

Scotland's Constitution - some Fundamental Thoughts

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A fundamental reappraisal of the Scottish constitutional situation in its broadest sense is now a matter of urgent and vital importance. On looking around it is hard to remember that it was Scots who taught the world constitutional government, not least through Enlightenment influence on the fledgling United States of America, because the level of constitutional illiteracy in modern Scotland is quite staggering. It is not simply a lack of knowledge of a fundamental law, but a lack of even the most basic sense of propriety in the conduct of public affairs. In what other country in the civilised world would – or could – a handful of politicians decide to build a new parliament building without as much as asking the elected representatives (in Westminster or Edinburgh) whether they wanted one? And, furthermore, have no sense of having done anything wrong?

Our task therefore goes far beyond the compilation of a fundamental constitutional document, important though that be. We cannot legislate for every eventuality, nor should we. The holes in the legal net have to be filled by standards of moral behaviour, and it is a measure of a truly stable society that it can afford a fairly wide legal mesh. Applied to this particular matter, there is no substitute for the inculcation of a sense of constitutional order that should become second nature to every citizen from his or her earliest days. An orderly world is a precondition for that sense of security and belonging that can motivate the individual to put the interests of the community above his or her own when occasion arises. Incalculable damage has been caused to a whole generation by the Thatcherist emphasis on the individual to the detriment of the community.

Sovereignty – Parliament versus The People

The need for a reappraisal of both the formal and informal aspects of Scotland's constitution – the foundation and make-up of the nation – has therefore never been more evident, because the rot now extends into the highest circles, and is evident even amongst political reformers. Former Prime Minister Tony Blair stated publicly that people are not interested in these abstract principles – meaning that he himself was not interested in any principles that would stand in the way of the exercise of his arbitrary will. As witness his revealing statement to *The Scotsman* in 1997 that “Sovereignty rests with me as an English MP, and that's the way it will stay.”

This misconception is clearly based on the English constitutional tradition of absolute monarchy, and the related mythology of the unlimited sovereignty of the Westminster Parliament (“the Queen in Parliament”, in Dicey's 19th-century invention), a concept that, if it ever had any validity in England, certainly does not apply in Scotland. It has been rejected

by the Scottish judges, by the General Assembly of the Church of Scotland, and by Scottish constitutional thinkers down through the ages. This legend, used as a lever of power, as a means of “shifting the goalposts” when necessary, is nonetheless a factor with which we still have to contend, as expressed by Professor G.M. Trevelyan amongst others (after the Scottish judges had threatened in 1928 to declare an act of the Westminster Parliament to be *ultra vires*):

"Since Scotland was to be merged in England as one state, it was impossible to set up a Supreme Court, such as exists to interpret the Constitution of the United States and to guard the rights of the States composing that federation. In the United Great Britain constituted in 1707 there was no such court set up to decide whether or not a proposed law was 'constitutional' and in accordance with the Treaty of Union. The British Parliament was, by old English custom, omnipotent. That is to say, there was, and could be, no limit to its legislating powers." (The Listener, 1929)

This was demonstrated by the Blair administration on 1 October 2009, when it did, in fact, set up a new UK Supreme Court, which promptly took it upon itself to adopt appellate jurisdiction over both civil and criminal cases from Scotland, in bland defiance of Article 19 of the 1706 Treaty and its two ratifying Acts under which Scotland had entered the Union. It was not thought necessary even to justify this obviously unconstitutional move, which in itself did little to strengthen the rule of law.

It is difficult to imagine that Trevelyan had ever actually read the two Acts of Union (Scottish and English), which ratified and implemented the 1706 Treaty of Union. It still does not seem to have penetrated the English consciousness that the English Parliament was wound up on 1 May 1707, when the new body representing Scotland and England superseded it. Be that as it may, the Scottish jurist Professor T.B. Smith effectively demolished this clearly fallacious argument:

"At the time of the Union the idea had not emerged in Scotland that an absolute sovereign power was to be found in King or in Parliament or in both combined. The theory that the Scottish King was not above the law is of ancient acceptance. Neither in public nor in private law was the King above the law, and he could not concede powers of absolute sovereignty to Parliament. In questions of private law the Scottish courts prior to the Union did not accept the English doctrine that 'The King can do no wrong'... Thus, when Dicey and Rait [A.V. Dicey and R.S. Rait, "Thoughts on the Scottish Union", 1920] refer to 'the transference in Scotland of authority from a non-sovereign to a sovereign Parliament' at the time of the Union, it is difficult to appreciate how they concluded that a non-sovereign Parliament could transfer greater powers than it itself could lawfully exercise. 'Nemo plus juris ad alium transferre potest, quam ipse habet'."

