

FUNDAMENTALS FOR A NEW SCOTLAND ACT: THE CONSTITUTION UNIT'S REPORT ON SCOTLAND

Graham Leicester

If there is a change of government at the coming election, it will usher in an administration, either Labour or a coalition of Labour and the Liberal Democrats, committed to legislate for Scottish home rule on the basis of the proposals of the Scottish Constitutional Convention (SCC).

That much is common knowledge. But the bill will need to take its place in a legislative programme which, over the course of a parliament, might include a number of other constitutional measures. All in all there is a heavy legislative agenda, and if Labour honours its pledge, to legislate in the first year of government, Scotland - and Wales - will lead the way. That gives rise to two potential problems:

- the devolution legislation might prove more difficult to enact than expected, might sap the government's energies, and might be fudged and amended to such an extent in order to get it through that it satisfies neither supporters nor opponents. All of these criticisms arguably apply to the devolution legislation for Scotland and Wales passed in the 1970s;

*Graham Leicester is senior research fellow with the Constitution Unit and author of **Scotland's Parliament: Fundamentals of the New Scotland Act**, available from the Constitution Unit for £10 (4 Tavistock Place, London, WC1H 9RA; tel: 0181 693 7781).*

Scottish Affairs

- the legislation could fail to take account of links with other constitutional measures (for example, House of Lords reform, extension of devolution to the English Regions etc) and effectively close off options which in the long run make the overall package less satisfactory.

It was with such potential difficulties in mind that the Constitution Unit was established at University College London in April 1995:

- to analyse current proposals for constitutional reform;
- to explore the connections between them;
- and to identify the practical steps involved in putting constitutional reform in place.

The Unit published a detailed report on Scottish devolution at the end of June 1996. The report considers how to draft a devolution bill which is sound and workable; what other changes in the UK system of government will be needed to make the devolution settlement work, beyond those included in the legislation; and how Scottish devolution relates to the other proposed changes in the British political system. The focus is less on the internal workings of the settlement in Scotland - how the parliament might operate, what policies it might pursue etc - than on the relationship between a Scottish Parliament and the rest of the UK political system. If the Scottish Parliament is to succeed then it will be necessary, through the devolution legislation and other instruments and agreements associated with it, to carve out a secure constitutional space within the British state in which it can freely operate.

THE SCOTLAND ACT 1978 REVISITED?

Naturally the first place to look for guidance is the Scotland Act passed in 1978, which itself drew on some of the lessons of failure from the 1976 Scotland and Wales Bill. There is a good deal of detail in the Act which would need to appear in some form or other in any future devolution Act. But as a model it is deficient in at least two respects - one technical and one political.

The technical flaw is in the way that the 1978 Act assigns legislative competence to the Scottish Assembly. It was put together by trawling through the statute book as it then applied to Scotland and assigning responsibility for each statute either to Edinburgh or Westminster. In many cases even within a

Fundamentals of the New Scotland Act

single statute some sections were devolved and others not. The result was a list of Edinburgh's legislative competence which ran to 28 pages of the statute book, which made no sense to anybody without cross referencing to other existing statutes, and which in spite of it all still left plenty of scope for argument in any individual case about whether a proposed Act of the Assembly fell within or outwith its authority.

It is very difficult to find any support for following this model again, especially amongst those involved in the interminable discussions of individual statutes which filled over two years of Whitehall committee time between 1974 and 1976. A better model exists in the Government of Ireland Act 1920, which specifies only the powers retained at Westminster rather than those devolved to the Stormont Parliament. A devolution Act on that model would still be a complex piece of legislation. But it would be clearer; it would be more firmly based on a principled division of powers; it would be more workable in practice (not least for the courts to interpret); and it would probably be easier and quicker to draft.

The second point is a political one. The 1978 Act contained a significant role for the Secretary of State for Scotland as the guardian of the devolution settlement. He was to act as the channel of communication between the two political systems, the interpreter of the devolution legislation to colleagues, the initiator and defender of policy in Scotland where it remained the responsibility of Westminster, and most importantly the person responsible for policing the Scottish Assembly's use of its powers.

It is this last role in particular which is troublesome today. The late John P. Mackintosh described the role as a 'one-man-House-of-Lords'. The Secretary of State had the right to recommend that Parliament strike down a proposed Scottish Act if he considered that it might affect a matter reserved to Westminster and that its enactment would not be 'in the public interest'. In effect, the 1978 provisions thus allowed a political decision about the extent of the Assembly's powers to trump any judicial interpretation of what the devolution legislation actually said. That arrangement, under which a Westminster representative enjoying perhaps little support in Scotland has a qualified veto over decisions of the Scottish Parliament, is surely politically unacceptable today.

The key to coping with such potential conflicts between the two Parliaments will be the provision of institutional machinery to allow an agreed political outcome to be reached if possible, and tight and efficient judicial procedures to resolve any disputes that remain. The Constitution Unit recommend a fast-

Scottish Affairs

track procedure for judicial challenge in advance of entry into force of an Act of the Scottish Parliament, and a reference procedure, by analogy with determining questions of European Community law, where devolution points arise in the course of other matters. The choice of the final court of appeal is a finely balanced one, but less important than framing the legislation in a clear and helpful fashion and devising straightforward procedures for the adjudication of disputes. The Unit favour the House of Lords over the Judicial Committee of the Privy Council.

