified and final mandate to establish the Scottish Assembly.

5. The General Election of May 1979

There were two discernible trends in the Scottish election results. The first was a considerably weaker version of the move to the right that brought the Conservatives to power in England. The Scottish Conservatives regained, rather precariously in most cases, a number of seats they had previously lost to the Scottish National Party, while actually losing ground to the Labour Party in important areas.

The second trend, rather a phenomenon in view of the unpopularity of the Callaghan government, showed that support for Scottish self-government had paid off handsomely for the Labour Party, which evidently succeeded in regaining the devolutionist (as distinct from independence) vote from the SNP. Even the devolutionist Liberals achieved an appreciable increase in their votes, with considerably fewer candidates. It should be noted, however, that almost one in every five Scottish votes was cast in favour of total independence for Scotland.

Expressed on the same basis as the referendum result, the general election results are as follows:

Labour	31.91 % of the electorate
Conservative	23.88%
SNP	13.14%
Liberal	6.50%

It will be observed that the Conservatives, although enjoying only the status of a minority party, have actually taken office in Scotland, with the support of less than a quarter of the electorate, and with nothing remotely approaching the size of the Yes vote in the referendum. Furthermore, 51.55% of the electorate voted directly against them, and (again by the referendum method) the proportion of those who said No to Conservative government in Scotland was a damning 76.12% of the electorate.

The significant thing about the Conservative vote is not the increase at the expense of the SNP, but the fact that, at a time when their English colleagues were celebrating landslide victories all over the country, the best that the Scottish Tories could manage was a return to about 60% of their former strength. At the same time, there was a substantial swing against them in the economically most important areas, to the extent that they have almost entirely lost their power base there and are now a geographically restricted country party of the fringe areas.

It seems that the trend of the past 25 years is continuing, and that the Scottish Conservatives are heading for a further reduction to the status of an insignificant minority group once the reaction to the sitting government takes effect. On this hypothesis the election may prove to have been no more than a “hiccup” on a steepening downward curve of Conservative fortunes in Scotland, an Indian summer situation in fact.

For the purpose of this study the most important factor is that the anti-devolutionist Conservatives received less than half the number of votes that went to the parties of devolution, that they are a minority party supported by less than a quarter of the electorate and therefore have no mandate to govern in Scotland. There can therefore be no question but that the election results not only provided no basis for the “repeal” of the Scotland Act, but also, according to the principles which govern the exercise of power by any British government, directly forbid any tampering by Government or Parliament with the now established principle of the transfer of legislative power to Scotland.

6. The Repeal Debate

The Labour government went out of office at the election, and the succeeding Conservative administration under Margaret Thatcher demonstrated its intentions in advance by tying the pro-devolutionist Scottish Conservatives down with government offices, thus preventing them from voting against the Government in the debate on the repeal of the Scotland Act.

The Conservatives placed a motion for the repeal of the Scotland Act before the House of Commons at the end of June 1979. The 40 per cent stipulation laid no obligation on Parliament to repeal the Act, but the motion was nevertheless carried by the Conservative majority and a number of Labour MPs who defied their own leadership. The clash with the binding precedent of the EC referendum, and the other elements of unconstitutionality, were fully known to the Government in advance, despite which they were neither discussed nor even mentioned during the debate.

Mr. George Younger, the Conservative government's new Secretary of State for Scotland, based the case for repeal entirely on the assertion that an insufficient proportion of the electorate had been in favour of the Act, and confirmed what had been predicted and publicised by the Yes campaigners during the referendum campaign, that abstentions were definitely being counted as negative votes.

He also made it quite clear that, in spite of promises made in several election campaigns, and the campaign statements made by numerous Scottish Conservatives from Lord Home downwards, the new Government had not the slightest intention of transferring any legislative powers to Scotland, and that the proposed all-party talks on the future "improvement" of the Scottish governmental system would exclude consideration of any form of Scottish assembly. It cannot be too strongly stressed, however, that neither Mr. Younger nor the people who put the words into his mouth had the slightest vestige of authority to override the results of the referendum and general election by laying down any such stipulation.

The debate was conducted in a general atmosphere of farce, and ended with the "repeal" of the 24th formal measure in nearly a century designed to give Scotland a domestic parliament. Once again the overwhelming majority of the Scottish Members of Parliament voted in favour of the measure, and once again they were brutally overruled by weight of English numbers, not merely Conservatives, but also a large number of English Labour MPs who finally rejected any attempt by their party leadership to keep them under control.