It is important at this stage to be clear on what we mean by sovereignty. It suffices to state that, in the modern political context, a sovereign is *the ultimate resting place of legitimate authority*. Sovereignty means the supreme and controlling power of an absolute and independent master. It is the place where arbitration stops; it is the source of final decisions from which there is no further appeal.

The emphasis here is on the word “legitimate”, because sovereignty can be usurped by means of armed force, brainwashing, propaganda, etc. Sovereignty is frequently equated with naked power, but this is untenable in a democratic society. It is true that power may be either exercised directly or delegated by a sovereign authority, but power is all too frequently exercised *without* such legitimisation, or even against the will of the sovereign authority, on the principle of “might is right”. Such exercise of power is merely a usurpation of the rights of the genuine sovereign authority and it remains illegitimate, null and void, even when it is superficially successful and backed up by the institutions of state. The fact that it may not be possible or expedient in a practical sense to oppose such exercise of power effectively does not legitimise it in the slightest.

Some Precedents and Modern Authorities

There are two aspects of sovereignty that must be addressed: internal and external. There is the question of who is the sovereign authority within the state, and the question of Scottish national sovereignty in relation to the outside world. Following are a number of points relevant to both aspects:

a) The Declaration of Arbroath of the year 1320, one of the earliest documents of the Scottish constitution, laid it down that the King of Scots (the then executive and head of state) was subject to the will of the Community of the Realm of Scotland, and could legally be deposed if he failed to carry out that will. The Declaration refers to "our kingdom", and not "the king's kingdom". The principle is crystal clear, and can easily be translated into terms of the modern executive. The expression "Community of Scotland", even in the sense in which it was understood in 1320, can be taken to include all the politically enfranchised members of the modern population.

b) The Claim of Right of the year 1689 justified the deposition of King James VII by the Convention of Estates (the Scottish Parliament meeting on its own authority) on the ground that he had subverted the constitution of Scotland by turning a legal limited monarchy into an arbitrary despotism, and had thereby forfeited the right to the crown, which had become vacant. Here, again, it requires no revolutionary thinking to realise that, in this age of international democracy, the principle is eminently applicable to the current Scottish situation.

c) The major Scottish constitutional writers down through the centuries, for example Hector Boece, George Buchanan and Samuel Rutherford, have all emphasised the principle that rulers are the servants of the people, and can legally be deposed by the people. Buchanan, quoting numerous Scottish precedents, used it to justify the deposition of Queen Mary I, whose emotional instability rendered her unfit to govern. This constitutional norm has been reinforced by the opinions of modern jurists such as Professor T.B. Smith and Lord President Cooper that the English doctrine of parliamentary sovereignty has no validity in Scotland.

d) The sovereignty of the people is the international standard in states all over the world with vastly differing socio-economic structures. In most cases it is written into their constitutions.

e) In a practical sense, decisions by a parliament or other legislature may be held to rank higher than those of the other institutions of state (courts of law, civil service, etc.). This is legitimate in theory, even if it is not true in reality (superiority of international law, overriding power of the Scottish courts in certain circumstances, etc.). There is no way, however, that the concept can be stretched like elastic to cover the supremacy of a parliament – the elected servants of the people – over the people themselves. All constituted power is subordinate and inferior to the power constituting.

f) The constitutional sovereignty of the people, represented by a qualified and registered electorate, implies the sovereignty of any part of that people and electorate in matters that concern that part alone. This must be particularly the case when, as in this instance, the "part" (Scotland) is in fact an integral whole, a distinct legal and constitutional entity in its own right with its status entrenched in the union agreement. It is clear that no referendum on independence for Scotland alone could be conducted on an all-United Kingdom basis, unless one can explain how matters fundamentally affecting the indigenous law of Scotland could be decided by an electorate resident under and subject to a totally different legal jurisdiction in what, for legal purposes, is a foreign country. The same principle could be said to apply to local issues within Scotland.

g) The sovereignty of the people is the basis of the right to self-determination laid down in major international instruments like the group of United Nations legal measures comprising the International Bill of Human Rights. The UN General Assembly has repeatedly ruled that the right to self-determination by identifiable "peoples" like the Scots is a fundamental human right. It should be noted that this right is expressly held by "peoples", not governments or legislatures. This international law, which is part of the modern global constitution, is absolutely binding on the United Kingdom. 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*".

