Foundations for Freedom — A discussion paper on the process for establishing an independent Scotland’s Constitution
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The case for Scottish independence depends upon an independent Scotland being a healthy, robust democracy. A strong, inclusive and reassuring constitutional foundation is necessary to ensure that. The Constitution is central, not peripheral, to making the case for independence.

Although some conservative academics continue to defend the British doctrine of parliamentary absolutism, theoretical arguments against constitutionalism appear to be increasingly irrelevant in Scotland. A written Constitution is the international norm. It is expected and demanded. No matter, therefore, how far-fetched the idea of adopting a written Constitution might be in the UK as a whole, in the context of an independent Scotland it has become a basic necessity.

The Scottish independence movement, both within and beyond the SNP, has long recognised this. The SNP, as well as the Scottish Green Party and a broad range of civil society organisations have publicly recognized that a Constitution is not an optional extra, but an essential basis for the legitimacy, stability, success and longevity of Scottish democracy post-independence. In asking for clear commitments to be made to a constitutional transition process, we are not asking for a change of policy, but for an undertaking to honour longstanding promises.

The best course of action is to develop a fully worked Provisional Constitution, by means of a Constitutional Conference, before the next referendum. The Constitutional Conference should be as representative as possible and as open and inclusive in its activities as possible, so that even if the Unionist politicians choose to boycott the Conference it has broad public legitimacy (akin to that achieved by the Constitutional Convention in the 1990s despite the absence of the SNP and Conservatives). The next independence referendum would then be held on the specific question of approving the Constitution approved by the Constitutional Conference – which Constitution would, if approved, come into effect on independence day. That Constitution would provide the institutional and legal basis for a Scottish State, at least on a provisional basis.

However, the Provisional Constitution need not be a final settlement. There would be scope for a subsequent period of post-independence constitution-making, by means of an inclusive and participatory process, in which the issues that are avoided by the Conference in the name of stability and expediency – like, for example, the question of a republic or the expansion of socio-economic rights – could be addressed, should there be sufficient public demand.
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Introduction

‘It is extremely easy to break down an existing form of government, but to build up anything substantial in its place is a matter of considerable difficulty […] and a long period of disorder must ensue during which the best efforts of the best men will not suffice to prevent ridiculous situations from arising.’

(Maj-Gen Lionel Dunsterville)

- This paper outlines proposals for the constitutional transition to an independent Scottish state.
- The paper emphasises the fact that having a written, entrenched, supreme-law constitution is not merely an option for an independent Scotland, but a necessity. Only such a constitution can provide reassurance – to both domestic and foreign audiences – that an independent Scotland will be a stable state characterised by the values of democracy, human rights, the rule of law and good governance.
- The paper addresses question of sequencing: whether constitution-making should take place before independence, after independence, or in a two-stage process straddling independence.
- It also discusses the structure and composition of constitution-making bodies, the process of public consultation and approval, and some substantive issues of constitutional design.

Background and Political Context

The First Minister has indicated that she wishes to re-boot the independence movement – to shift the debate away from tactics, such as the timing of the next referendum, and back onto the high ground of making the case for independence. In making that case, the constitutional basis of the new state, and the process of constitutional transition, are vital to a successful outcome – not only in terms of creating the conditions to win a referendum, but also in laying foundations for a stable, democratic, inclusive, well-governed, prosperous and internationally-recognised Scotland.

The principle that there should be a written Constitution in an independent Scotland has long been endorsed by the Scottish national movement and much good work has already been done on the constitutional question. In the early 1960s, a group calling itself the Scottish Provisional Constituent Assembly proposed a constitution for Scotland, which drew heavily on Scandinavian models and which even by today’s standards is a remarkably forward-looking document. The SNP formally endorsed a written constitution in 1977. Since then, the party has repeatedly confirmed, and never deviated from, that position. Prof. Neil MacCormick was the driving force behind a draft constitutional text that was presented by the SNP as party policy in 1997 and re-adopted with minor amendments in 2002. Although incomplete and imperfect, MacCormick’s draft represented the essence of a viable and acceptable Constitution for Scotland – it remains as a historical platform that can be built upon in explaining the case for a written constitution both within the SNP and in the wider movement.

The SNP Government reiterated calls for a written constitution in the run-up to the 2014 independence referendum. As former First Minister Alex Salmond said in a speech given on 28 August 2013, ‘Modern constitutions use their constitutions to articulate their values, to define who they are. They don’t only protect human rights; they enhance liberties and define responsibilities. Scotland’s constitution will do the same.’

However, the draft interim constitution proposed by the Scottish Government 2014 was disappointing. While it contained some promising principles, such as a commitment to both popular sovereignty and the European Convention on Human Rights, it included little of the basic institutional detail required of a constitution, and would have been deficient even as an interim measure.

In part, the shortcomings of the 2014 text were a result of the Scottish Government being over-enthusiastic about the role of a constitution in asserting values and identity, but failing to fully appreciate the importance of establishing a basic charter that would guarantee the institutional frameworks and safeguards for a democratic state. They saw the constitution only in aspirational and not in defensive terms. For example, it included a commitment to the removal of nuclear weapons and tackling climate change – two principles dear to the SNP – but said nothing about such mundane but vital matters as how Parliament was to be elected, how the First Minister was to be chosen, or how judicial independence and civil service neutrality were to be protected.

Since 19 September 2014, when independence was rejected by 55% of the votes cast, the constitutional question has gone quiet – having been overshadowed, firstly, by attempts (2014-2016) to strengthen Scotland’s autonomy and influence within the UK and secondly (since mid-2016) by attempts to mitigate or avoid the worst consequences of Brexit. In particular, the SNP under Nicola Sturgeon’s leadership has sought to focus on domestic and social policies, while deprioritizing constitutional affairs.

However, the constitution remains as central as ever to the case for independence. We cannot go into the next independence referendum ill-prepared, but must have not only a clear vision for Scotland’s constitutional future but also a workable plan of how to get there. This paper is a contribution to developing that vision and setting out that plan.
What is a Constitution?

As the word is understood in almost every democracy except the UK, a Constitution is a written fundamental law, at the apex of the legal and political systems, which is superior to ordinary Acts of Parliament. Constitutions define the state, proclaim the values and principles on which the state and society are based, establish and regulate public institutions, protect the rights of citizens, and in general provide an overarching legal framework for the conduct of politics.

A constitution has a special procedure for amendment. The mechanism may vary, but typically a supermajority in Parliament (e.g. a three-fifths, two-thirds or even three-fourths majority) is required. Some amendments may require a referendum, or two decisions separated by a general election. This means that the constitution can be adjusted to changing needs and demands when there is a sufficient consensus, but the government cannot unilaterally change the ground rules of politics; our rights and democratic institutions are protected from hasty or partisan change.

The word ‘Constitution’ is sometimes used rather loosely in British English to describe the overall working practices of a system of government – the laws, conventions and traditions according to which the state is normally operated. In this loose sense, every country, including the UK, possesses a ‘constitution’. For the avoidance of doubt, a distinction is sometimes made between ‘written’ constitutions, as defined in the UK’s ‘unwritten’ constitution.

However, ‘unwritten constitutions’ are a contradiction in terms. A constitution which does not clearly distinguish what is constitutional and what is simply part of ordinary law, is no constitution at all. Every right, every aspect of the system of government, is vulnerable to being overturned by ordinary Acts of Parliament passed by ordinary parliamentary majorities. There are no counter-majoritarian protections for minorities and for individual rights, and no basic principles to keep both the state and its citizens democratically grounded. It is better to be frank and to describe the UK’s system as one of ‘parliamentary absolutism’, informally moderated by convention and political expediency.

A written constitution is a global norm. Most other countries outside the UK – including all other European Union countries and the vast majority of Commonwealth countries – have a written constitution which is the supreme law and is capable of being amended only by a special procedure. The only partial exceptions, amongst democracies, are Israel and New Zealand, but even these have some important elements of constitutionalism that are missing in the UK.

Independence, Democracy and Development

To understand the central importance of the constitution to the case for Scottish independence, it is necessary to begin by stating clearly that Scottish independence is the process of creating a new Scottish state. That state, recognised as sovereign in international law, will not only take its equal place in Europe, the Commonwealth and the world, but also provide for the political, social and economic well-being of its citizens through legitimate, inclusive and effective institutions. The independence project is necessarily a state-building project and must be approached accordingly. Its aim is to enable the people of Scotland to exercise democratic control over the government of Scotland, in order to pursue policies that meet our needs and aspirations. This means far more than just winning a referendum. That is only one step in the transition process. State building means putting in place institutions that will provide for the successful transition to, and successful operation of, an independent state.

Independence matters because policies imposed by the UK in a range of areas, from austerity and punitive sanctions against the poorest to pursuing hard Brexit and inhumanly restrictive immigration policies, have not generally met Scotland's needs and aspirations. The problem with the UK is not one of national identity, but of democracy and good government. Despite vows made by the leaders of London-based parties, the UK’s closed, ossified, hierarchical and profoundly oligarchic structures of governance have not yet been, and probably can never be, reformed in a way that would make them responsive to Scotland’s interests and demands.

The whole case for independence rests on one crucial assumption: that the everyday lives of people in Scotland will be improved by the creation of a democratic Scottish State; that is, a State that represents the interests and meets the demands of the people better than the UK has done. We know from comparative experience that one of the greatest blessings that a country can have, for the flourishing of its economic life, society and culture, and for the well-being and happiness of its citizens, is good government. The countries that have prospered and developed after independence are precisely those in which politics has rested upon stable and broadly agreed constitutional foundations. Good government is infinitely more vital to the well-being of a people than, say, endowment with natural resources. Under a good government, resources are multiplied and put to use for the benefit of society; under a bad government, they are either left untapped or exploited only for the benefit of a few. Democracy is valuable, aside from its moral and intrinsic merits, because it provides a mechanism for enforcing good government. It forces governments to respond to public needs and demands, and to bear responsibility for their acts.

It is therefore no coincidence that the ‘arc of prosperity’ and ‘arc of democracy’ so closely align. The countries routinely topping
international Human Development indices are also those with the best rankings for quality of democracy. The distribution of the tax burden and the quality of public services are reflections, above all, of democratic performance. Likewise, the question of whether laws and policies are tailored to favour the privileged few or the common good depends on whether the government is effectively held accountable to the people, or whether it is in the pockets of rich donors and corporate and financial interests. That is why arguing about GERS figures is irrelevant: independence depends on what we do, not what we have on day one.

Unfortunately, however, independence itself is no guarantee that things will turn out well. Many countries have become independent only to fall into authoritarism, corruption and misrule. Often, they put all their efforts into independence and had little thought for how they would govern themselves democratically afterwards. In the words of a senior Kenyan politician: 'In 1963, we wanted independence. We did not think about building institutions of good governance. We just thought independence was the main thing, and we'd worry about all that constitutional business later. So we became independent, and the KANU party took office, closed down the democratic space and centralised power until we had become a one-party dictatorship.' Of course, Scotland is starting from a much more favourable position in terms of democratic experience and overall development than Kenya. Yet the point stands. The sobering fact is that many newly independent countries have gone from bad to worse because they have failed to consolidate stable democratic institutions and failed to build an effective state that reflects all of society, responds to public needs, and respects human rights.

Even today, successes are rarer than failures. The Economist's Democracy Index of 2012 (not a flawless measure, but a reasonable one for these purposes) identified just 25 'full democracies' out of 167 states, or 15% of the total number, containing 11.3% of the world's population. A further 54 countries, containing 37.2% of the world's population, were classified as 'flawed democracies', meaning that while competitive elections took place, sound democratic governance was hampered by human rights abuses, the exclusion of minorities, the weakness of the rule of law, endemic corruption, political violence or other failings.

A focus on 'mere independence' is not enough. Independence, in and of itself, says nothing about the distribution of power, nor about matters such as inclusion, public accountability and good governance. It is not enough to free ourselves from Westminster. To reap the benefits and mitigate the risks of independence, we have to ensure that the Scottish state will be a stable, inclusive and effective democracy. Democracy is an ideal that can go on illuminating Scottish political life. Unlike the pursuit of 'mere independence', the building and maintenance of a flourishing Scottish democracy does not come to an end on the day the Union flag is struck from Edinburgh castle. The desire to 'end London rule' must therefore be backed by a positive plan for the construction of a democratic constitutional state. Only on that constitutional basis can an independent Scotland successfully face the serious economic, demographic, ecological, technological, cultural and ethical challenges of the future. Independence without this basis would not be attractive and would not bring about the hoped-for improvements in people's quality of life.

The constitution is therefore central and essential to the case for independence.

**Inclusion, Sovereignty, Reassurance, Recognition**

A constitution is a necessary (but not a sufficient) condition for the successful establishment and maintenance of a modern democratic state. Constitutions do many things. They are not merely catalogues of rights. They also 'constitute' – in the sense of 'put together' the state. A future Scottish Constitution must establish a Scottish state on a solid democratic legal-institutional basis, ensuring that power operates impersonally, legally and institutionally – rather than power being exercised arbitrarily by a particular person or party. In so doing, the Constitution will lay a firm foundation for future social and economic progress, which is rooted in a stable, inclusive and accountable government, and in the rule of law and the protection of human rights. It will also serve as a standard of principles and values, showing up any deviations or corruptions that cry out for correction. A written constitution will help to ensure the inclusion of as many people as possible in the polity, enhance the democratic legitimacy of the state, protect the sovereignty of the people, reassure minorities, and promote Scotland's international recognition.

**Inclusion**

If independence happens, the Scottish state has to be a state for all its citizens, not just for those who voted for independence. In the event of independence we will all, 'yes', 'no' and 'undecided' alike, have a common interest in Scotland being a functioning democracy. We will all have an interest in stable and legitimate institutions, in freedom of political debate and opposition, in free elections, and in the honest and competent administration of public affairs. We will all have a common interest in creating and sustaining a Scottish state that is well-governed; one that represents all the people of Scotland, that protects our legal, civil, political and socio-economic rights, and that serves the common good of the whole country through inclusive and effective democratic processes. Those principles should unite rather than divide us. The first requirement for a Scottish Constitution, therefore, is that it should be an inclusive instrument. It should ensure that Scotland is not a private fiefdom, where power is monopolised by an individual, section, party or faction, but a genuine *res publica*: a public state, where power is exercised publicly, by public deliberation and in the public interest. The constitution should be a guarantee to all citizens that an independent Scotland is a state in which they, as members of the public, have a stake and a say, and can enjoy equal rights of citizenship and belonging. Anything less than an inclusive Constitution would betray the principles of civic, democratic nationalism that the Scottish independence movement has espoused since its inception.
Popular Sovereignty

The United Kingdom operates on the basis of Parliamentary Sovereignty – there is no (domestic) law superior to an Act of Parliament, and no essential distinction, in authority or in enacting process, between statutes of a ‘constitutional’ nature and any other statutes. Parliamentary sovereignty places every right, every liberty, every democratic principle, every institution, at the mercy of a government backed by a parliamentary majority. In contrast to this, the Scottish independence movement has always made popular sovereignty its cornerstone. Both the SNP’s 2002 draft Constitution and the Scottish Government’s 2014 draft Interim Constitution proclaim popular sovereignty as the foundation of Scotland’s legal and political order.

Popular sovereignty does not mean that every trifling decision is made by referendum; that would be chaos. Neither is it simply the right of the people, through democratic processes, to choose, scrutinise, influence and remove their governments – important though that is. Rather, popular sovereignty as a constitutional doctrine means that the people have a final and decisive veto on any changes to the constitution itself, to the basic form of government or to fundamental rights. These matters must be decided by the people themselves and not left to the mercy of the incumbent parliamentary majority. Articulated in this way, support for the doctrine of popular sovereignty is wider than just the pro-independence movement; ‘the sovereign right of the people of Scotland to choose the form of government best suited to our needs’ was asserted by the Scottish Constitutional Convention prior to devolution and reaffirmed by the Scottish Parliament in 2012 with cross-party support from Labour and the Liberal Democrats as well as the SNP and Greens. A written Constitution, which makes a clear distinction between constitutional amendments and ordinary laws, enables popular sovereignty to be expressed (in the adoption of the constitution) and preserved (through referendums on major amendments).

Reassurance

A primary task of a Constitution is to provide clarity, protection and reassurance: clarity on how the state will function and on what its legal-institutional basis will be, protection for democratic processes and human rights, and reassurance public authorities will operate in a non-discriminatory and non-partisan way. Supporters of independence, especially on the left, often think of the Constitution as a transformative, aspirational document – and it can be that – but primordially the Constitution must be defensive and preservative, preventing governments from abusing power by undermining rights or by rigging the rules of democracy. Again, this requires an amending formula that ensures that the Scottish Government, backed even by a large majority, could not (for example) change the electoral system for their own advantage, or dismiss all the existing judges and replacing them with their own partisan appointees. Above all, the Constitution provides a political space in which everyone can see themselves. This should be reassuring to opposition parties and perhaps encouraging to new parties and movements yet to emerge, who will find that a written Constitution protects their freedom and gives them a fair chance to share, through ordinary democratic processes, in holding office and shaping policy.

