
An Analysis of the Scottish National Party's Draft Constitution for Scotland

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ABSTRACT

In 2002 the Scottish National Party (SNP) produced a Constitution for Scotland, to be adopted by the people in a referendum upon achieving independence. This Constitution proposed a range of novel devices, such as fixed-term Parliaments, unicameralism, proportional representation, the election of the Prime Minister by Parliament and judicial review of the constitutionality of legislation, which were alien to the Westminster Model—although some of these proposals had already been incorporated into the devolved institutions created by the Scotland Act, 1998. This paper provides a detailed analysis of the provisions of the SNP's draft Constitution, from a political rather than legal perspective, focusing on the relationships between Parliament, the Government, the Head of State and the people. The extent to which the draft Constitution represents a rejection of the Westminster model is assessed, and the technical shortcomings of the draft Constitution are highlighted. The paper concludes with some recommendations for changes to the SNP's draft Constitution which could improve the overall design.

IN 2002 the Scottish National Party (SNP) published the latest version of its draft Constitution for an independent Scotland. Professor Neil MacCormick, architect of this proposed Constitution, had earlier argued that his proposals should be 'open to the clear light of day and to the searchlight of scholarly discussion and criticism'.¹ So far, this has not happened. Scotland's constitutional debate has, until now, focused on the relationship between Scotland and the rest of the UK, to the exclusion of post-independence constitution-making.² Ignored by unionists, and accepted without much criticism by nationalists, the SNP's draft Constitution has not been subjected to independent and scholarly analysis. With constitutional questions likely to be a major election battleground in the 2011 Scottish Parliamentary elections, the need for such analysis of the SNP's constitutional proposals is now more pressing than ever before.

Existing literature in the field of post-independence Scottish constitutional design is sparse. The only mention of a future Scottish Constitution to appear in a respected academic journal was a brief, and unsurprisingly positive, account of the SNP's draft by Neil MacCormick himself.³ This reflects the retreat of political science from

the analysis and evaluation of Constitutions. In the early years of the twentieth century the study of Constitutions had a central place in political science, and the Constitutions of newly independent or democratising countries were reviewed in English-language political science journals,⁴ but the institutionalist methodology underpinning this field of research fell from fashion in the post-war era, seemingly discredited by the inability of political scientists to predict the collapse of liberal democracies in the harsh social and economic conditions of the 1930s.⁵ Despite a brief revival after the events of 1989, and despite the lively literature on constitutional change in countries such as Belgium and Canada,⁶ political science has now largely withdrawn from the detailed study of Constitutions. The subject has been ceded to constitutional lawyers, who have tended to focus on a narrow range of questions surrounding human rights and mechanisms of judicial review,⁷ and who are perhaps ill-prepared to engage with such important constitutional matters as electoral systems, parties, parliamentary structures, committee systems, executive-legislative relations.

In assessing the SNP's draft Constitution, therefore, the subject is approached from a political rather than legal perspective. This means the paper focuses on how the mechanisms of representation, legislation, cabinet-formation and accountability, set forth in the draft Constitution would be likely to operate. There is no attempt to offer a detailed analysis of its human rights provisions, nor such issues as Church-State relations or the constitutional entrenchment of socio-economic policies.

The methodological approach is necessarily highly speculative. Since the draft Constitution exists only on paper, and not as the living Constitution of a Scottish State, empirical observation of its effects is impossible. Nevertheless, it is possible to make reasonable predictions. Although this paper does not claim to develop a systematic comparative framework, nor to demonstrate a causal relationship between particular constitutional forms and behavioural outcomes, illustrating examples will be drawn, as appropriate, from similar constitutional features in other countries. Most of these references are to small European liberal-democracies which feature in the SNP's own arguments for independence, such as Ireland, Denmark and Sweden.⁸

This paper consists of three parts. Part one argues that Scottish constitutional developments during recent decades, including the 1989 Scottish Claim of Right, the Scottish Constitutional Convention, the Scotland Act of 1998, and the Report of the Consultative Steering Group, show a widespread rejection of the Westminster Model in favour of a more consensual, balanced, power-sharing form of democracy, and that an evaluative analysis of the SNP's draft Constitution should reflect this. The second part examines the provisions of the SNP's draft Constitution in detail. It argues that the draft Constitution would likely produce a more consensual and constitutional democracy,

but that it has nevertheless inherited from the Westminster Model a lack of effective accountability, scrutiny and non-manipulability mechanisms, which could ultimately undermine the framers' intentions. The third part offers some explanations of this, arguing that the partial retention of certain 'default settings' inherited from the Westminster model is more attributable to accident than to intention. It also offers some recommendations which could improve the overall quality of the Constitution.

