



## **The Scottish Constitutional Convention**

*One of the Scotland-UN Committee's earliest projects was a proposal to hold a Scottish Constitutional Convention to go into the whole question of Scotland's political structure after the sabotage of the 1979 devolution referendum. And so a Blue Paper with an invitation was circulated to all the Scottish local and regional authorities as well as other institutions. Premises were booked at Edinburgh University, but the response was insufficient to justify proceeding with the event at the time. In the summer of 1979 Scotland was still reeling with shock and confusion and few people were thinking clearly about where they were going.*

*The idea of a Constitutional Convention nevertheless went the rounds, and three years later was being discussed widely across the country. The very vociferous Scotland-UN representatives in the Campaign for a Scottish Assembly (CSA as it still was at that early stage) forcefully projected the still quite nebulous idea, which was gaining strength almost daily. It was soon necessary to give such a concept a solid and above all practical form, together with a justification of its legal and political status, in order not to inhibit participation. And so the editors of Radical Scotland magazine wrote to ask for an article that would set out the concept of a Scottish Constitutional Commission in concrete terms. The following article was published in its December 1983/January 1984 issue.*

*The Convention got off the ground shortly afterwards, and managed to do a good deal of work on devolution. Its political coverage was marred when the Scottish National Party withdrew from it on the ground that the majority refused to consider independence as one of the constitutional options. The other participants continued their work, and eventually reported with a scheme of practical measures for the establishment of a directly elected Scottish administration. One step of primary importance was the acceptance by the Convention of the sovereignty of the Scottish people, and their inalienable right to decide their own form of government. This was not only a rejection of the sovereignty of the Westminster parliament, but also implied – despite the absence of the SNP – an acceptance that the Scots would have every right to decide on independence if that was their will.*

*The Convention did not bring about the restoration of the Scottish Parliament and Government – that was a result of a brilliant international diplomatic action by Scotland-UN at the Council of Europe in Strasbourg in 1993 – but it contributed a whole list of useful detail proposals for the inauguration of the new devolved system in July 1999 and overall justified the work that had been put into it.*

# A Scottish Constitutional Convention: the door to the future

James Wilkie

*“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.”*

(Article 1 of the UN International Covenant on Civil and Political Rights, and also of the International Covenant on Economic, Social and Cultural Rights)

In recent months there has been a steadily increasing discussion of constitutional issues in Scotland, with informed opinion slowly becoming conscious of first principles of constitutional theory that that for the best part of two centuries have been lost from sight in the swamp of British imperialist mythology.

It is hardly surprising, therefore, that this development – an attack from a totally unexpected quarter – is currently creating alarm and despondency among the establishment of political flat-earthers who, to serve their own interests, are determined to perpetuate the constitutional set-up of a bygone age, those separatists who are hell-bent on keeping Scotland in its present state of being cut off from direct contact with the rest of the world.

The constitutional approach is the only feasible method of attaining self-government for Scotland, because it is already clear that it is the arrow that has struck the Achilles Heel of the present moribund power structure.

The world has moved on since Professor Dicey expounded the pernicious doctrine of the “unrestricted sovereignty of Parliament”, which to this day is the basis of the stranglehold that the existing power cabals have on the UK political system. It has become increasingly clear since 1975 that this doctrine will simply not stand up to examination in the light of first principles, of international law, and of worldwide constitutional practice – not to mention the Scottish national constitution that is in the process of being rediscovered.

It is not the purpose of this article to discuss the question of sovereignty, which may be defined as the ultimate resting place of legitimate authority. In an international context sovereignty still lies with the individual state, with the qualification that all states have had this sovereignty restricted by international law in one way or another (the question of enforcement is another matter, but whether or not that is possible in a practical sense the law is binding).

Internally, however, there can be no questioning the principle that the people are the supreme constitutional authority in the state, and not their elected servants for the time being. Parliament may claim supremacy over all the other institutions of state, but any assertion that it exercises “unrestricted sovereignty” over the people from whom its entire authority to legislate is derived, is sheer unadulterated nonsense, as well as being lethally dangerous.