Consolidating a democratic order is a particular challenge for newly independent states that are rich in natural resources. Authoritarian populism, the capture of state institutions by corrupt oligarchs, and the under-development of non-extractive economic sectors are some of the risks to which such resource-rich states are particularly vulnerable. In democratic terms, oil and gas wealth are a very mixed blessing, and one whose ill consequences we must guard against.

Recognition

A written democratic Constitution is necessary for the international acceptability of Scotland. A three hundred year old state like the UK might be able to muddle through without adopting a written Constitution, but for a newly independent state it would be internationally unacceptable. Having a written Constitution is the norm throughout all of Europe, in almost all Commonwealth nations, and in most of the rest of the world.

Moreover, there is a framework of internationally recognized constitutional standards to which states must adhere if they are to claim democratic legitimacy in the eyes of the world. These include, but are not limited to, the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESR) and the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) and regional instruments such as the European Convention of Human Rights (ECHR) and the European Convention on Local Self Government (ECLSG). Although these international agreements leave wide latitude to states in how they choose to constitute themselves, they nevertheless provide clear minimum baselines with which states must comply in order to be legitimate democracies.

A written Constitution for Scotland is a way of showing, to an international audience, that Scotland is serious about a commitment to democracy, human rights, the rule of law and good governance – and that, in consequence, that the country is a welcome addition to the family of nations, not a ‘pariah state.’ This is especially important in the eyes of institutional gatekeepers such as the Venice Commission, the Commonwealth and the European Union, whose good estimation of Scotland would be vital to making a success of the independence project.
Preliminary Reflections on the Constitution Building Process

Co-operative Constitution-Making

Theorists and practitioners of constitution-building continue to debate the relative importance of elite pacts and public participation in the adoption and amendment of constitutions (Wheatley & Mendez, 2013; Saati, 2015; Ghai & Galli, 2006; Elkins, Ginsburg & Melton, 2009). What is clearly emerging from this field of study, however, is that both elite pacts and popular approval are necessary for a constitution to take root and thrive. Successful constitution-making involves a co-operative interaction between ‘Elites’, ‘Experts’ and ‘Everyone’. A sound constitutional transition processes should reflect that.

In many cases, constitutional design decisions require a compromise with elite interests. While a democratic constitution attempts to restrain elites and to force them to limit their excesses for the sake of the common good, to exclude elites entirely runs the risk of stalling the whole enterprise. One of the lessons from Iceland’s failure to adopt a new constitution after the financial crisis is that even the most democratic ‘crowdsourced’ constitutional process must include, and find compromise, with the existing political, institutional and economic elites.

Spain provides another good example of the need for compromise and accommodation with – and between – existing elite interests. The republican constitution of 1931 was doomed to fail because it reached too far, and did not compromise with conservative interests (who might have accepted a moderate republic, but not a radically progressive and aggressively secular republic). This insurrection created conditions for a reactionary backlash, civil war and ultimately a 40 year dictatorship. The 1978 Constitution, in contrast, which has produced Spain’s longest period of democratic stability, has succeeded, at least in part, because it allowed some symbolic and substantive concessions to the right and to traditional elites (monarchy, army, church).

Experts are needed to ensure that the constitution is technically sound. An otherwise good constitution can be weakened by poor drafting, insufficient detail or careless arrangement. There is a broad range of comparative experience on which to draw, which might prevent ‘schoolboy errors’ from creeping into the text. Experts can also act as advisors to the political elites in the negotiation of the constitution, helping them to think more clearly about the likely consequences of their decisions. We particularly need the experience of experts from countries which do have written Constitutions, especially those which have transitioned to independence from UK-rule since the Second World War.

‘Everyone’ is needed to give the constitution democratic legitimacy. The Constitution is the supreme law because it derives its legitimacy from the sovereign people. It embodies the ‘settled will’ of the people, above and beyond the particular mandate of any party in government. If the Constitution is to have this legitimacy, it must be acceptable to the people. This is especially the case in Scotland, in accordance with the principle of popular sovereignty as articulated in the Claim of Right. That calls for effective public engagement in the constitution-making process, but even if the general public only has a marginal influence on the text itself (which in most cases will, necessarily, be worked out by elites and experts), the people’s ultimate approval and acceptance of the text is vital.

Developing a good constitution need not be difficult. It is a well-worn path. Although the UK has no written constitution, it has been the midwife of many. Dozens of the world’s constitutions were drafted with the assistance of British officials, often at Lancaster House in London. It is not difficult to imagine a workable constitution conforming broadly to a tried and tested ‘Lancaster House’ model, but reflecting the existing provisions of the Scotland Act such as proportional representation, fixed term parliaments, and the election of the First Minister by Parliament.

Considerations on the Timing of the Process

Constitution-making may occur at different times in relation to independence. The basic options are: (a) pre-independence constitution-making; (b) post-independence constitution-making; and (c) incremental constitution-making, with stages straddling independence day.

Post-independence constitution-making means that the state would become independent, and only then create a constitution. Typically, this means that the first elections after independence are to a Constituent Assembly, which has sovereign constituent power, and which has political responsibility for adopting a Constitution. India is an example: it became independent in 1947, and only adopted its Constitution in 1950. The advantage of this approach is that it allows for full participation in the constitution-making process; with the question of independence settled, the whole political spectrum can be engaged. However, the disadvantages of this approach are:

(a) Asking people to vote for independence without certainty as to the constitutional shape of the resulting state is asking for a ‘blank cheque’. It gives control of the constitution-making process to those who win the first elections immediately after independence; it creates the conditions for a power grab, and making it difficult to guarantee inclusivity and impossible to provide the necessary reassurance.

(b) Becoming independent without a clear constitutional foundation opens up the risk of a legal-institutional
'black hole': how can the institutional stability of the state during its first years be assured?

(c) It is harder to achieve international recognition and to gain entry into international organisations, since there is no guarantee of the type of state that will emerge, or what its fundamental foreign policy orientation will be.

(d) When constitution building is taking place, many other activities are also necessary: adjustment of laws and administrative regulations, establishment of security forces, seeking international recognition, and so on. There are difficulties of concurrent activity – how to divide time, energy and resources between constitution-building and other aspects of the transition. The ship is being built at sea – and there is a danger that constitution-making is sacrificed to the expediency of immediate politics.

(e) There is a risk that constitution-making will be abandoned before completion: in Israel, the first Knesset was supposed to be a Constituent Assembly to draft a Constitution, but it failed to do so, leaving Israel without a proper constitution to this day. In Scotland, with no history of a written Constitution, there is a real risk that if constitution-making is left until after independence the constitutional project will fail or be abandoned, to our grave national detriment.

Pre-independence constitution-making means that the Constitution would have to be agreed before independence and would then come into effect on independence day. There would be no legal gap: on the ‘appointed day’, when the Union flag comes down on Edinburgh Castle and the Saltire goes up, the new constitution comes into effect. This was the approach widely taken by the British colonial authorities in the 1960s and 1970s. Typically, once an intention to become independent had been signalled (e.g. by pro-independence parties winning a majority in the legislature), a Constitutional Conference would be convened to develop a Constitution for the new state. These Constitutional Conferences would usually include politicians from the national-level legislature (government and opposition, plus any third parties if relevant), sometimes representatives of important interest groups, and an array of legal and secretariat staff. The Constitution agreed at the Conference would be bestowed upon the country at independence by means of a Schedule attached to the Independence Act (or Independence Order-in-Council) from Westminster or Whitehall. Such Constitutions are sometimes seen as being ‘imposed’ because of this process of legal adoption – but in fact they were usually agreed by the national-level political actors and in some cases also endorsed by either a special election or a referendum. The advantage of this approach is its certainty: doubts and instabilities are minimised. Legal continuity is assured. The new state is born with an intact and functioning constitution, and does not need to undergo a potentially lengthy constitution-building process during its first years of independence. On the other hand, however, there can be unique challenges to getting broad participation (at both level of inter-elite bargaining and level of public participation) when the question of independence is not settled.

Neither post-independence nor pre-independence constitution-making is entirely suitable for Scotland. Of the two, pre-independence constitution-making is superior: Scotland needs a Constitution in place on Independence Day, because to become independent without a constitution in place would be to invite all the risks enumerated above. Moreover, to be consistent with democratic principles, the Constitution would have to be agreed not only before independence day, but ideally before the decision to become independent is taken – otherwise, the ‘blank cheque’ argument remains unaddressed. However, the difficulty of getting the agreement and consensus necessary for constitutional legitimacy before the question of independence is settled cannot be ignored. An inclusive and participatory process of constitutional development, reaching beyond the ‘Yes’ side, would be difficult to organise before the primary question of independence is agreed upon. A substantial section of the population will probably be unwilling to engage in constitution building for an independent state until independence is accepted. This precludes radical, ambitious and transformative constitutional visions, if the Constitution is to have any hope of winning acceptance and legitimacy from those who voted No.

To solve this dilemma, Scotland should adopt a two-stage constitution making process with a Provisional Constitution: a ‘Trans-Independence’ approach. The first stage would be the adoption of a Provisional Constitution, which would be agreed ahead of the independence referendum and would come into effect on independence day. The process of agreeing that Provisional Constitution would be the same as that used for pre-independence constitution-making, but because of the Constitution’s provisional status, the stakes would be lower. Those opposed to independence would probably not participate, but it might not matter, provided that there is as wide a consensus as possible in the pro-independence camp. After all, it is the duty of those who favour independence to set out a clear prospectus for statehood, including the design of a constitution. The second stage would be the adoption of a permanent Constitution, which would be agreed after independence, by a more inclusive and participatory process. This two-stage process is illustrated in Figure 1 below. The timeline for the processes is further discussed in Annex A.3

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Figure 1: Two Stage Constitution Making Process

[Diagram showing the process with stages: Pre-Referendum Phase, Referendum, Independence, Post-Independence.]

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References:

1. The White Paper Project Scotland’s Constitution
2. Annex A.
The next referendum should be held on the concrete issue of the adoption of a Provisional Constitution for Scotland. That document, and not the abstract idea of independence, should be the subject of the vote. The question should be something to the effect of, "Do you approve the Provisional Constitution for Scotland as proposed by the Constitutional Conference?"

Tying the general question of independence to the approval of a specific proposed Provisional Constitution in this way has several electoral advantages. On the one hand, it provides small-c conservatives with certainty and reassurance that an independent Scotland will not be the next Zimbabwe. On the other hand, protecting human rights and democratic processes may attract small-l liberals disenchanted by the UK’s authoritarian drift. Because voters will not be asked to endorse a ‘blank cheque’ by handing unlimited power to the Scottish Parliament, the argument about independence being a ‘power grab’ by the SNP would be neutralised. The referendum would provide the necessary popular legitimacy while avoiding the unnecessary expense and campaigning associated with holding two referendums (one on independence in principle, one on the proposed provisional constitution) in close succession.

Moreover, independence is an emotive word which provokes emotive reactions. A change to the constitutional system of Scotland (a vote on a specific Provisional Constitution) is likely to be approached with less ingrained prejudice than a vote on the abstract idea of independence.

Content of the Provisional Constitution

The Provisional Constitution would have to be sufficiently complete and robust to provide the necessary reassurance and public and international legitimacy, and to establish a clear legal-institutional foundation for an independent Scotland.

The priority for a Provisional Constitution should be to protect Scotland’s existing institutions, by placing them upon a firm constitutional foundation, while adjusting them to the needs of an independent state. Scotland is fortunate in that many of the building blocks of statehood are already in place: a Parliament, Government, courts and legal system, police, ombudsman, auditor-general, and most aspects of internal administration. These institutions are basically sound. They appear to enjoy broad

Development of the Provisional Constitution: Constitutional Conference

The Provisional Constitution should be developed by a Constitutional Conference. If the next referendum is to be on the adoption of a Provisional Constitution, then the homework around that Provisional Constitution must be done well in advance of the vote. This was the procedure adopted by the Scottish Constitutional Convention before the 1997 referendum. It was also the means by which many post-independence Constitutions in the Commonwealth were adopted – including those of Malta, Jamaica, Fiji etc. It is a tried and tested way of proceeding.

The constitution has to be a national, and not a partisan, document. Therefore, a Constitutional Conference should be inclusive to the extent possible at the time (i.e. before the settlement of the independence question). It should include representatives of all parliamentary parties who wish to contribute to the development of a written Constitution for an independent Scotland, as well as civil society representatives who want to make independence work. That would ensure that it is as politically inclusive as practicable under the circumstances. There should also be some expert representation to help ensure the technical quality of the constitutional document, as well as a Secretariat to manage the process. One of the tasks of the Secretariat would be to ensure the process is supported by wide public consultation, not only through the Scottish Parliament’s usual consultation process, but also through public meetings and Citizens’ Assemblies [See Annex B for further details on the proposed composition of the Constitutional Conference].

There is nothing to prevent the Scottish Government from summoning such a Conference, without needing a Section 30 order or other external permission. A Scotland (Constitutional Transition) Act could authorise the holding of a Conference to draft a Provisional Constitution.

However, in the absence of a Section 30 Order (or an amendment to the Scotland Act which would render a Section 30 Order superfluous) at the outset, there would probably be a need for a second statute (say, a Scotland (Constitutional Referendum) Act), which would require such authorisation, to give effect to the recommendations of the Conference. This would: (a) Provide for the holding of a referendum on the Provisional Constitution as drafted by the Constitutional Conference; and (b) enable the Scottish Parliament to declare independence on ‘an appointed day’ and provide for the coming into effect of the Provisional Constitution on that day. –

There also may be a need, to avoid legal uncertainty, for the Westminster Parliament to pass a ‘Scotland (Independence) Act’, which would close the loop from the perspective of English law – depriving the Parliament of England, Wales and Northern Ireland of any right to legislate for Scotland.

The Provisional Constitution, adopted by the people in the referendum, would come into effect on Independence Day and would see Scotland safely through the first years of independence.
public support. Some changes would be needed to make them fit the needs of an independent state (e.g. making provision for declarations of war and command of the armed force, ratification of treaties, Electoral Commission, civil service etc).

A Provisional Constitution can be based on tried and tested Westminster-derived frameworks. Scotland is a ‘late adopter’ of constitutional technology and has the advantage of being able to avoid the mistakes of others. There are now many other written Constitutions in the world which are derived from the Westminster model, with appropriate national adaptations. From these we can derive the raw materials of a Scottish Constitution without having to break too much new ground. Examples include Constitutions of Ireland, Malta, the Commonwealth Caribbean, and India. Basing the Constitution on this tried and tested framework also adds to the Constitution’s strength and its capacity to provide reassurance: there is a globe-spanning community of political and legal practice that is familiar with operating such constitutions. That is not to say that we must be bound by these models, but they do provide a good starting point. Other sources of constitutional norms include the European Convention on Human Rights and the Commonwealth Charter.

The Provisional Constitution must be entrenched against easy amendment. The draft interim Constitution proposed by the Scottish Government in 2014 would not have been protected against majoritarian amendment. As such, it would have been little more than a politician’s promise, unable to restrain the potential abuse of power by the government, therefore unable to provide any real reassurance that a Scottish state would be democratic and inclusive. To correct this, a provisional constitution should be subject to amendment only by a parliamentary super-majority backed by a referendum. A two-tier amendment procedure may be appropriate: the normal amendment rule might be a three-fifths majority in Parliament followed by a simple majority in a referendum (which was the amending formula in the SNP’s 2002 draft), but there could also be provision for ‘minor, technical and uncontroversial amendments’ to be passed by a three-fourths majority without a referendum – thereby retaining the essence of popular sovereignty, while avoiding the need for a referendum for minor ‘housekeeping’ amendments.

Controversial issues should be avoided in the Provisional Constitution. Generating public engagement on the constitution ahead of the next independence referendum may encourage more open thinking about the possibilities and opportunities of independence. It enables the independence movement to form alliances with those who seek other political goals – for example, to safeguard human rights, reduce poverty, strengthen local democracy, or protect the environment – and to cement that alliance in a constitutional proposal. However, as the purpose of the Provisional Constitution is to protect and guarantee democratic institutions and basic human rights, it should avoid divisive ideological content. It should not attempt to be a wish list of policies, especially when those are likely to provoke a conservative backlash against the new Scottish state. Issues such as church-state separation (including the status of publicly funded denominational schools, abortion rights etc) should be handled in a way that neither threatens nor entrenches the status quo. Socio-economic rights, if included, should be framed in a way that respects the role of Parliament in determining the extent of their operation. If there are small innovations, they should focus upon strengthening the processes of democratic representation and accountability rather than seeking to impose partisan policy prescriptions.

