THE DAVID HUME INSTITUTE

AGENDA FOR THE SCOTTISH PARLIAMENT

Hume Occasional Paper No. 57

The David Hume Institute
21 George Square
Edinburgh EH8 9LD
Telephone 0131-650 4633
Fax: 0131-667 9111

ISBN 1 870482 58 1

Printed by Pace Print (Edinburgh) Ltd.

AGENDA FOR THE SCOTTISH PARLIAMENT*

THE DAVID HUME INSTITUTE

1999

*The sponsorship of this series by Esmée Fairbairn Charitable Trust is gratefully acknowledged.

CONTENTS

CONTRIBUTORS

Roy Goode is Emeritus Professor of Law at the University of Oxford

Russel Griggs is Executive Director of Scotland the Brand

Hector MacQueen is Director of The David Hume Institute and Professor of Private Law at the University of Edinburgh

Brian G M Main is Research Director of The David Hume Institute and Professor of Economics at the University of Edinburgh

Hugh Morison is Director of the Scotch Whisky Association

Lindsay Paterson is Professor of Education Policy at the University of Edinburgh

Jeremy Rowan Robinson is Professor of Law at the University of Aberdeen

FOREWORD

This Hume Occasional Paper reviews the seminar series entitled 'Agenda for the Scottish Parliament' which was held in 1998-99 under the auspices of The David Hume Institute. The purpose of the seminar series was to examine some of the subject areas that fall within the powers of the new Scottish Parliament under the Scotland Act 1998. We are grateful to the Institute's sponsors without whom this work would not be possible and we are especially indebted to the Esmée Fairbairn Charitable Trust who took a particular interest in this seminar series.

The exact schedule of seminars was as follows:

8 October 1998 Bill Jamieson (Journalist and author)	'The Economy'
19 November 1998 Vernon Bogdanor (Univ. of Oxford)	'The Start of a New Song'
25 November 1998 Roy Goode (Univ. of Oxford)	'Commercial Law and the Scottish Parliament'
10 December 1998 Lindsay Paterson (Univ. of Edinburgh)	'Education and Training'
21 January 1999 Russel Griggs (Scotland the Brand) Hugh Morison (Scotch Whisky Assoc.)	'Marketing Scotland and Scottish Products'
4 March 1999 Duncan Maclennan (Univ. of Glasgow)	'Housing and Regeneration'
18 March 1999 Jeremy Rowan Robinson (Univ. of Aberdeen)	'Land Reform'
8 April 1999 David Simpson (Standard Life)	'The Economics of Independence'

The Vernon Bogdanor lecture has been published as **Hume Occasional Paper No. 55** and a background paper to the David Simpson seminar

was published as **Hume Occasional Paper No. 56.** The current **Hume Occasional Paper** contains a summary chapter reviewing the entire series, written by Hector MacQueen and Brian Main, and also contains the papers by Goode, Paterson, Morison, Griggs, and Rowan Robinson, as used in their seminars.

It remains to be seen whether the suggestions and recommendations made in these pages have any direct impact on policy making by the Scottish Parliament, but it seems certain that the importance of these themes is unlikely to go unnoticed by the new MSPs, the Scottish Executive or the Scottish electorate. As always, it is necessary to emphasise that as a charity the Institute holds no collective views on the issues or the policy matters raised here, save the certitude that they are worth discussing.

Hector L MacQueen and Brian G M Main
Directors of The David Hume Institute
September 1999

Agenda for the Scottish Parliament: an overview

Hector MacQueen and Brian G M Main

Introduction

The range of topics covered in this collection of seminar papers is wide. That range serves to emphasise that the powers devolved to the Scottish Parliament are, indeed, significant and capable of exerting substantial change on the social and economic conditions of the Scottish population. In what follows, we first comment briefly on the powers devolved to the Scottish Parliament and then provide a brief thumbnail sketch of each speaker's paper. As explained in the preface, the papers themselves have, for the most part, been published elsewhere as earlier **Hume Occasional Papers**, or are reprinted here.

The Scotland Act: devolved powers and reserved matters

The Scotland Act 1998 sets up a Scottish Parliament which enjoys the power to legislate in all areas other than those which are expressly reserved to the Westminster Parliament. The list of reserved matters is extensive, and can be summarised as covering principally the constitution, foreign affairs and defence, fiscal, economic and monetary policy, areas affecting the "common market" of the United Kingdom, social security, and employment. This nonetheless leaves a large number of key areas within the legislative competence of the new Parliament: examples likely to be of crucial political importance are health, housing, education and training, local government, the transport infrastructure and regulation of its use, the attraction of inward investment, and land use and planning, while the general reform of Scots law outside the reserved matters (normally already covered by United Kingdom-wide legislation) will probably now usually fall to be dealt with in Edinburgh rather than at Westminster. Two other points can also be made: first, in a number of cases the scope of the reservation is by no means clear; and second, that restrictions on legislative competence do not prevent the Scottish Parliament from being a forum in which debate can be conducted about the reserved matters as they are seen to affect Scotland.

It thus seems certain that the agenda of the Scottish Parliament will not be confined to its devolved powers, and it was on this basis that The David Hume Institute approached the arrangements for a seminar series under that title in the winter of 1998-1999. While we were concerned to consider topics upon which it was likely that there would be legislation, we were also anxious to keep in view the fact that the Scottish Parliament will be playing a role in the United Kingdom, and that issues in that wider setting will inevitably have an effect upon what happens in Scotland. Indeed, we had to keep in mind the widest issue of all: whether a devolved Parliament with restricted powers will satisfy the popular demand for an increased measure of Scottish self-government, or will lead rather to calls for greater powers or even a breakaway altogether from the United Kingdom. Thus the series and this publication took account of areas which are not devolved, precisely because one way or another these will have a crucial impact upon the success or otherwise of the new arrangements.

