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The Constitutional Implications of the Scottish Referendum

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The Scottish referendum was a clear indication that, in spite of popular dissatisfaction with politicians and the political process, people can be ‘engaged’ and take an intelligent interest in a great political issue. The issue at stake was a great political issue, not only for Scotland but also - as the degree of international interest demonstrated - for people in other countries, many of whom saw in it a mirror of their own problems and aspirations.

In spite of, or perhaps because of, its many positive aspects, the referendum raises some fundamental questions about the British constitution and its future. This is so not least because we do not have a written constitution. In many respects we have only the sketchiest outlines of what our constitution may be and what it requires.

Almost fifty years ago, Professor J.D.B. Mitchell, my predecessor in the Chair of European Institutions at the University of Edinburgh, wrote this:

“...We have as a country run out of political imagination. The reasons for this are complex – but I suspect that three predominate. First the simple fact that our overt revolutions were held a century at least before most others; second the equally simple fact of the inertia of a closed society – for the world of politics (including both politicians and civil servants) is relatively closed .... Third, that for far too long we have lived in an isolated world of constitutional self-righteousness.”

I would go further and say that we have become constitutionally illiterate. Expressions like ‘parliamentary sovereignty’, ‘representative democracy’ and ‘democratic legitimacy’ trip off the tongue, but we don’t spend much time asking what they mean. My primary purpose this evening is to ask you, as

1 J.D.B. Mitchell Why European Institutions, Inaugural Lecture No.39, delivered on Tuesday, 5th November 1968, Edinburgh University Press.
opinion-formers of tomorrow, to cast aside these linguistic comfort blankets, and ask yourselves what such expressions mean – if they mean anything at all.

A written constitution?

One of the many promises that were made in the course of the referendum campaign was that we will have a written constitution. Six years ago, I was asked to join a Working Group to consider what a written constitution might look like. After some weeks, we concluded that there would be no point in attempting to draft a constitution: it would be more profitable to identify the questions that would need to be answered before the work of drafting could begin.

We produced a paper setting out the questions under 12 heads, each raising up to ten questions. For example:

• Who should write the constitution? How should they be chosen and by whom?
• What should be the basic principles? Should these be set out in a preamble? Should they include parliamentary sovereignty, sovereignty of the people, and separation of powers?
• Should there be a Bill of Rights, and if so, what rights? Should they include socio-economic rights, environmental rights and cultural rights?
• What should be the institutions of the State? Should there, for example, be reference to the Prime Minister and the Cabinet or, at the other end of the scale, to the powers and responsibilities of local authorities?
• What should be the electoral process? Should there be reference to political parties? Should there be provision for referendums, and if so in what circumstances?
• Should devolution be enshrined in the constitutional settlement and if so, devolution of what powers and to whom?
• Should the constitution refer to international law, membership of the EU and the status of EU law?
• Should there be reference to the conventions of the constitutions and, if so, which of them?
• How should the constitution be adopted and by whom?
• Should the judiciary have power to strike down legislation as unconstitutional?

Many of these questions would be relevant, in one way or another, to the subject of our discussion tonight. So, for example, if the answer had been Yes:

- Would this necessarily have led to Scotland becoming an independent state? In what sense was the result of the referendum, in the words of the Edinburgh Agreement, ‘decisive’?
- By what constitutional mechanism would independence have been achieved?
- Would it have been necessary for the separation of Scotland from the rest of the UK to be formalized by an Act of the Westminster Parliament, as Canada’s Constitution was ‘patriated’ by the Canada Act of 1982?
- If so, could the Westminster Parliament have refused to pass the necessary Act? Or could Westminster have insisted that the terms of separation be ratified by a further referendum – possibly including the electorate of England, Wales and Northern Ireland?
- Did the Scottish Government’s deadline for independence of 24 March 2016 have any constitutional significance?
- If negotiations with the rest of the United Kingdom and/or the EU had dragged on beyond that deadline, and if the Scottish election of May 2016 had been won by a unionist party, could the progress towards independence have been stopped?

Fortunately or unfortunately – depending on your point of view – those questions don’t now arise. But they do illustrate the rather fluid character of our topic for tonight.

Perhaps we should begin by considering whether the referendum must now be regarded as an integral part of the British constitutional mechanism. If so, two questions arise:

- What are the conditions of legitimacy of a referendum?
- What are the consequences for the doctrine of parliamentary sovereignty?