The Westminster Model in Scotland

The term 'Westminster Model' refers to the institutions, processes and assumptions which together make up the system of parliamentary liberal democracy traditionally practiced in the UK. The Westminster Model is characterised by 'the dependence of the executive on the legislature and the leadership of the legislature by the executive';⁹ the power to rule and decide is vested in Ministers who command a majority in the elected assembly and who are, ultimately, responsible to the assembly, and through the assembly to the people. The Westminster Model differs from other versions of the parliamentary system, such as those which developed in Scandinavia and the Low Countries, in the extent to which it is 'based on an elitist, hierarchical, top-down' conception of politics, where 'power should rest with the government'¹⁰. Criticism of the Westminster Model has been emerging in Scotland since at least the 1960s. It first became evident in the draft Constitution for an independent Scotland prepared, under the direction of Roland E. Muirhead, by the Scottish Provisional Constituent Assembly in 1964. The Muirhead proposal provided for a unicameral Parliament to be elected by proportional representation (single transferable vote), in contrast to the Westminster tradition of single member plurality. Parliament could not be prematurely dissolved without its own consent, in contrast to the Westminster crown prerogative of dissolution. The executive would be formally elected by Parliament, in contrast to Westminster conventions of tacit and negative parliamentarism. The Constitution would be written and judicially enforced, it would give constitutional protection to human rights and civil liberties, and would be capable of amendment only by a two-thirds majority vote in Parliament plus a referendum, in contrast to Westminster notions of parliamentary sovereignty. Elected local Councils would be given a constitutionally recognised status. Crucially, the Muirhead proposals marked a stylistic rejection of Westminster traditions, including the choice of the word 'Commissioner' for 'Member of Parliament' and 'President' for 'Speaker'.¹¹ It is also notable that many phrases in the Muirhead draft can be traced to the Constitutions of Norway and Sweden, not to those of former colonies.¹²

When the SNP began serious work on the drafting of an independent Scottish Constitution in the late 1960s, a variety of influences and

styles, often without much evidence of comparative or theoretical research, emerged. A rejection not only of rule from Westminster, but of rule according to the Westminster Model, united all these schemes. A proposal submitted by P. J. Findlay of Inverkeithing to the Constitutional Committee of the SNP in August 1968, for example, envisaged a Parliament of Three Estates, clearly inspired by the pre-1707 Scottish Parliament, with directly elected members sitting in one chamber alongside nominated members and indirectly elected members chosen from local Councils.¹³ In the same year, another proposal submitted by Arthur Donaldson provided for a hybrid Parliament: one half of the members would be chosen by Alternative Vote from single member constituencies, and one half chosen on a list basis. This was not strictly an MMP mechanism because the list seats would not have been 'top-up' seats: rather, they were 'rotating' seats, with the constituency members serving for four years and list members serving for two years, so as to achieve a continuous rotation in membership and thereby prevent harsh swings between left and right which the author associated with Westminster rule.¹⁴

At this time the SNP was still a rather marginal minority party. The broader political consensus in Scotland was far less critical of the Westminster Model and remained so throughout the 1970s. The (failed) devolution proposals of 1979 would have established a Scottish Assembly closely based on the Westminster Model, with single member plurality voting producing a dominant executive and weak assembly.¹⁵

A wider sense of estrangement from the Westminster Model developed during the period of Conservative government from 1979 to 1997. The winner-takes-all logic of the Westminster Model, with its parliamentary sovereignty and centralisation of power, had allowed a Prime Minister, unsupported by a majority of the Scottish electorate, to impose her will on Scotland in ways which were widely perceived to be insensitive and domineering. The cross-party Campaign for a Scottish Assembly, which later evolved into the Scottish Constitutional Convention, issued a Claim of Right for Scotland, endorsed by people from a wide spectrum of economic, social, religious and political groups.¹⁶

The Claim of Right offered a damning analysis of the Westminster Model.¹⁷ Several democratic flaws were identified. The first was the excessive power of the Prime Minister in relation to the rest of the political system: 'in fact, if not in theory, the Prime Minister is Head of State, Chief Executive and Chief Legislator, and while in office is not circumscribed by any clear or binding constitutional limitation'.¹⁸ The second flaw was that, owing to a disproportional voting system, the Westminster system entrusted these powers to a Prime Minister whose party may have won only a minority of the votes.¹⁹ The third flaw was Parliament's institutional weakness and its lack of independence from the Government, particularly in terms of its order of business,

procedures and committee system.²⁰ Perhaps the most serious flaw of the Westminster Model, according to the Claim of Right, was that this politically supine and institutionally weak Parliament remained legally sovereign. In the absence of a Constitution which is superior to ordinary law, 'every right the citizen has, can be changed by a simple majority of this subordinated Parliament. That applies even to the requirement to hold Parliamentary elections every five years'.²¹ The Scottish Constitutional Convention went on to offer detailed recommendations for the design of a new (devolved) Scottish Parliament, which, they hoped, would differ from the Westminster Model, and offer a more consensual and constrained form of democracy.