Such considerations explain the choice of topics for the series, the discussion of which is summarised in the remainder of this Introduction and the detail of which can be studied in the rest of this publication. Given limited time, inevitably some important subjects such as health, transport and local government were not covered—a gap which we hope to fill in future seminar series and publications. But as the summaries below will reveal, we examined many of the other areas which will be of major concern to the Scottish Parliament in its early years.

The Economy

In his discussion of the Scottish economy on 8 October 1998, Bill Jamieson started with a summary of the current state of the world economy. At the time he spoke, the Asian economic crisis was at its height and appeared to be on the verge of plunging the rest of the world's economy into depression. In the event, for reasons that have yet to be fully analysed, that catastrophe did not occur. But this does not lessen the force of Jamieson's argument that a number of adverse factors in the macro-economy and in political affairs, to say nothing of the restrictions upon its legislative competence, may well severely constrain the Scottish Parliament at the outset of its existence; and

such constraints are likely to result in strains on the budget settlement as defined in the Barnett Formula.

While being seen as a binding constraint in Scotland, Jamieson saw other regions in the UK becoming jealous of what they perceive as the relatively generous settlement in terms of the fiscal transfers implied by the Barnett Formula (at least as it currently impacts on public spending in Scotland). The Scottish Parliament with its increase in transparency will inevitably bring out into the open the extent of the fiscal transfer through the block grant to Scotland from the rest of the UK. While, in the long run, the Barnett Formula is designed to bring about an equalisation in per capita public spending in Scotland, the very public scrutiny that the Parliament is designed to achieve will make it very clear to those in certain areas of England, such as the North East, that their own provision is less generous. This makes any relaxation or bypass of the Barnett Formula highly unlikely.

Jamieson expressed concern that in any global downturn there would undoubtedly be a marked reduction in the level of foreign direct investment in Scotland with a consequent depressing effect on the Scottish economy. This would leave the policy makers in the Scottish Parliament looking for ways to increase spending to stimulate recovery, and, hence, in a position of being under pressure to deploy the tax raising powers available to them under the Scottish Variable Rate.

Jamieson encouraged the Scottish Parliament not only to forego such upward movements in tax rates, but recommended that tax rates be cut in an attempt to secure Laffer-curve type effects, whereby lower tax rates so stimulate economic activity that tax revenues actually rise at these lower rates, to yield greater tax revenues than are forthcoming at higher rates. Here he echoed arguments elaborated in detail earlier in the year in his Centre for Policy Studies booklet, *The Bogus State of Brigadoon*, where he called on Scotland 'to pull herself out of a nosedive towards political and economic implosion' by setting out on a 'new agenda'. Prominent on this new agenda are cuts in the marginal rate of income tax (at the 40% rate rather than the basic rate which is actually open to the Scottish Parliament), and cuts in capital gains tax and cuts in inheritance tax. All of these are seen

as providing Scotland with the tools to meet the challenge of globalisation.

Further supply-side improvements recommended by Jamieson include attention to both education and training, topics returned to below. The general thrust of the Jamieson argument was that devolved powers to Scotland need not mean more of the same. The potential of home rule was seen as lying in the ability to strike out in fresh new directions which free up market forces and allow the Scottish economy to thrive rather than falter in the global economy.

Relations with Westminster

In this paper, delivered as the annual Hume Lecture on 19 November 1998 and published separately as *The Start of a New Song* (**Hume Occasional Paper No. 55**), Vernon Bogdanor argued that the constitutional settlement represented by the Scotland Act 1998 is bound to introduce difficulties for the traditional doctrine of the supremacy of the Westminster Parliament. This doctrine, while enshrined in the Scotland Act 1998, and itself something with which David Hume would surely agree, will become difficult to maintain, according to Bogdanor, owing to the fact that power has been devolved to the Scottish Parliament. In this he took a contrary view to the conventional wisdom of constitutional theory where the old saw, power devolved is power retained, holds sway. The Bogdanor argument is that the political reality is that power devolved is, in fact, power transferred. This renders the notion of the continuing United Kingdom state as a unitary state as a sham, because in practice the state of affairs will be to all intents and purposes quasi-federal. It is then only a matter of time before other regions demand parity in treatment with Scotland and the process continues inexorably towards federalism. The one inhibition that may slow up this process is the extremely weak sense of regional identity in England itself. With the exception of areas in the North and Southwest most residents in England would struggle to identify 'their' region.

One on-going and much discussed perception of difficulty with the Scotland Act is the eponymous West Lothian Question. This Bogdanor found to be a non-question owing to the way in which the block grant to Scotland is to be calculated using the Barnett formula.

Under this formula Scotland retains a vital interest in the debate regarding how much should be spent on health, education, law and order, and so on, as these levels of expenditure for England will drive the level of spending available to the Scottish Parliament. While it is true that the Scottish Parliament retains the discretion to vary the ways in which this block grant is spent (with more, say, on health and less, say, on education), the total spending available varies from year to year to reflect the variation agreed for England (to be precise, the Barnett Formula guarantees that if an extra £100 per head in spent in England on devolved areas, the exactly £100 per head extra will be available in Scotland[1]). The ongoing participation (and, of course, voting) of Scottish Westminster MPs in these matters is therefore entirely appropriate from this perspective.

