



The Scottish Constitutional Tradition: A Very British Radicalism?

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Abstract

This paper discusses recent developments in Scottish nationalist constitutional thought during the period of 2002 to 2014, showing how the Scottish constitutional conversation has diverged from, but continues to be influenced by, the UK-wide constitutional conversation at Westminster. It presents Scottish nationalist constitutional thought as a ‘very British radicalism’, which is characterised by certain constitutional forms and ideas that are radical in a British context (such as popular sovereignty, proportional representation, a written constitution, and a commitment to covenantal socio-economic and environmental provisions) while at the same time retaining a persistent ‘Britishness’ in terms of specific institutional proposals and ambivalence towards the principles of constitutional government. Finally, I will discuss possible designs of a future constitutional settlement in Scotland and the United Kingdom. Notably, I will explore how far the Scottish constitutional tradition might impact on the constitutional shape of the United Kingdom.

Key-words

Sub-national constitutionalism, Scotland, UK, Devolution, British constitutionalism



1. Introduction

Before the independence referendum in 2014, the Scottish Government committed itself to certain democratic and constitutionalist principles which it envisaged as foundational to the new Scottish state it hoped to create. These included popular, instead of parliamentary, sovereignty and a written constitution with judicially guaranteed human rights (Scottish Government 2013).

This commitment highlights an interesting, if little studied, feature of the Scottish autonomist movement: despite having long been exposed to the constitutional values and assumptions of the British state, Scotland has developed its own distinct constitutional tradition of both thought and practice. The term ‘Scottish constitutional tradition’ does not imply, of course, that such a tradition is universal, either in the academy or in popular usage. It refers mainly to the constitutional ideas and institutions advocated by those who support independence or greater autonomy for Scotland, and it makes no claim regarding the acceptance of such a tradition by the courts as a source of existing constitutional law.

The emergent Scottish tradition, although deeply influenced by British orthodoxies, has also been radically critical of them, and has sought to draw upon indigenous Scottish practices from the pre-Union state, as well as upon European and Commonwealth examples, to forge a new democratic constitutionalism that appears quite at odds with Westminster norms. Its characteristics have been examined in earlier works, in terms of: (i) its origins in Scottish, European and global constitutional history (Bulmer, 2014a) and (ii) the place of constitutionalism in the Scottish independence debate (2014b). The first part of this paper recaps some of that earlier work in a condensed form, in order to demonstrate the existence of a distinctly Scottish constitutional tradition and to examine some of its key principles and features.

These earlier works were written, however, before the publication, in 2014, of the Scottish Government’s draft Interim Constitution for Scotland. That document, while not undermining the general thesis that there is an emergent Scottish tradition of constitutional thought and practice, does require the nature and characteristics of that tradition to be somewhat reassessed. The liberal-constitutionalist principles that the Scottish National Party (SNP) has upheld since the 1970s (Bulmer, 2011a) have been partially – although not



wholly – overshadowed by a new form of communitarian populism. The second part of this paper therefore contrasts the SNP’s 2002 draft Constitution for Scotland with the 2014 draft Interim Constitution and reflects on the causes of the differences between them.

Moreover, this paper is written after the rejection of Scottish independence in the September 2014 referendum. There is a hanging question – of relevance to politicians and policy-makers, as much as to scholars – about what this means for a future constitutional settlement in Scotland and the United Kingdom. The third part of this paper asks how this Scottish constitutional tradition might be expressed in a non-independent but autonomous jurisdiction, and what implications that might have on the future constitutional shape of the United Kingdom.

The three parts of this paper correspond to three time periods. The first covers the period from 1964, when the first draft Constitution for an independent Scotland was written, to 2002 when the SNP’s most elaborate constitutional proposal was published. The second covers the period from 2002 to the publication of the draft interim Constitution in 2014. The third, which is necessarily more speculative, discusses the period from 2014 into the immediate future.

2. The Emergence of a Scottish Constitutional Tradition: 1964 to 2002

The United Kingdom is almost unique in having evolved from a seventeenth century monarchy to a modern parliamentary democracy without revolutionary upheaval and without adopting a written, fundamental constitution (Thornhill 2011). The dominant British political tradition has taken pride in this gradual, *ad hoc* evolution, and has generally been highly suspicious of written constitutions, clear ground-rules, abstract principles, and judicially enforceable restrictions on the power of Parliament.

Half a century ago, the idea that there might be a countervailing tradition of ‘Scottish constitutional thought’, less wedded to parliamentary sovereignty and less hostile to abstract constitutional principles, was preposterous to most constitutional scholars. In the orthodox view, north and south of the border, the United Kingdom was a centralized unitary state, divided only by class and never by nationality or geography (Birch 1967; King 2001). Scotland’s indigenous constitutional traditions barely warranted a mention in this account:



‘Most of the generalizations that can be made about politics in England and Wales apply with only minor qualifications to Scotland, and for most practical purposes it is reasonable to treat the northern kingdom simply as part of a united political unit called Great Britain.’ (Birch 1967: 15)

Since then, much has changed. Those familiar with Scottish political history will be aware of the major milestones. Following the emergence of Scottish nationalism as an electoral threat to the established parties, a Royal Commission on the Constitution (the Kilbrandon Commission) was created ‘To examine the present functions of the central legislature and government in relation to the several countries, nations and regions of the United Kingdom’ (Jones and Kavanagh 1979: 21). The Commission’s report advised a form of ‘legislative devolution’ for Scotland (Jones and Kavanagh 1979: 22). In 1974 the SNP won 30 percent of the Scottish vote and 11 seats – a result that ‘frightened Labour’ into supporting devolution (Keating 1998: 223), but the 1979 devolution referendum was defeated because of low turnout. The first attempt to win devolution, having fallen on this hurdle, was indefinitely postponed by the Conservative victory in the 1979 Westminster election (Lynch 2002: 149).

This defeat was a pivotal moment in the emergence of Scottish constitutionalism. From it arose the Campaign for a Scottish Assembly (CSA), formed to ‘keep the [devolution] issue alive and mobilise support across the parties and within civil society’ (Keating 1998: 223). The CSA evolved into a Constitutional Convention, composed of a broad coalition of interests that could speak with some authority as the voice of Scotland. The refusal of the SNP to participate, once it became clear that there was no room on the agenda for independence, left the Labour Party and the Liberal Democrats in a dominant position, but minor parties such as the Greens were involved, together with the trade unions, the churches, the federation of small businesses and local authorities (Keating 1998: 224).