That being the case, the clearly expressed will of the people overrides any parliamentary decision. And it is indisputable fact that for more than a century the Scottish people have been agitating for the recall of their national legislature – call it Assembly, Parliament, or as you like. In the past 90 years there have been no fewer than 27 formal attempts in the Westminster Parliament, all of which foundered on procedural chicanery or simply bloody-minded opposition on the part of the English majority.

Every public opinion poll for the past half century has recorded a vast majority of Scots in favour of self-government. The National Covenant of 1951 was signed by almost two and a half million Scots, despite which the UK government of the day simply refused to accept the petition sheets. And of course there was the national referendum of 1979, when the principle of self-government was approved by a clear and adequate majority of the votes cast, and a proportion of the electorate almost exactly the same as that which approved EEC membership in 1975 (the 40 per cent rule is a total irrelevance in any consideration of the constitutional situation, on at least half a dozen grounds that need not be elaborated here).

A decision having been made by the country’s supreme constitutional authority, that decision is not open to reversal by any subordinate authority such as Government, Parliament or head of State. In the light of internationally accepted constitutional principles, the case for setting up the Scottish Parliament immediately is beyond question.

But what happens when the subordinate authority – the UK Government – blandly refuses to implement the will of its constitutional superior? To this it may be answered, firstly, that no institution of state has the power to “repeal” or otherwise tamper with the decision of a superior authority.

And secondly, nowhere is it laid down that a democratic decision by the people must be implemented exclusively by the government of the day and by no one else. What happened in 1979 was nothing but an ill-concealed conspiracy to defeat the ends of democracy; it was simply anarchy tempered by nihilism and self-interest, and must be treated as such.

The detailed reasoning behind this is too involved to be included in this article, but a number of firm conclusions may be listed at this stage:

1. In the light of internationally accepted constitutional principles the present Scottish governmental structure is unconstitutional, as are all laws, rules, enactments, surcharges, etc., enacted or imposed by the present administration.
2. In consideration of all the circumstances, there now exist no constitutional, legal or indeed moral barriers to prevent the Scots from simply implementing their own democratic decision, taken in accordance with all known constitutional rules and precedents, by setting up their own legislature.
3. In the light of a century of experience, the certain prospect of mindless English opposition, with the Scottish representatives again being overruled, makes the initiation of further measures at parliamentary level a pointless procedure.
4. Again in the light of experience, in any procedures laid down from London there is no chance of the Scots being allowed to determine their political status "freely" in terms of the UN International Bill of Human Rights – that is, in freedom from procedural and other chicanery, London-based media hostility, manipulation of financing, publicity, electoral registers, voting figures, etc., for the purpose of sabotaging the object of the exercise.

Almost five years have gone past since the referendum, with no action in spite of all promises, and the dereliction of duty is now beyond question. Therefore, there now exist no barriers to direct action by the Scots. Any suggestion that there is anything remotely illegal about this procedure must be emphatically refuted. The will of the people – the country's supreme constitutional authority – has been expressed with quite adequate clarity over the years, and any illegality there may be lies in the continued existence of the present set-up.

What is to be done to regularise the Scottish constitutional situation, and what sort of direct action is possible? Some three years ago, the Scotland-UN Committee, the non-party group that was set up to take Scotland's claim of right to self-determination to the United Nations and the international community generally, came to the conclusion that the calling of a Scottish Constitutional Convention would be the most appropriate response to the situation.

A date was actually fixed, and premises provisionally booked at Edinburgh University, but it was not proceeded with at the time, mainly on the ground that informed Scottish opinion had not yet developed that awareness of modern constitutional principles that would have been a precondition for its success.

It is not that there now exists an ideal situation in this respect, although it has certainly improved considerably, but it is felt that any further delay in bringing matters to a head would be both pointless and counter-productive, especially in view of the now rapidly worsening domestic situation and the ongoing destruction of local democracy.