In terms of the 'slippery slope' argument regarding the political consequences of devolution leading inexorably to Scottish independence[2], Bogdanor opines that it is far more likely that the exposure of the Scottish National Party to debate and scrutiny regarding its policies across a wide area is more likely to bring about splits and factions in that party and so inhibit rather than encourage any move to separatism.

Commercial Law

In his lecture on Commercial Law in the context of devolution, delivered on 25 November 1998, Roy Goode's analysis begins with the success of English (and he does not mean British) commercial law, which he attributes to its ready recognition of markets, physical and abstract; the sanctity and freedom of contract, without excessive intervention or reallocation of business risks on grounds of fairness;

---

[1] Given that the per capita level of public spending is currently significantly higher in Scotland than in England, then this formula also has the effect that in the long run the average level of per capita spending in both countries will be driven to equality.

[2] The economic considerations surrounding a move to Scottish Independence are considered in **Hume Occasional Paper No. 56** by Simpson, Main, Peacock and Zuleeg (1999).

an efficient and informal dispute resolution process; and the relative absence of legislation and mandatory laws, allowing self-regulation through a flexible law of contract and property together with an effective insolvency law. This has allowed English law to recognise without legislation the new world of derivatives and electronic commerce. In the development of commercial law Goode sees a recurring struggle between form and substance, between concepts and policy. Commercial legislation, mostly fashioned in the Victorian era, is out of step with the realities of modern markets: Goode's radical solution, perhaps a surprising one given that he has previously identified as a strength of the system the relative absence of legislation, is a Uniform Commercial Code along the lines of the American model. The reform of commercial law may be seen as essentially a UK or Westminster matter; yet a close study of the list of reserved powers in Schedule 5 of the Scotland Act seems to leave open a number of possibilities, particularly if we bear in mind that existing Westminster legislation in a devolved area can be amended or repealed, that codification is not excluded, and that the private law of obligations and property is devolved, along with rights in security and floating charges (which Goode subjects to critical analysis). The Scottish Parliament does therefore provide an opportunity for at least some of the necessary reforms of our commercial law.

Education

In his paper on education, given on 10 December 1998, which is printed separately later in this volume, Lindsay Paterson explains that the growth and expansion of democracy has been accompanied by a growth in education. This is seen to be especially true in Scotland and to present a particular set of expectations from in increasingly educated and democratically empowered citizenship. People want more, ever more, education, they want a visible measure of accountability in its delivery and, as a manifestation of this demand for accountability and responsiveness Paterson sees a clear endorsement for the principle of Scottish home rule as manifested in the Scotland Act 1998.

Paterson sees the Scottish Parliament as facing the challenge of expanding opportunities on the education front. A prime example of

this is the move away from the old Higher to Higher Still, a move that has the potential to satisfy the increasingly exacting demands of an ever more informed and educated class of parents, and indeed the demands that children themselves express partly as a reflection of their parents' views. The comprehensive principle, seen to have been a success in Scotland, is in need of renewal. Renewal particularly in terms of ensuring social inclusion as the system, in general, strains under increasing numbers and organisational and curriculum change.

Such a renewal of the comprehensive principle is seen by Paterson as easing the transition into higher education. Here a role is seen for the Parliament setting up a fund for lifelong learning, whereby projects could be funded that would widen access through television and radio broadcasting as well as internet access.

There is also a call for a more open system of governance in terms of setting educational policy, a process which is seen, at present, as being quango-dominated and opaque. There is a clear challenge here for the Scottish Parliament to work in concert with bodies such as the School Inspectorate, the Scottish Qualifications Authority, the teachers, parents, pupils and the wider community to develop new policies. The governing bodies of schools, colleges and universities, it is argued, should be similarly opened up to wider scrutiny and participation.

Paterson ends his lecture with a discussion of the connection between education and citizenship. This is a discussion that has also been visited more recently in England. Paterson's view is that Scottish education already achieves much in this direction. It delivers a wide based education, it allows pupils to discover and experience a degree of independence in learning. He also points to Modern Studies as being the prime example of a civics education in Scotland. But the Scottish Parliament faces some testing questions on this issue. For example, to what extent will regional differences within Scotland be encouraged to emerge in the educational process, likewise cultural differences with the prospect of separate Islamic schools with distinct Islamic communities?

This lecture sees the Scottish Parliament as having the opportunity to build on a generally successful record of education in Scotland over

the last 30 years, but it also sees that very success as providing a testing audience and electorate for the Parliament.

Marketing Scotland and Scotland's Products

This lecture, held in Glasgow on 21 January 1999, benefited from a dual presentation by Hugh Morison of the Scotch Whisky Association and Russel Griggs of Scotland the Brand. Morison concentrated on explaining the vital role that marketing played in the modern market economy. Consumers require and, indeed, demand to be educated about products and services. In an environment of rapid change it is no longer appropriate to rely on past loyalties (as Marks and Spencer has recently discovered to its cost).

Perhaps understandably, Morison takes as an example of a successful product, Scotch whisky, which constitutes the UK's fifth largest manufactured output, and Scotland's leading output as measured by value added. Several key elements in the success of Scotch whisky are identified. These include a legally enforceable quality definition, an associated range of powerful images, the characteristic of being an environmentally friendly 'green' product, possessing variety leading to niche markets, and being produced by companies that have vigorously built up the product and met the challenge (and opportunities) of globalisation.

One key area where the Scottish Parliament could play a part in enhancing the success of this and other Scottish products lies in tackling discriminatory trade barriers and discriminatory tax regimes. Certain successful battles have been won in Korea and in Japan against the former, but much remains to be done. And in terms of taxation, even the European Union is seen as exacting discriminatory alcohol taxes. But these measures are, for the main part, related to the reserved powers of the Westminster Parliament.