SCOTLAND'S RELATIONS WITH CENTRAL GOVERNMENT

This article referred earlier to carving out a constitutional space within the United Kingdom in which a Scottish Parliament and government will have room to operate. The framing of the legislation is crucial, but so too are several other factors which will have a strong impact on Scotland's policy autonomy in practice. England will always be the dominant partner within the Union: the devolution legislation needs to recognise this and entrench institutional and procedural safeguards which prevent as far as possible any abuse of that position in practice.

The first possible area for dispute is finance. Changes in the Scottish Office budget each year are currently derived by increasing Scottish programmes by a fraction of the planned increase in equivalent English and Welsh programmes. The fraction is based on Scotland's population share, and is embodied in the 'Barnett formula'. The Unit suggest that in the future an independent Commission should be established, comprising representatives appointed by both governments: to audit the Treasury's application of the formula; to highlight any difficulties in applying it (for example if there is no 'English equivalent' spending on which to base Scottish increases); and to conduct a needs assessment exercise across the UK to determine whether the present distribution of public spending between the regions and nations accurately reflects the differences in need that they clearly exhibit.

The second important area is European policy. Some overlap of legislative competence between the Scottish Parliament and the European Community will be unavoidable given the extent of the latter. Thus under EU rules it will formally fall to the United Kingdom to agree EC law even where domestic legislation in the same area would be the responsibility of the Scottish Parliament. Cooperation in this area is therefore essential - to make sure that the UK's position accurately represents the Scottish interest, and to allow the Scottish Parliament to implement European directives for itself to reflect

Fundamentals of the New Scotland Act

local concerns. The Unit propose a formal agreement between the UK and Scottish governments covering consultation over new legislative proposals, levels of representation in the Community institutions, and attendance at all relevant Council and working group meetings and at inter-governmental conferences to review the treaties. Special provisions in the devolution Act should also make clear where responsibility for failure to apply EC law lies.

European policy is a special case of a general need for the Westminster and Edinburgh political and bureaucratic systems to liaise with each other closely. That liaison will need to happen at all levels: officials, parliaments, governments. The Unit suggest a number of features which might help to make sure that the relationship functions smoothly. One is that the civil service should remain a unified UK-wide organisation, although with an enhanced degree of autonomy in Scotland. Another is the establishment of a Joint Council of the two governments, at least for the early years. Scottish - and other - MPs at Westminster might also join a Scottish Affairs Select Committee to monitor the devolution settlement. In time its terms of reference would probably expand to cover other devolved nations and regions: in other words, 'Devolution Affairs'.

The Secretary of State for Scotland will also have a key role to play in establishing this machinery in the early period, and in interpreting the devolution settlement to his or her colleagues. But the role may diminish, and - although it will still be open to the Prime Minister to fill it - will be difficult to justify once the Parliament becomes established.

Finally, the question of Scotland's level of representation in the Westminster Parliament will again be raised in the context of devolution, as it was in the 1970s when it became known as the 'West Lothian question'. The fact is that the question will still be asked so long as one Scottish MP remains at Westminster, and the only two genuine answers - no representation at all, and 'in and out' (Scottish MPs taking no part in Commons business dealing only with the rest of the UK) - are unjust or unworkable.

A political response might lie in reducing Scotland's representation at Westminster. But there are practical difficulties involved in implementing any change with so many other relevant factors to consider. They include, potentially, Welsh and Northern Irish representation, conflicting Boundary Commission rules in the different parts of the UK, the speed of development of English regional government, and the need to put a ceiling on the overall size of a constantly expanding House of Commons. It is not in any government's gift simply to change the level of representation unilaterally:

Scottish Affairs

any revision would have to emerge from a trusted process. That might be a Speaker's Conference, or perhaps a review by a new UK Electoral Commission. Both would need clear cross-party political guidance about the objectives of the review before commencing. That might prove difficult to obtain, especially with a referendum on change in the Westminster electoral system itself also in prospect (as proposed by the Labour Party).

CONCLUSION

This article has touched on a number of the fundamentals for success in legislation for devolution in the 1990s: the form of the legislation and the nature of the administrative infrastructure which will have to be provided to make it work. The Unit's report covers a good many other areas in significantly more detail. Even so, it does not claim to be comprehensive: there are still questions to answer, details to be sketched in, political judgements to be made.

It will have succeeded in its purpose, however, if it moves the debate in Scotland on from the point represented by the 1995 St Andrew's day report of the Constitutional Convention, and if in addition it succeeds in stimulating a wider debate south of the border. It suggests a number of areas where public and private discussion might usefully now focus: on what needs to be retained at Westminster rather than what can be devolved to Scotland; on the means of securing stability in the financial settlement rather than the mechanism for varying it potentially at the margins (tax raising powers); on the implications for central government on which the Convention remains silent, and in particular the practical implications of the overlap in Brussels and Edinburgh competences; and on the wider implications of a rolling programme of devolution for the way in which the Scotland/UK political relationship is to be managed.

In all of these areas the report has suggested possible solutions and responses, a range of possible options. It is not intended to be in any way prescriptive, or exclusive of other ideas. It is offered not as a blueprint, but as a contribution to the debate. Above all, it recognises that devolution - if it occurs - should not be considered as a gift graciously offered by the centre, but as a response to a demand from part or parts of the state which has to be met.

June 1996