The Provisional Constitution should retain the monarchy. Retaining the monarchy is a symbol of continuity and stability, which enables independence to be presented not as a wrenching and risky break with British traditions, but instead as the natural next step in Scotland’s constitutional development, similar to that which other independent Commonwealth Realms have undergone. Keeping the monarchy may help some unionists reconcile themselves to the existence of an independent state, as well as helping to secure the continued loyalty (channelled through the Crown) of vital institutional actors such as the armed forces, civil service and judiciary, whose willingness to work for and with the new state is vital to the overall success of independence. Maintaining a personal union through a shared monarchy may also help moderate any tensions arising between Scotland and the rest of the former United Kingdom after independence, and provides a symbolic recognition of shared history and common interests which persist even after independence. The retention of the monarchy does not affect the substance of independence (as the existence of fifteen other Commonwealth Realms can attest) and does not preclude the constitutional limitation of the Royal Prerogative over matters such as the appointment of a Prime Minister, the dissolution of Parliament, and the withholding of assent to legislation.

The Constitutional Conference should be bound by its Terms of Reference to adhere to some general principles (set out in Annex C) to ensure that it completes its work in accordance with this mandate (which would be given to it by the Scottish Government and Parliament).

An example of a draft Provisional Constitution for Scotland is presented in Annex D. This text is not intended to prejudge the work of the Constitutional Conference, but simply to provide an example of what such a constitution might look like for the guidance and information both of the participants and of the general public. At best, it might form the basis of an overture for debate.

Towards a Final Constitution

The Provisional Constitution is only a starting point.

As outlined above, the circumstances of the Provisional Constitution’s generation means that it cannot be too ambitious. Some may wish to go further. A final Constitution, developed by an inclusive democratic process, may consider (as an indicative, non-exclusive list) the following questions:

- Whether Scotland should become a republic, and if so whether the Head of State should be elected by Parliament or by the people.
- Whether to include a more fulsome set of rights, including...
not only more extensive socio-economic rights, but also cultural rights, gender rights, environmental rights, childrens’ rights etc.
• Whether there should be an enhanced role for direct democracy, using referendums in day-to-day governance, and not merely for the settlement of major constitutional issues.
• Whether the electoral system should be reformed – for example, to include gender quotas, ensure the balanced representation of minorities, or provide a recall system.
• Whether there should be a stronger system of regional government within Scotland, devolving substantial powers (for example) to the Highlands and Islands.

The framework of process for developing the final Constitution should be set out in the Provisional Constitution. This should include the following:

(a) Provision for the establishment of an inclusive Constitutional Commission, to be chosen in a way that proportionally represents the various political parties in Scotland, reflects the geographical diversity of Scotland, is gender balanced, and makes provision for the inclusion of ethnic, religious and linguistic minorities, young persons, and persons with disabilities.

(b) Provision for the funding of, and administrative support for, the Constitutional Commission through a dedicated secretariat and expert support group.

(c) A requirement for public consultation.

(d) Provision for the approval of the final Constitution by a supermajority of the Scottish Parliament and by the people in a referendum.

There should be a ‘failsafe mechanism’. If the final Constitution has not been adopted within a given time (e.g. seven years after independence) then the Provisional Constitution should lose its provisional status and simply become the Constitution for Scotland. Indeed, we might find that a good provisional constitution is sufficient, that it becomes hallowed by practice, and that – like the French Constitution of 1875 and the German Constitution of 1949 – it loses its provisional character over time. Either way, this means that: (i) any final Constitution would have to be better than the existing Provisional Constitution, on the assumption that regressive amendments would be resisted; and (ii) Scotland would not be left in a crisis if the process of developing the final Constitution were to fail to reach agreement, as there would be an adequate constitutional structure to fall back on – a vital safeguard. It also prevents constitutional politics from dragging on too long, to the detriment of other matters.

There needs to be a civic education and public engagement programme. Scotland is a constitutionally illiterate country, having never lived under commonly agreed written rules, but only under the hand of an arbitrary and sovereign Parliament. The Constitutional Conference and the Provisional Constitution will do much to educate the public before embarking on the process of developing the final Constitution. However, the
Annex A – Proposed Timetable of the Constitutional Transition Process

Starting point = T.
Referendum Day = R.
Independence Day = I.

**T: Initiation of the Process**

Scottish Government secures the passage of the Scotland (Constitutional Transition) Act by the Scottish Parliament. The Act provides for the establishment of a Constitutional Conference to develop a Provisional Constitution. If there is a Section 30 order or equivalent in place, the bill might also provide for the holding of the subsequent constitutional referendum – however, it would be possible to at least get as far as an officially-backed constitution for Scotland without first having secured a Section 30 order.

The Conference has a mixed expert, political and civil society membership, as set out in Annex B.

The Terms of Reference would be to develop the text of provisional constitution for an independent Scotland based on the principles set out in Annex C, having regard to the existing Scotland Act, Lancaster House templates, the European Convention on Human Rights, the Commonwealth Charter, the SNP’s 2002 constitutional proposals, the 2011 Model Constitution, and other relevant sources.

**T + 9 months: Publication of the Draft Provisional Constitution**

On completion of the Conference’s work, the draft Provisional Constitution is published (earlier working drafts will previously have been published for public comment, so this text should already enjoy fairly broad consensus support).

The Scottish Parliament provides by law for the holding of a referendum on the draft Constitution. The arrangements for the referendum may be integrated into the Scotland (Constitutional Transition) Act or laid down by means of a separate Referendum Act – it depends on the politics and at what stage a Section 30 Order can either be procured or circumvented. Either way, the Act would include the draft Provisional Constitution as a schedule, so everyone can see exactly what they are voting on. It would also contain the various regulations for the free and fair conduct of the referendum.

**T + 12 months (or later, depending on political circumstances): Referendum Day**

The referendum is held, in which the draft provisional constitution is put to the people.

If successful, the Scottish Government appoints the day for independence and begins to put into effect the other aspects of the transitional plan (including provision for currency, diplomatic service, military infrastructure, and so on).

**R + 12 months to 18 months: Independence Day**

On the appointed day, Scotland becomes independent. The Union flag goes down on Edinburgh Castle. The Saltire goes up.

The Provisional Constitution comes into effect. The existing Scottish Parliament becomes the first Parliament of an independent Scotland under the Provisional Constitution.

**After I: Development of Final Constitution**

The Parliament of Scotland, in accordance with the provisions of the Provisional Constitution, then initiates an inclusive citizen-led process for the development of the final constitution. The final Constitution would be put to the people in a referendum after approval by a two-thirds majority in Parliament.

If a final constitution is not adopted after seven years, the provisional constitution would remain in effect, but would lose its provisional character and become the permanent Constitution, subject of course to subsequent amendment.
Annex B – Organisation of a Constitutional Conference
(to develop a Provisional Constitution)

1. Legal Basis
The Constitutional Conference would be a statutory body, governed by a ‘Scotland (Constitutional Transition) Act’.

2. Terms of Reference
The provisions of Annex C provide a set of Terms of Reference for the Constitutional Conference.

3. Membership
The Constitutional Conference to consist of 36 voting members and 6 non-voting member:

- 24 voting members representing the political parties who wish to participate in the process, divided between them in a way that reflects their share of seats in the Scottish Parliament; at least half of each party’s delegation is to be made up of MSPs and MPs, the others may be non-parliamentary nominees. There could be provision for ensuring regional and gender balance in each delegation. It is important that front-bench members be included in the party delegations, because the Constitutional Conference must involve the main political leaders with the authority to negotiate and the influence to carry parliamentary and popular support for their decisions.

- 12 voting civil society members (nominations would be invited from the standard big-players in ‘civic Scotland’ such as Convention of Scottish Local Authorities, Scottish Council of Voluntary Organisations, Scottish Trade Union Congress, Scottish Federation of Small Businesses, Action of Churches Together in Scotland etc, etc, but the statute could also set out criteria by which other, smaller, more local organisations could be represented).

- 6 non-voting expert members (selected on non-party/ cross party basis, by the Parliamentary Bureau, with emphasis on those with constitutional experience from other Commonwealth Realms or Westminster-derived democracies: experts with Irish, Indian or Commonwealth Caribbean experience would be particularly useful). Note: These members would form a ‘Committee of Experts’ to prepare reports on particular issues referred to them by the plenary.

4. Working Practices
Presiding Officer of Parliament to be non-voting Convenor. Deputy-Convenor to be chosen from amongst the members of the Constitutional Conference.

Constitutional Conference to adopt its own Standing Orders. These should be similar to those of a committee, rather than those of a large parliamentary body. Preference given to decision-making by consensus wherever possible.

Sessions to be held in public, including at different places around Scotland. However, scope for main negotiating work to be done in closed sessions as necessary.

There would be a requirement for meaningful and effective public consultation. This might be arranged in two phases: (a) an initial phase at the outset of the process, with emphasis on civic education, raising of awareness, and basic principles; then (b) second phase once a provisionally agreed draft is available, to give feedback and amendment on specific issues.

5. Secretariat
The Conference should be supported by its own Secretariat. These may be on secondment from Parliament, but should be solely responsible to the Constitutional Conference, through a Chief of Secretariat who reports to the Convenor, for the performance of their duties in relation to the Conference.

The Chief of Secretariat to be a non-partisan appointee with experience of managing constitutional processes. He/she must have the confidence of the First Minister and at the same time have security of tenure necessary to stand up to the First Minister when required in support of the Conference’s statutory mandate.

6. Funding
The Constitutional Conference would need a sufficient budget to provide for staff salaries, per diems for members, operating budgets for consultations, publications, and so forth. This should be provided for in the statute by which it is created.

7. Outcome
The draft Provisional Constitution produced by the Constitutional Conference would be submitted to the people in a referendum, and, if approved, would then come into effect on independence day in accordance with the said Act.
Annex C – Terms of Reference
(Constitutional Principles Guiding the Constitutional Conference on the Development of a Provisional Constitution)

(1) Independence

Scotland is to be an independent democratic state. Its independence shall be exercised subject to such international treaties as may be ratified by Scotland, including but not limited to Treaties of European integration.

(2) Form of Government

Its form of government shall be a parliamentary constitutional democracy.

(3) Sovereignty

Sovereignty belongs to the people in the terms articulated in the Claim of Right 1989. This means that the people have the choice of their own form of government, and there should be no change to the status of Scotland or to the basic form, institutions and principles of government without the people’s consent by means of a referendum.

(4) Citizenship

The Constitution shall provide an inclusive definition of citizenship based on residence, and shall guarantee the right of all persons lawfully resident in Scotland at the time of independence or having other substantial connection to Scotland prior to independence to be Scottish citizens.

(5) Universal Suffrage

The constitution shall ensure universal adult suffrage in all elections and referendums, subject only to existing lawful restrictions.

(6) Fundamental Rights

The Constitution shall, as a minimum, protect human rights in accordance with the European Convention on Human Rights and those protocols already adopted by the United Kingdom.

It may also include such Economic, Social and Cultural Rights which enjoy a broad consensus of support.

(7) Parliament

There shall be a Parliament of Scotland, elected by the people, by a system of proportional representation that ensures the representation of parties in accordance with their share of the vote received and the representation of localities based on population.

The term of Parliament should be set out in the Constitution and should not exceed 5 years, with the possibility of early dissolution if a government cannot be formed within a reasonable time, or if Parliament votes for its own dissolution.

Parliament shall have the right to elect its Presiding Officer, adopt its standing orders, form committees, and conduct investigations, with due protection in the Constitution for: (a) the rights of the opposition, minorities and backbenchers; and (b) public consultation.

Parliament shall possess legislative power subject to the Constitution.

Treaty-making power and the power to declare war or commit Scottish troops to active service outside of Scotland shall be subject to parliamentary approval.

(8) Scottish Government

Executive power shall be vested in the Scottish Government, consisting of a Prime Minister and Cabinet who shall be elected or approved by Parliament, chosen from amongst the members of Parliament, accountable to Parliament, and capable of being removed by a parliamentary vote of no-confidence.

The total number of Ministers is not to exceed one-fifth of the members of Parliament.

(9) Head of State

The existing monarchy shall be retained, with the Head of State serving only as a ceremonial figurehead.

For the avoidance of doubt, the functions, powers, rights and duties of the Head of State should be carefully specified and narrowly defined in the Constitution.

The right of the Head of State to withhold assent to legislation, except on the advice of the Supreme Court on grounds of unconstitutionality or procedural defect, shall be abolished.

The appointment of the Prime Minister and the dissolution of Parliament should also be regulated in the Constitution in ways that limit the discretion of the Head of State and ensure the primacy of parliamentary democracy.
(10) Judiciary

There shall be an independent judiciary with a supreme court which has the power to review the constitutionality of legislation and to annul unconstitutional statutes.

Judicial appointments shall be made on the advice of an independent, non-partisan body having constitutional status.

Judges are to enjoy security of tenure, subject to removal for misbehaviour with the consent of a super-majority of Parliament.

(11) Independent Public Institutions

There shall be an independent, non-partisan Electoral Commission, with constitutional status, to ensure the free and fair conduct of elections and referendums.

The independence and non-partisan nature of the civil service shall be guaranteed.

The Constitution shall prescribe the role and powers of the Public Services Ombudsman, the Auditor General, and similar institutions – all of which shall be established on a non-partisan basis and insulated from government influence.

The Constitution shall provide for the regulation of political finance and for the maintenance of ethical standards in public office.

 Provision should be made for the independence of the central bank.

(12) Local Democracy

The autonomy of local government within the scope of its devolved powers shall be constitutionally recognised in accordance with the European Charter on Local Self-Government.

Local Councils shall be elected by proportional representation for terms not exceeding five years.

(13) Referendums

Provision shall be made in the Constitution for the participation of the people in major policy decisions by means of referendums. Referendums shall be obligatory for adopting, or making major amendments to, the Constitution, as well as for all questions of national sovereignty.

(14) Amendments and Replacement

The Provisional Constitution shall not be subject to major amendment without the consent of a three-fifths majority of Parliament followed by a referendum.
Annex D: Example of a Draft Provisional Constitution for an Independent Scotland

Chapter I. The State and Nation

1. Independence

(1) On Independence Day, Scotland becomes an independent State under the terms of this constitution.

(2) 'Independence Day' is a day to be specified by resolution of the Scottish Parliament.

(3) From Independence Day, and subject to this Constitution—

(a) the Scottish Parliament has full competence to make and modify the law of Scotland, and to enact, amend and repeal laws for the peace, order and good government of Scotland, including laws of extra-territorial jurisdiction; and

(b) the Scottish Government assumes full responsibility for the government of Scotland.

(4) No Act of the United Kingdom Parliament passed after Independence Day shall extend to or have effect in Scotland.

2. Territory

In accordance with international law, the territory of Scotland continues to consist of all the land, islands, internal waters and territorial sea that formed the territory of Scotland immediately before Independence Day.

3. Popular Sovereignty and Constitutional Supremacy

(1) In Scotland the people are sovereign and have the sovereign right to self-determination and to choose freely the form in which their State is to be constituted and how they are to be governed.

(2) This Constitution, as the solemn expression of the will of the people, is the supreme law of Scotland; therefore, any Act of Parliament, treaty, regulation, order, or other law, which is inconsistent with this Constitution shall be null and void to the extent of the inconsistency.

4. Citizenship

(1) The following people automatically hold Scottish citizenship, namely –

(a) all those who, immediately before Independence Day, hold British citizenship and either –

(i) are habitually resident in Scotland at that time, or

(ii) are not habitually resident in Scotland at that time but were born in Scotland,

(b) any person born in Scotland on or after Independence Day if either of the person’s parent, at the time of the person’s birth –

(i) holds Scottish citizenship, or

(ii) has indefinite leave to remain in Scotland, and

(c) any person born outside Scotland on or after Independence Day if –

(i) either of the person’s parents, at the time of the person’s birth, hold Scottish citizenship, and

(ii) the person’s birth is registered in Scotland.

(2) The following people are entitled to claim Scottish citizenship according to the prescribed procedures, namely –

(a) any person born in Scotland on or after Independence Day if either of the person’s parents meets the prescribed requirements,

(b) any person with –

(i) a prescribed connection by descent with a person holding Scottish citizenship, or

(ii) any other prescribed connection with Scotland.

(3) A person holding Scottish citizenship may also hold other nationalities or citizenships at the same time.

(4) Further provision about entitlement to Scottish citizenship is to be made by Act of the Parliament of Scotland, and 'prescribed' means prescribed by or under such an Act; and such an Act may, in particular, include provision supplementing, qualifying or modifying the provisions in this Section.

5. National Symbols

(1) The national flag is the cross of St. Andrew, blazoned: azure, a saltire argent.

(2) The national anthem shall be determined by Act of Parliament.

(3) The national emblem is the Thistle.

(4) The national motto is ‘Nemo me impune lacessit’.
(5) The City of Edinburgh shall be the capital of Scotland, but the seat of government may be moved to another place by a decision of the Scottish Government in the event of war, disaster or unrest.

Chapter II. Fundamental Rights and Freedoms


(1) The following provisions shall have effect for the purpose of guaranteeing the fundamental rights and freedoms of all persons in Scotland or subject to the jurisdiction of Scottish Courts.