It is in the area of trade promotion and image building that the Scottish Parliament is likely to be able to exert most beneficial influence of the marketing and selling of Scottish products. Trade missions under Scottish Trade International are seen as being hugely important. The work of Scottish Enterprise and the associated Local Enterprise Companies is also seen as vital in educating the small to

medium enterprises that are likely to hold the key to Scotland's future prosperity.

Likewise, powers of the Scottish Parliament over local authority finance (the uniform business rate, etc.) and certain aspects of regulation are seen as key ways of maintaining and encouraging the competitiveness of Scottish enterprises. But in a settlement where most fiscal issues and trade considerations are reserved to Westminster, the most direct way the Scottish Parliament can improve Scotland's recognition and visibility abroad is through its own existence and conduct. A plea is made here for the Parliament to strive for an image of quality and modernity while not forgetting its history or traditions.

Scotland the Brand

Following on from Hugh Morison, Russel Griggs picked up many of the same themes but took a more generic approach to Scotland and its products. After explaining the origins of the 'Scotland the Brand' agency, Griggs went on to describe in fascinating detail how they had recently mounted an extensive empirical exercise in England, France, Germany, Japan, Spain and the USA to assess exactly what it is that people associate with Scotland.

Desk research had produced certain possible and plausible themes such as 'spirit', 'integrity', 'tenacity', and 'inventiveness'. But market-research interviewers elicited data from respondents in these various countries telling a rather different story. Scotland has positive and strong associations in terms of environment and education, but does not score at all well in terms of innovation and inventiveness. The reality is that Scotland evokes images that are in and of the past.

On a more positive note, however, integrity does emerge as a strong factor, and Griggs spends some time using the recent location of Cadence in Scotland to tie in such notions of integrity to Intellectual Property Rights and the importance of the legal system in Scotland.

Once again a very strong and immediate role for the Scottish Parliament is identified as being by virtue of its very existence -- both in the sense of being a modern progressive legislature, but also in a more physical and visible sense. Griggs makes a special plea for the

new Parliament building to make prominent use of Scottish resources in a way that highlights Scotland's products to the world.

Housing

On 4 March 1999 Duncan Maclennan provided a comprehensive review of the state of housing in Scotland at the end of the twentieth century. One of the themes to which Maclennan returned was the existence of Scottish Homes. With the continuing sell-off of the public housing stock to existing tenants (privatisation) and the increasing efforts being made to shift those houses that remain in the public sector to housing associations and away from public authorities such a Scottish Homes or the local authority housing departments, there are those who ask whether there is any need for Scottish Homes to continue in existence. This is particularly true in an age when several political parties are, in theory and rhetoric at least, hostile to quangos. While declaring an interest as an outgoing Board Member, Maclennan argued that the role fulfilled by Scottish Homes in developing strategy and formulating policy in the housing sector in Scotland, would need to be done by some body, no matter what its title. The argument goes, then, that little would be achieved by abolishing Scottish Homes other than having to recreate it elsewhere.

Land Reform

On March 18, in the lecture which undoubtedly attracted the most heated discussion (and which is printed separately below), Jeremy Rowan Robinson explained that the term 'land reform' is not one widely used among lawyers. He does admit that the involved parties, whether it is a tenant farmer seeking ownership or security of tenure, a hillwalker seeking access, a developer seeking planning permission, or a landowner seeking privacy that each would be in no doubt as to its meaning for them. In order to bring some coherence to the subject the lecture is divided into five themes, namely:

- stewardship;
- community involvement in land;
- access to the countryside;
- planning gain;
- compulsory purchase and compensation.

These are portrayed as Rowan Robinson's 'desert island discs' if he were limited to five topics on land reform to lay before the Scottish Parliament.

On stewardship, the key issue is seen as one of establishing responsibilities as well as rights. Government intervention here is also commented on in the nature of the, mainly European Union subsidy programmes which support agricultural output to the tune of £450m and yet afford a more modest £20m for agricultural environmental issues. Rowan Robinson argued that this balance is not correct, although this itself will lie beyond the direct influence of the Scottish Parliament. On community involvement in land, the recommendations of the Land Reform Policy Group are highlighted. Here the emphasis is on providing opportunity to communities to purchase land. Rowan Robinson find this in itself unobjectionable, especially when one considers the substantial subsidy through right-to-buy programmes for council house privatisation and the MIRAS scheme of mortgage-interest-tax-relief. But the emphasis is seen as wrong with the true priority being to provide voice to local communities in matters pertaining to land use.

On access to the countryside the work of the Access Forum (a voluntary body comprising interested parties such as the Scottish Landowners Federation, the National Farmers' Union and the Scottish Crofters' Union) is generally praised as being measured and reasonable. Rowan Robinson then discusses the recent trend in 'planning gain' whereby planning authorities have extracted a local betterment levy on developers in return for planning permission. The plea to the Scottish Parliament is that such levies be restricted to reflect the actual costs of infrastructure requirements and other problems created by the development in question. This would be consistent with Scottish Office guidelines which currently have no legal force.

Finally the situation with compulsory purchase and consequent compensation is seen to cry out for urgent action by the Scottish Parliament. The process of compulsory purchase is seen to be far too long and drawn out, and the compensation when it is made is seen to be inadequate in several senses. The conclusion is that this is an area of rapid change where the Scottish Parliament will be centrally involved and where it has great potential to improve matters if it gets it right.