**The legitimacy of a referendum**

Relatively speaking, the referendum is a novelty in British constitutional practice, though it has now been resorted to twelve times since 1973. It has been an integral and respected part of the constitutional machinery of other countries for many years, notably in Switzerland. Elsewhere, experience has been less happy. Plebiscites were used after the first World War as part of the process of national self-determination – for example in East Prussia in 1920 and the Saarland in 1935 - but with more or less legitimacy as regards the result. Worse, the plebiscite was part of the machinery by which both
Mussolini and Hitler reinforced their rule or annexed territory. We have seen the same process at work this year in the Crimea and Eastern Ukraine.

In spite of the care with which our referendum was conducted, there have been claims, both before the vote and since, that the process was flawed or that the result was manipulated. So we have to ask whether the legitimacy of future referendums – and we may have another one on EU membership in 2017 - needs to be ensured by establishing certain principles in advance.

For example:

- Who should decide the terms of the question?
- Who should decide when the referendum will be held?
- Who should be entitled to vote?
- Should the right to vote depend on current electoral registration? or
- Should all citizens of British nationality be entitled to vote?
- What information should be supplied to the voters and by whom?
- Should the accuracy and objectivity of that information be checked in advance and, if so, by whom?

**The referendum and parliamentary sovereignty**

More fundamentally, as far as the constitution is concerned, we have to ask, what are the consequences for the doctrine of parliamentary sovereignty? Can a referendum ever be decisive in the sense that Parliament is legally bound to give effect to the result? If not, would it not be better to accept that, if parliamentary sovereignty is truly the corner-stone of the British constitution, no referendum can ever be more than consultative?

At this point we have to take a step back and ask what is really meant by the expression ‘parliamentary sovereignty’ or ‘the sovereignty of Parliament’?

I must admit to a great fondness for the way in which a great Scottish constitutionalist, James Bryce, began his lecture on “The Nature of Sovereignty”:

“The frontier districts, if one may call them so, of Ethics, of Law, and of Political Science have been infested by a number of vague or ambiguous terms which have provoked many barren discussions and caused much needless trouble to students. …

“No offender of this kind has given more trouble than the so-called ‘Doctrine of Sovereignty’. The controversies which it has provoked have been so numerous and so tedious that a reader – even the most patient reader – may feel alarmed at being invited to enter once again that dusty desert of abstractions through which successive generations
of political philosophers have thought it necessary to lead their disciples.”

Sadly, we must still face up to what is meant by the sovereignty of Parliament. For this we have to go back to the work of Bryce’s contemporary and friend, A.V. Dicey, and his magisterial book on *The Law of the Constitution*.

He began by explaining what he aimed to do (and Scots will have to overlook his use of the word ‘England’ to mean the United Kingdom):

“[T]he function of a trained lawyer is not to know what the law of England was yesterday, still less what it was centuries ago, or what it ought to be tomorrow, but to know and be able to state what are the principles of law which actually and at the present day exist in England.”

He explained the sovereignty of Parliament in this way:

“The sovereignty of Parliament is (from a legal point of view) the dominant characteristic of our political institutions. … Parliament means, in the mouth of a lawyer … the King, the House of Lords, and the House of Commons; these three bodies, acting together, may aptly be described as the ‘King in Parliament’, and constitute Parliament.

“The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.”

This is the doctrine enunciated in its purest form. But those who rely on it tend to forget four things

- first, Dicey was talking about the *legislative* sovereignty of Parliament – who can make laws which the courts are bound to obey and to enforce;
- second, he had originally been writing at a time when the House of Lords had unlimited power to reject bills passed by the House of Commons and when Queen Victoria exercised a significant degree of power, albeit behind the scenes;

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third, he accepted that “the actual exercise of authority by any sovereign whatever, and notably by Parliament, is bounded or controlled by two limitations”, internal and external – in short, the legislature cannot go beyond what public opinion will tolerate or what is internationally acceptable;6 and

fourth, he considerably revised his views in the last edition of the book published before his death.

The eighth edition of 1915 contains an Introduction that is almost as long as the text written in 1885 and revised up to 1908. For Dicey, the Parliament Act 1911 entirely changed the nature of the constitution. With considerable prescience, he wrote that:

“The Parliament Act gives unlimited authority to a parliamentary or rather House of Commons majority. The wisdom of the House of Lords is in matters of permanent legislation thereby deprived of all influence. A House of Commons majority acts more and more exclusively under the influence of party interests.”7

“The result of a state of things which is not yet fully recognised inside or outside Parliament is that a Cabinet, under a leader who has fully studied and mastered the arts of modern parliamentary warfare, can defy, on matters of the highest importance, the possible or certain will of the nation. ... The Parliament Act is the last and greatest triumph of party government.”8

He ended with a strong statement of the case for the referendum as a curb on the power of the House of Commons:

“The referendum is an institution which, if introduced into England, would be strong enough to curb the absolutism of a party possessed of a parliamentary majority. The referendum is also an institution which in England promises some considerable diminution in the most patent defects of party government. Some means must, many Englishmen believe, be found for the diminution of evils which are under a large electorate the natural, if not the necessary, outcome of our party system. The obvious corrective is to confer upon the people a veto which may restrict the unbounded power of a parliamentary majority.”9

I have quoted Dicey at length because he is so often appealed to as the ultimate authority on the British constitution and because his writings are so

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6 Ibid. pp. 74-84.
7 Ibid. p.xcvii.
8 Ibid. pp. c-ci.
9 Ibid. pp. xcii-xliv.
often misunderstood. For example, in recent months, members of the House of Commons, and even Ministers, have invoked the sovereignty of Parliament to rebuke the judges for failure to give effect to resolutions of the House of Commons, ministerial statements, or even the Prime Minister’s pronouncement that the idea of prisoners’ voting rights makes him sick. Such utterances are not, in any sense, expressions of the sovereignty of Parliament, and nothing said by Dicey requires the judges to take the slightest notice of them in the performance of their constitutional function.

So I would suggest that there is no inherent incompatibility between the referendum as a constitutional mechanism and the sovereignty of Parliament properly understood. Dicey saw the referendum as a process of popular veto. So far, we have not used it in that way, and perhaps it would be better to view it as a form of popular mandate.

Of more immediate importance is the question of whether the far-reaching devolution settlement promised for Scotland (and possibly other parts of the UK as well) can co-exist with unqualified assertion of the sovereignty of the Westminster Parliament.

Section 29 of the Scotland Act 1998, on which the legislative competence of the Scottish Parliament depends, provides (in subsection 7) that, “This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.” Whatever Holyrood enthusiasts may say, the Scottish Parliament is not ‘sovereign’.

In practice, the legislative mechanisms established by the 1998 Act work rather well – notably, the procedure of the Legislative Consent Motion which enables the Scottish Parliament to legislate on ‘reserved matters’ (matters that are formally reserved to Westminster). But it is questionable whether unqualified assertion of Westminster’s legislative sovereignty will really be compatible with the grant of far-ranging powers that are said to be a step towards a ‘federal’ United Kingdom.

A federal UK?

That leads to another interesting constitutional question: what is meant by a ‘federal UK’? Like ‘sovereignty’, ‘federalism’ is one of Bryce’s “vague or ambiguous terms which have provoked many barren discussions and caused much needless trouble to students”.

In the way the word is normally used in this country, ‘federalism’ implies some sort of top-down arrangement. Thus, a ‘federal Europe’ is thought to mean the imposition (from above) of a European super-state.
By contrast, in the United States and Germany (to take the two best-known examples), ‘federalism’ is essentially bottom-up. The Federal Government of the United States can exercise only such powers as have been granted to it by ‘the People of the United States’ (i.e. the people of the constituent States) under the Constitution. Similarly, the Constitution of Germany (the Basic Law) begins by asserting the constituent power of the German people, consisting of ‘Germans in [the sixteen Länder]’.

Seen in this way, the idea of a federal UK would be entirely compatible with the claim that the constituent power in Scotland is neither the Crown nor Parliament but the ‘sovereign will of the Scottish people’. Against the background of the promises of far-reaching devolution, the No vote in the Referendum could be said to have expressed the sovereign will of the Scottish people to live with the other nations of the UK in a bottom-up, federal arrangement. (Properly presented and understood, that might draw the sting of some of the resentment stirred up by the result.)

That leads us to consider how such an arrangement might be fashioned, given the unequal size of the four components of the Kingdom. This inequality is often cited as the reason why ‘federalism’ could not work. The ‘West Lothian Question’ is only one aspect of this problem since it depends on the assumption that Westminster will remain as it is, acting as the Parliament of the United Kingdom as a whole and of England as one of its constituent parts.

Inequality of size and population is not unique to the UK. The Maritime Provinces of Canada are tiny compared with the others. Wyoming has just over half a million inhabitants, while California has over 38 million. The city state of Bremen has a surface area of 419 sq.km. and a population of 660,000, while North-Rhine-Westphalia has an area of 34,000 sq.km. and a population of 18 million.

Nevertheless, it is claimed that no workable system of federation could cope with the asymmetry of this country, given the small number of constituent parts and the disproportionate size of one of them. That may be so, but it’s no reason why we should not try.

Here, the first question must be whether there should be a separate Parliament for England, leaving the Westminster Parliament to deal only with ‘federal questions’ (foreign affairs, defence, currency and such like). Then we would have ‘home rule all round’.