(2) The rights and freedoms hereby guaranteed shall be enjoyed by all persons without discrimination on grounds such as sex, race, colour, religion, personal beliefs, abilities or status.

(3) Every person shall be granted by a competent court a full and adequate and speedy remedy for any infringement whatsoever of his or her guaranteed rights and freedoms.

(4) None of the rights guaranteed in this Chapter shall be subjected to any restriction or limitation other than as expressly provided, nor shall any such restriction or limitation be applied for any purpose other than that expressly prescribed.

7. Voting Rights

(1) Subject to sub-section (2) of this Section, all citizens, having reached sixteen years of age, shall be entitled to vote in referendums and in the election of members of Parliament and local authorities.

(2) The following persons may be excluded from the franchise by Act of Parliament:

   (a) persons under legal guardianship for severe mental incapacity, and

   (b) persons serving a custodial sentence for a serious criminal offence who were disenfranchised in accordance with any law in effect at the time of independence.

(3) Provision may be made by Act of Parliament for resident non-citizens, after a qualifying period of residence, to vote in local elections of the area in which they reside on the same terms as citizens.

8. Right to Life

(1) Every person has the right to life.

(2) No person shall be condemned to death or executed.

(3) If any person's death occurs as a result of a lawful act of war, or of another person's acting in a manner which is permitted by law and which is no more than necessary to defend a person or persons from unlawful violence, or to effect a lawful arrest or to prevent the escape of a person lawfully detained, the action so taken shall not be rendered unlawful by the fact that death has result from it.

(4) This Section shall not be construed as invalidating any law made for the purpose of:

   (a) permitting the voluntary medical termination of pregnancy in cases of rape, incest, severe fetal abnormality, or serious risk to the mother's mental or physical health, or any law for these or connected purposes in effect at the time of independence; or

   (b) permitting voluntary euthanasia or assisted suicide in cases where a patient suffers a chronic painful or debilitating condition without realistic prospect of amelioration.

9. Prohibition of Torture

No person shall be subjected to torture, or to inhuman or degrading treatment or punishment.

10. Prohibition of Slavery and Forced Labour

(1) No person shall be held in slavery or servitude, nor shall any person be required to perform forced or compulsory labour.

(2) For the purposes of this Section, ‘forced or compulsory labour’ shall not include:

   (a) Any work, not of a hazardous, degrading or profit-making nature, required to be done in the ordinary course of detention imposed according to the provisions of Section 11 of this Constitution, or during conditional release from such detention;

   (b) Any service of a military character or, in case of conscientious objectors, service exacted instead of military service;

   (c) Any service lawfully exacted in case of an emergency or calamity threatening the life or well-being of the community; or

   (d) Any work or service which forms part of normal civic obligations.

11. Personal Liberty

(1) Every person has the right to personal liberty and security, and accordingly no person shall be deprived of liberty save in the following cases and in accordance with the procedures prescribed by the law of Scotland:

   (a) In the case of his or her lawful detention in accordance with the sentence passed by a competent Court upon his or her conviction of an offence;

   (b) In the case of his or her lawful arrest or detention for
non-compliance with the lawful order of a court;

(c) In the case of his or her lawful arrest or detention upon reasonable suspicion of having committed, or being engaged in the commission of, or being about to commit, a criminal offence under the law of Scotland;

(d) In the case of detention of a person under the age of 16 years by lawful order for the purpose of his or her educational supervision or personal welfare;

(e) In case of the lawful detention of a person who is of unsound mind and danger to themselves or others;

(f) In the case of the lawful arrest of a person to prevent his or her unlawfully entering Scotland, or of a person against whom lawful action is being taken with a view to deportation or extradition.

(2) Every person who is arrested or detained shall be informed, as soon as is possible in the circumstances of the case, in a language which he or she understands, of the reason for his or her arrest or detention and of any charge which is to be laid against him or her; he or she shall be entitled to inform a member of his or her family of his or her whereabouts and of the stated reason for his or her detention, and shall be entitled as soon as possible to consult a legal practitioner.

(3) Every person who is arrested or detained in accordance with sub-section (1)(c) of this Section of this Constitution shall, wherever it is practicable to do so, be brought before a competent court not later than the first lawful day after being taken into custody, such day not being a public or local holiday: failing which, he or she shall be brought before a competent court as soon as is possible thereafter.

(4) Every person who is arrested or detained in accordance with sub-section (1)(c) of Section 11 of this Constitution shall be brought to trial as soon as is possible; no person who has been committed for trial of any offence shall be detained in custody for more than 140 days from the date of such committal, except in so far as the High Court of Justiciary may grant lawful extensions.

(5) Every person who has been deprived of liberty by arrest or detention has the right to petition the appropriate court for his or her unlawfully entering Scotland, or of a person against whom lawful action is being taken with a view to deportation or extradition.

12. Right to Fair Trial

(1) Every person has the right to fair and impartial judicial proceedings to determine any question raised by process of law concerning his or her legal rights or obligations, or any criminal charge against him or her.

(2) Every such question or charge shall be heard and determined by the competent court or tribunal established by law. Trials shall be conducted in public and judgment shall be pronounced publicly, except in so far as the law permits a court or tribunal to exclude members of the public from part of such proceedings or to prohibit publication of reports concerning part of such proceedings on all or any of the following grounds:

(a) The protection of national security;

(b) The prevention of disorder in court;

(c) The protection of children or young people, or other vulnerable persons;

(d) The protection of the personal privacy of both parties; or

(e) In the interests of justice, in circumstances in which publicity would inevitably cause serious prejudice to the fair determination of an issue.

(2) Every person charged with a criminal offence shall be presumed innocent until proven guilty according to law.

(3) Every person charged with a criminal offence has the following rights:

(a) To be informed in detail, as soon as is possible in the circumstances of the case, and in a language which he or she understands, of the charge which is made against him or her;

(b) To have adequate time and facilities for preparing a defence;

(c) To defend himself or herself in person or through a legal practitioner of his or her own choosing;

(d) To such financial assistance as is necessary in the light of his or her means to secure adequate legal assistance if desired;

(e) To examine or have examined witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf in the same conditions as witnesses against him or her;

(f) To have all proceedings in court connected with the charge against him or her translated by a competent interpreter into the language which he or she best understands, if that language is not the language of the Court; and

(g) To be informed in a language which he or she understands of his or her rights under this Sections 11, 12, 13, 14 and 15 of this Constitution.

(4) The right to trial by jury, as such right existed under the law of Scotland at the time of the coming into effect of Constitution shall not be suspended, restricted or abridged, except during a State of Emergency.

13. No Double Jeopardy

(1) No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he has already been finally acquitted or convicted in accordance with the laws of Scotland.

(2) Provided, that this Section shall not prevent the reopening of the case in accordance with the law and penal procedure of Scotland, if there is evidence of new or newly discovered
facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

14. Right to Appeal

(1) Everyone convicted of a criminal offence by a court or tribunal shall have the right to have his conviction or sentence reviewed by a higher court or tribunal.

(2) The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.

(3) This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.

15. No Punishment without Law

(1) No person shall be convicted of any criminal offence save in respect of an act or omission which, at the date of its commission, constituted a criminal offence under the law of Scotland or the law of nations.

(2) No penalty shall be imposed which is heavier than the maximum permitted under the law of Scotland at the date of the commission of the offense.

16. Protection of Private and Family Life

(1) Everyone has the right to respect for privacy in his or her personal affairs, family life, home, and correspondence.

(2) There shall be no interference with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

(3) Every person who suffers unlawful interference with his or her personal privacy shall be entitled to an adequate civil remedy therefore.

(4) Provision shall be made by law for the safeguarding of personal data and information, and in particular to preserve the privacy and security of all communications and transactions conducted by electronic media.

16. Freedom of Thought, Conscience and Religion

(1) Every person has the right to freedom of thought and of conscience and to the free confession and practice of religion.

(2) This right includes freedom to change his or her religion or belief and freedom (either alone or in community with others and in public or private) to manifest his or her religion or belief in worship, teaching, practice and observance.

(3) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and necessary in a democratic society in the interests of public safety, or for the protection of public order, health or morals.

(4) Nothing in this Constitution shall affect:

(a) the existing status, freedom or liberties of the Church of Scotland, as recognized by the Church of Scotland Act 1921 and by the Articles Declaratory of the Constitution of the Church of Scotland in Matters Spiritual, or

(b) any provision made by law for the state funding of denominational schools.

17. Freedom of Expression

(1) Every person has the right to freedom of speech, writing and publication, and of the expression of opinion, including the right to impart and receive information and ideas freely to and from any other person or persons whatsoever.

(2) The law may prohibit abuses of this right, to the extent necessary in a democratic society –

(a) In the interests of national security or public safety;

(b) For the prevention of disorder or crime;

(c) For the protection of health or morals;

(d) For the protection of the reputation or rights of others;

(e) For preventing the unlawful disclosure of personal or private information received in confidence; or

(f) For maintaining the authority and impartiality of the judiciary.

(3) The foregoing provisions shall not be interpreted as invalidating laws regulating the licensing of broadcast transmissions or cinemas, theatres and other like places of public resort.

18. Freedom of Assembly and Association

(1) Every person has the right to freedom of peaceful assembly and to freedom of association with others for all lawful purposes.

(2) The right to freedom of assembly and of association shall be subject only to such restrictions as are prescribed by law and are necessary in a democratic society –

(a) For the protection of national security or public safety;

(b) For the prevention of disorder or crime; or

(c) For the protection of the rights of others.

19. Freedom of Movement

(1) Subject to sub-section (2) of this Section, everyone lawfully within the territory of a Scotland shall, within that territory, have the right to liberty of movement and freedom to choose his residence, and shall have the freedom to leave the country at will.

(2) No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary
in a democratic society: -

(a) In the interests of national security or public safety;
(b) For the prevention of disorder or crime;
(c) For the protection of public health or the environment; or
(d) For the protection of the rights and freedoms of others.

(3) Everyone in Scotland has the right of free access to hills, mountains, waterways and open country, except in cases in which unrestricted access is likely to cause substantial interference with agriculture, forestry or fishing, and subject to any provisions of the law restricting this right under sub-section (2) of this Section.

20. No Imprisonment for Debt

No one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation.

21. Familial Rights

(1) Men and women of marriageable age have the right to marry and to found a family in accordance with the laws governing the exercise of this right.

(2) Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This provision shall not prevent the State from taking such measures as are necessary in the interests of the children.

22. Property Rights

(1) Every person has the right to hold private property, and to the peaceful enjoyment of his or her property.

(2) Parliament may, however, enact laws that control or restrict the use or acquisition of property in the general interest, in cases where Parliament determines that the needs of the community require to be given precedence over the rights of individuals.

(3) All laws which sanction measures of expropriation shall make provision for fair compensation.

(4) Nothing in this Section shall have the effect of invalidating any tax, duty or custom levied in accordance with the law, or the lawful collection of any service charge or administrative fee, or the lawful imposition of a criminal penalty of fine or forfeiture.

23. Freedom of Information

(1) Every person shall have the right of access to governmental information, including on request all documents, files and other records pertaining to them or to government policy.

(2) The right of access to official information can only be restricted by law to the extent necessary, in a democratic society: -

(a) For the protection of national security;
(b) For the purpose of protecting personal privacy or commercial confidentiality;
(c) For the protection of crime; or
(d) For ensuring the due process of judicial proceedings.

(3) It shall be the duty of the Parliament of Scotland to ensure by law that, so far as possible, in such sound and television broadcasting services as may be provided in Scotland, due impartiality is preserved in respect of matters of political or industrial controversy or relating to current public policy and that broadcasting facilities and time are fairly apportioned between persons belonging to different political parties.

24. Prohibition of arbitrary expulsion

(1) No citizen of Scotland shall be expelled, by means either of an individual or of a collective measure, from the territory of Scotland, nor deprived of the right to enter the territory thereof.

(2) Collective expulsion of aliens (that is, persons who are not citizens) is prohibited.

(3) An alien lawfully resident in Scotland shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:

(a) to submit reasons against his or her expulsion;
(b) to have his or her case reviewed; and
(c) to be represented for these purposes before the competent authority or a person or persons designated by that authority.

(4) An alien may be expelled before the exercise of his or her rights under this Section when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.

25. Compensation for wrongful conviction

When a person has by a final decision been convicted of a criminal offence and when subsequently his or her conviction has been reversed, or he or she has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to the law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her.

26. Social, economic and cultural rights

(1) For all purposes, every person has the right to use any of Scotland's three official languages, Gaelic, Scots or English. Parliament shall be responsible for ensuring by legislation that adequate provision is made for the use of Gaelic and Scots, in addition to English, in the administration, local government, broadcasting, and public education.

(2) Every person has the right to work and to pursue freely any profession or vocation subject only to such requirements as to minimum qualifications as may be prescribed by or in accordance
with the law.

(3) Every person in employment has the right to conditions of work which are fair and which respect the dignity of the person in the sense implied by this Section of this Constitution; in particular, everyone has the right to safe and healthy conditions of work, as determined by legislation concerning health and safety at work.

(4) Every person who is unable to work by reason of age or physical or mental disability or infirmity, or by reason of family responsibilities, or because suitable employment is unavailable, has a right to be provided with reasonable alternative means of subsistence to be determined in accordance with law; in particular, persons who have reached the age of retirement as prescribed by law shall, in terms prescribed by law, have the right to pensions sufficient to maintain the dignity and independence of elderly people in the general social and climatic conditions prevailing in Scotland.

(5) Parliament shall be responsible for ensuring by legislation that everyone has a right to housing and that no person is involuntarily deprived of adequate shelter and living accommodation.

(6) Parliament shall be responsible for ensuring by legislation that the Scottish national health service is properly maintained, and that everyone has the right to publicly funded health care to secure wellbeing and human dignity within an acceptable level of overall cost and subject to prevailing conditions of medical practice.

(7) Parliament shall be responsible for ensuring by legislation that everyone has the right to education for the optimal development of their abilities and potential, within an acceptable level of overall cost and subject to prevailing conditions of educational practice and that educational services are properly maintained at nursery, primary, secondary and tertiary levels and are available on fair terms to all persons.

27. Restriction of Rights During Emergencies

(1) If the Head of State, acting on the advice of the Prime Minister, is satisfied that a grave public emergency exists whereby the security of Scotland is threatened he or she may, by public proclamation, declare that a state of emergency exists.

(2) Before tendering such advice to the Head of State, the Prime Minister shall, so far as is reasonably practicable to do so, consult with the Presiding Officer and the Leader of the Opposition.

(3) A declaration of a state of emergency lapses –
   (a) if the declaration is made when Parliament is sitting, at the expiration of seven days after the date of publication of the declaration; or
   (b) in any other case, at the expiration of fourteen days after the date of the declaration, unless it has in the meantime been approved by a resolution of Parliament approved by an absolute majority of the members of Parliament.

(4) The Head of State shall revoke a declaration of emergency –
   (a) if so advised by the Prime Minister; or
   (b) if Parliament passes a resolution declaring that there is no longer sufficient reason to keep the state of emergency in effect and that keeping the state of emergency in effect is not in the public interest.

(5) A declaration of emergency that has been approved by a resolution of Parliament under sub-section (3) of this Section remains in force, subject to the provisions of sub-section (4), for three months or such shorter period as is specified in the resolution.

(6) A state of emergency that has lapsed or is about to lapse under sub-section (5) may be renewed for a further period of up to three months, if the circumstances so require, by means of a resolution of Parliament passed by a two-thirds majority vote of the members thereof.

(7) During the period during which a state of emergency is in force, the Scottish Government, or any Minister or officer thereof to whom such authority may be delegated by the Prime Minister, may make such orders, having the force of law, as are reasonably required for securing public safety, maintaining public order or safeguarding the interests or maintaining the welfare of the community.

(8) An order made under sub-section (7) of this Section may impose additional limits or restrictions on the rights guaranteed by Sections 11, 16, 19 and 20 to the extent necessitated by the emergency.

(9) An order made under sub-section (7) of this Section shall cease to have when the state of emergency lapses or is revoked, unless:
   (a) the order is sooner repealed by the authority which issued the order;
   (b) the order is sooner revoked by a resolution of Parliament.

28. Head of State

(1) Her Grace Elizabeth Windsor, Queen of Scots, shall be Scotland’s Head of State.

(2) Her Grace is to be succeeded as Head of State by Her heirs and successors according to law.

(3) The Parliament of Scotland may by Act of Parliament make provision for:
   (a) the order of succession to the office of the Head of State, having regard to the principles of the Perth Agreement 2011;
   (b) the appointment of a regent during the minority or incapacity of the Head of State;
   (c) royal titles for use in Scotland;
   (d) the civil list; and
   (e) the regulation of the royal household in Scotland.
29. Powers and Functions of Head of State

(1) The Head of State shall, subject to this Constitution and any provision made by Act of Parliament, continue to enjoy all the rights, powers and privileges which, according to law, attached to the Crown in Scotland immediately before Independence Day.