The opening act of the Convention was to issue a Claim of Right for Scotland, asserting ‘the sovereign right of the people to determine for themselves the form of government which best meets their needs’ (Dudley-Edwards 1989). This evocation of popular sovereignty was a direct challenge to the British doctrine of parliamentary sovereignty. It reflected not only a desire for the territorial redistribution of power from London to Edinburgh, but also, more radically, a desire to change the source and legitimate



ends of power, and with it to change the way that power was to be exercised in and over Scotland. The Convention's objection was not just to rule from Westminster, but also to the Westminster way of ruling:

'Our direct concern is with Scotland only, but the failure to provide good government for Scotland is a product not merely of faulty British policy in relation to Scotland, but of fundamental flaws in the British constitution.' (Claim of Right, Para. 1.2, cited in Dudley-Edward 1989).

Here the Scottish constitutional tradition diverges most clearly from British orthodoxy. Twentieth century accounts of the British constitution (e.g. Headlam-Morley 1928; Birch 1967) typically attributed its success to three traits. Firstly, its reliance on well-established traditional rights and privileges, embedded in historical compromises and unspoken norms, rather than on principled foundations expressed in written Constitutions. Secondly, a plurality electoral system that reduced factionalism and favoured an adversarial contest between Government and Opposition parties. Thirdly, a dominant executive, armed with the power of dissolution, that could lead and 'discipline' Parliament. Against this, most European models of democracy, characterised by abstract rights, written constitutions, proportional representation, and less dominant executives, were seen as inferior and inherently unstable. Scottish Constitutional Convention reversed traditional interpretations of these three features, presenting them not as the secrets of Britain's strength, but as problematic legacies that were damaging to democracy, morally unsustainable, and alien to the Scottish ethos. It criticized the excessive power of the Prime Minister and party whips (Para. 4.1), the procedural weakness of Parliament and its vulnerability to arbitrary dissolution (Para. 4.4), and the disproportional electoral system (Para. 4.5). It rejected the 'English' doctrine of parliamentary sovereignty as a danger to liberty, since 'every right the citizen has, can be changed by a simple majority of this subordinated Parliament' (Para. 4.3). Mere devolution, without challenging the basic assumptions, traditions and institutions of the British polity, would not provide a satisfactory response to these problems; indeed, it might replicate them in a Scottish context. Scotland needed a Parliament that would be very different from Westminster: a Parliament elected by



proportional representation, with inclusive and transparent procedures, and a more balanced relationship between the executive and legislative branches.

The Scottish Constitutional Convention was not alone in its critique of British orthodoxies and institutions. UK-wide reform groups, such as Charter 88, pointed to a wider sense of dissatisfaction. However, a major difference between the Scottish and the British-English constitutional traditions is this: that whereas voices for reform have remained firmly on the margins of English politics, in Scotland their grievances have been heard, accepted, and used to shape institutional change. The Scotland Act 1998 gives institutional form to nearly all of the Constitutional Convention's desires: the Scottish Parliament is elected by proportional representation for fixed terms, and the executive has no right of arbitrary dissolution. The Scotland Act formed, in relation to the Scottish Parliament, a 'quasi-constitution', which was beyond the powers of the Parliament to change unilaterally. European Convention rights were embedded in the Scotland Act, and a system of judicial review was established by which the 'constitutionality' of laws could be tested. The Consultative Steering Group, created to prepare the Parliament's working practices, made further procedural recommendations, which were broadly accepted, to enhance the role of the opposition and of committees, and to strengthen Parliament as a whole (Bulmer 2014a; Cairney and Johnston 2013).

Since devolution, the practical limitations of these changes, faced with an adversarial party system and a deeply engrained legacy of majoritarian politics, have become apparent (Cairney and Johnston, 2013). Nevertheless, important, and in their own way 'radical', institutional changes have been made. While the UK as a whole voted against even moderate electoral reform in 2010, proportional representation in Scotland is no longer the demand of a handful of reformers; it is a fact. Restrictions have been placed on the prerogative of the Crown, reducing the potential for political influence by the monarch in government formation or the dissolution of Parliament. Constitutional ideas and institutions that were once 'somewhat radical' (MacCormick, 1991; 2000) have now become 'part of the common stock of democratic thought in Scotland today' (MacCormick, 2008).

The divergence between constitutional traditions has deep roots. Since the 1950s some Scottish nationalists have seized on obiter remarks in *McCormick vs Lord Advocate* as justification for the view that parliamentary sovereignty was an 'English' doctrine, alien to



Scottish constitutional law. As early as 1964, the first known draft Constitution for an independent Scotland was published by a group calling itself the Scottish Provisional Constituent Assembly (SCPA) (Moffat, 1993). This included a range of what were then, in a British context, constitutional novelties: a written Constitution, limits on the crown prerogatives, justiciable rights, proportional representation, a unicameral Parliament, constitutional amendment by referendum, a powerful ombudsman (Bulmer 2011a). Four years later, the catalogue of constitutional grievances set out by H. J. Paton in *The Claim of Scotland* (1968) pointed to a distinctly Scottish constitutional tradition, which, if dormant, retained a shadow of life that might one-day be revived. The SNP worked on developing a draft during the 1970s, with its 1977 text (which again provided for popular sovereignty through a written Constitution that only the people, and not Parliament, could amend) forming the basis for subsequent proposals. In those days, however, Scottish autonomists were at best a marginal force in politics, and these views were ignored by the Anglo-centric mainstream of constitutional scholarship.

