Scotland’s Constitutional Future

Thank you for the invitation. This is a slightly revised version of a paper I gave back in November on the general theme of ‘where are we now’. Essentially what I am saying is the debate about Scotland’s constitutional future ought to be a debate not just about the Scottish Parliament’s powers but about the control and accountability of government in Scotland.

Turning though to where we are now, two things can be said with confidence:

No agreement

The first is that there is no agreement or prospect of agreement over Scotland’s constitutional future – over whether Scotland should remain as part of the United Kingdom or become an independent state. On the one side you have a substantial minority of the Scottish population who are not content with the post-devolution status quo, however one cares to define it. On the other side, you have a majority, or so the polls tell us, who want to remain part of the United Kingdom. And it is difficult to see these two sides being brought together in the foreseeable future.

Continuous adjustment

The second is that the relationship between Scotland and the rest of the United Kingdom has been the subject of a more or less continuous process of adjustment for well over a century now - ever since the appointment of a Secretary for Scotland in 1885 (for almost 150 years if we go back to the elevation of the Lord President of the Court of Session to the peerage in 1867 to assist in the appellate business of the House of Lords). Since when we have had:

* the elevation of the Secretary to a full Secretary of State in1925 (the salary came later);
* administrative devolution and the relocation of the Scottish Office to Edinburgh in 1939;
* a Royal Commission on Scottish Affairs in 1952;
* a Royal Commission on the Constitution in 1969;
* the failed Scotland Act 1978; and then
* devolution and the establishment a Scottish Parliament at the second time of asking in 1998.

Since when we have had the Calman Commission on Scottish Devolution followed by the Scotland Act 2012, and the Edinburgh Agreement, which paves the way for referendum in October 2014. But whether referendum will represent a ‘final’ adjustment to the relationship remains to be seen.

The most significant adjustment?

But if we were to ask which of those adjustments had been the most significant, the answer would have to be devolution (although a case can be made for the Secretary for Scotland Act 1885 because without that early recognition of the territorial principle the rest might not have followed).

The most significant for three reasons:

First, because it established a new locus of political power - the Scottish Parliament - with a claim to be more representative of Scottish opinion than Westminster.

Second, because it put the relationship between Scotland and the rest of the United Kingdom on a statutory basis. Hitherto that relationship had rested on an uneasy mixture of case law and convention, the practical significance of which was far from certain (were the Westminster Parliament to seek to abolish the Court of Session or the separate system of Scots law for the protection of private right how would the courts respond? .… an unlikely scenario to say the least). Devolution meant that the relationship was, in part at least, defined in statute for the first time. It became part of or was ‘built into’ the constitution. Or, to put it another way, devolution ‘constitutionalised’ the relationship, made it part of the fabric of the constitution.

And third, because it gave Scotland its own constitution, a constitution that is not just a carbon copy of the (overarching) United Kingdom constitution - it is not just the United Kingdom constitution writ small, although politicians tend to act as though it is - but one that is different in significant respects, most notably in incorporating the strong form of constitutionalism that is absent from the United Kingdom constitution, so that Convention rights, i.e. rights under the ECHR, have a higher status than Acts of the Scottish Parliament, the Parliament has no power to legislate in defiance of them, and if it does so the courts have the power to strike down its Acts as unlawful. Whether judicial supremacy is any more to politicians liking north of the border than it is south is a question I will come back to later, but first let me say a little more about the concept of devolution.

The concept of devolution

‘Devolution was a concept invented by Harold Wilson to obscure the hitherto clear distinction between local government and federalism. Explain and discuss.’

For the Kilbrandon Commission, the key issue was sovereignty:

‘The transfers of power with which we shall be concerned … are those which would leave overriding control in the hands of Parliament. The extent of the powers transferred and the conditions under which they were to be exercised would be prescribed by statute and might at any time be changed by Parliament or by Ministers answerable to it. In other words we shall be concerned with devolution, which is the delegation of central government powers without the relinquishment of sovereignty.’ (para 543).

‘It is inherent in the concept of legislative devolution that Parliament would … retain in full its own power to legislate for the region on any matter. ... It is this power that distinguishes this form of devolution from a federal arrangement (para 762).

