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Dr Karin Bowie: Constitution questions are not new



Are there historical precedents for the writing or rewriting of Scottish constitutions? Picture: Robert Perry

- by DR KARIN BOWIE

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A YES vote in September will lead to the writing of a new constitution, while a No vote is likely to trigger a reworking of the UK constitution with greater devolution of powers to the Scottish parliament. But are there historical precedents for the writing or rewriting of Scottish constitutions?

A 2013 government white paper on the creation of a constitution for an independent Scotland stresses the newness of the act, comparing it to recent constitutions produced in Germany and Slovakia. Historians of Western constitutions have paid little attention to Scotland, finding their origins in seventeenth-century England and eighteenth-century America.

Yet seventeenth-century Scotland offers striking examples of constitutionalism. In 1603, James VI inherited the English crown and became James I of England. In this Union of the Crowns, Scotland remained independent but its sovereign moved to London. Over the next century, tensions in the union led Scottish leaders to develop constitutionalist means to limit London-based sovereign power.

When, in 1604, James VI proposed union talks, the Scottish parliament restricted its negotiators by declaring that they could not impinge “in any way any fundamental laws, ancient privileges, offices, rights, dignities and liberties of this kingdom”. This approach reflected a rising legalism in Scottish culture: official collections of parliamentary statutes were available in print from 1566 and landowners turned to lawsuits to replace violent struggles for local dominance. The kingdom was understood to be constituted in law: a 1604 pamphlet supported the union talks but did not expect them to subvert the “ancienne estait, lawis, statutis and auld constitutiounes” of Scotland.

But James VI and his son Charles I wanted to encourage closer union by engineering conformity between the two kingdoms. Both kings sought to make the Scottish Presbyterian church more Anglican, triggering a sharply constitutionalist response in Scotland. When Charles I issued a new liturgy in 1637 by royal proclamation, opposition was expressed on constitutional grounds. As petitions rained down on the Privy Council, the Presbytery of Kirkcudbright was typical in protesting that the liturgy had been imposed “contrair to the ordour of law appointit in this realme for establisheing of maters ecclesiastick”.

The 1638 National Covenant sought to restrain the king and bolster the authority of parliamentary law. Acting as a constitutional document, the National Covenant listed parliamentary statutes by which the reformed Church of Scotland had been established and a 1584 act confirming the authority of Scottish law. The Covenanting regime passed a series of statutes in 1640-41 to bolster this vision, including an act by which parliament would meet at least every three years, and one requiring parliamentary approval of the king’s officers of state.

The National Covenant reminded the world that Charles I had sworn a coronation oath to rule “according to the laudable laws and constitutions received in this realm”. At his 1651 coronation, Charles II was forced to swear the National Covenant before the coronation oath.

This constitutionalist approach was unmade at the 1660 Restoration, but returned with the Revolution of 1688-89. In the 1689 Claim of Right, the Scottish Convention justified the overthrow of James VII on his failure to take the coronation oath and his betrayal of what they called “the fundamental constitution of this kingdom” as a “legal limited monarchy”. The Convention then made a conditional offer of the Scottish crown to King William and Queen Mary of England, instructing their commissioners to read the Claim of Right before administering the coronation oath. At Queen Anne’s accession in 1702, an act of parliament reaffirmed these restrictions on the Scottish crown.

In the 1690s, tensions between Scotland and England arose over the Company of Scotland and its colony at Darien. This triggered attempts to impose further limitations on the Scottish monarch in London. A 1703 Act of Security required that if the successor was also the monarch of England, “conditions of government [be] settled and enacted as may secure the honour and sovereignty of this crown and kingdom, the freedom, frequency and power of parliaments, [and] the religion, liberty and trade of the nation from English or any foreign influence”.

In a series of famous speeches, Andrew Fletcher of Saltoun demanded transfer of powers to parliament in Edinburgh, envisioning a sovereign parliament with no royal assent required for its acts.

Queen Anne did not find these proposals congenial. She pursued incorporating union, leading to the formation of the United Kingdom in 1707. In choosing to send Scottish representatives to a British parliament in London, the Scottish Parliament found a different remedy.

Three hundred years later, the people of Scotland will be asked whether a new remedy is needed. Whatever they decide, the outcome will not be new: in the first century of union, the Scots wrote and rewrote their constitution in order to defend their distinctive interests and institutions. This reveals the basic dilemma of Anglo-Scottish relations since 1603: given a union between Scotland and England, to what extent should Scotland retain power over its own affairs? The referendum will provide a fresh answer to a very old question.

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