The SNP's most recent draft of a permanent Constitution for an independent Scotland was published in 2002 (SNP 2002; Bulmer, 2011a). This 2002 draft has been analysed elsewhere (Bulmer, 2011a; 2011b), and it is necessary here only to provide an overview of its main provisions. It opens with a ringing proclamation of popular sovereignty and constitutional supremacy (SNP, 2002: Article I). The ceremonial office of Head of State is vested in the Queen and her successors according to Scots law (SNP 2002: Article II, Section 1). A unicameral Parliament would be elected by proportional representation for four-year terms, and could not be dissolved except in circumstances where a Government cannot be formed. Parliament would have the right to form committees, to determine its own procedures, and to elect its Presiding Officer. The declaration of war and the ratification of treaties would require parliamentary assent (SNP 2002: Article III, Sections 8 and 9). Executive powers would be exercised by, and on the binding advice of, responsible Ministers, with the Prime Minister being elected by Parliament and the other Ministers being nominated by the Prime Minister from amongst the members of Parliament (MacCormick 1991: 165; SNP 2002: Article II). Judicial review of the constitutional validity of laws would be vested in the Court of Session (SNP 2002: Article V). Judges would be nominated by an independent 'Commission on Judicial Appointments'; once appointed, they would enjoy security of tenure, subject only to removal on grounds of misconduct by



a two-thirds majority of Parliament (SNP 2002: Article V). In the absence of a second chamber, the draft Constitution contained a minority veto referendum provision which would enable bills, other than money bills, to be suspended for up to eighteen months by a two-fifths minority of the members of Parliament; the majority would be able to overturn this suspension by appealing to the people in a referendum (Bulmer 2011c). Local Councils, elected by proportional representation, would enjoy autonomy in respect of the powers vested in them by law (SNP 2002: Article IV, Section 1). Suffrage in parliamentary and local elections would be granted from the age of sixteen. Constitutional amendments would need to be approved by a three-fifths majority of Parliament followed by a referendum (SNP 2002: Article 7).

Substantively, the 2002 draft Constitution guaranteed the equality of English, Scots and Gaelic as official languages, but otherwise contained little ‘constitutional nationalism’ (defined by Hayden [1992: 655]) as ‘a constitutional and legal structure that privileges the members of one ethnically defined nation over residents in a particular state’). It specified no national flag or anthem, contained no preamble, had an open approach to citizenship based on residence not ethnicity, and made no mention of church-state relations (Bulmer 2011a). European Convention rights were integrated into the text, including certain protocols such as the abolition of the death penalty. The draft also provided for socio-economic rights, including a right to fair working conditions, housing, education and healthcare.

In many contexts, such proposals would be unremarkable. Written constitutions, guided by principles of higher-law constitutionalism, are the common stuff of which modern democracies are made (Goldsworthy 2006; Law and Versteeg 2012; Miller 2010; Tate and Vallinder 1995; Thornhill 2011). In a British context, however, these constitutional proposals, and the principles that undergird them, are radical. While the constitutional orthodoxies of parliamentary sovereignty and conventional practice prevail at Westminster, many within Scotland have learnt a new language of democratic constitutionalism with popular (rather than parliamentary) sovereignty at its core.



3. A ‘Very British’ Radicalism: Developments 2002-2014

During its minority administration (2007-2011) SNP made few constitutional commitments. Although the party’s constitutional policy was never formally changed, the Government’s primary focus was on domestic administration. After gaining a majority in 2011, however, important constitutional principles were re-affirmed. In early 2012 the Scottish Government asked the Scottish Parliament to endorse a key clause of the Claim of Right containing the principle of popular sovereignty. This endorsement was granted overwhelmingly, with Labour, Liberal Democrat, Green and independent members, as well as the SNP, all voting in favour; only the Conservatives abstained. By this decision, a principle which had once been a moral claim, external to accepted constitutional principles, was recognized and embraced by Scotland’s national legislature.

This was followed, in November 2013 by a White Paper, ‘*Scotland’s Future*’, that re-affirmed key aspects of Scottish constitutionalism. It promised that proportional representation, popular sovereignty, and judicially guaranteed human rights, would be entrenched in Scotland’s new constitutional order:

Independence will enable Scotland to be a modern, democratic European country with independent government institutions that build on the existing Scottish Parliament, Scottish Government, autonomous legal system and independent judiciary. [...] Central to this will be a written constitution setting out and protecting the rights of the people of Scotland. (Scottish Government 2013: 351)

The Scottish Government also committed itself in the White Paper to a two-stage constitution-building process. Firstly, the Scottish Parliament would create an interim ‘Constitutional Platform’, establishing the ground-rules and institutional frameworks of a Scottish state from the date of independence. There would then be an inclusive process, during the first post-independence Parliament, to develop an enduring Scottish Constitution:

One of the first and most fundamental tasks of the parliament of an independent Scotland will be to establish the process for preparing Scotland’s first written constitution through an open, participative and inclusive constitutional convention. (Scottish Government, 2013: 351).



This two-stage process marked a change from the SNP's previous policy. When the SNP was in opposition (1999-2007), it had envisaged a process similar to that which took place in most former British colonies, whereby a prospective constitution would be agreed and put to the people before the referendum (SNP, 2002; 2005). This tactical change in the chronological order of independence and constitution-making reflected, according to Scottish Government sources, a desire to avoid the politically damaging perception that the Scottish Government would dictate the terms of the future constitution. Yet, in opting for this two-stage process, the Scottish Government distanced itself from the specifics of the SNP's 2002 text (as the details of the future Constitution were now to be worked out after independence, not presented to the people before the vote).

Delaying detailed constitution-drafting until after independence gave the Scottish Government the ability both to promise more, in terms of constitutional rhetoric, and to deliver less, in terms of clear constitutional guarantees, than has been previously envisaged. The 2002 draft reflected a liberal-procedural (Lerner, 2011) approach to constitutionalism. While being strong on human rights, democratic processes, and protections for political minorities, it contained no rhetorical preamble, articulated no grand vision of society, and was silent on matters of national identity, religion and values. Since 2011, however, the SNP's proposals – and public rhetoric – have focused on the prescriptive potential of a Constitution, with less emphasis on procedures and institutional rules, and more emphasis on the constitutional entrenchment of certain principles and policy decisions that are deemed to be foundational to the new Scotland.

