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EDITOR'S FOREWORD

This issue of the *Scottish Parliamentary Review* (*SPR*) goes to print on the threshold of Scotland's historic vote on independence. In just a few short weeks, a referendum will decide whether Scotland is to be an independent nation again, or alternatively, to continue its union in the United Kingdom. These pages will, in the future, account for the results of that historic vote, but for the moment let us briefly languish in the realm of 'what if'. What if the voters decide on independence? The answer triggers endless questions, which beget yet more questions.

The Scottish Government (SG) has begun to answer some of the questions, both in documents and in debates. One of the key questions is: will the new nation have a written constitution? The SG says 'yes' in a document entitled 'Scotland's Future: From the Referendum to Independence and a Written Constitution'.[1] But what should be in such a written compact between the people and the state? Who should decide its contents? What process should be utilized? Should the SG determine the answers to these questions, or the Scottish Parliament, or indeed, should there be a separate referendum on some of these important questions? In the event of an affirmative vote for independence, all these questions will come to the forefront.

Scotland is, of course, not unique in considering independence. Just three years ago, South Sudan seceded from Sudan after a referendum, with the latter being the first to recognize the new country. A few years earlier, Kosovo and Montenegro broke away from Serbia, the former after a violent struggle and the latter after a peaceful referendum. But perhaps the best parallel for Scotland is the peaceful and successful separation of Czechoslovakia in 1993 into the Czech and Slovak Republics, both now members of the European Union.

[1] Available at: http://www.scotland.gov.uk/Resource/0041/00413757.pdf.

This issue of the *SPR* is called 'The Constitutional Issue' because the editors have chosen to keep a focus on constitutional matters from home and abroad. We have the Scottish scholar, Dr. Elliot Bulmer's article on some important values a future Scottish constitution should contain. In addition, we have articles from authors who provide guidance on the experience of other nations which have travelled the road to independence and change, including (former) Justice Albie Sachs of the Constitutional Court of South Africa on that country's new constitution, (former) Justice Andrzej Zoll of the Polish Constitution Tribunal on Poland's interim and final constitutional arrangement, and Prof. Richard Helmholz of the University of Chicago Law School, who shares ideas from the American constitutional experience. The purpose here is to provide a reminder on what other nations have had to consider on the road to a written constitution.

Supporting this theme is the eminent Judge David Edward's thought-provoking article on a council of state for the Scottish Parliament, to strengthen and assist the institution in fulfilling its constitutional role in scrutinizing government legislation. Finally, we have an insightful article from Malcolm McMillan, Chief Executive of the Scottish Law Commission, on a new process for the Scottish Parliament's consideration of reports and bills from the Commission.

Over two centuries ago, the legendary Supreme Court justice, John Marshall stated: "The ... Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void; and that courts, as well as other departments, are bound by that instrument."[2] Will such a written constitution prevail in Scotland and beyond? We will keep you updated.

Saamir K. Nizam
Edinburgh

[2] Marbury vs. Madison, 5 U.S. 137, 180 (1802).

PRE-LEGISLATIVE SCRUTINY IN THE SCOTTISH PARLIAMENT
THE ROLE OF A COUNCIL OF STATE

David Edward*

Scotland has a unicameral (single chamber) Parliament. The legislative system set up by the Scotland Act 1998 was based on the assumption that no political party would be able to form a government without the support of one or more other parties, or at least the willingness of other parties to allow it to govern as a minority government. The Committee system was intended to provide the sort of non-partisan pre-legislative scrutiny that is performed by the second chamber of some parliaments – notably, at their best, by the specialist committees of the House of Lords.