The Kilbrandon Commission’s definition of devolution as ‘the delegation of central government powers without the relinquishment of sovereignty’ invites the question whether it is still realistic to talk in terms of Westminster having retained sovereignty – that it retains in full its own power to legislate for Scotland on any matter - other than as a matter of strict constitutional theory. And if it is not, whether we have not moved closer to the federal arrangement Kilbrandon rejected out of hand forty years ago.

For me one of the most striking features of the protracted business of putting the Scotland Act 2012 onto the statute book was that the SNP government was able to prevent the devolution settlement being amended against its wishes, and in particular to prevent it being amended in ways that I suspect were intended to strengthen the UK government’s hand in future dealings with a Scottish government. I am thinking, in particular, of the power to refer individual sections of a Bill rather than the whole Bill to the Supreme Court for a pre-assent ruling, or the power to implement international obligations in the devolved areas concurrently with the Scottish Ministers in place of the power to compel action by the Scottish Ministers, which power like the power to refer whole Bills to Supreme Court I suspect is in practical political terms unworkable.

What the SNP government wasn’t able to do of course was to secure the amendments to the settlement that would have made the Scotland Bill ‘worthy of the name’. That would have required the agreement of the UK government. But if it is the case that the devolution settlement cannot be amended without the Scottish Parliament’s consent, as the business of putting the Scotland Act 2012 onto the statute book strongly suggests, then that it seems to me represents a significant step in a federal direction­ – bearing in mind that one of the features of a federal constitution is that no one legislature can amend the constitution against the other.[[1]](#footnote-1)

Willie Rennie and the Liberal Democrats I notice are much given to arguing that what is needed is not just a transfer of fiscal powers but a transfer of *constitutional* power as well but, arguably, the transfer of constitutional power has already occurred, albeit some of the guarantees one would look for in a federal relationship are missing. ….

Where we are today

Turning to the question of where we are today, one advantage of replacing the language of devolution with the language of federalism is that it helps to highlight aspects of the relationship between Scotland and the rest of the United Kingdom that might otherwise be overlooked. There is it seems to me a near obsession with powers - devo plus, devo max, independence lite – to the exclusion of other aspects of the relationship that seem to me no less important.

There are five aspects of the relationship between Scotland and the rest of the UK - five of the ‘fundamental ‘building blocks’ of federal arrangements - which I think are deserving of attention: the division of competences; financial arrangements (which are the two that have received most attention to date), intergovernmental relations; Scotland’s ‘voice’ at the ‘centre’, i.e. in relation to the rest of the United Kingdom; and the role of the courts in the devolution settlement.

Division of competences

In his book, *The British Constitution,* Anthony King summed up the devolution of power to Scotland as having been ‘on a prodigious scale. There has probably never in any country been a greater voluntary handover of power by any national government to a subnational body within its own borders.’ Whether that is correct I do not know, but there is no question about the extent of the Parliament’s law making power or of the use that has been made of that power since devolution. At some point this year we will pass the 200 Acts of the Scottish Parliament mark – to which should be added upwards of 5,000 SSIs. Whether that is a good thing or not is not for me to say, but had it been suggested at the outset that the Parliament would pass on average 15 bills a year the likelihood is the suggestion would have been dismissed as absurd; the assumption was that once the Westminster ‘backlog’ of legislation had been cleared the Parliament’s legislative business would quickly diminish. That has not been the case.

What the Parliament’s legislative fertility underlines is the extent to which the law is now being made in Edinburgh rather in London .... Or should I have said in Edinburgh *as well as* in London, Brussels and Strasbourg? Because the other striking feature about the division of competences is the extent to which Westminster is continuing legislating in the devolved areas - with it should be said the Parliament’s consent. At the time of devolution it was widely assumed that Westminster would cease to legislate in the devolved areas – in federalism terms the underlying model was one of dual rather than cooperative federalism. But what we have seen since devolution is a much greater reliance on Westminster legislation in the devolved areas than anyone anticipated at the time of devolution, with more than 120 ‘Sewel’ or ‘legislative consent’ motions signifying the consent of the Scottish Parliament to Westminster legislation in the devolved areas (or altering its legislative competence or the executive competence of the Scottish Ministers).