7. The Constitutionality of the Situation

By virtue of what authority does the Parliament at Westminster convene and legislate to direct our affairs? By virtue of what authority does a certain person emerge as the head of a government formed by members of a certain political grouping to exercise all the functions of state power? There is only one possible answer to these questions, namely, that the whole structure receives its legitimacy through the manner in which votes are cast by the electors. The single and ultimate source of all parliamentary and governmental authority is therefore the people, more specifically the qualified and registered electors, and none other. Merely to pose the question is to destroy the hollow myth of the unrestricted sovereignty of Parliament.

There has been a tendency in recent years to neglect the study of fundamental political philosophy in favour of what might be termed the science of political expediency. One reason for this is that in practically the whole of the Western world the problem of authority and legitimacy has long since been resolved in favour of the sovereignty of the people over the state institutions. This is in fact written into the formal constitutional documents in many Western states.

There is not an international court or authority of any description that either could or would entertain the proposition that a legislature exercises supremacy over the people who elect it. This disposes of any suggestion that a referendum can be merely consultative in nature.

One can agree with Burke that in the normal course of events Members of Parliament are elected to use their individual judgement on the broad issues of the day, but immediately any matter is referred back to the electorate, to the source of parliamentary authority, for a decision, it is surely an arrogant assumption to conclude that the elected representatives are free to overturn any such decision at will. To conclude thus would be to set the servant over the master, to assert that men and women acting by virtue of granted powers may do not only what these powers do not authorise, but also what they expressly forbid.

The English doctrine of the unrestricted supremacy of Parliament referred in any case to the supremacy of the former English Parliament over the King of England, centuries before the extension of the franchise to all the adult population. To assert that its successor UK Parliament exercises supremacy over the people from whom alone it derives its authority is wholly illogical. Nor can the lack of a written constitution be pleaded. If there is no constitution there exists merely anarchy. If the constitution is unwritten, then the unwritten rules must by as inflexibly binding as any statute, or the whole edifice collapses into chaos. This is the stage to which the mishandling of the devolution question has brought us.

The sovereignty of Parliament has now been severely undermined by the massive transfer of that sovereignty to the European Economic Communities over wide areas, but even what remains is a purely English doctrine that has no counterpart in Scottish constitutional law (it should be repeated that there is no such thing as British law, constitutional or otherwise). It has never even been suggested that the pre-union Scottish Parliament exercised unrestricted sovereignty in Scotland, indeed it was generally recognised that both Parliament and Executive operated under the law (King James VI was actually ejected from the Court of Session in 1599 when he tried to force the judges to decide a case according to his wishes), while the “modern” concept of popular sovereignty was not unknown either.

The Declaration of Arbroath of 1320 made it clear that the Head of State and Executive was subject to the will of what was described as “the whole Community of the Realm of Scotland”, and could be deposed for failure to abide by it. The 16th century scholar George Buchanan, in his “De Jure Regni Apud Scotos”, stated that the monarch’s right to rule derived from the people, and that to them the rulers were responsible. The Claim of Right of the year 1689 states unequivocally that King James VII had forfeited the right to the Crown on account of his breach of the fundamental constitution of Scotland.

Although the Scottish Parliament at the time of the union possessed greater power than its English counterpart (e.g. control over foreign policy) it neither claimed nor possessed absolute sovereignty within Scotland. Therefore, since it could not transfer to its successor any more power than it itself could legally exercise (*nemo plus juris ad alium transferre potest, quam ipse habet*, a principle of all Western legal systems), the UK Parliament could not exercise unrestricted sovereignty over Scotland, nor, in view of the entrenched nature of the union agreement, could it possibly acquire such supremacy in the course of time.

What this means in practice is that no branch of government has the power to overturn the will of the people, least of all when their opinion has been formally invited on any subject – a principle which is doubly entrenched in Scottish constitutional law. Applied to the matter under discussion, the results of the Assembly referendum and the general election of May 1979 mean that it is now beyond Parliament's lawful powers to reduce the transfer of power to a Scottish legislature to a level below that contained in the Scotland Act. This principle can be denied only by simultaneously denying the very basis of parliamentary authority.

The conclusion must be that Parliament could not repeal the Scotland Act, because by that time it no longer possessed the requisite authority to do so, the highest authority in the land having already directed otherwise. The one possible qualification is that if a more satisfactory substitute measure involving at least the same degree of transfer of power had previously been placed on the statute book the "repeal" would then probably have been constitutionally correct. As it is, Parliament and Executive now find themselves in a situation of unconstitutionality which, if different in kind, is certainly no different in degree from that of the Rhodesian administration after their unilateral declaration of independence.