h) The United Nations has also laid down certain principles for the recognition of a "people" as a cohesive social entity entitled to exercise and enjoy the right of self-determination. These include the possession of distinctive national characteristics, a lengthy shared experience over a considerable period of time, a previous history of self-government, and an association with a defined territory. The Scots meet these conditions many times over.

i) The principle of self-determination is also contained in the Helsinki Final Act, which constitutes an international norm, and was underlined once again with all emphasis by the then 35-nation Conference on Security and Cooperation in Europe, at its plenary meeting in Vienna that ended in January 1989. The three major submissions on the Scottish situation that were placed before the Conference by the Scotland-UN Committee played no small part in causing it to issue this restatement of the relevant international law, which is both politically and legally binding on the United Kingdom, at which it was primarily directed:

[The participating states] confirm that, by virtue of the principle of equal rights and self determination of peoples, and in conformity with the relevant provisions of the [Helsinki]

Final Act, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic and cultural development. (Questions Relating to Security in Europe, No. 4)

Who, then, are “the people” who are to exercise this right? Political philosophers have debated this question for centuries. In a modern political context, however, the expression must be taken to include every one of any age and condition who is entitled to citizenship of a particular political unit. It is obvious, however, that many of these people are incapable of exercising the responsibilities of citizenship. Babies, immature young people, the insane, convicted prisoners and others are all citizens with rights, but they are excluded from the process of political decision-making. The remaining enfranchised citizens – still the vast majority of the total population – exercise the sovereign power of the people on behalf of everyone. For our purposes, therefore, our country’s supreme constitutional authority can be defined as “*the people of Scotland, represented by a qualified and registered electorate*”.

Our Constitution is now Global

It will be obvious from much of the above that *international law has now become an integral part of our national constitution*. This new development has actually been gaining force slowly ever since the Second World War, but the pace of development has become breathtaking since 1989, after the end of the Cold War and the collapse of Communism and the bipolar world system. Bilateral diplomacy between individual states on major issues has almost disappeared, and the results of the new multilateral diplomacy around the negotiating table are being steadily integrated into the explosively expanding body of international law.

Nowadays there are more international and regional organisations than sovereign states. The flood of new international treaties, conventions and agreements is bewildering. Authorities to monitor adherence to them are being set up, regular follow-up conferences to bring them up to date come up with constant changes, and specialised “alphabet agencies” are shooting out of the ground everywhere.

There are now in effect four principal levels of government: global, regional (e.g. European), national and local. While this all forms part of our modern constitution, representation at the two “upper” levels, global and regional, is still largely the prerogative of national governments, which is why foreign policy now enjoys enhanced status at national level.

While most regions of the world have only one regional authority, Europe has five major organisations and a number of other specialised ones. The 27-member European Union (EU) has achieved notoriety on account of the amount of legislation it imposes on member states, but what is not generally realised is that others like the 47-member Council of Europe (CoE), the 56-member UN Economic Commission for Europe (UNECE), the 57-member Organisation for Security and Cooperation in Europe (OSCE) as well as the dozens of global organisations within and without the United Nations family are all major sources of law that must be implemented at national level.

The aspect of this situation that impinges most directly on the Scottish constitutional situation is that a significant part of this flood of international law lays down standards of governance that must be adhered to by individual states. For example, the Council of Europe, which operates the European Court of Human Rights, has specified principles of pluralist democracy, the rule of law and respect for human rights that must be implemented by state governments at the risk of international sanctions. No national government can now plead that such issues are exclusively internal matters.

It was action by the Council of Europe against the UK's breach of all three of these norms that led to the restoration of the Scottish Parliament, and the Blair government was powerless to hold out against it, despite some very underhand attempts to do so – none of which, incidentally, has been allowed to get into the public domain. At any rate, the Scottish constitution, when it is finalised, must pay close attention to these international norms of governance, certainly in spirit, and where necessary to the letter.

This article can be no more than a general introduction with a tour d'horizon of the most basic constitutional principles, and perhaps a touch of Calvinist fundamentalism. What emerges is that the sovereignty of the Scottish people, and their power to decide their own internal and external political status freely and without external interference, is unassailable. In due course it will have to be fleshed out with much fundamental detail like citizens' rights and responsibilities as well as the necessary structural and procedural content.

An inherent sense of communal order among the Scottish people is not going to be achieved overnight, but in striving for constitutional propriety what we are really trying to do is to lay the foundation for a new Scottish society that can have profound effects for generations to come.