Economic Aspects of Political Independence.

In the final lecture of the series, David Simpson presented the results of a research study that had been commissioned from The David Hume Institute by MacDonald Orr Ltd. to investigate the economic aspects of independence. This work was carried out by David Simpson, Brian Main, Sir Alan Peacock, and Fabian Zuleeg and is the subject of the separate **Hume Occasional Paper No. 56**. The methodology adopted by the research team was to choose several countries of similar size and position to Scotland and to compare their performance with that of the Scottish economy. The countries chosen are Denmark, Finland, Ireland and Norway. From the comparative data available the team suggested that there was no reason to doubt that as a politically independent economy Scotland would have, under the appropriate pro-business policies, every prospect of thriving and achieving a growth rate that in the past has eluded it.

In this comparative work the case of Ireland received particular attention, given its proximity to the UK and its recent high degree of involvement with that economy. Of course, recent years point to a remarkable success story reflecting successful pro-business policies adopted by the Irish government and the beneficial side effects of membership of the European Union. The benefits of EU membership in terms of inward investment of structural funds would not be a likely prospect for an independent Scotland as with the imminent

enlargement[3] of the EU Scotland would almost certainly be above any measure of poverty or underdevelopment that would be used as a criterion for qualification for such funds. In addition, it was pointed out that for much of the period of the Republic of Ireland's independence the economic policies pursued had been anything but helpful and the growth rates attained anything but impressive.

The research study also examined the thorny issue of transition and here its conclusions were less sanguine. With the heavy reliance on its financial sector, the Scottish economy is particularly exposed to business confidence. While membership of EMU would offer confidence, such membership would depend on UK membership, given the current exposure of Scottish trade with the rest of the UK. Absent UK membership, then Scotland would continue to use sterling. Even with the prospect of EMU membership, however, the challenge of meeting the required Growth and Stability Pact is a daunting one for the Scottish economy. It is daunting because of the large structural deficit that the Scottish economy currently runs with the rest of the UK. Although the study drew back from any attempt to forecast future trends in such figures and while recent movements in the deficit have been in the direction of an improved balance, the figures presented in the study do suggest that transition to independence would not be without its difficulties and that this would probably be the area where most research attention is merited. One irony that was pointed out in the study is that under the constitutional settlement in the Scotland Act 1998, the operation of the Barnett Formula as a mechanism for deciding the funds available to the Scottish Parliament is set to produce a squeeze on public spending (labelled by some commentators as 'the Barnett Squeeze') that is likely to frustrate the Scottish Parliament, cause some tensions between it and Westminster and, at the end of the day, move the economy away from its current fiscal deficit with the rest of the UK. This last effect would, of course, lessen the transition problems alluded to above.

---

[3] The Visegrad Four (Poland, Hungary, Czech Republic, and Slovakia); the Baltic Three (Estonia, Latvia, Lithuania); not to mention Slovenia, Bulgaria and Rumania, nor, indeed, Cyprus, Turkey or Malta. A long queue of potential entrants!

Conclusion

Through this summary and the more detailed papers presented below, the debate and discussion started in The David Hume Institute 1998-99 seminar series, Agenda for a Scottish Parliament, can continue and be allowed to exert an ongoing influence. In our forthcoming seminar series in 1999-2000, we hope to address additional topics such as referendums, transport, relationships with the rest of the European Union, and aspects of health service delivery. The agenda for the Scottish Parliament is a long one and is sure to stimulate a high and ongoing level of interest. The David Hume Institute, as a charitable body, takes no position in itself in any of these matters but is happy to provide a vehicle for policy analysis and discussion.

Bibliography

Bogdanor, Vernon (1998). The Start of a New Song. Edinburgh: Hume Occasional Paper No. 55.

Jamieson, Bill (1998). The Bogus State of Brigadoon. What can save Scotland? London: Centre for Policy Studies.

Simpson, David, Main, Brian G. M., Peacock, Sir Alan, and Zuleeg, Fabian (1999). Economic Aspects of Political Independence. Edinburgh: Hume Occasional Paper No. 56.

Commercial Law and the Scottish Parliament

Roy Goode

Introduction

Having had the privilege of delivering the Miller lecture some years ago and then enjoyed the glorious hospitality for which Edinburgh is famous, I am delighted to have been asked to pay a return visit to this great city and university.

My task tonight is to offer some thoughts on the current state of commercial law in the United Kingdom and on its possible future development. My focus will be on the private law governing commercial transactions, as opposed to business regulation. Let me say at once that while I am a great admirer of the Scottish legal tradition and of its distinguished scholars, past and present, several of whose works adorn my bookshelves, my knowledge of Scottish commercial law is very limited and of Scottish legal procedure even more so. For a start, the terminology is somewhat confusing to an Englishman, and even the legal Latin is entirely different. I have a vivid memory of my one and only involvement with an action in the Court of Session, when I was on the other side of the legal profession and our clients were defending a large claim for recovery of a bank deposit and making substantial counterclaims. I sent copies of the pleadings to the client company, which was English, and almost immediately after received a puzzled telephone call from the company secretary:

"Roy, what does this mean? 'The defender's averments being irrelevant *et separatim* lacking in specification, a decree of *absolvitur* should accordingly be pronounced.' "Don't worry about it, John." I said. "It's just Scottish ritual and almost entirely harmless!"