(2) For the avoidance of doubt it is hereby declared that the Head of State shall have the power, acting on the advice of the Prime Minister of Scotland or of a responsible Scottish Minister acting under the general authority of the Scottish Government, and subject to the provisions of this Constitution and the law:

(a) to appoint and to accredit, to receive and to recognize ambassadors, plenipotentiaries, diplomatic representatives and other diplomatic officers, consuls and consular officers;

(b) to enter into and ratify international conventions, treaties and agreements;

(c) to declare war and make peace;

(d) to confer honours and precedence.

30. Head of State to act on Advice

In the exercise of his or her functions under this Constitution or any other law, the Head of State shall act only in accordance with the advice of the Prime Minister of Scotland or of a responsible Scottish Minister acting under the general authority of the Scottish Government, except in cases where the Head of State is:

(a) required by this Constitution to act on the advice of the Presiding Officer of Parliament, the Judicial Appointments Board, or any other person or authority; or

(b) required by this Constitution to act upon the nomination of Parliament.

31. Information to Head of State

It shall be the duty of the Prime Minister:

(a) To arrange for the circulation to the Head of State of the copies of the agenda and minutes of Cabinet and all other papers laid before Cabinet at the time when they are circulated to Ministers; and

(b) To furnish such information relating to the affairs of Scotland and proposals for legislation as the Head of State may call for.

32. Lord High Commissioner

(1) The Head of State may from time to time appoint a Lord High Commissioner for Scotland, who shall serve as the Head of State's personal representative in and for Scotland whenever the Head of State is absent from Scotland or otherwise unable to perform her constitutional duties in Scotland.

(2) The Head of State may, subject to this Constitution and the law, delegate such functions and duties to the Lord High Commissioner for Scotland as the Head of State shall see fit. Such functions and duties being performed by the Lord High Commissioner for Scotland on behalf and in the name of the Head of State shall be regarded as having been lawfully performed by the Head of State.

(3) Any reference in this Constitution to the Head of State, except where the context otherwise necessarily implies, shall also be read as a reference to the Lord High Commissioner.

Chapter IV. The Scottish Government

33. Executive Authority

(1) The executive authority of the State shall be vested in the Scottish Government, herein known generally as 'The Government'.

(2) Statutory functions may be conferred on the Scottish Ministers by that name, and shall be exercisable by them on behalf of the Head of State.

(3) Statutory functions of the Scottish Ministers shall be exercisable by any member of the Scottish Government.

(4) Any act or omission of, or in relation to, any member of the Scottish Government shall be treated as an act or omission of, or in relation to, each of them; and any property acquired, or liability incurred, by any member of the Scottish Government shall be treated accordingly.

(5) Subsection (4) does not apply in relation to the exercise of—

(a) functions conferred on the Prime Minister alone, or

(b) retained functions of the Lord Advocate.

34. Composition of the Government

(1) The Government shall consist of:

(a) the Prime Minister, the Deputy Prime Minister, and the Ministers responsible for the principal government departments, who collectively constitute the Cabinet.

(b) any Junior Ministers, State Secretaries, and Ministers without Portfolio, who shall not be members of the Cabinet, but may attend Cabinet sessions when invited.

(2) The total number of persons holding ministerial office (including both Cabinet ministers and any Junior Ministers, State Secretaries and Ministers without Portfolio not in the Cabinet) shall not at any time exceed one-fifth of the membership of Parliament.
(2) The Head of State, shall appoint as Prime Minister the member of Parliament who is nominated to that office by a vote of Parliament. The appointment of a Prime Minister shall be countersigned by the Presiding Officer of Parliament.

36. Appointment of other Ministers

The Ministers other than the Prime Minister, including the Deputy Prime Minister, and any Junior Ministers, State Secretaries and Ministers without Portfolio, shall be appointed and dismissed by the Head of State acting on the advice and with the countersignature of the Prime Minister.

37. Ministers to be Members of Parliament

(1) Subject to the provisions of sub-sections (2) and (3) of this Section, no person shall hold or be appointed to any Ministerial office unless that person is a member of Parliament.

(2) If an occasion arises for the appointment of a person to ministerial office while Parliament is dissolved, a person who was a member of Parliament immediately before the dissolution may be appointed to Ministerial office, but shall continue in office only in accordance with sub-section (3).

(3) A Minister who was a member of Parliament immediately before the most recent dissolution of Parliament may continue in office for a period of no more than forty days after the first meeting of Parliament following the said dissolution.

38. Conduct of Government Business

(1) The Prime Minister shall be the Head of Government, shall preside over meetings of the Cabinet, and shall co-ordinate Government policy and oversee its implementation.

(2) If the Prime Minister is unable, due to illness or absence, to perform the functions of his or her office, the Head of State shall authorise the Deputy Prime Minister to perform those functions.

(3) If the Deputy Prime Minister is unable to deputise for the Prime Minister in accordance with sub-section (2), the Head of State shall authorise another Minister to perform those functions, acting in accordance with the advice of the Prime Minister, or, if it is impracticable to obtain the advice of the Prime Minister, acting upon the advice of the most senior Minister who is able to tender such advice.

(4) The Prime Minister shall, by directions in writing charge any Minister with responsibility for the conduct (subject to this Constitution and any other law) of any business of the Government including responsibility for the administration of any department, agency or programme.

(5) All orders, regulations, writs, and other instruments, issued by or on the authority of the Government, shall be signed by the Minister who is responsible for their execution.

39. Responsibility and Resignation of the Government

(1) The Government shall be collectively responsible to Parliament for its general conduct, policy and administration.

(2) Each Minister shall be individually responsible for the administration of the department or agencies under his or her charge, and for his or her personal conduct in office.

(3) If Parliament, by an absolute majority vote, passes a vote of no-confidence in the Prime Minister or in the Government, the Prime Minister shall without delay submit the Government's resignation to the Head of State. The Head of State shall without delay accept such resignation and Parliament shall then proceed within ten days to nominate a Prime Minister in accordance with Section 36.

(4) If Parliament by an absolute majority vote passes a motion of no-confidence against a particular Minister (other than the Prime Minister), the said Minister shall without submit his or her resignation to the Prime Minister, and the Prime Minister accept such resignation at delay and shall nominate another person to take his or her place.

40. Caretaker Governments

(1) Following a general election, or the resignation or removal of the Government, the incumbent Ministers shall continue to serve in a caretaker capacity until a new Government is appointed.

(2) If the Prime Minister dies in office, or is incapacitated, the other Ministers shall continue in a caretaker capacity until a new Prime Minister is appointed.

(3) A Government serving in a caretaker capacity should usually:
   (a) perform only such routine or emergency operations as are necessary to maintain the proper functioning of the state; and
   (b) consult with the opposition before undertaking any necessary departure from existing policy.

(4) Sub-section (3) of this Section shall not be justiciable in any court and nothing in this Section shall affect the validity of any official act undertaken by a Government or Minister in a caretaker capacity.

41. Ministerial Salaries

(1) Subject to sub-sections (2) and (3) of this Section, the members of the Government shall receive such salaries as may be prescribed by law.

(2) A bill for a law to increase or diminish the salaries of members of the Government shall not be introduced to Parliament except upon the recommendation of the Public Service Commission, which shall from time to time conduct an independent review of such salaries.

(3) No law to increase or diminish the salaries of members of the Government shall come into effect except after an intervening general election.
(4) The salaries of members of the Government shall be a charge on the Consolidated Fund.

42. Secretary to the Cabinet

(1) There shall be a Secretary to the Cabinet, who shall be head of the Cabinet Office and who, under the direction of the Prime Minister, shall:
   (a) prepare the agenda for meetings of the Cabinet, and keep and circulate minutes,
   (b) act as custodian of Cabinet papers, and
   (c) in general provide such administrative and secretarial support to the Cabinet as may be required.

(2) The Secretary to the Cabinet shall be appointed by the Head of State on the advice of the Prime Minister, given after consultation with the Public Service Commission.

(3) The Head of State, on the advice of the Prime Minister given after consultation with the Public Service Commission, may remove the Secretary to the Cabinet from office on grounds of misconduct or incapacity.

43. Ministerial Code

(1) There shall be a Ministerial Code, which shall inter alia provide authoritative guidance on:
   (a) the procedures and practices of the Cabinet,
   (b) the duties and responsibilities of Ministers,
   (c) the relationship between Ministers and civil servants,
   (d) the relationship between Ministers and Parliament, and
   (e) the standards of conduct, behaviour and integrity expected of Ministers.

(2) The Secretary to the Cabinet, under the direction of the Prime Minister, shall from time to time revise the Ministerial Code and cause each revision to be published and presented to Parliament.

44. Law Officers

(1) There shall be two Law Officers:
   (a) a Lord Advocate, who shall be head of the Crown Office and director of the Procurator Fiscal Service;
   (b) a Solicitor-General, who shall deputise for and assist the Lord Advocate as required.

(2) The Law Officers shall be appointed by the Head of State on the advice of the Prime Minister, given after the Prime Minister has consulted with the Minister of Justice.

(3) The Law Officers shall not be members of Parliament or of the Government, but may be invited to attend the Cabinet, as required, to give legal advice or to consult on matters related to their duties.

(4) The Law Officers shall serve for a term of five years, which may be renewed once.

(5) During their terms of office, the Law Officers not be removed from office except for incapacity, neglect of duty or misconduct.

(6) The provisions of Section 41 shall apply, mutatis mutandis, to the salaries of the Law Officers.

(7) In the exercise of any powers vested in the Law Officers in relation to public prosecutions, they shall act according to their discretion and shall not be subject to the control of any other person.

(8) Unless otherwise provided by Act of Parliament, Section 27 of the Scotland Act 1998 shall apply.

Chapter V. The Parliament of Scotland

Part 1 – Election and Composition

45. Establishment of Parliament

There shall be a Parliament of Scotland, which subject to this Constitution shall be the supreme legislative, representative and deliberative assembly of Scotland.

46. Composition of Parliament

(1) Parliament shall consist of one hundred and twenty-nine members, or such greater number of members, not exceeding two hundred, as may hereafter be prescribed by an Act of Parliament.

(2) Parliament shall sit and vote as one chamber.

(3) The members of Parliament shall be directly elected by the enfranchised citizens of Scotland, by secret ballot, by means of a system of proportional representation that ensures a fair reflection of the composition of Scottish society, both in general and with particular regard to party preference and to geographical diversity.

(4) Provided that a quorum is present, the validity of any proceedings of the Parliament is not affected by any vacancy in its membership.

(5) Until and unless otherwise provided by an Act of the Parliament, the mode of electing members, the distribution of constituency and regional members, the procedure for calculating the allocation of seats, the procedure for filling vacancies, and all other matters incidental to the holding of elections for the Parliament of Scotland shall continue to be the same as those hitherto applied for the election of members of the devolved Scottish Parliament under the Scotland Act 1998.

(6) A bill for an Act of Parliament for the purposes specified in sub-section (5) of this Section shall not be deemed to have been passed by Parliament unless approved on its final reading by a two-thirds majority of the members of Parliament.
47. Ordinary General Elections

(1) Ordinary general elections shall be held on the first Thursday in May the of fourth calendar year following that in which the previous ordinary general election was held, unless the day of the poll is determined by a proclamation under sub-section (2) of this Section.

(2) If the poll is to be held on the first Thursday in May, the Parliament—

(a) Is dissolved by virtue of this Section on the second Friday in April; and

(b) Shall meet within the period of fourteen days beginning immediately after the day of the poll.

(3) If the Presiding Officer, after consulting with the Prime Minister and the Leader of the Opposition, proposes a day for the holding of the poll which is not more than one month earlier, nor more than one month later, than the first Thursday in May, then the Head of State shall by proclamation—

(a) Dissolve the Parliament on the day proposed;

(b) Require the poll at the election to be held on the day proposed; and

(c) Require the Parliament to meet within the period of fourteen days beginning immediately after the day of the poll.

48. Postponement of Elections during War or Emergencies

(1) Notwithstanding the provisions of Section 48, Parliament may by a resolution passed in accordance with this Section extend the duration of Parliament for a period of up to one year.

(2) A resolution to extend the duration of Parliament shall be:

(a) jointly proposed by the Prime Minister and the Leader of the Opposition; and

(b) passed by a two-thirds majority of the membership of Parliament.

(3) A resolution under this Section may be proposed only:

(a) When Scotland is at war, under enemy occupation or subject to threat of invasion;

(b) In the event of a natural disaster or other calamity which makes the holding of a general election impracticable; or

(c) if a state of emergency under Section 28 is in effect.

49. Extraordinary General Elections

(1) The Presiding Officer shall propose a day for the holding of a poll if —

(a) The Parliament resolves that it should be dissolved and, if the resolution is passed on a division, the number of members voting in favour of it is not less than two-thirds of the total number of seats for members of the Parliament; or

(b) Parliament has failed to nominate a Prime Minister within a period of thirty days following a general election, or within thirty days after the death in office, resignation or removal of the former incumbent Prime Minister.

(2) If the Presiding Officer makes such a proposal, the Head of State shall by proclamation —

(a) Dissolve the Parliament and require an extraordinary general election to be held;

(b) Require the poll at the election to be held on the day proposed; and

(c) Require the Parliament to meet within the period of fourteen days beginning immediately after the day of the poll.

(3) The date for the holding of a poll under this Section shall be no sooner than thirty days, and no later than ninety days, after the circumstances specified in sub-section (1)(a) or (1)(b) have arisen.

(4) If a poll is held under this Section within the period of twelve months ending with the day on which the poll at the next ordinary general election would be held (disregarding sub-section (3) of Section 48), that ordinary general election shall not be held. This provision shall not affect the year in which the subsequent ordinary general election is to be held.

50. Meetings of Parliament

(1) The first meeting of the Parliament following a general election shall be held on the day and at the time determined by the Presiding Officer, such day being no later than fourteen days after the dates of the general election. The Presiding Officer shall notify members of the date and time of that meeting.

(2) The Parliament shall decide, on a motion of the Parliamentary Bureau, the date and time for any other meeting of the Parliament, or, until the Parliament has so determined, the Presiding Officer shall appoint such dates and times.

(3) Parliament shall meet for at least one hundred and eighty sitting days in each parliamentary year.

(4) The Presiding Officer may convene the Parliament on other dates or at other times in an emergency.

51. Term of office of members

(1) The term of office of a member of Parliament begins on the day on which the member is declared to be returned.

(2) The term of office of a member of Parliament ends with the dissolution of the Parliament, unless the member –

(a) resigns his or her seat in accordance with sub-section (3) of this Section, or
52. Qualification and Disqualification of Members

Subject to sub-section (2) of this Section, and to rules of residency and nomination as may be prescribed by law, every citizen who is eligible to vote in parliamentary elections, who is at least twenty-one years of age, shall be eligible for election as a member of Parliament.

(2) No person shall be qualified for election as a member of Parliament who –

(a) Is, by virtue of his own act, under any acknowledgement of allegiance, obedience or adherence to a foreign power or state, except as permitted by law;

(b) Holds, or is acting in, any judicial office, military office, diplomatic office, or other public office which is by any law for the time being in force in Scotland declared to be incompatible with membership of Parliament;

(c) Is an undischarged bankrupt;

(d) Is certified to be insane or otherwise adjudged to be of unsound mind under any law for the time being in force in Scotland;

(e) Is under sentence of imprisonment (by whatever name called) for a term of, or exceeding, six months, including a suspended sentence, imposed on him by such a court or substituted by competent authority for some other sentence imposed on him by such a court;

(f) Is disqualified from membership of Parliament or from registration as an elector or from voting at elections under any law for the time being in force in Scotland relating to offences connected with elections; or

(g) Holds, or is acting in, any office the functions of which involve any responsibility for, or in connection with, the conduct of any election to Parliament or the compilation or revision of any electoral register for that purpose.

(3) If a person who is disqualified from being a member of the Parliament or from being a member for a particular constituency or region is returned as a member of the Parliament or (as the case may be) as a member for the constituency or region, his return shall be void and his seat vacant.

(4) If a member of the Parliament becomes disqualified from being a member of the Parliament or from being a member for the particular constituency or region for which he is sitting, he shall cease to be a member of the Parliament (so that his seat is vacant).

53. Judicial proceedings concerning disqualification

Any person who claims that a person purporting to be a member of the Parliament is disqualified or has been disqualified at any time since being returned may apply to the Court of Session for a declarator to that effect.

(2) An application in respect of any person may be made whether the grounds on which it is made are alleged to have subsisted when the person was returned or to have arisen subsequently.

(3) No declarator shall be made on grounds which subsisted when the person was returned, if an election petition is pending or has been tried in which the disqualification on those grounds of the person concerned is or was in issue.

(4) The person in respect of whom an application is made shall be the defender.

(5) The applicant shall give such caution for the expenses of the proceedings as the Court of Session may direct; but any such caution shall not exceed £5,000 or such other sum as the Cabinet may by order specify.

(6) The decision of the court on an application under this section shall be final.

(7) In this section “disqualified” means disqualified from being a member of the Parliament or from being a member for the constituency or region for which the person concerned purports to sit.