The White Paper indicated that a post-independence Constitution could, for example, contain prescriptive provisions on such matters as 'equality of opportunity and entitlement to live free of discrimination and prejudice'; 'entitlement to public services and to a standard of living that, as a minimum, secures dignity and self-respect and provides the opportunity for people to realise their full potential both as individuals and as members of wider society'; 'protection of the environment and the sustainable use of Scotland's natural resources to embed Scotland's commitment to sustainable development and tackling climate change'; 'a ban on nuclear weapons being based in Scotland'; 'controls on the use of military force'; 'rights in relation to healthcare, welfare and pensions'; 'children's rights' and 'rights concerning other social and economic matters, such as the right to education



and a Youth Guarantee on employment, education or training the constitution? (Scottish Government 2013). It also included some brief provisions relating to the status of local government, the independence of the judiciary and the civil service, and the parliamentary ratification of treaties, as well as a commitment in principle to popular sovereignty, human rights and the accountability of the state to the people. Such a Constitution would not only be a Charter of democratic rights and institutions, but a new Covenant amongst the people of Scotland, symbolising a commitment to a more inclusive, communitarian and egalitarian society (Bulmer 2014c).

Despite this professed constitutional radicalism, the draft interim Constitution was a short and rather minimal document. It would have retained the existing institutional structures of the devolved Parliament and Government, adapting them minimally to the needs of an independent state. As such, it contained almost no institutional provisions. There was nothing in the text to regulate how the Parliament of Scotland would be elected, its terms of office, the process of government formation, relations between ministers and the Crown, the mechanism for appointing and removing judges, the procedure for enacting laws, the holding of referendums, or any of the other key procedural institutional elements of that it is the primary task of any written constitution to define. All these matters would have been regulated by an amended Scotland Act as a separate, sub-constitutional, statute.

Moreover, although popular sovereignty was proudly proclaimed, the text of the draft interim Constitution made no provision for the effective entrenchment of the Constitution. The power to amend the Constitution, and the Scotland Act, was to reside in the ordinary parliamentary majority. It contained no clear constitutional supremacy clause and, indeed, the right of the courts to review the constitutionality of laws (which, in any case, would be rendered quite meaningless by the absence of entrenchment) was not explicitly stated. This would, in practice, have transferred sovereignty – understood simply as the power to make changes to fundamental law – to Parliament. In effect, the 2014 text would have established a new form of parliamentary absolutism – a populist parliamentarism, in which power would be popular in its origins, but parliamentarian in its exercise.

The differences between the 2002 and 2014 texts demonstrate a dramatic shift in the SNP's constitutional thinking. On an institutional level, the 2002 draft was committed to a major reform of the Westminster model. Its counter-majoritarian provisions, such as the minority-veto referendum mechanism, the entrenched higher-law status of the constitution,



and a commitment to proportional representation, would have helped to encourage a more consensual model of democracy (in the terms defined by Lijphart 1999). In these respects the 2014 draft is a more majoritarian – and much less constitutionally radical – text.

However, the 2014 draft can also be seen as a product of a new type of constitutionalism that has emerged in parts of Scottish society. In contrast to an institutional, ‘liberal-procedural’ (Lerner 2011) constitutionalism, concerned primarily with the structures of government and fundamental rights, this new constitutionalism is focused on the expression of values and principles. Angus Reid’s ‘Call for a Constitution’ is an example of this tendency; in trying to encapsulate constitutional principles in poetic form, Reid advocates a form of constitutionalism that is based on inspirational ethical principles, not dry laws and institutions (Reid and Davis 2014). Thus the Scottish Government in 2014 offered a brand of populist-communitarian constitutionalism that embraced the principle (if not the reality) of popular sovereignty and progressive socio-economic rights, but which was content with only minor changes to the existing institutional arrangements established by the Scotland Act.

This makes the 2014 draft an example of ‘very British radicalism’. It is radical because it embraces an expansive, transformative, covenantal view of the constitution, and makes a number of progressive policy commitments in seeking to establish a socially just and unified community. Yet it is ‘very British’ in its concentration of powers in the hands of the leader of the parliamentary majority, and its reluctance to place higher-law constitutional limits on the legislative power of that majority.

It is likely that the changing dynamics of party competition had an influence on the SNP’s change of heart between 2002 and 2014. According to Negretto (2013), political parties involved in constitution-making processes have to negotiate between ‘co-operative’ goals (the stake all political actors have in a functioning, legitimate, state) and ‘distributive’ goals (the stake each actor has in maintaining and expanding its own power). The stronger a party is, and the surer it is of maintaining its electoral strength, the more that party will, on the one hand, seek to maximize the power of incumbents (expecting to enjoy incumbency) and, on the other hand, seek to place substantive and policy provisions in the constitution that are favourable to its own ends. The shift in emphasis from the 2002 text to the 2014 text is consistent with what Negretto’s model would predict for a party that has graduated from opposition to office. For example, the minority veto referendum



procedure, which featured so prominently in the SNP's 2002 text, has never been publicly mentioned since the party came to power, and finds no place in the White Paper's proposals or in the 2014 draft interim Constitution. This is exactly what one would expect from a party that anticipates being in government rather than opposition. Conversely, the Scottish Government's constitutional announcements on substantive issues, such as the public funding of university education and a ban on weapons of mass destruction, show signs of wanting to use the constitution to promote the party's policy goals.

The change of emphasis can also be attributed, at least in part, to a clash between the popular constitutional consciousness unleashed by the independence campaign, on the one hand, and the ingrained habits of the British state, on the other. Public demands for a written constitution were voiced by a diverse range of civil society groups on the Yes side of the referendum debate, but the civil service in Scotland, which is steeped in British ways of working, and seemingly hostile or apathetic to the idea of higher-law constitutionalism, struggled to conceive of a constitution in any terms but those described by Eskridge and Ferejohn (2001) as a 'super-statute'. Such a constitution would have little or no more than statutory status in law, even though it might have political salience (McHarg 2014).

The SNP's constitutional radicalism also remained 'very British' in at least two other senses. Firstly, the party was keen to maintain continuity with the British past and with British identities, through the retention of various forms of 'union' between Scotland and the rest of the UK: a common travel area, a currency union, a dynastic union through a shared head of state, a range of cross-border services, and an informal and intangible, but still vital, sense of 'social union' (Scottish Government 2013). Secondly, the SNP's proposals are radical only in a British context, and there is little in them that is new, innovative, or radical in the wider context of modern constitutionalism, as practiced in the democratic states of Europe and the Commonwealth. Indeed, when placed alongside emerging global norms of democratic constitutionalism SNP's proposals appear quite ordinary and even perhaps conservative.