The composition, powers and procedures of Holyrood Committees were not laid down in the Scotland Act 1998, establishing the Parliament. So far as the Act is concerned, Section 31 ("Scrutiny of Bills before Introduction"), as amended, requires only that the person introducing a Bill must state that "*in his view* the provisions of the Bill would be within the legislative competence of the Parliament" and that the Presiding Officer must make a decision to the same effect

* The author is Professor Emeritus of the University of Edinburgh; Judge of the European Court of Justice 1992-2004. He studied at University College, Oxford and the University of Edinburgh (LL.B.).
Author's note: I acknowledge with grateful thanks the help given to me by my friend and colleague, Dr P.G.J. Kapteyn, Member of the Council of State of the Netherlands 1976-1990 and Judge of the European Court of Justice 1990-2000. I would also like to acknowledge the helpful suggestions of Professor Chris Himsworth and Dr Robert Lane. I am alone responsible for the contents of this article.

("in his view"). In neither case do we know what advice has been sought or given to enable such a view to be formed.

There is also provision for Bills to be referred to the Supreme Court for scrutiny as to legislative competence. Subject to that, as at Westminster, pre-legislative scrutiny lies in the hands of the Parliamentarians.

My first experience of giving evidence before a Holyrood Committee was entirely pleasant. The atmosphere was friendly and the members showed a genuine desire for such information and help as I was able to provide. I was not able to discern the political affiliation of the members (apart from those whom I already knew). Alas, things have changed. The composition and day-to-day conduct of Committees no longer reflects non-partisan party balance and the atmosphere is sometimes confrontational, intemperate and occasionally downright offensive. This is hardly an objective way of ensuring that the Parliament produces legislation that will be effective and efficient.

So what should be done? There is little or no appetite for the creation of a second chamber, even if Scotland were to become independent, nor any sign whatever of agreement as to how such a chamber might be composed or elected.

Further, the issue is not – or at least not primarily - one of constitutionality, where it would be appropriate to introduce a more developed system of 'reference' to the Court of Session on the lines of the reference procedure in Canada[1] and in Ireland[2]. The question whether proposed legislation will be effective and efficient is not a question for judges.

[1] Section 53 of the Supreme Court Act 1985 (power of the Governor in Council to refer for hearing and consideration important questions of law or fact).

[2] Constitution of Ireland, article 26 (power of the President to refer any Bill to the Supreme Court).

The purpose of this article is to suggest that we should instead consider adapting to our traditions and needs an institution that works well in other European countries – the Council of State.

The Council of State is a very old institution, existing in many countries, whose function was to advise the monarch on issues affecting the state. Our own Privy Council is such a body, submitting Orders in Council for Royal approval and, in its Judicial Committee, giving 'advice' to Her Majesty on the determination of appeals from those parts of the Commonwealth that still recognise its jurisdiction.

Initially, 'devolution issues' arising under the Scotland Act 1998 were referred to the Judicial Committee. It is perhaps unfortunate, for presentational as well as deeper constitutional reasons, that this jurisdiction was transferred to the Supreme Court by the Constitutional Reform Act 2005.

In France, the creation of the *Conseil d'État* in its modern form was part of Napoleon's administrative reforms of 1799 (*l'an VIII*). It has 'advisory' and 'judicial' functions.

In reality its advisory role is not limited to giving advice, since it is closely involved in the drafting of primary and secondary legislation. Nor is its judicial role, formally speaking, that of a 'court' as we would understand it, since it has been a principle of French law since the Revolution that "the judicial functions are distinct and will always remain separate from the administrative functions".[3] As an inadequate generalisation, it can be said that the administration judges itself and the *Conseil d'État* stands at the apex of that system.

[3] *Loi des 16-24 août 1790*, art. 13.

Dicey in the first edition of his book *The Law of the Constitution*, published in 1885, said that, for students, "the whole body of [French] *droit administratif* is well worth their study", but it "rests on ideas foreign to the fundamental assumptions of our English common law, and especially to what we have termed the rule of law".[4] The reason, in Dicey's view, was that our administrators are answerable to the ordinary courts for the lawfulness of their acts.