Part 2 – Parliamentary Organisation, Procedure and Privileges

54. Presiding Officer

1) The Parliament shall, following a general election, elect from among its members a Presiding Officer and two deputies.

(2) The Parliament must do so—

(a) before it conducts any other proceedings, except the taking by its members of the oath of office, and

(b) in any event, within the period of 21 days beginning immediately after the day of the poll at the election.

(3) The Parliament may, at any time, elect from among its members one or more additional deputies.

(4) A person elected Presiding Officer or deputy shall hold office under sub-sections (1) and (2) unless he or she previously resigns, ceases to be a member of the Parliament otherwise than by virtue of a dissolution or is removed from office by resolution of the Parliament.

(5) Standing orders may make provision for additional deputies to hold office for a shorter time than provided by sub-section (4).

(6) If the Presiding Officer or a deputy ceases to hold office before the Parliament is dissolved, the Parliament shall elect another from among its members to fill his or her place.

(7) The Presiding Officer’s functions may be exercised by a deputy if the office of Presiding Officer is vacant or the Presiding Officer is for any reason unable to act.

(8) The Presiding Officer may (subject to standing orders) authorise any deputy to exercise functions on his or her behalf.
(9) Standing orders may include provision as to the participation (including voting) of the Presiding Officer and deputies in the proceedings of the Parliament.

(10) The validity of any act of the Presiding Officer or a deputy is not affected by any defect in his or her election.

(11) The Presiding Officer shall perform his or her duties in a non-partisan manner, and shall, on election as Presiding Officer, forthwith resign from membership of any political party.

55. Clerk of the Parliament

(1) There shall be a Clerk of the Parliament, who shall be appointed by the Scottish Parliamentary Corporate Body.

(2) The Clerk's functions may be exercised by any Assistant Clerk if the office of Clerk is vacant or the Clerk is for any reason unable to act.

(3) The Clerk may authorise any Assistant Clerk or other member of the staff of the Parliament to exercise functions on his or her behalf.

56. Scottish Parliamentary Corporate Body

(1) There shall be a body corporate to be known as 'The Scottish Parliamentary Corporate Body' (referred to in this Constitution as the 'Corporate Body') to perform the functions conferred on the corporation by virtue of this Constitution or any Act of Parliament.

(2) The members of the corporation shall be—
   a. The Presiding Officer; and
   b. At least four members of the Parliament appointed in accordance with Standing Orders to reflect the partisan, regional and gender balance of the Parliament.

(3) The Corporate Body shall provide the Parliament, or ensure that the Parliament is provided, with the property, staff and services required for the Parliament's purposes.

(4) The Parliament may give special or general directions to the Corporate Body for the purpose of or in connection with the exercise of the corporation's functions.

(5) Any property or liabilities acquired or incurred in relation to matters within the general responsibility of the corporation to which (apart from this sub-section) the Parliament would be entitled or subject shall be treated for all purposes as property or (as the case may be) liabilities of the corporation.

(6) Any expenses of the Corporate Body shall be payable out of the Scottish Consolidated Fund. Any sums received by the corporation shall be paid into that Fund, subject to any provision made by or under an Act of the Parliament of Scotland for the disposal of or accounting for such sums.

(7) Until and unless otherwise provided by law, Schedule 2 of the Scotland Act 1998 (which makes further provision about the corporation) shall continue to have effect.

57. Parliamentary Bureau

(1) There shall be a Parliamentary Bureau consisting of—
   a. The Presiding Officer; and
   b. One member of Parliament nominated by each parliamentary party having at least five members of Parliament.

(2) Independent members and members of Parliament belonging to any party having less than five members of Parliament may unite into a 'Mixed Group' which shall be entitled to representation in the Parliamentary Bureau if in total it has at least five members of Parliament.

(3) The Parliamentary Bureau, subject to this Constitution and to the standing orders of Parliament, shall determine Parliament's timetable and order of business.

(4) In determining the order of business, the Parliamentary Bureau shall give precedence to business proposed by the Scottish Government, but at least one-third of parliamentary time shall be reserved for opposition business and for business proposed by committees, private members, or public petitions.

(5) The Parliamentary Bureau shall as far as possible conduct its meetings by consensus, but if a vote is necessary, each member shall have a bloc vote equal to the number of members of Parliament adhering to the party or parliamentary group that he or she represents.

58. Standing Orders

(1) Subject to the provisions of this Constitution, Parliament shall have the authority to regulate its procedures in accordance with its own standing orders, adopted by majority vote on the proposal of the Corporate Body.

(2) The standing orders shall include provision for preserving order in the proceedings of the Parliament, including provision for—
   a. Preventing conduct which would constitute a criminal offence or contempt of court, and
   b. A sub judice rule.

(3) The standing orders may include provision for excluding a member from proceedings or for withdrawing from a member of the Parliament his rights and privileges as a member.

(4) The standing orders shall include provision requiring the proceedings of the Parliament to be held in public, except in such circumstances as the standing orders may provide.

(5) The standing orders may include provision as to the conditions to be complied with by any member of the public attending the proceedings, including provision for excluding from the proceedings any member of the public who does not comply with those conditions.

(6) The standing orders shall include provision for reporting the proceedings of the Parliament and for publishing the reports.

(7) Standing orders which provide for the appointment of committees may include provision for those committees to have
power to appoint sub-committees.

(8) The standing orders shall include provision for ensuring that, in appointing members to committees and sub-committees, regard is had to the balance of political parties in the Parliament.

(9) The standing orders may include provision for excluding from the proceedings of a committee or sub-committee a member of the Parliament who is not a member of the committee or sub-committee.

59. Power to call for witnesses and documents

(1) The Parliament may require any person—
   (a) To attend its proceedings for the purpose of giving evidence; or
   (b) To produce documents in his custody or under his control, concerning any subject for which any member of the Scottish Government has general responsibility.

(2) The Parliament may not impose such a requirement on a judge of any court, or a member of any tribunal or commission in connection with the discharge by him of his functions as such.

(3) Such a requirement may be imposed by a committee or sub-committee of the Parliament only if the committee or sub-committee is expressly authorised to do so (whether by standing orders or otherwise).

(4) A person is not obliged under this section to answer any question or produce any document which he would be entitled to refuse to answer or produce in proceedings in a court in Scotland.

(5) A procurator fiscal is not obliged under this section to answer any question or produce any document concerning the operation of the system of criminal prosecution in any particular case if the Lord Advocate considers that answering the question or producing the document might prejudice criminal proceedings in that case or would otherwise be contrary to the public interest, and has authorised the procurator fiscal to decline to answer the question or produce the document on that ground.

(6) The Presiding Officer or such other person as may be authorised by standing orders may administer an oath to any person giving evidence in proceedings of the Parliament and may require such oath to be taken.

(7) Standing orders may provide for the payment of allowances and expenses to persons—
   (a) Attending proceedings of the Parliament to give evidence; or
   (b) Producing documents which they have been required or requested to produce.

60. Conflicts of Interest

(1) Provision shall be made for a register of interests of members of the Parliament and for the register to be published and made available for public inspection.

(2) Provision shall be made—
   (a) Requiring members of the Parliament to register in that register financial interests (including benefits in kind), as defined for the purposes of this paragraph;
   (b) Requiring that any member of the Parliament who has a financial interest (including benefits in kind), as defined for the purposes of this paragraph, in any matter declares that interest before taking part in any proceedings of the Parliament relating to that matter.

(3) Provision made in pursuance of sub-section (2) shall include any provision which the Parliament considers appropriate for preventing or restricting the participation in proceedings of the Parliament of a member with an interest defined for the purposes of sub-section (2)(a) or (b) in a matter to which the proceedings relate.

(4) Provision shall be made prohibiting a member of the Parliament from—
   (a) Advocating or initiating any cause or matter on behalf of any person, by any means specified in the provision, in consideration of any payment or benefit in kind of a description so specified, or
   (b) Urging, in consideration of any such payment or benefit in kind, any other member of the Parliament to advocate or initiate any cause or matter on behalf of any person by any such means.

(5) Provision made in pursuance of subsections (2) to (4) shall include any provision which the Parliament considers appropriate for excluding from proceedings of the Parliament any member who fails to comply with, or contravenes, any provision made in pursuance of those subsections.

(6) Any member of the Parliament who takes part in any proceedings of the Parliament without having complied with, or in contravention of, any provision made in pursuance of subsection (2) or (3), or who contravenes any provision under subsection (4), is guilty of an offence.

(7) Provisions made under this Section shall be made by standing orders or by Act of the Parliament of Scotland.

61. Privileges and Immunities of Members

(1) For the purposes of the law of defamation—
   (a) any statement made in proceedings of the Parliament, and
   (b) the publication under the authority of the Parliament of any statement,shall be absolutely privileged.

(2) Members of Parliament shall enjoy immunity from arrest and criminal prosecution during sittings of Parliament, unless such immunity is waived by the Presiding Officer in accordance with Standing Orders.

62. Remuneration of Members of Parliament

(1) The Parliament shall make provision for the payment of salaries to members of Parliament.
The Parliament may make provision for the payment of allowances to members of the Parliament for the purposes of:

(a) Travel and accommodation;
(b) Office expenses; and
(c) Secretarial and research support.

The Parliament may make provision for the payment of pensions, gratuities or allowances to, or in respect of, any person who—

(a) Has ceased to be a member of the Parliament or the Scottish Government; or
(b) Has ceased to hold such office, employment or other post in connection with the Parliament or the Scottish Government as the Parliament may determine but continues to be a member of the Parliament.

Such provision may, in particular, include provision for—

(a) Contributions or payments towards provision for such pensions, gratuities or allowances,
(b) The establishment and administration (whether by the Parliamentary corporation or otherwise) of one or more pension schemes.

In this section “provision” includes provision—

(a) By an Act of the Parliament of Scotland; or
(b) By a resolution of the Parliament conferring functions on the Corporate Body.

Leader of the Opposition

The member of Parliament who is the leader of the largest opposition party shall be designated by the Presiding Officer as Leader of the Opposition.

The Leader of the Opposition, in addition to the other duties and privileges vested in his or her office by this Constitution or by law or custom, shall be entitled to a salary equivalent to that of a Minister and shall rank immediately after the Prime Minister in the order of precedence.

The term ‘opposition party’ in this Section means a party which does not form the government, is not in coalition with the government, and does not have a ‘confidence and supply’ or any other such agreement to support the government.

Part 3 – Legislative Procedure

Power to make laws

Subject to the provisions of this Constitution, Parliament may enact, amend and repeal all laws for the peace, order and good government of Scotland.

The laws referred to in this section shall take the form of bills passed by Parliament. When a bill has been passed by Parliament it shall be presented to the Head of State for assent, and when such assent is given the Bill shall become law.

Submission of Bills for Royal Assent

The Presiding Officer shall submit bills passed by Parliament to the Head of State for Royal Assent.

The Head of State, on receipt of a bill presented for Royal Assent, shall within twenty-eight days from the day on which the bill was presented to him or her, either:
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(a) Grant assent, and thereby enact the bill as an Act of Parliament; or
(b) Subject to the provisions of sub-section (3), withhold assent.

(3) The Head of State shall not withhold assent to any bill unless:
(a) the Lord Advocate advises the Head of State that the bill is, in his or her view, repugnant to this Constitution or incompatible with Scotland's obligations under international law; or
(b) the Presiding Officer advises the Head of State that the bill has not in fact been passed by Parliament owing to a procedural defect.

(4) If after the elapse of the period of twenty-eight days specified in sub-section (2) of this Section, the Head of State has neither granted nor withheld Royal Assent in accordance with sub-sections (2) and (3), the bill shall be deemed to have received Royal Assent at the expiration of that period.

68. Delegation of Legislative Power

(1) Parliament may enact laws providing for the delegation to Minister and other public authorities of the authority to make regulations having the force of law, subject to such parliamentary scrutiny and approval procedures as may be specified by law or by Parliament's Standing Orders.

(2) Parliament may not delegate legislative authority concerning:
(a) the levying of taxation;
(b) the creation of new criminal offences,
(c) the personal rights of citizens, or the principles of civil or criminal law.

(3) Nothing in this Section shall be construed as restricting the authority of Scottish courts to make Acts of Sederunt or Acts of Adjournal in accordance with Acts of Parliament regulating such powers.

69. Referendums

(1) Parliament may make provision by law for the holding of a national referendum to ascertain the views of the people on:
(a) any proposed legislative bill, other than a money bill; or
(b) any question of policy of national importance, as set out in a White Paper.

(2) Referendums held in accordance with sub-section (5) of Section 98 on the approval of a bill to amend provisions of the Constitution are binding. All other referendums shall be consultative and non-binding.

Chapter VI. Judiciary

70. Judicial Authority

(1) The judicial authority of Scotland shall comprise –

(a) Court of Session and the High Court of Justiciary, as the supreme courts of Scotland for civil and criminal matters respectively; and
(b) The Sheriff Courts, Sheriff Appeal Court, and such other Courts and Tribunals as may from time to time be established by Act of Parliament.

(2) The Court of Session, High Court of Justiciary, Sheriff Courts, Sheriff Appeal Court, and other Courts and Tribunals shall have such jurisdiction, powers and authority as may be conferred upon those Courts respectively by this Constitution or any other law.

(3) This section does not affect the jurisdiction of the Court of Justice of the European Union, the European Court of Human Rights or any other court or tribunal established under an international agreement to which Scotland is a party.

71. Appointment of Judges

(1) The judges of the Court of Session and High Court of Justiciary, Sheriffs Principal, Sheriffs, and all other members of the judiciary, with the exception of Justices of the Peace, shall be appointed by the Head of State, acting on the advice of the Judicial Appointments Board.

(2) The Judicial Appointments Board shall be constituted in accordance with Schedule 1 of the Judiciary and Courts (Scotland Act) 2008.

(3) Where the Judicial Appointments Board is selecting an individual to be recommended for appointment:
(a) Selection must be solely on merit, which shall include knowledge of the law and skills and competence in the interpretation and application of the law;
(b) The Board may select an individual only if it is satisfied that the individual is of good character.

(4) Subject to the provisions of sub-section (3), the Board in carrying out its functions, must have regard to the need to encourage diversity in the range of individuals available for selection to be recommended for appointment to a judicial office.

72. Tenure of Office

(1) Subject to the provisions of this Section and Section 74, judges of the Court of Session, High Court of Justiciary, and Sheriff Courts, shall continue in office for life.

(2) Members of the judiciary shall retire on reaching the retirement age prescribed by law.

(3) Early retirement may be granted by the Judicial Appointments Board on the grounds of illness or infirmity.

73. Removal of Judges

(1) A judge may be removed from office only by the Head of State only upon a resolution of Parliament praying for their removal on the grounds of inability, neglect of duty or misbehaviour.
(2) A tribunal to investigate and report on whether a person holding a judicial office is unfit to hold the office by reason of inability, neglect of duty or misbehaviour:

(a) must be constituted when so requested by the Lord President, and

(b) may be constituted in such other circumstances as the Prime Minister thinks fit.

(3) A tribunal under sub-section (2) of this Section shall consist of:

(a) two individuals who hold, or have held, high judicial office (“judicial members”),

(b) one individual who is, and has been for at least 10 years, an advocate or solicitor, and

(c) one individual who does not hold (and has never held) high judicial office and is not (and never has been) an advocate or solicitor.

(4) A resolution for the removal of any judge under sub-section (1) of this Section:

(a) may be proposed only on the basis of a written report issued by a tribunal constituted under sub-section (2) of this Section, concluding that the individual in question is unfit for office by reason of inability, neglect of duty or misbehaviour, and giving reasons for that conclusion; and

(b) shall have effect only if it is passed by a two-thirds majority of the members of Parliament present and voting.

(5) A judge may be suspended from office in accordance with the law when a tribunal under sub-section (2) of this Section has been appointed, but suspension of an individual from judicial office under this sub-section does not affect any remuneration payable to, or in respect of, the individual in respect of the period of suspension.

74. Judicial Independence

(1) The following persons must uphold the continued independence of the judiciary—

(a) the Prime Minister,

(b) the Lord Advocate,

(c) persons holding Ministerial office,

(d) members of Parliament, and

(e) all other persons with responsibility for matters relating to—

(i) the judiciary, or

(ii) the administration of justice.

(2) In particular, the Prime Minister, the Lord Advocate and persons holding Ministerial office —

(a) must not seek to influence particular judicial decisions through any special access to the judiciary, and

(b) must have regard to the need for the judiciary to have the support necessary to enable them to carry out their functions.

75. Appeals on Constitutional Matters

The Court of Session shall have final appellate jurisdiction over all questions concerning –

(a) The validity of Acts of Parliament, treaties, and other laws, under the terms of this Constitution; and

(b) The interpretation of this Constitution.