This is not to deny the emergence of a distinctly Scottish constitutionalism (the idea that a Constitution could, in the name of a sovereign people, commit the state to principles such as free university tuition or the prohibition of nuclear weapons would be quite alien to orthodox British constitutional thought); it is merely to note that Scottish constitutionalism does not exist in a vacuum, but in a tussle of party-politics and long term influences.



Moreover, the change in the SNP's constitutional priorities does not negate the existence of a Scottish constitutional tradition that is wider than the SNP. It is worth reiterating that the Claim of Right was asserted as a national claim, not merely a *nationalist* one. Its principles were endorsed by a wide spectrum of the political class and by civic society – from Gordon Brown downwards.¹ These principles were not invented by the Convention, but were derived from a long tradition of distinctly Scottish constitutionalism with roots that can be traced back through the theo-political thought of the Scottish Reformation to the limited and contractual kingship of the Declaration of Arbroath (Bulmer 2014a). Indeed, it could be argued that the 2014 draft interim constitution was itself 'unconstitutional', in that its substitution of parliamentary for popular sovereignty contravened the *grundnorm* of Scotland – which is the sovereignty of 'the whole community of the realm', in their original, plenary, constituent capacity – and the consequent limitation of any parliamentary body.

4. Consequences for Scotland and the UK: From 2014 Onwards

The rejection, for the time being, of independence, does not mean that we can simply go back to the old ways of thinking about the sovereignty of the Westminster Parliament. The referendum can be interpreted as an endorsement and a confirmation, not a denial, of the principle that the people of Scotland are sovereign and so can determine the form of government best suited to their needs. Such sovereign and constituent power does not demand the end of the United Kingdom; merely that, if the United Kingdom is to hold together, it must be based on a new constitutional settlement in which Scotland's place – and the rightful place of the people within Scotland – is properly recognized.

The referendum showed that a majority of the people in Scotland wish to maintain the Union, or at least to give the Union another chance at reinventing itself. The question of *what form* that Union should take, however, remains an open one. Former Prime Minister Gordon Brown, supported by the leaders of the Conservative, Labour and Liberal Democrat parties, intervened in the last days of the campaign with a 'solemn vow' to the effect that a 'No vote' was not a vote for the status quo, but rather an endorsement of an additional transfer of powers to Scotland, resulting in a new constitutional settlement that would amount to 'home rule' or 'as near to federalism as possible' (Campbell 2014).



Former SNP Leader, Alex Salmond, who is contesting the 2015 general election, has stated that his party's priority is to ensure fulfillment of that vow by delivering home rule, interpreted as autonomy over everything except foreign affairs and defence (Knight 2015).

In Scotland, '*We the people*' have chosen to be governed as part of a United Kingdom, sharing powers with United Kingdom-wide institutions as required – but only on such terms as the people agree to, and only for so long as the people wish.

This commitment to the sovereignty of the people rules out any form of devolution as a lasting settlement. Devolution was designed to delegate powers to Scotland whilst retaining parliamentary sovereignty in Westminster. Enhanced devolution would extend the range of devolved powers, but not change the locus of sovereignty or reinforce the status of constitutional guarantees. Under the 'devolution plus' proposals of the Smith Commission (a round table of the political parties hastily convened by Lord Smith at the instigation of Prime Minister David Cameron in the weeks following the referendum), Scotland would continue to be dependent on Westminster's goodwill not only for every power it possesses, but also for the very existence of its democratic institutions.

The Smith Commission's report refers to the Scottish Parliament being made 'permanent' by means of legislation, but it does not say anything about how that legislation is to be protected from or entrenched against hostile majorities in the UK Parliament (Smith Commission 2014). This would be a violation of the Claim of Right. Without popular sovereignty, the people of Scotland might *enjoy* certain privileges and powers by the grace and favour of Parliaments, but will not truly *possess* them by constitutional right. What has been given in devolution, by the benign indulgence of Westminster, might just as easily be taken away by their pique or jealousy. This is not an idle fear: the history of Northern Ireland shows that Westminster is willing to suspend or abolish devolved institutions, by unilateral action, when it sees fit to do so.

The strategic opportunity for the Scottish movement is to set out an intermediate position, between independence and devolution, that would respect the Claim of Right and other advances in Scottish constitutional thinking, while remaining (for as long as a majority of the people of Scotland so wish, and on such terms as the people see fit) part of a United Kingdom. In principle, this could be achieved in two ways: (i) by the creation of a federation of the home nations based on a written federal Constitution for the United Kingdom as a whole, or (ii) through a negotiated bilateral arrangement between Scotland

and Westminster which would guarantee Scotland semi-detached status and substantial ‘secure autonomy’ in the ‘shell’ of the United Kingdom.

4.1. A Federal United Kingdom

The defining characteristic of a federation is that there are ‘two constitutionally established orders of government with some genuine autonomy from each other’ (Anderson 2008: 4). This means that the federal legislature cannot unilaterally change the powers of ‘state-level’ institutions, whose powers and rights are secured by a written Constitution.¹¹ Adopting a federal structure, in which the Scottish Parliament would be secured by a written constitutional framework that is beyond the easy reach of any parliamentary majority, would require root and branch transformation of the United Kingdom. The process of negotiating, drafting and adopting a federal Constitution would provide an incentive and ample opportunity to rectify other features of the United Kingdom that are anachronistic and increasingly difficult to defend, such as the absence of effective human rights protections, the disproportional electoral system for the House of Commons, the vague and shadowy extent of Crown prerogatives, religious establishment, and the composition and functioning of the House of Lords.

Replacing devolution with federalism would place the powers of the Scottish Parliament on a more stable and secure constitutional basis, but would not, in itself, enhance the scope of those powers. A draft Constitution produced in 2014 by the House of Commons Political and Constitutional Reform Committee is federal in nature – at least to the extent that the existence and powers of the Scottish, Welsh and Northern Irish institutions would be constitutionally recognized and protected, and that no change concerning these powers could be made to the constitution without a two-thirds majority vote in both Houses of the Westminster Parliament and the consent of two out of three of these Parliaments or Assemblies (Constitutional and Political Reform Committee 2014). However, this text (which is strongly Unionist throughout) would actually reduce the powers of the Scottish Parliament. So we cannot say that federalism – whatever its other benefits might be – would necessarily give Scotland the powers that most Scots appear to want. Indeed, almost all existing federations give to the federal level extensive competence over many aspects of domestic policy – including social security, taxation, and much of



criminal law – that would be unacceptable in a Scottish context, if the aim is to produce a compromise that would make the Union attractive to ‘Yes’ voters.