I want to talk this evening about three issues. The first is whether the commercial laws of England and Scotland provide the commercial community of the United Kingdom with what it is entitled to expect of its courts and its legislature. What are the desiderata of a sound system of transactional rights and duties? And how far are these being met? The second is whether the law governing commercial transactions—which in both jurisdictions is still largely based on

common [case] law—should be codified, and if so, whether this should take the form of an enacted code or a restatement. The third is whether, if a code were to be produced, it should be for the whole of the United Kingdom or should make separate provision for the two jurisdictions.

Commercial law as a response to commercial activity

The driving force in the evolution of commercial law is the practices and usages of the business community. Bankers and businessmen are constantly devising new products with which to capture customers and enhance their competitive position. They may initially do this without reference to lawyers at all, but at some stage they are likely to consult their legal advisers to see whether what they are doing is legally valid or to draft documents which will achieve the desired objective. In many cases the novelty of the product is such that no reported decision will be found that is directly in point. In such a case the lawyer has to advise from the standpoint of general principle, and his advice is likely to be significantly influenced by the judicial environment, and in particular the responsiveness of the law and the judges to emerging commercial needs. In the history of English law there have been judges who recognised the importance of upholding reasonable commercial practice and have done everything they could to facilitate new business instruments and to advance the predictability of decisions. One of these is rightly regarded as the founder of English commercial law. I refer, of course, to William Murray, who as Lord Mansfield served as Lord Chief Justice of England for no less than 30 years and of whom the Duke of Richmond had earlier written, on Murray's first entry into Parliament, that:

"The only objection that can be made to him is what he can't help, which is that he is a Scotchman, which (as I have a great regard for him) I am extremely sorry for."[4]

---

[4] Letter from the Duke of Richmond to the Duke of Newcastle, quoted in C.H.S. Fifoot's brilliant biography, *Lord Mansfield*, at p. 33.

It is, indeed, ironic that it should have been a Scot who first gave shape to English commercial law, welding a mass of undigested case law into a coherent set of principles, and using his profound knowledge of both the common law and the civil to remould concepts so as to produce commercially sensible results. But I hope I shall not be thought unduly xenophobic in pointing out that while William Murray no doubt enjoyed an exemplary education at the Perth Grammar School, he left Scotland for good at the tender age of 14 and the academic foundations of his future career were laid firmly at Westminster School, London, and Christ Church, Oxford. The other great judge who attached huge importance to the upholding of legitimate business practice is of our own time. Lord Denning, whose extraordinary gift of empathy continues to enthral everyone he sees as he approaches his 100th birthday and who still lives in the little Hampshire town of Whitchurch where he was born, was firmly of the view that courts should be slow to invoke legal doctrine to strike down established commercial usage.

"When merchants have established a course of business which is running smoothly and with no inconvenience of injustice, it is not for the judges to put a spoke in the wheel and bring it to a halt. Even if someone is able to point to a flaw, the courts should not seize on it so as to invalidate past transactions or produce confusion."[5]

On the other side of the line we have Lord Holt, in many ways a great Chief Justice of the King's Bench, who nevertheless proved extremely hostile to what he perceived to be mercantile encroachments on the common law and who single-handedly obstructed recognition of the negotiable character of a promissory note to the point where it became necessary for the merchants to procure an Act of Parliament[6] to surmount his opposition.

Where the legal system and judicial attitudes are seen as receptive to informality of transactions and sympathetic to the reasonable aspirations of the commercial community, a strong motive power is thereby given to innovation in business structures and techniques

---

[5] *United Dominions Trust Ltd. v. Kirkwood* [1996] 2 QB 431 at 454-455.

[6] 3 & 4 Anne, c. 9.

and to the development of sophisticated markets capable of attracting large volumes of business not only within the country but from all around the globe. English commercial law, as I shall show, strongly supports party autonomy in business dealings and adopts a very liberal attitude towards contractual remedies and the creation and enforcement of security rights. It is thus no accident that London and New York are world financial centres, and that capital cities in countries that have a more paternalistic attitude towards the conduct of business are not. And since law is not created in the abstract but evolves as a response to human activity, it is not surprising to find that the degree of sophistication of a country's commercial law is directly related to the level of it entrepreneurial activity and the sophistication of its markets and its business forms and practices.

The changing patterns of trade and finance

What, then, does a highly developed commercial community expect of the private law governing its commercial transactions? To answer this question we need to look a little more closely at what those engaged in banking and commerce actually do and how they organise their affairs. Business activity typically takes two forms, the conclusion of contracts and the transfer of assets of various kinds—land, goods, securities, claims and other intangibles—either absolutely or by way of security. While the fundamentals of such transactions have no doubt remained basically unaltered from what they were in Biblical times, the last half of the 20th century has witnessed the most profound changes in the scale, speed and organisation of transactions.

For a start, we have the growth of specialised markets in commodities, securities and finance, each with their own membership and operational rules and their own settlement and payment systems, and each spinning off derivative products (futures, options, and the like) which can be traded separately from the underlying trade or financial transaction. Secondly, we have the phenomenon somewhat misleadingly termed globalisation, and more accurately described as the interdependence of major world markets and the practice of issuing and dealing in securities in the markets of different countries at the same time. These two factors have facilitated the standardisation of contracts and contract

procedures, both domestically and internationally, and have greatly enhanced the importance of contractual procedures to reduce market risk, such as the multilateral netting out of contracts and the contractual mechanism by which contracts between traders are novated to a central well-funded clearing house, so that the risk of default is internalised and transferred from the trader to the clearing house. Thirdly, the sheer scale of modern business is unprecedented. To give an example, the CHIPS clearing system in New York processes over $1 trillion dollars of inter-bank payments *every night*. Again, huge amounts of money are raised on the domestic and international securities markets.