These recommendations were embodied in the Scotland Act, 1998. Five key features of the Scotland Act mark a shift away from the Westminster Model. Firstly, the executive power in Scotland is vested not in the Crown, but in a statutory body—the Scottish Executive (Government).²² The Westminster notion of executive power being 'vested in' the Crown, but 'exercisable' by convention on the 'advice' of Ministers is rejected. This might seem like an arcane distinction, but it permits a more rational understanding of the executive power, in which the executive power is separated from the Head of State in law as well as in practice; as a consequence, the Head of State is permitted, in certain instances, to act on the binding advice of other actors (such as the Presiding Officer) in ways which can limit executive domination.

Secondly, the Scotland Act provides for fixed-term Parliaments, which cannot be dissolved at will by the First Minister.²³ A premature dissolution is possible, but only on the advice of the Presiding Officer (*not* the First Minister—a good example of the development outlined above), and only in certain circumstances, namely if a First Minister cannot be appointed, or if Parliament by a two-thirds majority votes for its own dissolution. This represents a major divergence from the Westminster model of executive dominance, since it means that a First Minister who loses the confidence of the Scottish Parliament cannot appeal over the heads of Parliament to the people, at least not without Parliament first having the opportunity to form a new government.

Thirdly, the relationship between the Government and Parliament is codified in a manner which is common to post-1945 Constitutions,²⁴ but is alien to the British tradition. The notions of tacit confidence and negative parliamentarism on which the Westminster system is based, enable a Government to treat any adverse parliamentary vote as a matter of confidence, and thus to present any disagreement as a 'defeat'. In Scotland, the First Minister is nominated by a formal investiture vote of Parliament, and effectively holds office until there is a parliamentary election, or until removed by a specific vote of no-confidence. As a result, the Scottish Government can suffer legislative setbacks in Parliament without having its continuance in office

called into question, creating greater balance of power between the Government and Parliament.

Fourthly, the Scotland Act adopted a system of proportional representation for elections to the Scottish Parliament.²⁵ Proportional representation, especially when combined with fixed term Parliaments and the formal election of the First Minister, creates a situation in which coalitions and minority governments are the rule rather than the exception, and so serves to facilitate a more balanced distribution of powers.

The fifth reform was the incorporation of both the European Convention on Human Rights and a system of judicial review. As in Westminster, bills passed by the Parliament become law on receiving Royal Assent, but unlike the Westminster system, bills are presented for Royal Assent by the Presiding Officer, not by the government, and there is a mechanism of abstract judicial review in place by which the legality of the bill can be challenged by the Advocate General or Lord Advocate before the Presiding Officer makes the submission.²⁶ This is in part designed to prevent the Scottish Parliament from exceeding the bounds of its devolved powers, but the structure is akin to those of countries such as France, Spain and Germany, which allow the constitutionality of legislation to be challenged before being enacted.

Shortly before devolution, a Consultative Steering Group was established by the Scottish Office to examine the working practices of the new Scottish Parliament. The Consultative Steering Group adopted four principles,²⁷ which were based on the proposals of the Scottish Constitutional Convention.²⁸ These principles reflected a desire for a 'new politics' in Scotland which would redress the shortcomings of the Westminster system,²⁹ and would instead develop greater openness, power-sharing and accountability.³⁰ The principles were: (i) power-sharing between the people and Parliament, and between Parliament and the executive; (ii) the accountability of the executive to Parliament, and of the Parliament and of executive to the people; (iii) a more participative approach to the development, consideration and scrutiny of policy and legislation; and (iv) equality of opportunity.³¹ The extent to which the Scottish Parliament has lived up to these principles is beyond the scope of this paper, but the effort to embody them in the design and operating procedures of the new Parliament is evidence of a movement away from what might be termed 'Westminster thinking'.

This part of the paper has argued that, in Scotland, the Westminster Model no longer represents the *status quo*, but an obsolete and increasingly alien *status quo ante*. Proportional representation, fixed-term parliaments, the formal election of the executive by Parliament, and the incorporation of human rights into constitutional law, are no longer dangerously radical notions.³² Rather, they are widely accepted as Scotland's new reality and are central to the 'common stock of democratic thought in Scotland today'.³³ This settled, the question of

whether the SNP's draft Constitution reflects this change, and if so how consistently, will be explored in the following part.