Such legislation may commend itself for a number of reasons. It enables policies to be implemented on a UK or GB wide basis. It means that there is no need to disentangle the devolved from the reserved aspects of a proposal – on which the Scottish Parliament would be unable to legislate. It provides an alternative and potentially quicker means of conferring functions on the Scottish Ministers in the reserved areas than an executive devolution order. It enables the more effective judge-proofing of legislation through the doctrine of parliamentary sovereignty. It also has the major advantage from the point of view of a Scottish government of enabling policies which it supports, or to which it is not opposed, to be given legislative effect at little or no cost to itself in terms of legislative resources, leaving it free to concentrate on its legislative priorities.

But for present purposes it is an important reminder that the Scottish government’s policy making capacity is limited, and reliance on Westminster provides one way of making up the shortfall.

Financial arrangements

Under the devolution settlement the Parliament was to be funded mainly by grant. It was also given a limited tax varying power, a power which was never used and was in effect allowed to lapse because of the failure to keep the record of Scottish tax payers up to date. The choice of grant rather than taxes as the principal means of financing the Parliament’s budget, reflected a number of considerations – the availability of an already existing mechanism for determining the Scottish Office’s share of United Kingdom public expenditure in the shape of the Barnett formula; Treasury opposition to the devolution of tax raising powers; and last but not least a concern on the part of Scots to ensure that Scotland continued to receive its fair share of UK public expenditure. For the Scottish Constitutional Convention it was essential that Scotland continue to be ‘guaranteed her fair share of UK resources, as of right.’

But what we have seen since devolution is that initial emphasis on ensuring that Scotland ‘continue to benefit from its appropriate share of UK public expenditure’ (Cm 3658 para 7.2), as determined under the Barnett formula, overlaid by a much greater emphasis on the Parliament’s financial accountability, beginning with David Steele’s Donald Dewar Memorial lecture in 2003 in which he argued that ‘no self-respecting parliament should expect to exist permanently on 100% handouts determined by another parliament, nor should it be responsible for massive public expenditure without any responsibility for raising revenue in a manner accountable to its electorate.’

Since when we have had:

* the Calman Commission’s recommendations, which the Commission was confident, once implemented, would make clear that the Scottish Parliament was not ‘wholly dependent on grant from another Parliament’ and now had the responsibility for raising ‘a significant proportion of its revenue’, estimated at 35%, ‘in a manner accountable to the electorate’; and
* courtesy of the Scotland Act 2012, what has been billed as ‘the largest transfer of fiscal power from London since the creation of the United Kingdom’, a somewhat exaggerated claim given that the only previous transfer had been under the Government of Ireland Act 1920, and that was almost entirely eaten up by exceptions.

Be that as it may, the Scotland Act 2012 will see:

* the replacement of the Scottish variable rate by a Scottish rate of income tax in partial replacement of UK income tax; together with
* the devolution of stamp duty land tax and landfill tax to the Scottish Parliament, together with provision for the devolution of further taxes with the agreement of the UK Parliament, and
* an increase in the Scottish government’s borrowing powers.

All of which will impose - is imposing - further pressure on the devolved institutions’ legislative and administrative resources.

Intergovernmental relations

The successful operation of the devolution settlement is premised on effective co-operation between the two levels of government. That is as true of devolved arrangements as it is of federal arrangements. As the Calman Commission said, ‘a vital element of the success of any devolution settlement is the strength of the relations, both formal and informal, between Governments, Parliaments, and the other democratic representatives and institutions of the state’ (para 4.4). But what is abundantly clear 13 years into the settlement is that cooperation cannot be assumed or taken for granted.

The Commission was highly critical of the existing intergovernmental arrangements, based on the Memorandum of Understanding and the Joint Ministerial Committee, which it variously described as: ‘not wholly satisfactory’ (para 4.72) ,‘underdeveloped’, ‘unsystematic’, ‘insufficient’ and ‘too ad hoc’ (para 4.120; see also 4.123 and 4.124) before adding that the near complete absence of scrutiny of intergovernmental relations was ‘indefensible’ (para 4.190).