Personally, I am a disciple of William of Ockham (1288-1347) who coined the immortal principle that “entities are not to be multiplied without necessity”. So, in vulgar terms, I would be inclined to say that we have quite enough Parliaments and politicians already and we don’t need any more.
The problem of EVEL (the West Lothian question)

It is, of course, true that there are serious problems to be overcome, or at least alleviated. ‘English Votes for English Laws’ (EVEL) is an attractive slogan, even if it would not be easy to define what constitutes an ‘English Law’. The allocation of funds under the Barnett Formula is indirectly proportionate to the amount spent in England on education, health and other matters that are devolved to Scotland, Wales and Northern Ireland. So Scottish, Welsh and Irish MPs have an interest in the outcome of legislation on these topics for England.

The McKay Commission has suggested that a constitutional principle should be adopted, backed up by appropriate procedures, according to which,

“decisions at the United Kingdom level with a separate and distinct effect for England (or for England-and-Wales) should normally be taken only with the consent of a majority of MPs for constituencies in England (or England-and-Wales).”

It seems to me that a solution along these lines would be entirely consistent with Dicey’s theory of the sovereignty of Parliament since, as I have pointed out, he accepted that that sovereignty is subject to internal and external limits – notably what public opinion would tolerate.

Procedural solutions may not, of course, satisfy the underlying political motives for EVEL. But are we really so lacking in political and constitutional imagination that we cannot find an acceptable solution to ‘the English problem’ in order to create what, for want of a better word, would be a federal UK?

Here I would like to invoke, once again, our fellow-Scot, James Bryce. In 1885 he wrote an essay with the daunting title “The Action of Centripetal and Centrifugal Forces on Political Constitutions”. I strongly recommend all of you to read it, along with its companion piece, written a year before, entitled “Flexible and Rigid Constitutions” – so highly regarded in Italy that it has recently been translated and republished in Italian.

Bryce’s thesis was fairly simple. There are some features of political life that draw people together (the centripetal forces) and some that drive them apart (the centrifugal forces). Industry, commerce, faster modes of travel and a common currency are practical examples of things that draw people together

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11 Costituzioni flessibili e rigide, ed. Alessandro Pace, Giuffrè (Milan) 1998.
and encourage them to live in a common political society. By contrast, people may be driven apart by such things as religion, race and culture, or simply by a tendency towards over-centralisation on the part of government, or through excessive dominance of the interests of one region or class over others.

We can see all these forces at work in this country and in Europe, to go no further afield. Indeed, the excessive dominance of London was frequently invoked as a reason for Scottish independence.

According to Bryce, the secret of a good political constitution is that it should favour the things that draw people together and minimise the effect of those that tend to drive them apart.

One of the ways in which Bryce suggested that this can be done is not to insist on absolute equality as between the component parts of the State or Federation. He cites as examples the special position of Scotland within the United Kingdom and the special position of Quebec within Canada. Administrative and even legislative functions can be assigned to particular regions or areas, empowering them to regulate their local affairs in their own way. As he said:

“[N]othing contributes more to the smooth working of a central government and to the satisfaction of the people under it, than the habit of leaving to comparatively small communities the settlement of as many questions as possible.”

That is what is called, in modern jargon, the principle of subsidiarity, and it is regrettable that it is so often forgotten by the authorities of the EU, the authorities in Westminster and Whitehall, and also – be it said – by those in Holyrood and St Andrews House.

Subsidiarity, federalism or devolution necessarily imply that matters will not be equal as between the constituent parts of the overall political entity. You cannot devolve responsibility for health to one part and then complain that inhabitants of that part receive free medication while those of another part do not. Inequality is inherent in such arrangements.

In one sense, it is ‘unfair’ that Wyoming with half a million inhabitants should have the same number of Senators as California with 38 million. But that is part of the balance of interests struck by the American Constitution.

Some politicians and journalists have suggested that the ‘obvious’ answer to the English problem would be to reduce the number (and therefore the influence) of MPs at Westminster from Scotland, Wales and Northern Ireland.

12 Essays, cit. sup. note 3, Vol. 1, p. 244.
But, as others have pointed out, this would ‘unfairly’ reduce the influence of the electorate of Scotland, Wales and Northern Ireland on questions of truly United Kingdom significance – not least the decision to go to war.

**Representative democracy and statistical democracy**

Underlying much of this discussion is ambiguity as to what we mean by ‘parliamentary democracy’ or ‘representative democracy’.