The SNP's 2002 draft Constitution for Scotland

In broad outline, SNP's draft Constitution resembles the Constitutions of several other small-to-medium-sized European liberal democracies, such as Luxembourg, Sweden, Denmark and Norway. Like them, it provides for a constitutional monarchy having a chiefly ceremonial role, with legislative powers vested in a unicameral Parliament chosen by universal suffrage and proportional representation, executive powers held by a cabinet which is responsible to Parliament, and an independent judiciary. The draft Constitution is divided into seven articles, with a total of 57 sections and about 6000 words.³⁴ This would make it about twice the length of the Constitution of Iceland, and about the same as that of Denmark, but it would still be one of the shortest Constitutions in Europe, and less than half the length of the EU average.³⁵

The first article proclaims that 'the rights of the people of Scotland to self-determination and to sovereignty over the territory and natural resources of Scotland are absolute'.³⁶ This wording is taken directly from the SNP's 1943 statement of aims.³⁷ It goes on to confirm that '[these rights shall be exercised in accordance with this Constitution, which shall be the supreme law of the land]'.³⁸ The draft Constitution, therefore, establishes both the sovereignty of the Scottish people and the supremacy of the Constitution as the highest and most direct expression of that sovereignty. This marks not only a rejection of rule from Westminster, but also a rejection of the Westminster doctrine of parliamentary sovereignty. It represents the belief, fundamental to Scots law (at least as that law is interpreted by nationalists),³⁹ that sovereignty rests in the 'whole community of the realm'.⁴⁰ The self-government of Scotland may be limited, however, by agreements made with 'other nations or states or international organisations for the purpose of furthering international cooperation, trade and world peace'.⁴¹ The Constitution also recognises 'all rights and obligations of European Union membership'.⁴² These provisions reflect the SNP's pro-European and internationalist stance.⁴³ The remaining sections of the first article define Scottish territory and state Scotland's claims to off-shore assets, and regulate citizenship according to the SNP's open policy of residency, not ethnicity.⁴⁴

The second article deals with the Head of State and the executive branch. The office of Head of State is vested in the Queen and her successors, 'as determined by the law of Scotland, acting in right of Scotland'.⁴⁵ This means that the Parliament of Scotland, by the normal process of legislation, could amend the order of succession to the Scots Crown, thus potentially ending the personal union between the Crowns—although the preamble of the Statute of Westminster, if

regarded as conventionally binding in Scotland, could act as strong constraint against its use. Executive powers are exercised on the binding advice of responsible ministers, who are to be chosen from amongst the members of Parliament. The prime minister is to be elected by Parliament and the whole ministerial team is to be confirmed by a formal vote of investiture. Under normal circumstances, this break from Westminster conventions would effectively prevent the Head of State from exercising any personal influence in the formation of a government (although, as noted below, there are important and potentially problematic exceptions). To reduce the weight of the 'payroll vote' the number of ministers is constitutionally limited to one-fifth of the size of Parliament.⁴⁶

The unicameral Parliament, covered in the third article, is directly elected by proportional representation for four-year terms. The prime minister cannot dissolve Parliament at will, although it may be dissolved by the Head of State if a government cannot be formed. There is a counter-majoritarian mechanism, offered in place of a second chamber,⁴⁷ whereby bills may be suspended for up to 18 months by a two-fifths minority; the majority can overturn this suspensive veto by appealing to the people in a referendum. All bills must receive Royal Assent before becoming law. Although the details are vague, Parliament is able to form committees, to determine its own procedures, and to elect its Presiding Officer. In contrast to the Westminster Model's reliance on prerogative power in matters of foreign affairs and defence,⁴⁸ the declaration of war and the ratification of treaties would require parliamentary assent.⁴⁹

The fourth article concerns local democracy. Local Councils are to be elected by proportional representation,⁵⁰ and are to enjoy administrative autonomy in respect of the powers vested in them by law.⁵¹ Special autonomy is afforded to the Island Councils, whose powers cannot be abridged without the consent of the islanders in a referendum.⁵² Within these limits, Parliament has authority to 'legislate generally for local government and in particular to legislate concerning the composition, areas of authority, and financial and taxing powers of local authorities'.⁵³ Therefore, there is no guarantee that the Constitution would, in practice, promote greater local autonomy.

The fifth article deals with the judiciary. There is no provision for a dedicated constitutional tribunal on the Kelsian model.⁵⁴ Instead, the judicial review of laws is vested in the Court of Session.⁵⁵ Neil MacCormick attributed this decision to 'Scots legal conservatism', rather than to the intrinsic superiority of such an arrangement.⁵⁶ The independence of the judiciary is promoted by the creation of a Commission on Judicial Appointments,⁵⁷ similar in principal to the *Belgian Conseil supérieur de la Justice*⁵⁸ or the Spanish *Consejo General del Poder Judicial*,⁵⁹ to advise the Head of State on judicial appointments. Judges, once appointed, enjoy security of tenure and

may only be removed from office, on grounds of misconduct, by a two-thirds majority vote of Parliament.⁶⁰ On the other hand, there is no protection for judicial salaries, nothing to prevent judges being re-assigned, and no prohibition against their holding political office: all these are left to ordinary law, custom or subsequent interpretation.