It therefore sought ‘a much better developed and more robust framework between parliaments and governments …to ensure that, where devolved and reserved responsibilities overlap or impinge on one another, proper coordination and joint working are more fully encouraged and supported, with appropriate scrutiny by the parliaments to which the governments are accountable’ (para 4.128).

How much has actually changed as a result of its recommendations is difficult to say from the outside. *Strengthening Scotland’s Future,* the White Paper published alongside the Scotland Bill, offered little more than a breathless canter through Calman without adding a great deal. My guess would be not that much, given the extent to which attention will have focussed on the referendum since May 2011.

But one thing that does come out clearly, in Calman as much as in the UK government’s response, is resistance to putting the existing machinery of intergovernmental relations on a more formal basis –what is described as building intergovernmental relations into the constitution – on the grounds that it would detract from the flexibility of the existing arrangements, it would open the door to judicial intervention etc. In other words, the UK government’s existing prerogatives should be left undisturbed.

The result is a highly discretionary system with few guarantees of Scottish interests written into it when it comes to matters such as finance or EU decision-making. One of the ‘improvements’ the SNP government sought but failed to secure in the Scotland Bill was a ‘guaranteed’ voice in the EU decision making process. If one were seeking ways to ‘improve’ the current settlement this would be one of the more obvious ones.

Scotland’s voice at the ‘centre’

Intergovernmental relations are only one aspect of the wider question of Scotland’s ‘voice’, i.e. the representation and protection of Scottish interests at the ‘centre’ - or if you prefer in relation to our largest neighbour.

One reading of the Scottish history of the last 300 years would be that as well as retaining a substantial measure of autonomy over their own affairs, the Scots have been able, through their participation in the joint venture of the United Kingdom, to gain a measure of influence over their largest neighbour, which they otherwise would have lacked. One of the risks of independence it seems to me is that by choosing ‘exit’ over ‘voice’ we would be depriving ourselves of that influence. For present purposes it is worth reminding ourselves of some of the sources of that influence.

Representation at Westminster (the legislative branch)

59 MPs - 13 fewer than before devolution (which number was set to fall to 50 under the Parliamentary Voting System and Constituencies Act 2011).

I don’t know how many members of the House of Lords, which is not constituted on a territorial basis, but Scotland does not lack effective representation in the House of Lords. The Royal Commission found that life peers from London, Scotland and the South East of England represented a significantly higher proportion of the membership of the House of Lords than might be expected on the basis of populations.

But what we lack, as the Calman Commission pointed out, is anything in the way inter-parliamentary arrangements, akin to the admittedly unsatisfactory arrangements in respect of inter-governmental relations, a lack which it described as ‘indefensible’.

 ‘Scots in the Cabinet’ (the executive branch)

The precise number will vary depending on which party (or combination of parties) is in power, so if Labour were in power we would expect more Scots in the Cabinet than if the Conservatives or Liberal Democrats were in power, because Labour have more Scottish MPs to choose from, although we are unlikely, I imagine, to see a return to the ‘jockocracy’ of the Blair and Brown years.

UK bodies

And then as we move beyond central government, the governance and accountability of some UK bodies but by no means all have been adjusted to take account of their importance to Scotland, e.g. by appointment of Scottish members to governing board, reports laid before the Scottish Parliament etc.

As a general rule, it is those bodies exercising devolved functions, whether on a UK-wide basis or in combination with reserved functions, whose governance arrangements have been adjusted, while the governance arrangement of those bodies exercising reserved functions have been left unchanged (on the basis that they are solely accountable to UK ministers).

The position is complicated however by the fact that the principle of territorial representation was conceded in relation to some bodies that are now reserved before devolution …

As part of the negotiations over the Scotland Bill, the UK government was also prepared to concede the principle of territorial representation in relation to the BBC Trust (Scottish member appointed with the agreement of the Scottish Ministers) and the Crown Estate Commissioners (Scottish Commissioner appointed after consultation with the Scottish Ministers), but not in relation to the HMRC, which will be responsible for collecting the Scottish rate of income tax.