76. Prerogative of mercy

The Head of State, acting on the advice of the Minister for Justice, and subject to any provisions or procedures prescribed by law, may –

(a) Grant a pardon, either free or subject to lawful conditions, to any person convicted of any offence;

(b) Grant to any person a respite, either indefinite or for a specified period, of the execution of any punishment imposed on that person for any offence;

(c) Substitute a less severe form of punishment for any punishment imposed on any person for any offence; or

(d) Remit the whole or any part of any punishment imposed on any person for any offence or of any penalty or forfeiture otherwise due to the Crown on account of any offence.

Chapter VII. External Relations and Defence

77. Treaties and International Agreements

(1) Treaties and other international agreements to which Scotland becomes a signatory are not to be ratified on behalf of Scotland, or otherwise to bind Scotland, unless—

(a) the Scottish Government has laid a copy of the agreement before the Scottish Parliament, and

(b) Parliament has approved the agreement in accordance with such procedure as the Parliament may determine by Act of Parliament or by parliamentary Standing Orders.

(2) Sub-section (1) of this section does not apply to any international agreement ratified in relation to Scotland before Independence Day and by which Scotland, as an independent State, continues to be bound on or after Independence Day in accordance with international law.

(3) Treaties and other international agreements to which Scotland is a party do not have direct effect in Scots law; they shall take
effect in Scots law only to the extent provided by an Act of Parliament.

78. International Co-operation and Euro-Atlantic Integration

The Scottish Government is authorised by this Constitution to pursue Scotland’s admission as a member state to –

(a) The North Atlantic Treaty Organisation,
(b) The Commonwealth of Nations,
(c) The Council of Europe,
(d) Either:
   (i) The European Union, or
   (ii) The European Free Trade Association and the Customs Union.
(e) The United Nations,
(f) The Organisation for Security and Co-Operation in Europe,
(g) The British-Irish Council, and
(h) The Nordic Council.

79. Shared Service Agreements

(1) Provision may be made by agreement between the Scottish Government and the United Kingdom Government for:

(a) the continued provision of services in Scotland or to citizens of Scotland by the United Kingdom Government or any agency or department thereof;

(b) enhanced bilateral co-operation in defence, border security, cross-border transportation, postage and telecommunications communications, culture and heritage, broadcasting, macro-economic management, quarantine, protection of the environment, research and higher education, or other areas of common interest or concern.

(2) Agreements under this Section, in so far as they affect the domestic law or finances of Scotland, shall come into effect only after enabling legislation has been enacted by the Parliament of Scotland.

80. Armed Forces

(1) Subject to this Constitution and any other provisions prescribed by law, the Armed Forces of Scotland shall be under the supreme command of the Scottish Government, acting through the Minister of Defence.

(2) Parliament shall provide by law for the regulation, order, discipline, funding, recruitment, and administration, of the Armed Forces.

81. War Powers

(1) Subject to the provisions of sub-sections (2) and (3) of this Section, no war may be declared, nor the armed forces deployed outside of the territory of Scotland on active service, except with the previous authorisation of Parliament. Such authorisation shall be given by means of a resolution, passed by an absolute majority of the members of Parliament, on the proposal of the Government.

(2) In the event of invasion or imminent threat of invasion, or other urgent threat to the safety and security of Scotland, the Government may take such action for the defence of the nation as the Government may see fit, including but not limited to the deployment of armed forces on active service outside the territory of Scotland.

(3) When Scotland is bound by terms of a treaty to go to the defence of another state or to commit armed forces to the collective defence of an alliance, the Government may act in accordance with such obligation without having to seek the prior authorisation of Parliament.

(4) Whenever sub-sections (2) or (3) of this Section are invoked by the Government, it shall be the duty of the Government to report the matter to Parliament as soon as the circumstances of the situation will permit, by means of a ministerial statement followed by a plenary debate.

Chapter VIII. Financial Provisions

82. Consolidated Fund

(1) All revenues or other moneys raised or received for the purposes of the Scottish Government shall be paid into and form one Consolidated Fund.

(2) Sub-section (1) of this Section shall not apply to revenues or other moneys that are payable by or under any Act of Parliament into some other fund established for a specific purpose or that may by or under any such law be retained by the authority that received them for the purposes of defraying the expenses of that authority.

(3) No monies shall be withdrawn from the Consolidated Fund except –

(a) To meet expenditure that is charged upon the Fund by this Constitution or by any other law in force in Scotland; or

(b) Where the issue of those monies has been authorised by an appropriation law or in such manner, and subject to such conditions, as may be prescribed in pursuance of Section 84.

(4) No moneys shall be withdrawn from any public fund of Scotland other than the Consolidated Fund unless the issue of those moneys has been authorised by or under an Act of the Parliament of Scotland.

(5) The deposit of any moneys forming part of the Consolidated
83. Authorisation of expenditure

(1) The Minister with responsibility for finance shall cause to be prepared and laid before the Parliament, before or not later than thirty days after the commencement of each financial year, estimates of the revenues and expenditure of Scotland for that year.

(2) The heads of expenditure contained in the estimates for a financial year (other than expenditure charged upon the Consolidated Fund by this Constitution or any other law) shall be included in a bill, to be known as an appropriation bill, introduced into the Parliament to provide for the issue from the Consolidated Fund and other public funds of Scotland of the sums necessary to meet that expenditure and the appropriation of those sums for the purposes specified in the bill.

(3) If in any financial year it is found –
   (a) That the amount appropriated by the appropriation law for the purposes included in any head of expenditure is insufficient or that a need has arisen for expenditure for a purpose for which no amount has been appropriated by the appropriation law; or
   (b) That any moneys have been expended on any head of expenditure in excess of the amount appropriated for the purposes included in that head by the appropriation law or for a purpose for which no amount has been appropriated by the appropriation law;

Then the Minister with responsibility for Finance shall cause a supplementary estimate showing the sums required or spent to be prepared and laid before the Parliament and the heads of expenditure shall be included in a supplementary appropriation bill introduced in the Parliament to provide for the appropriation of those sums.

(4) If the appropriation law in respect of any financial year has not come into operation by the beginning of that financial year, the Minister with responsibility for finance may, to such extent and subject to such conditions as may be prescribed by Parliament, authorise the withdrawal of moneys from the Consolidated Fund and other public funds of Scotland for the purpose of meeting expenditure necessary to carry on the services of the Scottish Government until the expiration of four months from the beginning of that financial year or the coming into operation of the appropriation law, whichever is the earlier.

84. Contingencies Fund

(1) There shall be such provision as may be prescribed by Parliament for the establishment of a Contingencies Fund and for authorising the Minister with responsibility for finance, if he is satisfied that there has arisen an urgent and unforeseen need for expenditure for which no other provision exists, to make advances from that Fund to meet that need.

(2) Where any advance is made from the Contingencies Fund, a supplementary estimate shall be laid before the Parliament, and an appropriation bill shall be introduced therein, as soon as possible for the purpose of replacing the amount so advanced.

85. Remuneration of Constitutional Officers

(1) There shall be paid to the holders of the following offices such salaries and such allowances as may be prescribed by Parliament:
   (a) The Lord High Commissioner
   (b) Any judicial office, other than the office of justice of the peace
   (c) The Auditor-General
   (d) The members of the Electoral Commission
   (e) The members of the Public Service Commission
   (f) The Public Services Ombudsman

(2) The salaries and any allowances payable to the holders of the offices to which sub-section (1) applies and the remuneration and allowances shall be a charge on the Consolidated Fund.

(3) Any alteration to the salary or remuneration payable to any person holding any office to which sub-section (1) applies or to his or her terms of office, other than allowances, that is to his or her disadvantage shall not have effect in relation to that person after his or her appointment unless he or she consents to its having effect.

86. Public Debt

(1) All debt charges for which Scotland is liable shall be a charge on the Consolidated Fund.

(2) For the purposes of this Section debt charges include interest, sinking fund charges, the repayment or amortisation of debt, and all expenditure in connection with the raising of loans on the security of the revenues of Scotland or the Consolidated Fund and the service and redemption of debt thereby created.

87. Auditor-General for Scotland

(1) There shall be an Auditor General for Scotland who shall be an individual appointed by the Head of State on the nomination of the Parliament. Such nomination shall be made by resolution on the proposal of a Selection Committee, which shall be appointed in accordance with Standing Orders to reflect the partisan balance of the Parliament.

(2) Subject to the provisions of this sub-section (3) of this Section, the Auditor General shall hold office for a term of five years, and may be re-appointed for one subsequent term.

(3) The Auditor General may be removed from office only upon a motion of the Parliament praying for his or her removal, on the grounds of misconduct, neglect of duty, or incapacity, passed by a
two-thirds majority of the members of Parliament.

(4) The public accounts of Scotland and of all courts of law and all authorities and offices of the Scottish Government shall be audited and reported on by the Auditor-General and for that purpose the Auditor-General or any person authorised by him or her in that behalf shall have access to all books, records, reports and other documents relating to those accounts.

(5) The Auditor-General shall annually submit and lay his or her reports before the Parliament.

(6) In the exercise of his functions under this Constitution the Auditor-General shall not be subject to the direction or control of any other person or authority.

(7) In reporting on public expenditures, the Auditor-General may consider not only the lawfulness and propriety of expenditures, but also questions of good economy, efficiency, effectiveness and sustainability.

**Chapter IX. Administrative and Miscellaneous Provisions**

88. Civil Service

(1) The administration of Scotland shall be organised as a permanent, professional and non-partisan civil service, the members of which shall be selected and promoted on merit and shall enjoy security of tenure during good behaviour.

(2) All members of the Scottish civil service are to act with integrity, honesty, objectivity and impartiality.

89. Public Service Commission

(1) There shall be a Public Service Commission for Scotland, which shall be responsible for –

- (a) supervising and monitoring the selection, promotion, pay, conditions of service, and discipline, of the civil service;
- (b) advising the Government on certain public sector appointments and in general on matters of personnel administration; and
- (c) Upholding ethical standards in public life.

(2) The Public Service Commission shall consist of at least three but not more than five Commissioners, who shall be appointed by the Head of State acting on the advice of the Prime Minister.

(3) The Prime Minister shall tender advice under sub-section (2) only after:

- (a) having consulted with the Secretary to the Cabinet; and
- (b) having obtained the approval of the Leader of the Opposition.

(4) A majority of the members of the Public Service Commission must be persons qualified by their knowledge of public service and their experience of senior management in the public sector.

(5) A person shall be disqualified for appointment as a member of the Public Service Commission if he or she is, or has during the last five years prior to his or her appointment been –

- (a) A member of Parliament;
- (b) A candidate at any parliamentary election; or
- (c) A member of any political party.

(6) A person shall not, while he or she holds or is acting in the office of a member of the Public Service Commission or within a period of five years commencing with the date on which he or she last held or acted in that office, be eligible for appointment to or to act in any public office.

(7) Subject to the provisions of sub-section (5) of this Section, members of the Public Service Commission shall hold office for a period of five years from the date of their appointment.

(8) The office of a member of the Public Service Commission shall become vacant –

- (a) If he or she becomes disqualified for appointment under sub-section (5) of this Section;
- (b) If he or she tenders his resignation to the Head of State, and if the Head of State, acting on the advice of the Prime Minister, given after he or she has consulted the Leader of the Opposition and the Secretary to the Cabinet, accepts such resignation;
- (c) If he or she is removed from office by the Head of State following a motion of the Parliament passed by a two-thirds majority of the members of Parliament praying for his or her removal, on the grounds of misconduct, neglect of duty, or incapacity.

(9) The Head of State, acting on the advice of the Prime Minister given after consultation with the Leader of the Opposition, shall designate one member of the Public Service Commission to serve as Convenor of the Commission, and shall designate another member to serve as Deputy Convenor.

(10) If there is any vacancy in the membership of the Public Service Commission, the Head of State shall appoint a person to fill the vacancy, acting in accordance with this Section. Provided, that until such member of the Commission is appointed, the Public Service Commission may perform its functions notwithstanding any vacancy.

(11) In the exercise of its functions under this Constitution or any law the Public Service Commission shall not be subject to the direction or control of any other person or authority.

(12) All powers, duties and functions hitherto vested in the Commissioner for Ethical Standards in Public Life by or in accordance with any law in effect in Scotland shall be vested in the Public Service Commission, and the office of Commissioner for Ethical Standards in Public Life is hereby abolished.

90. Appointment of Public Officers

(1) Subject to the provisions of this Constitution, and to any general rules concerning the recruitment, selection, pay, pensions, privileges, discipline and removal from office of civil servants and other public appointees as prescribed by law, the power to make and confirm appointments to the civil service and public bodies, and to remove and to exercise disciplinary control over persons
holding or acting in such offices is vested in the Public Service Commission.

(2) The Public Service Commission may, subject to such conditions as it thinks fit, delegate any of its powers under this section by directions in writing to any member of the Commission or to any public officer.

(3) The provisions of sub-sections (1) and (2) this Section shall apply to officers of the Scottish Civil Service and, except as otherwise prescribed by this Constitution or by any law in force in Scotland, to all other officers in the service of the Scottish Government or of any Scottish public body.

(4) The provisions of sub-sections (1) and (2) of this Section shall not apply to –
   (a) Officers of any local Council or other locally elected body;
   (b) Officers of Parliament and employees of the Parliamentary Corporate Body; or
   (c) Judicial officers, or officers of any Court in Scotland; or
   (d) Officers of the Scottish Armed Forces

(5) The Head of State, acting on the advice of the Prime Minister, given after the Prime Minister has consulted with the Public Service Commission, shall appoint and may remove:
   (a) The Permanent Secretary of each administrative department, and other officers of Permanent Secretary rank;
   (b) Any Ambassador, High Commissioner or other principal representative of Scotland in any other country.
   (c) Members of the personal staff or retinue of the Lord High Commissioner; and
   (d) Officers of the Royal Household in Scotland.

91. Public Services Ombudsman

(1) There shall be a Public Services Ombudsman, whose duty it shall be to investigate complaints made against the public service or public bodies in Scotland on behalf of the public.

(2) The Public Services Ombudsman shall be appointed by the Head of State on the nomination of the Parliament. Such nomination shall be made by resolution on the proposal of a Selection Committee, to be appointed in accordance with Standing Orders to reflect the partisan balance of the Parliament.

(3) Subject to the provisions of this sub-section (4) of this Section, the Public Services Ombudsman shall hold office for a term of five years, and may be re-appointed for one subsequent term.

(4) The Public Services Ombudsman may be removed from office by the Head of State following a motion of the Parliament praying for his removal, on the grounds of misconduct, neglect of duty, or incapacity, passed by a two-thirds majority of the members of Parliament.

(5) Subject to the provisions of this Constitution, the Public Services Ombudsman shall have the power to –
   (a) Enquire into the conduct of any person in the exercise of
   (b) Make recommendations to rectify complaints, to assist in the improvement of the practices and procedures of public bodies, and to eliminate arbitrary and unfair decisions.

(6) The Public Services Ombudsman shall not inquire into the decisions or actions of any Court or judicial decision, nor, until otherwise provided by Act of Parliament any matter referred to in the Fourth Schedule of the Scottish Public Services Ombudsman Act, 2002.

(7) The Public Services Ombudsman shall annually submit and lay his reports before the Parliament.

(8) In the exercise of his functions under this Constitution or any law the Public Services Ombudsman shall not be subject to the direction or control of any other person or authority.

92. Local Government

(1) For the purposes of local government and administration, Scotland shall be divided by law into local authority areas.

(2) Each local authority is to be administered by a Council which:
   (a) shall have autonomy in the carrying out of their functions and in the exercise of the powers vested in them by or in accordance with the law, and
   (b) shall represent and promote the interests of the people of the local area.

(3) The members of each local Council are to be elected in accordance with law –
   (a) directly by people living within the local area,
   (b) by a system of proportional representation, and
   (c) at elections to be held at intervals of not more than 5 years.

(4) Nothing in this Section shall prohibit provision being made by law for the direct election of Lord Provosts, Provosts, or other executive officers of local councils.

(5) Until otherwise determined by Act of Parliament the existing unitary authorities, having the boundaries established by the Local Government (Scotland) Act, 1996, shall continue in being.

(6) Subject to the provisions of this Section, Parliament shall by law determine the boundaries, duties, powers, responsibilities, organisation, composition and functioning of local authorities.

93. Conduct of Elections

(1) Parliament shall provide by law for the suppression of all corrupt and illicit practices in relation to elections and referendum campaigns, in order to ensure that elections and referendums are free and fair.

(2) Provisions under sub-section (1) of this Section may include, but shall not be limited to:
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(a) Regulating spending on elections and referendum campaigns by parties, candidates and other organizations or individuals;

(b) ensuring equitable access to public broadcasting media for parties, candidates and referendum campaigns;

(c) requiring donations and other sources of funds for parties, election campaigns and referendums to be openly declared; and

(d) prohibiting all foreign and corporate donations.

94. Electoral Commission

(1) There shall be an independent and non-partisan Electoral Commission, which shall consist of –
   (a) the Chief Electoral Commissioner, and
   (b) four Electoral Commissioners.

(2) The Chief Electoral Commissioner shall be a serving or former judge of at least seven years’ standing, who shall be appointed by the Head of State on the advice of the Judicial Appointments Board.