Fundamental rights and liberties are enshrined in the sixth article. These rights are closely based on the European Convention, and include such liberal democratic staples as the right to life, the prohibition of torture, the prohibition of slavery, personal liberty, due process, the right to a fair trial, freedom of religion, privacy of the home and of family life and communications, freedom of expression, freedom of assembly and association and the right to property.⁶¹ These rights may be limited by law during a state of emergency, but a state of emergency must be endorsed by a three-fifths majority vote of Parliament within two weeks, and cannot continue for more than three months without a further parliamentary vote.⁶² The same article also includes a right to fair working conditions, housing, education and healthcare, and guarantees the equal status of English, Scots and Gaelic as Scotland's three official languages. The right to vote in parliamentary and local elections is granted to all citizens and residents of Scotland over the age of 16.⁶³ The seventh and final article concerns amendments to the Constitution, which must be approved by a three-fifths majority of Parliament and then approved by a popular referendum.⁶⁴

The draft Constitution is as interesting for what it does not say as for what it does. For a so-called 'nationalist' Constitution, it is devoid of nationalism. There is no preamble, no stirring words about 'national struggle', no ringing declaration of liberty, equality and fraternity. It does not even specify a flag or an anthem. This is a functional document, a basic framework of democracy, not an ideological statement.

In certain important respects, the draft Constitution appears incomplete when viewed alongside the Constitutions adopted in recent decades by other European countries. There are notable omissions with regard to the Constitution's provisions on the composition and functioning of Parliament. Parliament is to be elected by a form of proportional representation which '[secures] a fair reflection of the composition of Scottish society, both in general and with particular regard to party preference and to geographical diversity'.⁶⁵ but the form of proportional representation is not specified in the Constitution; all the details of the electoral system are left to Parliament's discretion.⁶⁶ This is a stark contrast with Constitutions such as those of Sweden, Ireland and Malta, where the electoral system is specified in the Constitution.⁶⁷

Even the size of Scotland's Parliament is to be regulated by ordinary law. This, when combined with the lack of a constitutionally entrenched boundaries commission or electoral commission, means that the electoral system could be manipulated to the advantage of the

governing majority without being blocked by the Constitution. Larger parties, whilst retaining a notionally 'proportional' electoral system, could easily conspire to exclude small parties from representation by simply increasing thresholds, the reducing the size of Parliament, or decreasing the district magnitudes. When interviewed about this, Neil MacCormick was unconcerned by variations between different forms of proportional representation and saw no danger in allowing Parliament to sets its own size, thresholds and district magnitudes.⁶⁸

The draft Constitution adopts fixed term Parliaments. These, being intended to 'diminish the overweening power of the executive over Parliament',⁶⁹ are regarded as a deliberate attempt to move away from the Westminster Model. The Head of State, however, has the power to dissolve Parliament prematurely 'if at any time Parliament is unable to agree on a Government, in the sense that no person can be found who is able to command its confidence as Prime Minister'.⁷⁰ This exception is necessary to avoid a situation of deadlock; notably, its use would require not only that an incumbent Government lose the confidence of Parliament, but also that no alternative government commanding the confidence of Parliament could be formed.⁷¹

As in the Swedish system,⁷² such a premature dissolution would not result in the Parliament being re-elected for another four-year term, but only for the remainder of the previous four-year term. Thus, a Prime Minister has little incentive to abuse this rule by deliberately contriving to lose a confidence vote. However, the acceptable timescale in which a Prime Minister must be appointed is unspecified, as is the extent to which the Head of State is able to act according to her discretion rather than relying on the advice of the (outgoing) government. The draft Constitution is less satisfactory, in this regard, than the Scotland Act, which clearly that the Presiding Officer is to call an election if a First Minister cannot be nominated within 28 days of a general election, or after the resignation or removal of the former First Minister.⁷³

A similar lack of precision is evident with regard to the organisation of Parliament, the transaction of legislative business and the privileges of its members. The procedural developments introduced in the Scotland Act, such as the institution of a Parliamentary Bureau to control the legislative agenda and a Corporate Body to administer parliamentary facilities, are not replicated in the draft Constitution. Neil MacCormick stated that this omission was not a matter of policy, but he did not think it strictly necessary for these matters to be put on a constitutional basis.⁷⁴ Likewise, the regulation of parliamentary committees, and their powers and composition, is left to Parliament's discretion. This faith in Parliament to ensure the fair management of its own business could be interpreted as naïve, or as a legacy of Westminster-shaped thinking; certainly, it is not beyond parliamentary majorities to manipulate these rules in order to weaken committees, to

deny time and voice to the opposition, and thereby to concentrate power in the executive in a way reminiscent of the Westminster Model.