In his Introduction to the last edition of the book to be published in his lifetime, Dicey revised his view on the grounds that

> "in some directions the law of England is being 'officialised', if the expression may be allowed, by statutes passed under the influence of socialistic ideas. It is even more certain that the *droit administratif* of France is year by year becoming more and more judicialised".

He concluded that:

> "France has with undoubted wisdom more or less judicialised her highest administrative tribunal, and made it to a great extent independent of the government of the day. It is at least conceivable that modern England would be benefited by the extension of official law.[5] Nor is it quite certain that the ordinary law Courts are in all cases the best body for adjudicating upon the offences or the errors of civil servants. It may require consideration whether some body of men who combined official experience with legal knowledge and who were entirely independent of the Government of the day, might not enforce

[4] A.V.Dicey, *The Law of the Constitution*, Chapter XII.

[5] Dicey used the expression 'official law' to refer to what we would now describe as administrative law.

> official law with more effectiveness than any division of the High Court".[6]

These ideas were largely ignored until the 1960's when Professor J.D.B. Mitchell, Professor of Constitutional Law and then of European Institutions at the University of Edinburgh, urged us to think more clearly about the state of public law in the United Kingdom.[7] He said:

> "The question, quite bluntly, is whether we want to restore the place of law in government. That restoration demands a susceptible law and a susceptible body which administers the law, a body which at the same time is aware of the real needs of government and of the value of the individual. That is what, behind its technicality, droit administrative is about; it is what the *Conseil d'État* tries to be."

As he put it, it is a question of "legal and political morality".[8] In the event, British administrative justice has followed a different path, kick-started by Lord Reid in *Ridge* v *Baldwin*[9] in 1964, and in Scotland by Lord Fraser in *Brown* v *Hamilton District Council*[10] in 1983.

For this and other reasons, this article does not aim to renew the arguments in favour of the French approach to administrative justice, albeit a similar approach is taken by a number of similar jurisdictions in Europe and elsewhere. But it should be recognised that, almost by a process of osmosis, ideas and concepts drawn from continental administrative

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[6] *Ibid.,* 8th edition, pages xlvi and xlviii.
[7] See , for example, *The State of Public Law in the United Kingdom,* (1966) 15 ICLQ , pages 133-149 ; and *The Real Argument about Administrative Law* in (1968) 46 Public Administration pages 167-170.
[8] *The Real Argument*, note 8 *supra*, page 167.
[9] [1964] A.C. 40.
[10] 1983 S.C. (H.L.) 1.

law, such as legitimate expectation and proportionality, have entered the day-to-day vocabulary of the British courts.

Far less attention has been paid in this country to the 'advisory' function of the French *Conseil d'État* and of its equivalents in other European countries. The French model would not be well-adapted to our needs because it is part of a highly developed administrative structure including, for example, the influential *École nationale d'administration* [ENA].

More in keeping with our traditions, not least because of our legal roots in Dutch law, would be the model of the Council of State of the Netherlands (the *Raad van State*) – a body created by the Emperor Charles V almost 500 years ago. Unfortunately, there is not much readily available information about the *Raad van State* in English, even on the web.[11]

Formally, the *Raad van State* consists of the King as President, the Vice- President who is overall charge of the organisation and running of the institution, and a maximum of 10 Members (*Leden*) with experience of different areas of national life (e.g. political, commercial, diplomatic, legal, military). In addition to the members, there are over 50 State Councillors (*Staatsraden*) who, in the exercise of their duties, have the powers of members, and may be supplemented by Extraordinary State Councillors (*Staatsraden in*

[11] The *Raad van State* has published a small information brochure in English, from which some of the information in this article has been taken directly. An English text of the Council of State Act (*Wet op de Raad van State*) is published on the Council's website (www.raadvanstate.nl). A useful overview of the work of the Councils of State of Belgium, France, Greece, Italy, Luxembourg and the Netherlands is given in Newsletter 9 of the Association of the Councils of State and Supreme Administrative Jurisdictions of the EU at www.aca-europe.eu/index.php/en/newsletter-en/197-newsletter-9.

buitengowonen dienst). It is they who undertake the day-to-day work of the Council.