The "repeal" of the Scotland Act was therefore a mere form of words with neither constitutional nor any other form of validity. It was an act of pure anarchy that not only undermined the rule of law with devastating force, but also in effect destroyed Britain's unwritten constitution with a single hammer blow.

It is a matter of elementary logic, confirmed by world-wide judicial practice, that nobody is under the slightest legal obligation to pay any attention to such a decision, that it remains for all time null and void, a bone of contention in the nation at large, and a heaven-sent gift for any future extremists seeking justification for their activities.

A democratic decision having been taken by the highest authority in the land, which neither Government, Parliament nor even the Head of State has any power to overturn, it is theoretically open to any group of Scots to arrange the setting up of a Scottish Assembly, preferably at the request of the Crown, but even without that should it not be forthcoming. Again theoretically, there would seem to be no reason why Westminster, Whitehall or Downing Street must necessarily be involved at all in such a process.

Mr. Younger stated during the "repeal" debate that any proposal to set up a Scottish legislature in the future would require a further referendum on the subject. One would like to think of this as an affirmation of his adherence to the basic principles of democracy, but since his every other action on this question belies this interpretation, it is a safe assumption that it merely reflects a confidence on the part of the Tory hierarchy and their financiers that any future referendum could be rigged and manipulated as successfully as they imagine the last two to have been.

The statement is in any event incorrect, since the results of the referendum and general election represent the approval by the constitutionally supreme Scottish electorate of the principle of the transfer of power to a Scottish Assembly up to the limits contained in the Scotland Act. A further referendum would be necessary only if a transfer of power substantially in excess of the provisions of the Scotland Act were to be proposed.

8. General Summary

a) The Assembly referendum was not conducted to the standards that in all Western countries are considered necessary to ensure an objective decision. The financial imbalance between the two sides would not have been permitted in a parliamentary election. There is reason to believe that the overwhelming majority in favour that existed a week or two previously was reduced by methods of unprecedented unscrupulousness that owed more to the late Josef Goebbels than to the presentation of balanced argument.

b) The majority in favour of the Scotland Act was nevertheless completely decisive, and sufficient to justify immediate implementation.

c) The constitutionally immensely significant EC referendum in 1975 was decided by a simple majority of those voting. Therefore, the vast changes in the Scottish constitutional situation having been decided by 35 per cent of the electorate on that occasion, and a definitive and binding precedent having been established, the reference of the comparatively minor constitutional change of the Scotland Act back to Parliament, on the basis of the 40 per cent rule and despite the positive outcome of the referendum, is unconstitutional and invalid.

d) The general election result, with the Conservatives receiving the support of less than a quarter of the Scottish electorate, and less than half the number of votes given to the parties of devolution, not only invalidates the "repeal" of the Scotland Act, but also directly forbids any tampering with the principle of the transfer of power to a Scottish legislature.

e) Even though the Scottish Conservatives in favour of devolution were judiciously gagged by appointing them to government offices, the overwhelming majority of the Scottish Members of Parliament voted in favour of implementing the Act, the 24th formal Scottish home rule measure in almost a century. Once again they were overridden with the huge English majority in the Westminster Parliament, and the "repeal" was carried.

f) The people are the source of all power in the state, and the highest authority therein. Therefore, providing it is not in conflict with a higher law such as one of the international codes of human rights, neither Parliament, Executive nor Head of State has the power to overturn the result of a properly conducted referendum. The "repeal" of the Scotland Act is therefore unconstitutional, null and void, and inoperative.

9. Conclusion

There has never been a time when the present method of legislating for Scotland has been generally accepted as satisfactory. There has never been a time when the opposition to the most modest degree of a return of legislative power to Scotland has been anything other than emotional and wildly irrational. There has also never been a time when this opposition has more clearly taken the form of what could justifiably be described as "institutionalised lawlessness". This is indeed one of the hallmarks of British public life today, from the trade unions to the conduct of cabinet and parliamentary business, but the devolution affair brought it to the surface in an unprecedented manner.

There is no point in indulging in euphemisms here. The practices described above, together with others not directly connected with the Scotland Act, are probably the worst series of constitutional offences to have been seen for several centuries, and to allow such practices to pass unopposed would be subversive of all government. The persons responsible for them would richly deserve to be impeached for what were, in effect, subversive or even treasonable activities, directed not only against our own constitution, but also against the whole scale of values that have come to be regarded as the hallmark of freedom in the Western world. It is these fragile values whose very existence is threatened here.