The idea of a Constitutional Convention is now being taken up by leading individuals and organisations throughout the country as the constitutional debate begins to widen.

So far so good. What is a Constitutional Convention and what would it achieve? The first thing that should be made clear is that it is not to be a talking shop, that its function is not to debate the principle of Scottish self-government, but to draw up a hard and fast draft of a Scottish governmental system based on a directly elected Scottish legislature and executive.

The institution has a long and honourable history. One recalls the Scottish National Convention of 1689 that drew up the Claim of Right and offered the Crown of Scotland jointly to Mary Stewart and her husband as William II and Mary II, King and Queen of Scots.

The most famous example from abroad is the Philadelphia Convention of 1786/87, including a fair number of Scots, which drew up the present Constitution of the United States of America.

Who would take part? All the major national institutions ought to be represented, as should the existing local government units. All the Scottish Members of Parliament should be there, of course, and invitations could be sent directly to individuals with relevant qualifications and experience in a personal capacity. The important thing is to achieve a composition that is broadly representative of Scottish national life.

It is understandable that some individuals and institutions would be somewhat wary about association with such an event, but they should be reassured on this point. There would be no question of the Constitutional Convention taking unilateral action. Its function would not be to enact law, but to draft constitutional proposals for approval elsewhere.

In the first instance these proposals would be laid before the Parliament at Westminster as the product of a consensus of Scottish opinion. What happens in the event of further obstruction there is a matter that need not concern us at this stage. The important thing is that, in the actual drafting of a scheme for the modernisation of Scottish national government, no openings are left for any further unsatisfactory imposed schemes, and that no opportunities are presented for sabotage by London civil servants and other vested interests.

With a remit as broad as drawing up proposals for the modernisation of the Scottish governmental system, the Constitutional Convention would clearly not be a one-day affair. It could go on for some time, with occasional plenary meetings being interspersed with detailed work on specific aspects. It should, however, start by issuing a formal declaration, mentioning the International Bill of Human Rights, asserting Scotland's distinctive nationhood and the sovereignty of its people, and setting out clearly the competence of a representative Constitutional Convention to draw up proposals.

It would be highly advisable to have the plenary meetings at least attended by invited observers from the United Nations, the EEC, Council of Europe and international Commission of Jurists, amongst others, and these organisations should be kept in touch at all stages of the proceedings in order to inhibit any dragging of feet in London as regards the necessary transfer of powers.

In particular, if there is any question of a further referendum on the final proposals, then it should be held under United Nations auspices, with the London authorities having no say in its organisation or conduct. After the last experience there is no need to elaborate on the reasons for this.

We must, of course, be realistic about the initial situation. To be brutally frank, there is an almost total lack of experienced statecraft in contemporary Scotland, as was shown by the extremely primitive niveau of the constitutional debate in 1979. Even prominent experts tend to be hidebound by a false tradition. It is going to take years to correct this situation, but we cannot afford to wait for years. The Constitutional Convention must be organised against this background, but it itself will play no small part in stimulating the intellectual recovery. The Scots, with their great traditions of learning behind them, will certainly be quick to pick up the threads again.

Scotland is standing at a constitutional crossroads just now, and the issues are not confined to the right to self-determination. What happened in 1979 was nothing less than a confrontation between the people and the state to decide which is in possession of sovereignty – the ultimate resting place of legitimate authority. If we permit the state to retain the temporary initiative it gained in 1979, then we may as well scrap the entire defence budget, for against what are we supposed to be defending ourselves?

The Scots are as distinct a nation as any on earth, and they certainly fall within the United Nations definition of a “people” with the right to free self-determination. In an age when the international constitutional norm in East and West is that every nation, land, province, region, town and district is governed by a directly-elected legislature that is sovereign under the people and the law within its range of competence, why should a distinct geographical, economic, social, constitutional and legal entity such as Scotland be denied this normal right?

And in the light of all that has occurred, who can now deny the Scots the right to take their future into their own hands?