(3) The Electoral Commissioners shall be persons who are qualified and experienced in electoral law or electoral administration, of which:
   (a) two shall be appointed by the Head of State acting on the advice of the Prime Minister with the concurrence of the Leader of the Opposition;
   (b) one shall be appointed by the Head of State on the advice of the Presiding Officer, given after the Presiding Officer has consulted with the leaders of all political parties represented in Parliament other than the parties forming the Government or the official Opposition; and
   (c) one, being a member of the public service, shall be appointed by the Head of State on the advice of the Public Service Commission.

(4) No person may be a member of the Electoral Commission who:
   (a) has during the last ten years been a member of Parliament, or a candidate for election to Parliament;
   (b) has during the last five years been a member of any political party; or
   (c) is the spouse, former spouse, parent, child, sibling, niece, nephew, uncle, aunt, cousin, or business partner, of any person who has been a member of Parliament, or a candidate for election to Parliament, in the last five years.

(5) Members of the Electoral Commission shall serve for a term of six years, during which time they shall enjoy the same security of tenure enjoyed by judges; they may be re-appointed for one further term.

(6) Subject to this Constitution and the law, the Electoral Commission shall be responsible for ensuring the free and fair conduct of elections and referendums, including but not limited to:

95. Civic Honours

(1) Parliament shall, in accordance with its Standing Orders, appoint a Civic Honours Committee consisting of members reflecting the balance of the parties in Parliament, which shall have the authority to:
   (a) make recommendations to the Prime Minister in tendering advice to the Head of State under sub-section (2)(d) of Section 30; and
   (b) draw up guidelines concerning the award of honours to ensure that honours are awarded on merit, and report to Parliament on compliance with these guidelines.

(2) Honours granted under this Section shall not be hereditary and shall not entitle the bearer to any special privileges.

(3) Unless otherwise provided by law, honours shall not be accompanied by any pension or other financial reward.

96. Oaths of Office

(1) All members of Parliament, members of the Government, civil servants, police, military and diplomatic officers, and judges, as well as all other persons holding a public office under this Constitution, shall take an oath or affirmation of office in the following terms:

‘I do hereby solemnly swear / affirm that I will defend and uphold the Constitution of Scotland, and that I will perform my duties with honesty and integrity, to the best of my ability, in accordance with the Constitution and the law (so help me God).’

(2) The oath or affirmation of office may be validly taken with or without religious invocation.
Chapter X. Amendment of the Constitution

97. Power to Amend Constitution

(1) Subject to the provisions of this Section, Parliament may by Act amend this Constitution.

(2) A bill to amend the Constitution must expressly declare its intention to do so and must be designated as a constitutional amendment bill in its short title.

(3) A bill to amend the Constitution shall be published and circulated for public discussion for at least three months before being voted upon in Parliament.

(4) A bill to amend the Constitution shall not be deemed to have been passed by Parliament unless it is approved at its final reading by a three-fifths majority vote of the total membership of Parliament.

(5) Except as provided in sub-section (6) a bill to amend the constitution shall not be presented to the Head of State for assent unless –
   (a) the bill has been the subject of a national referendum held in accordance with a law enacted under Section 70; and
   (b) a majority of the votes cast in the referendum are in favour of the bill.

(6) A referendum under sub-section (5) shall not be required if the following conditions apply –
   (a) the Presiding Officer has certified that the constitutional amendment bill is of a minor, technical or non-contentious nature, and that it does not concern national independence, popular sovereignty, universal suffrage, the electoral system, the Head of State, judicial independence, or the basic structure of parliamentary democracy.
   (b) the bill has been approved by a three-fourths majority of the total membership of Parliament.

(7) The Head of State shall not grant assent to any bill to amend the Constitution unless the bill is accompanied by a certificate of the Presiding Officer stating that the procedures of this Section have been complied with; and such certificate shall be final and conclusive for all purposes.

98. Provisional Status and Replacement of Constitution

(1) Subject to sub-section (8) of this Section, this Constitution shall have provisional status and shall remain in effect only until such time as a permanent Constitution is adopted in accordance with the provisions of this Section.

(2) At any time after this Constitution has come into effect, a Constitutional Commission may be appointed by Act of Parliament to draft a permanent Constitution for Scotland.

(3) The membership of the Constitutional Commission shall be selected by or in accordance with an Act of Parliament, provided always that it shall:
   (a) proportionally represent the various political parties in Scotland;
   (b) reflect the geographical diversity of Scotland;
   (c) be gender balanced and make provision for the inclusion of ethnic, religious and linguistic minorities, young persons, and persons with disabilities.

(4) Subject to any provisions prescribed by law, the Constitutional Commission shall:
   (a) have the right to elect its own Convenor, to appoint sub-committees, and to determine the procedures and processes to be following in carrying out its task;
   (b) take decisions where possible by consensus, and where consensus cannot be reached by a two-thirds majority vote;
   (c) be supported by an Expert Advisory Panel, the members of which –
      (i) shall be appointed on a non-partisan basis from among persons with relevant knowledge and experience, as prescribed by law or by Standing Orders; and
      (ii) may include foreign nationals, not exceeding one-half of the total membership.
   (d) have the assistance of a Secretariat; and
   (e) consult with civil society and with the general public in carrying out its task.

(5) The Constitutional Commission shall report to Parliament with its recommendations for a draft permanent Constitution within such time as may be prescribed by or in accordance with the law.

(6) The draft prepared by the Constitutional Commission shall be debated in Parliament, but no amendment to the Constitutional Commission's draft may be made except by a two-thirds majority vote of Parliament, and the final text must be adopted by a two-thirds majority of the members of Parliament.

(7) The text adopted by Parliament in accordance with sub-section (6) shall be submitted to the people in a referendum held in accordance with Section 70, and if endorsed by a majority of the votes cast shall come into effect as the Constitution of Scotland on the date prescribed by law.

(8) If at the expiry of ten years from the coming into effect of this Constitution no permanent Constitution has been adopted in accordance with sub-sections (2) to (7) of this Section, this Constitution shall cease to have provisional status and shall remain in effect as the permanent Constitution, and the provisions of this Section shall thereupon cease to have any effect.

Transitional Provisions

(1) The Scottish Parliament elected in May 2016 shall continue in being as the first Parliament of Scotland under this Constitution, and shall remain as such until it is dissolved in accordance with
the provisions of this Constitution; provided, that the duration of this sitting Parliament shall be five years, with the first ordinary elections due to be held in May 2021.

(2) The rules and orders of Parliament in force immediately before the commencement of this Constitution, shall, to the extent that they can mutatis mutandis be applied in respect of the business and proceedings of Parliament under this Constitution, continue in force until amended or replaced as herein provided.

(3) The Scottish Government in office on the day on which the Constitution comes into effect shall remain in office as the Government of Scotland under this Constitution until such time as it resigns or is removed from office in accordance with the provisions thereof.

(4) A person who immediately before the commencement of this Constitution held a public office in Scotland or was employed within the public sector in Scotland, shall after commencement continue in such office or employment, subject to and in accordance with the applicable laws regulating such office or employment.

(5) With the exception of any rules of law inconsistent with this Constitution, every rule of law which is in force in Scotland at the date at which this Constitution comes into force shall remain in force until such time, if any, as it is repealed or amended by Act of Parliament or other competent legislative act.
Whilst this paper outlines the timeline for writing and ratifying the constitution of Scotland before and as part of the referendum for independence, the political circumstances faced by the country may dictate that the referendum for independence occurs before the constitution is determined. An alternate timeline for the creation of a constitution under the latter scenario is outlined in Common Weal’s 2018 book How to Start a New Country.

Sub-section (1) is taken from the Scottish Government’s 2014 Interim Constitution. Also similar to (but not identical to) the provisions on citizenship in the SNP’s 2002 text.

Sub-section (2) is inspired by the SNP’s 2002 Interim Constitution and by the Claim of Right. Sub-section (2) replicates standard constitutional supremacy clauses in New Commonwealth Constitutions. The particular form of words linking popular sovereignty with constitutional supremacy is taken from the 1972 Constitution of Bangladesh – simply because it was the text that expressed this most succinctly.

This Chapter is basically copied from the European Convention on Human Rights, with such small modifications as are hereby indicated.

This constitutionalises the principle of universal suffrage. The requirement for any deprivation of voting rights to those serving a custodial sentence to be limited to those who have committed a ‘serious’ offence (rather than a blanket ban) is an attempt to ensure compatibility with the Hirst vs United Kingdom (No. 2) decision, without rocking the boat on this sensitive issue too much.

The provisions in sub-section (4) do not confer any particular right: their intention is simply to allow decisions about abortion and euthanasia to be made primarily by Parliament and not by the courts.

This was included in the SNP’s 2002 text. Is it now a bit retro? Or still an important constitutional safeguard?

The form of words is taken directly from the SNP’s 2002 text. There is no right to trial by jury in ECHR, however, I believe it to be an important constitutional right. This is taken from the SNP’s 2002 text, with the added clarification that suspension is possible during emergencies.

Sub-section (4) is designed to ensure that existing practices are not rendered unconstitutional. Decisions about the public funding of religious schools, in particular, should be made by the legislature not the courts, and this provision is intended to provide the legislature with that latitude. The reference to the Articles Declaratory is intended to ensure that the Constitution provides reassurance to religious interests, who may recoil from a stridently secularist constitution, by recognising the constitutionality of existing practice.

Sub-section (3), on the ‘right to roam’, taken from the SNP’s 2002 text.

ECHR does not include freedom of information. This provision is inspired by the SNP’s 2002 text. Sub-section (3), on medial balance, inspired by similar provisions in the Constitution of Malta.

This form of words, taken from the SNP’s 2002 text, places the emphasis clearly on Parliament to give effect to these rights, while at the same time creating a legitimate expectation that Parliament should do so.

This is a rather standard Emergency Powers clause, as typically found in New Commonwealth Constitutions.

The provisions of this Chapter are rather standard – they are similar to the provisions relating to Governors-General in most New Commonwealth Constitutions.

The unity of Commonwealth Realms under the Crown is assured by explicit reference to the Perth Agreement, which requires the consent of the Parliaments of all realms to a change in the succession.

Sub-section (1) is taken from the Scottish Government’s 2014 Interim Constitution; sub-section (2) is taken from the 1965 Constitution of Rhodesia, simply because there is advantage in being explicit, and this is the neatest and most clear expression of the principle that I can find amongst New Commonwealth Constitutions.

This is fairly standard. The only slight novelty is that this text refers to acting on the nomination of Parliament – which is necessary, since certain officials (Prime Minister, Ombudsman, Auditor-General) are appointed by the Head of State on the basis of a parliamentary resolution.

This is a standard clause in all New Commonwealth Constitutions. It ensures that the Head of State can be adequately briefed to carry out her ceremonial / diplomatic duties without incident or embarrassment.

The appointment of a Lord High Commissioner to serve as the Queen’s representative is in accordance with Scottish tradition: the office already exists for ecclesiastical functions. The office of Lord High Commissioner is similar to that of Governor-General in other New Commonwealth Constitutions, except that in Scotland’s case it is expected that the Lord High Commissioner might not be such a permanent fixture. The Queen, living part of the year in Holyrood or Balmoral, might be expected in Scotland to exercise more of her functions in person, passing responsibility...
to the Lord High Commissioner only during her absences from Scotland.

26 Most of the provisions of this Chapter are standard – found in most or all New Commonwealth Constitutions – with only such adaptations as are necessarily to reflect existing practice under the Scotland Act.

27 Taken from the Scotland Act.

28 The restrictions on the total number of Ministers – which is intended to limit the size of the ‘payroll vote’ is taken from the SNP’s 2002 draft. Similar rules are found in India, Belize and other Commonwealth nations.

29 This is a standard clause, found in most New Commonwealth Constitutions, with the standard exceptions.

30 The norm in most Westminster-derived Constitutions is for a vote of no confidence to force the PM to choose between resignation and requesting a dissolution; some allow the GG/HoS to refuse a dissolution requested in such circumstances (e.g. Malta), while others make dissolution automatic (Jamaica). Neither model applies in Scotland, where fixed term parliaments mean that the proper response to a vote of no confidence is the election of a new Prime Minister, with resort to a dissolution only if a PM cannot be elected.

31 The first two sub-sections are standard: they provide for continuity of government. Sub-sections (3) and (4) give explicit recognition to the convention that governments in this situation should act only in a caretaker capacity, without, however, giving that convention any legal (as opposed to political) force.

32 The Ministerial Code is often an important source of rules and norms that are central to good behaviour by those in high office, but Ministerial Codes are rarely given constitutional recognition; they are often amendable at will by the government and given little publicity. This provision simply provides that the Ministerial Code must be laid before Parliament, thereby raising its prominence and providing opportunities for scrutiny.

33 This provision reflects existing practice under the Scotland Act.

34 Most of this Chapter is taken directly from the Scotland Act, with minimal modifications.

35 This keeps Parliament at its existing size (enabling existing electoral law to be used), while still allowing some scope for the expansion that would almost certainly be beneficial in the event of independence.

36 Under devolution, elections could be delayed or suspended by the UK Government if required. An independent constitution would need some way of postponing elections in an emergency situation. These provisions, reflecting international good practice, use an opposition veto and a supermajority requirement to prevent abuse of this power.

37 This provision is taken from the Standing Orders of the Scottish Parliament.

38 The Scotland Act refers to eligibility to the House of Commons as its conditions for eligibility to the Scottish Parliament – that would obviously be unsatisfactory in an independent state. These provisions mirror those in substance and are based on standard provisions in other New Commonwealth Constitutions. One notable, small, exception is that gives the Parliament authority to waive, by statute, the prohibition on foreign nationals serving – one might not wish to exclude (as Australia has done) dual citizens from being parliamentarians.

39 The only change from the Scotland Act is to include a provision requiring the Corporate Body to ‘reflect the partisan, regional and gender balance of the Parliament’.

40 It is standard practice to recognise the role of the Leader of the Opposition – an omission in the Scotland Act which must be rectified, not least because of the role of the Leader of the Opposition in advising on certain appointments.

41 This provision is a little more explicit than standard. It retains the formality of Royal Assent, but makes the withholding of assent subject to certain substantive and procedural requirements which place responsibility for its exercise upon the Presiding Officer and the Lord Advocate, rather than the monarch. This reflects also the system of pre-legislative scrutiny established under the Scotland Act.

42 This provision, enabling Parliament to hold and to regulate referendums, is included mainly for the avoidance of doubt – it prescribes that referendums on constitutional amendments are binding, while others are non-binding.

43 The provisions of this Chapter mostly reflect existing practice under the Scotland Act and other statutes. Some provisions are taken from the 2014 draft Interim Constitution. The overall intention is to ‘play safe’.

44 This provision is taken from the 2014 draft Interim Constitution. It does not add much: the real basis of judicial independence lies not in declarations of principle, but in rules of appointment and tenure. Even so, such declarations of principle have a norm-prescribing, expectation-setting function that cannot be ignored.

45 This – based on the SNP’s 2002 draft – is a necessary consequence of establishing a constitutional democracy in which the supremacy of the constitution over ordinary law is given effect.

46 This constitution follows the SNP’s 2002 draft Constitution in its provision for the parliamentary ratification of treaties and for declarations of war.

47 This provision is taken from the Scottish Government’s 2014 Interim Constitution.

48 This provision is taken from the SNP’s 2002 draft Constitution, with clearer exceptions for treaty obligations.

49 This chapter is based on standard provisions in Commonwealth Constitutions. It retains the distinction between expenditures which are charges on the Consolidated Fund and those dependent upon annual votes.

50 This provision is taken from the Scottish Government’s 2014 Interim Constitution.

51 An independent Scotland, with its own civil service, would need its own Public Service Commission to manage it. Since this would, in part, replicate the existing functions of the Commissioner for Ethical Standards in Public Life, the latter position would be redundant and is abolished.

52 This reflects existing provisions of the Scotland Act, combined with the appointment procedures in Standing Orders.
These provisions reflect those of the Scottish Government’s 2014 Interim Constitution. They carry over existing practice, establish the principle of local democracy, and protect local authorities from abolition, while leaving a lot of discretion to Parliament.

An independent Scotland would need its own Electoral Commission. The provisions of this section are based on standard practices in other Commonwealth Realms.

The amendment formula is based on that of the SNP’s 2002 draft Constitution: a 3/5ths parliamentary majority, followed by a majority of votes cast in a referendum. This seems a reasonable balance between rigidity and flexibility. It also upholds the principle of popular sovereignty. However, to avoid the need for a referendum on minor, technical and uncontroversial matters, an alternative amendment route (3/4ths majority in Parliament).

Given the intention that this would be only a provisional constitution, it includes provisions for its own replacement by means of an inclusive, participatory constitution-building exercise. However, it also allows for the possibility that there might be little appetite for such an exercise, in which case, after a period of time, the provisional simply becomes (subject to the usual amendment rule) permanent.