If a workable and enduring federal solution is to be found for the United Kingdom, it would have to be a very loose federation – or perhaps, more precisely, a ‘confederation’,^{III} in which limited powers over certain matters are shared between Scotland and the other nations of the United Kingdom on an equal, mutual, consensual basis, such that: (i) sovereignty resides ultimately with the peoples of the states, who retain a right of secession;^{IV} (ii) the powers of the Union are more limited than is usual in most contemporary federations, being restricted to foreign affairs, defence, the monarchy, passports, immigration, the currency, and perhaps – for a transitional period – a few uncontroversial incidentals; (iii) the states contribute to the common treasury from their own funds, rather than being taxed directly; and (iv) the central institutions of the federation are kept relatively small and simple.

Federalism of this sort has many advantages. It would guarantee the long-demanded wish of reformers for ‘home rule all round’ within a loose, consensual Union. It would be highly decentralized both in terms of the extent of powers exercised by each state and in terms of the recognition of the sovereignty of each state. As well as guaranteeing Scotland’s autonomy, it would also provide a means of protecting human rights, deepening democracy, promoting political integrity across the United Kingdom. This would be attractive not only in Scotland, Wales and Northern Ireland, but also to democrats in England; it would ensure ‘English votes for English laws’ in a balanced and coherent way that does not create complications for the rest of the United Kingdom.

One objection to a federal solution is the difficulty of drawing appropriate state boundaries, given the relative size of England, in relation to Scotland, Wales and Northern Ireland. The classic texts on federalism, such as John Stuart Mill’s *On Representative Government*, asserted that there should be a rough equality of size between the states, such that no one can outweigh or outvote the others (Mill 2009/1861). The only prospect for federalism in the United Kingdom, in that case, would be if England were to be divided into regions, such that there would be not four national-states, but perhaps a dozen or so ‘nations-and-regions’. This would lead, however, to other objections: how can Scotland be an equal *nation*, if it is treated on a par with mere *regions* of England? How can England have



a sense of itself, if a thousand year old nation is divided into regions that have little historical, cultural or social relevance?

Yet an alternative perspective, which speaks in favour of a four-nation federation, is to see England's size as an asset; England's counter-poised power could be the key to creating a balanced Union in which the federal institutions do not overshadow the States. In a four-nation federation a Prime Minister of the United Kingdom would have to share power with a First Minister of England – perhaps of a different party – who would have a similar electoral mandate and a broadly equivalent claim to legitimacy. The Parliament and Government of England would demand powers from the United Kingdom, would jealously guard their autonomy, and would ensure that the federal institutions do not over-reach themselves. Mere 'regions' are incapable of that. In the political space between an English Parliament and a Federal UK Parliament there would be room for Scotland, Wales and Northern Ireland to breathe. The fact that English voters would, by virtue of their population, have the largest influence on federal policy need not be problematic provided that the federal government be limited to foreign affairs, defence, and a few other matters.

English predominance could be limited in other ways, too, as part of an overall power-sharing arrangement. The usual way is to give each State equal representation in a federal Senate, while having representation by population in the lower house; this can work, especially if combined with a nuanced legislative process that allows the Senate to veto certain classes of legislation, while not necessarily frustrating clear decision making in other areas. However, given limited powers at the federal level, it might be worth considering other, simpler, alternatives, such as the deliberate over-representation of Scotland, Wales and Northern Ireland in a unicameral Federal Parliament. One way of doing this would be to prescribe a formula for the distribution of seats that awards half the seats on an equal basis (i.e. one-eighth of the total number of seats for each State) and the other half on the basis of population. On current figures, this would give English members a small majority, sufficient to pass ordinary legislation, but not a two-thirds majority necessary for certain key decisions – such as constitutional amendments – over which the representatives of the other three States would have a veto.

Whatever its advantages may be, reaching political agreement on a federal constitution for the United Kingdom will not be easy. The gap between the constitutional conversations north and south of the border, and within Scotland between those seeking greater



autonomy and those wish to put the brakes on the process, is so wide that anything acceptable to an SNP-led Scottish Government is unlikely to be acceptable to opposition parties in Scotland, and even less likely to be acceptable to Westminster.

Much of the difficulty arises from the fact that the English people (whose consent would be essential to the successful creation and operation of a federal system) have no collective say in their own national affairs. Their interests are swallowed up in a United Kingdom from which they cannot clearly distinguish or easily disentangle themselves. At present there is no English Parliament, only a United Kingdom Parliament in which English members have an overwhelming majority. Fundamental restructuring of this type is politically difficult precisely because a federation, in creating a balance of power between the Parliaments and Governments of England, on one side, and of the United Kingdom, on the other, would split the England-UK axis and thereby weaken the power-base of the British elite. Attractive as genuine federalism would be to the people of the four nations, the British establishment would abhor it, and would no doubt resist it with every power they can muster.

Besides, British legal conservatism is probably still too strong to allow the United Kingdom's conventional system to be replaced by a modern, written, federal constitution of this type. It is easier, from an establishment point of view, to find bespoke solutions for Scotland than to challenge the core workings of the British State in ways that could undermine their precious privileges. Indeed, it is arguably less painful for the British establishment to lose control over Scotland, because of independence, than to lose control over England because of a democratic federal constitution.

4.2. Secure Autonomy (Home Rule)

A second line of approach is to pursue autonomy for Scotland by means of a bilateral 'Home Rule' (federacy) settlement between Scotland and the United Kingdom Government. The terms of this settlement would be broadly as follows: the United Kingdom would continue, from the outside, to be one state, with one army, one foreign policy, one head of state, one flag, one passport and the other trappings of statehood. However, this would just be a 'shell'. From the inside, Scotland would be a distinct entity, with its own Constitution, full internal self-government, and full fiscal autonomy – meaning that Scotland would be responsible for raising and spending all of its own



revenues. This autonomy would be enshrined in an overarching constitutional structure which would recognise the ultimate sovereignty of the people of Scotland, freeing us from constitutional dependence on the Westminster Parliament.