These developments have forced a re-examination of trading and settlement methods which has implications for our commercial law. The commercial community took pride many years ago in the development of what I have termed documentary intangibles, that is, negotiable paper by which intangible rights can be reified by incorporation into a document which is the legal embodiment of the rights, enabling the holder to transfer rights to payment or to possession of goods or entitlements to securities to be transferred by delivery of the paper and by which goods could be pledged or sold and resold while still in transit. We came to recognise that the concept of negotiability facilitated transfers and liquidity, and all this could be done by a short writing authenticated by a signature. The whole of our law on negotiable instruments and bills of lading, not to mention international conventions, is predicated on agreements being made in writing and signed. But in recent times we have been almost overwhelmed by the volume of paper and have belatedly come to see that paper-based titles and transfers create serious problems: problems of storage, of risk of theft or loss, and of insurance and transportation. So we have had to devise new and paperless forms of issue and transfer, such as electronic funds transfer, electronic bills of lading, the issue and transfer of securities in dematerialised form and the immobilisation of paper with depositary institutions, the depositors giving up ownership of their securities in exchange for rights represented by a security account with their depositary.

All this has been made possible by new technology, which enables vast quantities of data and transfer instructions to be stored and

transmitted around the globe at the drop of a hat. But this is not all. An increasing volume of trade is conducted over the Internet, where you may conclude a cross-border contract without having any idea through what countries your communications have passed or even the identity of the with whom you are contracting. And it will not be very long before we all give up using notes and small change and carry round with us a smart card stored with digital cash with which to pay for goods and services.

The scale of modern finance, coupled with the growth of privatisation and the move from sovereign risk to enterprise risk, has also brought into sharper focus the need for effective and efficient security devices which will help to safeguard creditors against the consequences of their debtors' default and insolvency. And here again we see profound changes. The assumption that banks and other financiers can and will inspect collateral before lending against it no longer holds true in many cases. Banks do not have the facilities for inspections of this kind, except in the isolated case. Moreover, it is simply not feasible for banks to engage in an indeterminate number of one-shot security transactions in which a particular advance is made against a particular asset. There has been a growing trend away from security in specific assets and towards global security. What banks need is the ability, by a single security instrument protected by a single filing in a public registry, to make present and future advances against classes of asset, or even against all the debtor's assets, both present and future. Further, traders want to have the facility of raising substantial funds against their receivables without disturbing their relationships with their customers. Hence the sharp move in recent years from notification receivables financing, such as old-style factoring, to non-notification invoice discounting, in which the trader, having assigned his receivables, is left to collect them in and pay them over to the assignee, no notice of the assignment being given to customers unless and until the assignee considers it necessary to take over collection direct. Accordingly legal requirements which make intimation of an assignation of debts a condition of the validity of the transfer against the assignor's trustee in bankruptcy or liquidator simply do not respond to modern commercial and financial needs.

The implications for commercial law

I have said that most commercial activity consists of the making of contracts and the transfer of assets. Accordingly, the legal underpinning of this activity is provided primarily by three great branches of law, the law of contract, the law of property and the law of insolvency. The law of contract determines the creation, scope and enforceability of consensual personal obligations; the law of property governs the acquisition, enforcement, transfer and priority of rights in things, whether tangible or intangible. Insolvency law determines the ranking of claims and the extent to which pre-insolvency property rights will be respected in a liquidation or bankruptcy and will preserve their priority against unsecured creditors.

LAW OF CONTRACT

For any jurisdiction which claims or desires to have sophisticated markets in commodities, securities or finance, it is essential that its legal regime should accommodate commercial needs and understandings and the changes in the patterns of trade and financing I have described. In the field of contract law as it relates to dealings between commercial enterprises, this involves the following:

(1) A large measure of party autonomy

Commercial men value the ability to run their own affairs. That is why they attach such importance to the principle *pacta sunt servanda*. They prize predictability and do not want courts to be too ready to disturb contract terms by reference to considerations of good faith and equity. They would, I suspect, be concerned over the introduction of a generalised principle of good faith, particularly if they were told that the latest edition of *Staudinger* on the German Civil Code devotes no fewer than 1,000 pages to the analysis of a single section of the BGB, section 242, which imposes a general requirement of good faith.

An important aspect of party autonomy is the recognition of the right of the parties, within broad limits, to define for themselves the remedies for default, including self-help remedies, such as acceleration of liability, termination of the contract, repossession and

sale. I should emphasise that I am here dealing with issues of private transactional law affecting dealings in which both parties contract in the course of a business. Contracts involving consumers obviously call for certain constraints on party autonomy, but they are not contracts with which I am presently concerned. It must also be accepted that even in relation to dealings between merchants there must be some limits to freedom of contract, and some role for public law, particularly in relation to competition and to the conduct of operations on organised markets. But within these limits commercial people should as far as possible be free to make their own law. It is this freedom which makes English law so attractive to foreigners, even for disputes having no connection with England.

