

The Scottish Independence Bill: a consultation on an interim constitution for Scotland

Response to the consultation

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1. This response is primarily a response to question 2 on the consultation:

What are your views on the proposed content of the Scottish Independence Bill, set out in Chapter 1 and explained in Chapter 3?

2. The Scottish people decided, in the referendum held on 18th September, that they did not wish Scotland to be an independent country. For some, that may seem to make the question of developing an interim constitution superfluous. I do not share that view. Constitutions are not only needed for independent countries. Any corporate organisation which wishes to specify its governance and source of authority can benefit from a constitution: charities, religious bodies and voluntary organisations commonly have one. The primary purpose of a constitution is to identify the principles according to which an organisation or authority is to be governed, the institutions through which it will be done and the rules through which governance will take place. Those issues are all relevant to the governance of Scotland, whether or not it is an independent country.

Rules of governance

3. In *The Concept of Law*, HLA Hart identifies three kinds of rule that are needed for a developed system of law: rules of *recognition*, *change* and *adjudication*. These rules are fundamental to constitutional authority, but the draft Bill has gaps in relation to each of them.

4. Rules of *recognition* explain how law can be identified and recognised as authoritative. Although the constitution refers to the ‘sovereign will of the people’, it only identifies one route by which laws are made, and that is the Scottish Parliament rather than popular agreement. It does not state that the Scottish Parliament is able to delegate any part of that authority. The need for delegation is unavoidable – for example, in the issuing of statutory regulations, or the passing of by-laws by local government or statutory agencies - and it should be provided for explicitly.

5. Rules of *change* explain how laws can be amended. This may be an interim constitution, but there is no provision for it to be changed except by its complete replacement. Provision for amendment is basic.

6. On rules of *adjudication*, the bill tells us in s.14 that there will be courts, but not what the powers of the courts are. ‘Civil’ and ‘criminal’ branches are envisaged, but the constitution does not define a constitutional branch. Can the courts determine the meaning of the constitution authoritatively, or will they be overruled by government? Judicial review will continue to take place on established criteria, but can there be judicial review of government action solely on the basis that such action is in breach of the Constitution? What will happen if the courts and the Parliament disagree?

Institutions

7. Most of the institutions that are referred to in the draft Bill are in existence, but the consultation document is heavily reliant on existing custom and practice, referring to it frequently without considering alternatives. The Scottish Parliament currently has no revising chamber, and the Bill does not envisage any avenue through which additional legislation can be introduced. If there have not been serious bottlenecks in business in the Scottish Parliament, it is not because Holyrood can manage without further capacity. The practice of the Parliament since its foundation has led to periodic reliance on referral to Westminster, through the mechanism of the Sewel motion to obtain legislative consent. However, it is possible, even likely, that the reforms currently being undertaken via the UK parliament will remove Scottish business from its remit, and if that happens some other body has to take up the role. This could be done by a second chamber, such as a Senate, but it does not have to be; there are several other methods by which it could be done, such as the French *Conseil d’Etat*, which has delegated authority to advise on or revise legislation.

8. The powers of local government, as described in s 17, are very limited indeed. Local government is said to be there ‘to represent and promote the interests of the people living within the local area’. That is, more or less, the current role of a community council. It falls a long way short of the powers local governments need to provide public services or to undertake public projects. Local government in Scotland has rather more powers now (even if they are less than the powers permitted to councils in England); they need the power to act on behalf of a local population to increase welfare and to serve their population.

Powers

9. Under the terms of the Scotland Act, the Scottish Government can claim no powers that are not devolved to it. It can however decide voluntarily to restrict its powers, for example through recognition of human rights (provided for in s.26) a commitment to consult or hold referenda on matters of significance (which would be consistent with s.3 of the Bill) , or by setting restrictions on the terms through which statutory instruments may be defined (not presently in the draft).

10. Although defence and border security are both likely to remain as reserved powers, the Scottish Government may wish to consider whether it should not voluntarily limit its own capacity to act in relation to weapons of mass destruction or actions taken in respect of foreign nationals.

Principles

11. Statements of principle are always liable to be controversial. The Bill opens with one statement of principle, in sections 2-3: that is, the sovereignty of the people. Later principles include commitments to respect for human rights and fundamental freedoms (s.26), equality (s.28) and sustainability (s.32). In the context of a constitutional document, such statements of principle contain implicitly the potential for the principle to be referred to subsequently in a legal case, typically when such a principle has been breached. It is consequently prudent to treat all statements of principle in a constitution as potentially justiciable.

12. I have contributed discussion papers to the Common Weal movement, suggesting a range of principles that might be considered to guide political action in Scotland. Three are additional to those in the draft bill:

- *The common good*: a commitment to the welfare of all through the welfare of each person
- *Solidarity*: the recognition of obligations to each other.
- *Common enterprise*: the establishment of common capacity through shared enterprise and endeavour.

Process and timetable

13. The Scottish Government now has no need to follow the timetable originally envisaged in the consultation document. A broadly based consultation would make it possible to refine the principles, and it would provide an opportunity to continue the exemplary commitment to public engagement that has been established in the process of the referendum on independence.

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