Full Home Rule for a sovereign and autonomous Scotland within a 'loosely United' Kingdom could be established in at least two ways. One is by means of a new Treaty of Union, which would replace the old incorporating Union of 1707 with a new non-incorporating Union.^v There are various historical precedents and current examples of how such an arrangement might work. It could, for example, take inspiration from the Austro-Hungarian Empire under the 'historic compromise' of 1867. The Imperial Government, which had come close to ruin during the 1848 revolutions, and had maintained its power in the 1850s only by means of repression, decided to reconstitute the Empire on a more mutual and inclusive basis. It retained a single external identity in international law for the purposes of foreign affairs and defence. Internally, it was divided into two entities: (i) Austria (including the Czech, Slovak and Polish lands, and other parts of the empire outside of Hungary and Croatia) and (ii) Hungary (including Croatia, Transylvania, and parts of what is now Slovakia). Each of these two entities was fully autonomous over all matters of domestic law, policy and finance. Each had its own Parliament, its own responsible Government, its own constitutional arrangements, and its own civil service. There was a personal union in the monarchy, such that the titles of Emperor of Austria and King of Hungary were combined. There were just three joint ministries: foreign affairs, war, and finance. These ministers were responsible to the Emperor-King (unlike the Austrian and Hungarian Prime Ministers, who were responsible to their respective Parliaments). Besides the three common ministries, there was a Customs Union and common external trade tariff, negotiated between the two Governments, approved by the two Parliaments, and renewed every ten years. There was also a common coinage and a joint national bank, and co-operation on common projects, such as railways and postal services – all of which was negotiated between the two entities on an *ad-hoc* basis and implemented through parallel legislation passed by both Parliaments (Taylor 1976).

This would be possible only if the United Kingdom Government were to recognize the existence of a Scottish entity with whom treaty negotiations could take place. Some argue that a residual, dormant statehood was preserved by the Treaty of Union, and that a future Scottish Government, with the backing of the Parliament and people of Scotland, could



therefore renegotiate new terms of Union on the basis of a claim to continuity with the pre-1707 state. Although this is very much a minority view, and one that many British constitutional lawyers as well as international lawyers would contest, there is nevertheless, on political if not legal grounds, a strong precedent for such an approach in the Anglo-Irish Treaty of 1920 which led to the creation of an Irish Free State. That agreement, concluded between the *de facto* Governments of the United Kingdom and of Ireland approved by both the Westminster and Dublin Parliaments, was never really accepted as a formal treaty by the British Government, which refused to accept the credentials of Irish representatives as plenipotentiaries; yet, in practice, it acted as a treaty, even if, to mollify British legal sensibilities, its provisions had to be re-stated as an Act of Parliament.

Patterning new United Kingdom institutions on those the long-dead and little-loved Austro-Hungarian Empire might seem improbable, but this idea should not be dismissed without careful thought. It would transform the United Kingdom into what many Scots have always claimed it to be in principle, but have long known it not to be in effect: a treaty-based Union, entered into freely, for mutual benefit, on certain limited conditions, by two equal sovereign entities. The concerns of Unionists, in matters such as identity and security, and the aspirations of Nationalists, in matters such as economic and fiscal powers, would both be met on common ground of thinner, more equal and more democratic Union.

Another approach to Home Rule is for Scotland to be given the power, by an Act of the United Kingdom Parliament, to adopt a Home Rule Constitution. This Constitution could be adopted by the people, as an act of sovereignty, following debates and negotiations amongst political and civic actors in Scotland – perhaps through a Constituent Assembly. The Home Rule Constitution would renounce the sovereignty of Westminster over Scotland, while at the same time providing for certain shared powers and institutions (the monarchy, foreign affairs, defence, immigration, passports, the currency, etc). It could also allow for voluntary co-operation in a few other, miscellaneous and uncontroversial areas, where duplication of regulations and administrative personnel would be unnecessary (e.g. meteorological services, or vehicle licensing). Everything else would be Scotland's autonomous responsibility, including the right to raise and spend all of our own money.

For this, inspiration can be drawn from the example of Gibraltar and other overseas territories. Under the Constitution of 2006, Gibraltar has its own Parliament and



Government with full powers over all matters of policy except foreign affairs, defence and security, and with full control over all of its own taxing and spending. The United Kingdom Government is represented by an appointed Governor, who is responsible for external and military matters. Gibraltar has no representation in the United Kingdom Parliament, but is represented on an inter-governmental basis; United Kingdom policies in regard of Gibraltar are determined in consultation with the Gibraltarian Government. In other words, Gibraltar, a colony with a few tens of thousands of people, has more autonomy, and a stronger democratic basis for that autonomy, than Scotland would gain if the proposals of the Smith Commission, or any of the other forms of ‘enhanced devolution’ hitherto put forward by the major parties, were implemented.

An even better example of autonomy, for Scotland’s purposes, is provided by the Cook Islands, a chain of Islands in the South Pacific. The Cook Islands remain part of the Realm of New Zealand. The Queen, ‘in right of New Zealand’ is the Head of State, and is represented in the Cook Islands by a ‘Representative’ whose duties are mostly formal and ceremonial. Cook Islanders are New Zealand citizens. Since 1964, however, the Cook Islands have enjoyed full autonomy over almost all matters except for foreign affairs, defence and the issuing of passports, which remain the responsibility of New Zealand. All these provisions are laid down in the Constitution of the Cook Islands, which can be changed only by a two-thirds majority in the Cook Islands Parliament, followed, in the case of major amendments, by a referendum. New Zealand, like the United Kingdom, is one of the few countries that lacks a written, supreme Constitution, yet this has not prevented the establishment of a written Constitution for the Cook Islands. The Cook Islands therefore show that it is possible for Scotland to have a written, supreme Constitution of our own, even while being in a Union, for external purposes, with a country that does not have a written Constitution.