Like the French *Conseil d'État*, the *Raad van State* is divided into two Divisions, the Advisory Division (*De Afdeling Advisering*) and the Administrative Jurisdiction Division (*De afdeling Bestuursrechtspraak*). Each Division is supported by a Department with expert and support staff.

The Advisory Division provides independent advice on:

- all bills introduced to Parliament by the government;
- all international agreements put before Parliament for approval;
- all draft Orders in Council;
- other matters referred to the Council for advice.

Every year the Advisory Division delivers some 600 advisory opinions on legislation, about 95% of them within three months. For example, on 14 July 2014, it delivered an Opinion on a proposed law to modernise the confidentiality of letters, telephone calls and telegraph messages, while on 17 July 2014, it delivered an Opinion in response to a question raised by the Second Chamber of the Parliament on the transfer of national competences and sovereignty to the European Union. Summaries of these Opinions were published within the week on the Council's website.

In assessing Bills and other requests for advice the Advisory Division uses an assessment framework made up of three elements: policy analysis, legal issues and technical aspects. These are assessed in the following way:

Policy analysis:

- Is the problem being addressed one that can or should be solved by legislation?

- Will the proposed legislation be effective, efficient and balanced as regards costs and benefits?
- Will it be possible to implement and enforce the proposed legislation and to monitor its effects?

Legal issues:

- Is the Bill or Order compatible with superior rules of law (the national Constitution, international treaties such as the ECHR, and EU law)?
- Is it in accordance with principles of democracy and the rule of law?
- Is it in accordance with the principles of good legislation, such as equality before the law, legal certainty, proper legal protection of the individual and proportionality?
- Can it be easily incorporated into the existing legal system?

Technical aspects:

- Is the Bill or Order well drafted from a technical point of view?
- Does it establish a logical, systematic régime?

The conclusion of the Advisory Opinion (the *dictum*) may be favourable or unfavourable (recommending against the Bill altogether or recommending suspension until substantial amendments have been made). Thereafter, the matter rests with the responsible minister and ultimately with the Parliament. The Advisory Opinion, as its name suggests, is not binding, but it will be made public when the Bill is presented to the Lower House or when the final text of an Order is officially published. Some Opinions are hard-hitting

and are a formidable check on the introduction of ill-considered, ill-drafted or tokenistic but unenforceable legislation.

Plainly, the introduction of such a system in Scotland would involve a substantial departure from the conventional wisdom as to British parliamentary procedure. It might, however, have forestalled the débacle over corroboration, and raised questions as to the wisdom and workability of the 'named person' provisions of the Children and Young People (Scotland) Act 2014 .

As to the structure and cost in manpower and finance, it cannot be pretended that the creation of a Scottish Council of State (whatever it might be called) would be cost free. But it could undertake some at least of the functions currently performed by civil service departments in preparing legislation, the functions of competence scrutiny by the Presiding Officer and possibly also of the Law Officers, as well as the functions of the Scottish Law Commission in making proposals for law reform.

It is important to emphasise that this is not a recipe for legalism or, worse, domination of the legislative process by lawyers. The members of the Advisory Division of the *Raad van State* include former high-level civil servants and other administrators, politician and economists.

The aim would be to ensure good, workable legislation by making provision for a system of objective analysis within a transparent, non-partisan framework at a stage in the legislative process where problems and pitfalls can be identified and guarded against. This, surely, is what the people of Scotland are entitled to require from their Parliament, whether Scotland becomes independent or not.

In the short term, the criteria used by the *Raad van State* as set out above (policy analysis, legal issues and technical aspects) offer a rule of thumb that the Holyrood Committees might be encouraged to adopt.