There is no point in expending a vast proportion of our national wealth on armed forces and other security services as measures of defence against encroachment by authoritarian regimes if we simultaneously permit our affairs to be run by people who pay lip service to law and order while they themselves recognise no law except their own arbitrary will. No individual citizen is permitted to choose which laws he will obey, and which not. Why, then, should this be allowed to politicians and administrators who are themselves acting under authority?

The fundamental principle at issue here is essentially no different from that at stake in Nazi Germany, when arbitrary and lawless acts were also given a cosmetic respectability by being carried out "legally" through state institutions and related bodies. Millions of lives were lost during this century in the struggle to extirpate this cancer of absolutism in democratic camouflage from our Western society, and this most ominous resurgence of the disease at the level of British government must be eradicated to its very roots or there will be no security for any of us. That means that under no circumstances can the unconstitutional attempt to prevent the transfer of power to a Scottish legislative Assembly be accepted, condoned, or remain unopposed.

A number of issues arise here in addition to the main constitutional ones. For instance, some sort of protection is urgently required to shield the electorate against grossly unbalanced political campaigns of the kind experienced in Scotland before the referendum, indeed, before both referendums, EC and Assembly. No bill of rights has yet succeeded in affording protection against mass suggestion, brainwashing and other abuses of the media that are open to those with the right connections and sufficient financial power.

One example of what was happening was afforded by the Daily Express, which in an earlier period had actually brought to light the immense support in Scotland for home rule. Having closed down its Scottish printing and publishing operations, throwing 1,800 Scots out of work, it produced a "Scottish" Daily Express from England which, under its new London ownership, ran for weeks on end by far the most virulent anti-Assembly campaign of the entire referendum. Legally permissible, but otherwise?

Why were the Scots not left to finance and organise their own campaign under sensible rules that would have ensured the development of a balanced discussion of the issues at stake, free from foreign money and influence? It is clear that the Confederation of British Industry, in collusion with the Conservative Party, must bear a considerable part of the responsibility for the constitutional havoc their tactics have created, while the Labour Party's No campaigners in Scotland do not seem to have fully realised the extent of the infamy to which they were lending their support.

The handling of this matter must inevitably raise serious doubts concerning the degree of competence and even integrity of the state administration over a wide range of other functions. It almost defies credibility that any administration could be so inept as to rush with wide-open eyes into a constitutional mess of this magnitude. Undoubtedly a large part of this is due to sheer ignorance of the constitutional situation, swathed as it is in clouds of mythology. In the sumptuous libraries and restaurants of the Palace of Westminster, where the hardly diminished atmosphere of past glories pervades the whole environment in which politicians and administrators live and work, it is sometimes difficult to realise that the rest of the world has passed one by, that the United Kingdom has long since become a constitutional and political backwater. This may be understandable, but it hardly excuses the moral degeneracy of the devolution debate. In addition, it is indisputable that one effect of the debate has been to expose the inferior intellectual calibre of a disturbingly large proportion of the people who hold positions of considerable power in the state.

To sum up, after 24 formal attempts extending over the best part of a century, in the course of which no perversion of democratic procedure and the rule of law has been considered unacceptable as a means of suppressing the movement for Scottish home rule, it has now been convincingly demonstrated that the democratic system is no longer usable to this end. It is probably only a matter of time before the movement, of necessity, finds other channels for the expression of its considerable energy, now that the option of peaceful change by democratic means has been denied to it.

In conclusion, there are two quotations that have a bearing on the situation. The first is one of the fundamental documents of the Scottish constitution, the Claim of Right drawn up by the Convention of Estates, which met on its own initiative in Edinburgh in 1689, when it formally deposed James VII as King of Scots. In its statement of reasons for taking this step the Convention asserted that the King, by abuse of prerogative powers, had “invaded the fundamentall Constitution of the Kingdome. And altered it from a legall limited Monarchy to ane Arbitrary Despotick Power... whereby he hath forefaulted the right to the Crowne, and the Throne is become vacant”.

This principle remains part of the Scottish constitution to the present day – translated into terms of the modern Executive, of course. The second quotation, on the contrary, is part of the modern global constitution, and one that is equally binding on the British government. In accordance with Article 1 Par. 2 of the Charter of the United Nations Organisation, Article 1 of the International Covenant on Civil and Political Rights, which is simultaneously Article 1 of the International Covenant on Economic, Social and Cultural Rights, states: “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”.

To determine “freely” means in freedom from the influences to which the Scots were subjected during the referendum campaign, in freedom from the chicanery that has blocked every attempt for a century, and above all in freedom from being “democratically” outvoted by a mindlessly prejudiced foreign majority. The British government still has time to put its house in order in respect of self-government for Scotland. It is to be hoped that they will utilise the opportunity before this time runs out.

16