UK Supreme Court (the judicial branch)

The UK bodies in which Scotland has an interest also include the UK Supreme Court. By convention there have for many years been two Scottish Law Lords and, more recently, two Scottish Justices of the Supreme Court. On Lord Hope’s retirement in June 2013, Lord Reed will be the only Justice from Scotland. In making its recommendation the selection commission will have regard to the requirement under section 27(8) of the Act to ‘ensure that between them the judges will have knowledge of, and experience of practice in, the law of each part of the United Kingdom.’ But whether that will result in the appointment of another Scottish Justice remains to be seen.

Which takes me to ….

The role of the courts in the devolution settlement

Under the devolution settlement, the final say on the division of powers between Edinburgh and London belongs to the United Kingdom Supreme Court, which inherited the devolution issues jurisdiction formerly exercised by the Judicial Committee of the Privy Council. In theory the Supreme Court could be trumped by Westminster, or by both Parliaments acting together, but the UK government has said that the section 30 power should not be used as a means of resolving disputes over the interpretation of the Act. These should be settled by the courts in the normal way.

In terms of relations between the different levels or orders of government, however, the Supreme Court’s jurisdiction has not so far proved controversial. Inter-governmental disputes have been settled behind closed doors with no recourse to the courts. There have been two cases with a direct bearing on the division of powers – *Martin v Most* in which the majority clearly felt that the Scottish Parliament should be left to get on with it. ‘Given that the Scottish Parliament is plainly intended to regulate the Scottish legal system’, Lord Brown said, ‘I am disinclined to find a construction of Schedule 4 which would require the Scottish parliament, when modifying that system, to invoke Westminster’s help to do no more than dot the i’s and cross the t’s of the necessary consequences.’ The other case is *Imperial Tobacco* ….

Where the Supreme Court’s jurisdiction has proved controversial - the judicial shoe has pinched - is in relation to the domestic Scottish constitution, leading to its jurisdiction in Scottish criminal cases being cut back by the Scotland Act 2012. This is one area where one suspects Scottish politicians and elements of the Scottish judiciary have been rather less comfortable with the ‘new’ Scottish constitution than the old unwritten constitution that preceded it - which is why I find it surprising that an SNP government in its sketch of its thinking on a new, new Scottish constitution should apparently be content to recreate for an independent Scotland a relationship between parliament and judiciary that has not proved at all to its liking in a devolved Scotland.

The controversy that erupted over the *Cadder* and *Nat Fraser* judgments suggests to me that we have some way to go before we are fully reconciled to a constitution in which the courts have the final say.

The Scottish constitution, however, is not just a question for another day – a question to be addressed in the event that we vote yes to independence. It is a question for now. As I have explained, one of the consequences of devolution was to give Scotland its own constitution. And one of the things I also find surprising – well not that surprising - is how quickly we seem to have forgotten some of the concerns that animated the discussions over that constitution, most notably those over the control and accountability of government. The demand for a Scottish Parliament wasn’t a demand for independence, although some saw it as a stepping stone to independence while others saw it as a means of killing nationalism stone dead. It was first and foremost a demand for a government that was accountable to the people of Scotland.

For the Claim of Right, which still merits reading as an indictment of the government of the United Kingdom and of Scotland as it stood at the time, the crucial questionswere power and consent– making power accountable and setting limits to what could be done without general consent. That was what united the proponents of a Scottish Parliament. That was what they had in common. But it as though a Parliament having been achieved, the argument has degenerated into an argument over the extent of its responsibilities, with little or no regard for wider constitutional values it was supposed to reflect and in particular the accountability of that government to the people of Scotland.

1. K C Wheare, *Modern Constitutions* (2nd ed 1966 OUP) 22. ‘… in a federal Constitution the legislatures both of the whole country and of its parts are limited in their powers and independent of each other. Consequently they must not be able, acting alone, to alter the Constitution so far as at any rate the distribution of powers between them is concerned. They are not subordinate to each other but they must all be subordinate to the Constitution.’ [↑](#footnote-ref-1)