The most notable feature of the legislative process established by the draft Constitution is the minority veto and its associated referendum override mechanism, which was intended to act as a compensation for the loss of the delaying power of an upper house.⁷⁵ The rules are as follows: there is a delay of ten days between the final reading of all bills, other than money bills, and their presentation for royal assent; during this time, any member of Parliament may sign a written motion calling for the bill to be suspended; if such a motion is signed by not less than two-fifths of the total number of members of Parliament, then the bill is suspended for at least 12 months; after at least 12 months, but no more than 18 months, have elapsed, Parliament may again vote on the bill, and if it is reconfirmed by a simple majority it is presented for royal assent; however, during its period of suspension, the bill may be submitted to a referendum by a simple majority resolution of Parliament, and if the bill is then approved a majority of the votes cast it shall be presented for royal assent.

It is difficult to predict how this mechanism might work out in practice. A convention may arise, as in Denmark,⁷⁶ that favours negotiation with the opposition in order to avoid delay and prevent a referendum. This would make the Scottish system more consensual. On the other hand, fierce brinkmanship between the government and opposition could lead to frequent referendums, and a more polarised, but more lively and participative, form of democracy. An analysis of the bare constitutional text, without any knowledge of the post-independence party system or political environment, makes any prediction necessarily speculative. What is clear, however, is that the incentive structure of this mechanism gives the parliamentary majority, not the minority, the final say. The majority has always the choice of whether or not to go to the country in a referendum. If in a hurry, and sure of public support, it can take its chance in the referendum. If in doubt about the extent of public support, the majority can bide its time, waiting for the (relatively short) period of suspension to elapse. This contrasts with the Danish system, in which the parliamentary minority has the final word, and with the Latvian system, in which the people have the final word by means of petition.⁷⁷ In theory, the checking power of the parliamentary minority under this arrangement could be weaker than that of the House of Lords in the British system, since a suspensive veto by the Lords must be 'sat out', whereas a minority veto exercised under the draft Constitution may either be sat out or appealed to the people, at the sole discretion of the ruling majority; nevertheless, the existence of such a mechanism gives the opposition a potential negotiating power which is far greater than that which would traditionally be associated with the Westminster Model.

The draft Constitution replicates Westminster in its failure to specify the limits of Crown prerogative and its failure to distinguish between the office of Head of State and the executive power. By nominally vesting executive powers and all residual prerogatives in the Head of State, yet requiring the Head of State to act on the binding advice of ministers,⁷⁸ the draft Constitution effectively grants to the prime minister sweeping powers over matters such as the summoning and prorogation of Parliament, the power of pardon, and the awarding of civic honours (none of which is explicitly mentioned in the draft Constitution). This would most probably have the effect of reinforcing the executive, giving the prime minister the sort of leverage and patronage which those in Westminster systems often possess. An additional problem arises in those circumstances where the Head of State, as constitutional arbitrator and upholder of the regular function of constitutional bodies, might be expected to exercise some personal discretionary power—for example, in dissolving Parliament, appointing a Prime Minister, or, in extremis, withholding assent to unconstitutional legislation. As at Westminster, the bounds of these powers are unclear and unspecified, being left to convention. It is most probable that they would fall into disuse, and that the prime minister's voice would be decisive, further concentrating powers in the executive, although it is also possible that an energetic future monarch might seek to use these powers in person, thus challenging democracy; either way, uncertainty is problematic.

The draft Constitution states that the Prime Minister is to be formally elected by Parliament, but lays down no mechanism by which the election is to take place. It further confuses the matter by stating that 'in default of [an] election' the Head of State is to appoint as Prime Minister the person who, in their opinion, is 'best able to command the confidence of Parliament'.⁷⁹ No time limit is specified, and it may be assumed that the decision of whether or not such an election is 'in default' is left to the Head of State. This, however, is subject to the aforesaid ambiguities concerning the extent, if any, of the Head of State's discretionary powers. The draft Constitution is similarly silent about the mechanism for removing a Prime Minister by means of a vote of no-confidence, which is implied but not stated. In respect of the instruments for the appointment and the removal of the Prime Minister, therefore, the draft Constitution appears as a retrograde step when compared with the Scotland Act.⁸⁰

The draft Constitution is deficient in other respects as well. It is silent about the role and appointment of an ombudsman and an auditor-general—parliamentary officers whose independent authority is necessary to protect citizens from misrule and to guard the public purse. It makes no mention of political parties. There is no rule guarding the professional impartiality of the civil service. These matters, which can greatly affect the quality of democracy, are left to be

regulated by ordinary law, by standing orders or by convention. This means, in practice, that they are at the mercy of the governing majority, subject to only to the loose limits of political acceptability.