The German Constitutional Court has insisted that, in a democracy, each person’s vote must have the same weight as everyone else’s. That might be termed ‘statistical democracy’, and it is an approach that seems to commend itself to a number of Westminster parliamentarians. According to that approach, every constituency should, as far as possible, have the same number of electors, subject perhaps to exceptions in favour of more remote areas, since it would be absurd to insist that a single MP in the Highlands and Islands of Scotland should represent the same number of constituents as the Member for Kensington and Chelsea.

The ultimate expression of statistical democracy is the party list system used in many European countries. At its most perfect (or perhaps its most theoretical), it assures proportional representation. At its worst, it is a most effective way of creating a gulf of understanding between those who are elected and those they are supposed to represent.

By contrast, the British tradition, as I have always understood it, is that Members of Parliament are not delegates but ‘representatives’. If that is so, there should be some correlation between the parliamentary constituency and the community that the MP is expected to represent.

In any case, it is important to remember that, in Germany, statistical democracy in the popular Chamber (the Bundestag) is balanced by the regional membership of the other Chamber (the Bundesrat) which consists of delegates of the sixteen Länder.

So if we are moving, as I think we probably are, towards a greater degree of statistical democracy in the House of Commons, we must consider whether, as the Liberal Democrats and others propose, the Upper House in Westminster should become a Senate representative of the regions.

**The second Chamber**

It humbly seems to me that we cannot long continue with an Upper Chamber whose membership is constantly increasing and may, within quite a short

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period, reach one thousand. Is there any other country in the world – apart perhaps from China and North Korea - where one of the chambers of the legislature consists of an unlimited number of nominees, selected by processes which, to say the least, are not ‘transparent’?

An objection often advanced against reform of the House of Lords is that it brings together, not only representatives of the political parties, but also members with a wide range of experience from the non-political world who exercise a valuable function in scrutiny of legislation. This would be lost in an elected Senate of the Regions. That is unquestionably true, but does it outweigh the case for reform? Would it be possible to adopt a different mechanism for effective legislative scrutiny?

In that connection, it should be recognised that the Scottish Parliament does not enjoy the benefits of a revising or scrutinizing chamber and there seems to be no appetite whatever for creating one. The danger of a single chamber Parliament is that it may be dominated and controlled by a single party that can force through legislation that is, to put it no higher, ill-considered and ill-drafted. The point becomes all the more important if we are to move towards ‘Devo-max’.

It seems to me – and here I am going out on a limb (or some would say a frolic of my own) – that we ought now to consider adopting for Scotland, and perhaps for the UK as a whole, an institution that has stood the test of time in many other countries of Europe and elsewhere in the world – the Council of State.

**A Council of State?**

The Council of State is a very old institution, whose original 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.

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. Quite a lot of attention has been paid in this country to the judicial functions of the *Conseil d’État*. Far less attention has been paid to its advisory function, and very little to 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, and typically French, administrative structure
including, for example, the immensely influential École nationale d'administration.  

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. I will try to summarise what I have been able to discover. I have set it out in greater detail in an article in the *Scottish Parliamentary Review*.

The membership of the *Raad van State* brings together a wide range of experience in national life. Its administrative 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 proposal to modernize the law on the confidentiality of letters, telephone calls and telegraph messages. 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 under the following heads:

**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?

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14 The ‘ENA’, whose products are known, not always with affection, as ‘Enarchs’.

15 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](http://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](http://www.aca-europe.eu/index.php/en/newsletter-en/197-newsletter-9).

• 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 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. So, the Opinion 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 body would involve a substantial departure from the conventional wisdom as to British parliamentary procedure. It might, however, have forestalled the débacle over the legislation to abolish the general rule requiring corroboration in criminal cases, and have 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 poor legislation is far from cost free either.

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, politicians and economists. In our case, one would expect the office of ‘Councillor of State’ to be a Crown appointment with Parliamentary nomination or at least approval, and that appointment of the officers responsible for the day-to-day work would follow the selection procedures for public office that have now become the rule.
It is also important to stress, once again, that the advice of the ‘Council of State’ would not be binding on the legislature. The measure of its influence would be its quality. 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 are entitled to require from their Parliament.

**Conclusion**

In closing, I would like to go back to the beginning.

We must be prepared to show political imagination. We must not get lost in a dusty desert of abstractions, searching for perfect fairness or equality, or arguing about the meaning of our political vocabulary. We must get out of our isolated world of constitutional self-righteousness and be prepared to consider the merits of political institutions that have proved their worth in other countries comparable to ours.

If nothing else, the Scottish referendum has shown that the people, including the youth of the country, are sufficiently intelligent to discuss ideas, and to demand the information that will enable them to discuss the issues with greater understanding.

Whichever way you voted, the referendum need not have been the end but the beginning of something new.