Although the technicalities of the constitutional status would be different, Scotland under a Home Rule Constitution would, in practical terms, be in a position not unlike that of the Channel Islands and the Isle of Man, which also enjoy substantial autonomy while still being reliant on the United Kingdom Government for the purposes of foreign affairs and defence, and while still using the pound. The key difference is that Scotland would be ‘inside’ the United Kingdom, while the Channel Islands and the Isle of Man are ‘Crown dependencies’. Nevertheless, the Channel Islands and the Isle of Man show that the United



Kingdom can be tolerant of substantial autonomy, so long as its military and diplomatic interests are unchallenged, and the degree of autonomy they enjoy could be extended to Scotland – under suitable constitutional arrangements – without great difficulty.

5. Conclusion

In a fusion of nationalist and democratic rhetoric, the Scottish national movement has articulated a radical constitutionalist critique of the British system of government that goes beyond a mere ‘centre-periphery’ dispute. It has sought not only to redistribute power from London to Edinburgh, but more fundamentally to constitute a Scottish state in accordance with its own principles, values and institutional preferences. Although the SNP’s constitutional proposals have evolved over time, they have been consistently ‘radical’ in the sense that they have challenged the institutions of the United Kingdom and rejected many of the prevailing constitutional norms, values and assumptions by which those institutions operate.

Yet this radicalism has been shaped by its wider British context and by the partisan interests of the SNP. The two are closely linked: as the party’s electoral fortunes have increased, and as it has enjoyed and come to expect the privileges of office, its critique of the British system has changed, from a complaint against over-centralised executive power, in the period from the 1970s to the early 2000s, to a complaint against the undemocratic origin of power. Reading the 2014 draft interim Constitution, it seems to suggest that executive power, concentrated in a First Minister leading a coherent majority in a single-chamber legislature, without internal checks or external balances, is acceptable – so long as that single chamber is fairly elected by the people of Scotland. The doctrine of popular sovereignty has shifted, in the SNP’s rhetoric and policy proposals, from a defense of the people against Parliaments as asserted in the Claim of Right (since no Parliament could ever act in place of the sovereign people) to a vindication of the unlimited authority of elected Parliaments. In spite of this, however, the SNP felt the need to continue to rely on the notion of Scottish popular sovereignty, as opposed to Westminster parliamentary sovereignty, to make its case. So although the 2014 draft interim Constitution would have resulted in the Scottish Parliament exercising powers of sovereignty (through its ability to unilaterally make and unmake constitutional law, at least during an interim period), that



sovereignty would not, as a point of recognized and asserted constitutional principle, have been inherent in Parliament – it would always be exercised in the name, and on the behalf, of the people. This is a point of principle that Westminster has never formally endorsed, but which in Scotland is now the foundation-stone of an emerging and vibrant constitutional tradition.

This principle has the potential to transform the next stage of the debate, about the place of Scotland within the future constitutional arrangements of the UK. The sovereign people have spoken in the independence referendum, and, while a clear majority of them have chosen to give the Union another chance, it is a chance to deliver *on the terms set by the people of Scotland* – not by Westminster. This means finding a form of autonomy that recognises Scotland’s sovereignty, and its equality within the Union, without necessarily demanding independent statehood. Either a loose federal UK or home rule for Scotland (the choice between them is essentially a pragmatic one, dependent upon the will of Westminster and the rest of the UK to embrace radical constitutional change at the centre) if adopted in a spirit of sincerity, would enable Scotland and the rest of the United Kingdom to go forward together in a partnership of equals, sharing certain powers and responsibilities where this is in our mutual interests, while respecting the liberty, autonomy and distinct interests of each country. This would appeal to many supporters of independence, since Scotland would have the ability to pursue different models of economic and social policy, to address the problems of poverty and inequality, and to fund those policies from its own resources, while shaking off the myth of being dependent ‘subsidy junkies’. It would also be attractive to moderate unionists, since, despite near total autonomy in internal affair, the Scots would still be ‘British’, would still fly the Union flag as well as the saltire, would still carry British passports, could still join the British armed forces, would still be represented abroad by British embassies and consulates, and would still use the British pound.

Finally, if the people are to be sovereign, there should be no change to the constitutional relationship between Scotland and the rest of the UK, or to the rules by which Scottish institutions are structured, or to the rights of Scottish people, except by the consent of the people. This makes a written, supreme Constitution, capable of being amended (at least in its essentials) only by the vote of the people in a referendum, almost a prerequisite for a stable and lasting outcome.



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^I In 2011-2012, prior to the re-endorsement of the Claim of Right by the Scottish Parliament, the Constitutional Commission, of which the author was then Research Director, undertook to trace the original signatories of the Claim of Right – and we discovered that many senior Labour figures, who were implacably opposed to Scottish independence, had solemnly pledged themselves to defend the sovereign rights of the people of Scotland.

^{II} To cite just two well-known illustrative examples: any change to the distribution of powers between the Union Parliament and the States in India requires a constitutional amendment passed by a two-thirds majority in both Houses of the national Parliament and the approval of a majority of the State legislatures; in Canada, most important amendments require the approval of the legislatures of at least seven out of ten Provinces, having between them a majority of the population (the latter provision is designed to ensure that Quebec and Ontario, the two largest provinces, have a mutual veto).

^{III} The technical distinction between federalism and confederalism is a fine one that has been much debated by scholars. The Germans differentiate between a ‘*Bundestaat*’ (a federal ‘union-state’, with emphasis on the unity of the whole) and a ‘*Staatenbund*’ (a confederal ‘union of states’, with emphasis on the distinct identity of each state). This expresses the essence of the distinction more neatly than is possible in English.

^{IV} There are examples, even within these islands, of the recognition of the right of succession. The Belfast Agreement recognises the right of the people of Northern Ireland to leave the United Kingdom and to be reunified with the rest of Ireland. The Edinburgh Agreement similarly emphasized that Scottish membership of the United Kingdom is based on consent, and can be unilaterally withdrawn.

^V The distinction between an ‘incorporating Union’ (a single, sovereign state) and a ‘non-incorporating Union’ (two equal entities united by treaty for certain common purposes) is drawn from Andrew Fletcher’s ‘*State of the controversy between United and Separate Parliaments*’ (Edinburgh: Saltire Society, 1982).

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