In the words of the 2002 Constitutional Policy Paper which accompanies the draft Constitution, 'A written Constitution is necessary to protect the rights of every Scottish citizen and to place restrictions on what politicians can and can't do'.⁸¹ The Constitution, it is claimed, would 'set out the rights of citizens' and 'define the powers and responsibilities of government and parliament'.⁸² The aim was to create a 'normal European democracy'⁸³ (not, tellingly, a 'normal Westminster democracy'). As can be seen from the above account, the draft Constitution is partially successful in accomplishing these aims. In the adoption of proportional representation, the formal election of the Prime Minister by Parliament, fixed term Parliaments, an innovative minority suspensive veto with referendum override mechanism and the constitutional recognition of local government, as well as in the development of a written, codified, judicially enforceable Constitution in the first place, the SNP's draft Constitution does appear to achieve its core objectives, and to do so in ways which deviate substantially from the assumptions and institutions of Westminster Model as hitherto applied in the UK. It is possible that it could, given appropriate development by law and convention, serve as an adequate framework for a stable liberal democracy—and one in which multiparty politics and coalition or minority government are the norm.

However, the draft Constitution is deeply flawed in ways which could well hinder it from developing along such lines. Owing to its lack of clarity regarding the extent, if any, of the Head of State's prerogative, the draft Constitution introduced a dangerous uncertainty into the procedure for dissolving Parliament, the mechanisms of government formation and removal, and the granting of assent to legislation. There is a risk of constitutional crises arising from these critical points, largely attributable to the way in which the draft Constitution seeks to introduce new formal rules, while still clinging to Westminster assumptions about how informal rules should be applied.

The absence of constitutional protection for the powers and independence of scrutinising institutions such as the ombudsman and auditors, together with majority dominance of Parliament's timetable, procedures and committee rules, contributes to the concentration of irresponsible power in the executive way which is reminiscent of the Westminster Model. There is no indication that the draft Constitution would lead to the development of a mature, consensual, working Parliament, which can involve itself with the details of legislation, as opposed to a weak, reactive, Westminster-style debating theatre. Add to this the potential for electoral manipulation, owing to the lack of a specified electoral system and the absence of an electoral commission to ensure the integrity of elections, and the draft Constitution appears

not only much less radical than at first sight, but also much less technically competent than it ought to be.

Explanations and recommendations

The picture that emerges from the above analysis is of a draft Constitution which only partially and imperfectly improves on the Westminster Model. This assessment is both surprising and frustrating, especially when one considers the radical ambitions of its authors and the fact that many of its technical issues have already been resolved in the Scottish Parliament. Two questions naturally arise. Firstly: How could the SNP's leading constitutional scholars have created a draft Constitution which is, at best, only a partial success? Secondly: What could be done to improve the draft Constitution, so as to realise the hopes of its authors for a higher quality of democracy in Scotland?⁸⁴

To answer the first of these questions, it is necessary to examine the history of the SNP's draft Constitution. It is the direct descendant of a text first produced by the McIntyre Committee (convened by Dr Robert McIntyre) in 1977.⁸⁵ By the standards of that time, the draft Constitution was a bold document. Those who wrote it had no personal experience of living in an independent country with a written Constitution and a fair electoral system. Just to conceive of such a thing, however imperfectly, required a leap of the imagination which put them far ahead of most of their fellow citizens. Considering these limitations, the original 1977 draft was a remarkable piece of work: for its time and place, it was truly radical, innovative and progressive:

'In 1977, this was all somewhat controversial. Unicamerality was regarded by some as doubtful; proportional representation was regarded with suspicion by the two larger parties of state; election of ministers rather than their appointment by the Queen as Head of State was not favoured; the idea of a commission on judicial appointments was considered insulting in view of the historic powers of the Lord Advocate and Prime Minister in advising the monarch. Entrenched Bills of Rights were considered anti-democratic by many, because of the discretion they remove from elected politicians and confer on judges'.⁸⁶

The revisions of 1991 and 2002, under Neil MacCormick's direction, 'adapted rather than radically reconceived' the 1977 text.⁸⁷ The main changes included the addition of the sections on local government and the replacement of archaic language with more modern terminology. The core of the draft Constitution—the function of, and relationship between, the institutions of the State—has remained largely unchanged since 1977. According to interviews with those who were involved in writing the first draft of the Constitution, the drafting process was haphazard and informal, since SNP was at that time a still marginal party,

without research facilities; much of the work was done by small groups of friends in late-night whisky sessions.⁸⁸

At that time, moreover, there were few good examples from which to work. The 1978 Constitution of Spain, with its modern model of parliamentary monarchy,⁸⁹ had not yet been written. The Constitution of Sweden, with its precisely defined mechanism of electing Prime Ministers, was still in its infancy.⁹⁰ Even where good models did exist in other European countries, they were unlikely to have been relied upon. In 1977, Scotland's cultural and institutional ties with the Commonwealth were unquestionably stronger than those with our European neighbours, so that Canada and New Zealand would be much more likely sources of constitutional borrowing, despite the rudimentary nature of some of their Constitutions, than, say, Denmark or Sweden.

Fewer excuses can be made for the 2002 version. The draft Constitution reads as if the Claim of Right, the Scotland Act and the Consultative Steering Group, had never existed. It is a 'stranded' text, a glimpse of constitutional radicalism overtaken by events. In part, this is because the SNP, being internally divided about devolution, did not fully participate in the process leading up to the Scotland Act, and so did not share in detailed deliberations about how to make Scotland's political system different from Westminster. As a result of this lack of engagement, the SNP's constitutional thinking, so advanced a generation ago, has stagnated, or perhaps even reversed, since devolution. Radical proposals for constitutional renewal can still be found, such as the proposals for direct democracy suggested by Mike Russell and George Reid,⁹¹ but these are yet to be incorporated into the SNP's official constitutional policy. Instead, SNP policy has become fixated on the 'status question' of Scotland's relationship with the rest of the UK, and the assumption of the National Conversation team is that constitutional design will be addressed only after a referendum on independence, not before.⁹² The details of the future Scottish Constitution, which seemed so urgent in 1977, are now, paradoxically, too far over the horizon to be worthy of much attention.

To address the second question is to cross the line from analysis to advice—a dangerous step for any political scientist to take. The recommendations which follow are offered in a tentative, speculative manner, with no claims to certainty or finality.

The first recommendation is to create a separate office of Head of State, with specified functions and powers, and then to vest the executive powers explicitly in the Cabinet. Models of how this might be achieved can be found in the Constitutions of Ireland, Spain and Sweden. The Irish Constitution is a particularly good model, as it expressly states those limited, but potentially critical, circumstances in which the Head of State may act with personal discretion. For example, a provision similar to Article 26 of the Irish Constitution,

which allows the President to withhold assent to a bill and refer it to the Supreme Court for a decision on its constitutionality, would not only remove any uncertainty from the question of whether the Queen can withhold assent, but also provide an additional check against unconstitutional legislation.⁹³ If it is felt that such discretion in the hands of a hereditary monarch is unacceptable in a democracy, then a similar power could usefully be entrusted to the Presiding Officer.

The second recommendation is to replace the draft Constitution's vague and contradictory provisions, particularly those relating to the premature dissolution of Parliament and the election and removal of the executive, with text modelled on the Scotland Act. This would streamline and clarify the relationship between the main governing institutions, further remove any ambiguity about the discretion of the Head of State in these areas, and reduce the potential for constitutional crises in the future.

The third recommendation is that the role and functions of the ombudsman, as a guardian of the people against the administration, and of auditors, as guardians of the public purse, should be given constitutional recognition. The mechanisms of appointment and tenure which are already in place under the Scottish Public Services Ombudsman Act 2002⁹⁴ and the Public Finance and Accountability (Scotland) Act 2000⁹⁵ are probably quite adequate, but placing these offices on a constitutional basis would better protect them from the Government and from partisan interference. To avoid domination and manipulation by the majority party, the rules of the Scottish Parliament concerning the Parliamentary Bureau and Corporate Body, and the powers and functions of parliamentary committees ought to be established in the Constitution.

Fourthly, the electoral rules should be specified with greater precision. Again, the Constitutions of Sweden⁹⁶ and Ireland⁹⁷ provide good models. The question of whether single transferable vote or mixed member plurality is adopted is secondary to the requirement that *some* suitable system be entrenched against transient majorities. An independent and impartial electoral commission, perhaps including the functions of a boundaries commission, should also be given constitutional status in order to help ensure the integrity of elections from partisan pressure and government manipulation.

Conclusions

In terms of its general principles and overall structures, the SNP's draft Constitution represents a rejection of the Westminster Model in favour of a more constrained and consensual form of government. Proportional representation, fixed term Parliaments, positive parliamentarism, a written Constitution with provision for the judicial review of the constitutionality of legislation, and a minority suspensive veto mechanism, all point in the same direction, building on the

Scottish Claim of Right, the Scotland Act, and the report of the Consultative Steering Group. However, it partly denies its own radicalism, at the level of detailed design, by its lack of precision concerning the personal prerogatives of the Head of State, its silence over matters of parliamentary procedure and committee powers, its lack of mechanisms of scrutiny and control such as ombudsmen and auditors, and its ill-defined electoral system which is susceptible to majoritarian manipulation. It would go some way to encourage power sharing in coalition or minority governments, and to limit power through constitutionalism, but it would do little, if anything, to strengthen the accountability of the government between elections, or to foster a more consensual style of parliamentary deliberation.

These deficiencies could be corrected by re-drafting the Constitution, paying greater attention to these matters of detail.⁹⁸ I can think of no greater tribute to the late Neil MacCormick than to revisit the draft Constitution with fresh eyes, learning from the experience of the Scottish Parliament as well as from our neighbours to the north, west and east, in order to improve and build upon it. Then, if Scotland does vote to become independent, we will have the chance to possess a good Constitution, which will serve for generations as the basic law of a 'kinder, gentler democracy'.⁹⁹

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