(2) Informality

The rules must allow contracts in general to be made informally, without need of writing or signature, or must alternatively expand the concept of writing to embrace computerised data that are retrievable in tangible and readable form and the concept of signature to include all forms of cryptography and electronic or digital authentication.[7]

(3) Upholding of reasonable market usages and procedures

At the multilateral level, contract law, together with the rules of insolvency, must recognise the binding force of the reasonable usages of the relevant market, including the multilateral netting of obligations through an organised exchange or a clearing house. The networking nature of organised markets is such that if a key market rule or trade practice were to be held void or unenforceable for any reason, the domino effect on major players could have serious implications for the market as a whole. The same is true of bilateral transactions geared to standard-term contracts settled by external institutions and designed to reflect a fair balance of interests. Hence the vital importance of ensuing that the law will uphold reasonable market usage. While businessmen value fairness, what is particularly

---

[7]See, in this connection, the UNIDROIT Convention on International Factoring, art. 1(4), and the UNCITRAL Model Law on Electronic Commerce, art. 7.

important to them, as I have said, is predictability. Nothing is more calculated to undermine this than a too great willingness to deal with hardship in the individual case by recourse to notions of good faith and equity, or by striking down usages and understandings on which markets are based. That is why the decision in the *Shearson Lehmann*[8] case upholding the power of the London Metal Exchange to make retrospective rules for the stabilisation of the tin market after the collapse of the International Tin Council was greeted with such relief in the market and why, on the other hand, there was so much consternation at the decision of the House of Lords in *Hazell v. Hammersmith and Fulham London Borough Council*[9] striking down a large number of swap transactions entered into by a local authority as *ultra vires* even in those cases where they had been entered into by way of what the Court of Appeal[10] had considered to be prudent debt management. Since then a measure of relief has been given by new legislation,[11] but not before a good deal of damage was done to London's international reputation.

LAW OF PROPERTY

Most legal systems have strict formal requirements for dealings in land. In general these cause no great difficulty. Land is permanent and the speed and frequency of dealings in land are substantially lower than for other types of property. By contrast, tangible and intangible movables have become major commercial assets which need to be able to flow freely in the stream of trade. This can be only be fully achieved in a legal environment which has a liberal and flexible approach to the acquisition and transfer of rights in movable property.

---

[8] *Shearson Lehmann Hutton Inc. v. Maclaine Watson & Co. Ltd.* [1989] 1 All ER 1056.

[9] [1992] 2 AC 1. For a discussion of both cases, see my 1997 Hamlyn Lectures, *Commercial Law in the next Millennium*, pp. 41, 53ff.

[10] [1990] 2 WLR 1038.

[11] Local Government (Contracts) Act 1998.

What does this entail? First, the ability to transfer tangible and intangible movables with the minimum of formalities and without the need for physical transfer of an instrument of title. I have already alluded to the movement from paper-based to paperless transfers, and a consequent reduction in the significance of documentary intangibles—bills of lading, negotiable instruments, share certificates—as a species of commercial asset, a process facilitated by subordinate legislation.[12] Secondly, the ability to grant interests in future property by words of general description, without the need for individual specification and without requiring a new post-acquisition act of transfer by the grantor of the interest. The law has to recognise the marked shift that has taken place over the years from the grant of rights in specific and existing assets to the grant of rights in after-acquired property, including in particular intangible property such as future receivables and future income streams. The easy creation of security over such property by a single instrument perfected by a single filing is of crucial importance to lenders and other receivables financiers, as is the ability to acquire title to receivables under an assignment of them and to have this title respected by a liquidator or trustee irrespective whether notices of assignment have been given to the account debtors. Thirdly, we need a functional approach towards the treatment of security interests, so that transactions intended a security and having the same economic effect are treated in the same way, whether they take the form of mortgages or charges on the one hand or title-retention sales and hire-purchase transactions on the other. Such an approach, advocated nearly 30 years ago by the Crowther Committee in its Report on Consumer Credit,[13] is necessary not only to reflect the intended security character of the transaction as between creditor and debtor but also to provide transparency by extending registration requirements to conditional sale and hire-purchase agreements. Thirdly, we need to break down doctrinal barriers to co-ownership interests in fungible goods and intangibles. In the case of

---

[12]See the provisions for the issue and transfer of dematerialised securities in the Uncertificated Securities Regulations 1995 (SI 1995/3272) made under the Companies Act 1989. s. 207.

[13]Cmnd. 4596, 1971.

contracts for the sale of goods this objective has largely been achieved, in consequence of amendments to the Sale of Goods Act 1979 which introduced new provisions dealing with part-interests in a bulk.[14] But also needed is an adequate legal regime to accommodate interests, including co-ownership interests, arising from the deposit of securities with a custodian or other depositary institution.[15]

INSOLVENCY LAW

Insolvency is a large subject. All I wish to note on this is the need for the law to recognise the efficacy in insolvency of arrangements for the multilateral netting and settlement of obligations among participants to an organised exchange or clearing house system. In the case of credit institutions this need is considered so vital to the avoidance of systemic risk that the EC has issued a Directive requiring Member States to have in place just such a legal regime.[16] The UK is in course of finalising regulations to give effect to this Directive.

The adequacy of the existing legal regimes

(1) English law

So far as English law is concerned, the general legal regime for contracts is broadly satisfactory, though not, I think, as good as Scots law, which does not require consideration and which upholds contracts for the benefit of a third party. English law is also liberal towards the taking and enforcement of security and the exercise of

---

[14]Sections 18, Rule 5, 20A, 20B, 61(1).

[15]As always, the United States is ahead of the rest of the world in this field with its revised Article 8 of the Uniform Commercial Code, a revison which combines imagination with a highly practical approach to the facilitation of dealings in security entitlements embodied in accounts held with custodians and lower-tier interests.

[16]Directive 98/26 EC on settlement finality in payment and securities settlement systems.

self-help remedies, and offers a flexible regime for global security through fixed charges over existing and future property and floating charges for those assets such as inventory which a debtor company needs to be able to deal with in the ordinary course of business.

However, English commercial law possesses serious deficiencies. In the first place, its commercial law statutes are uncoordinated and completely out of date. The Sale of Goods Act 1979 is still substantially in the form in which it was enacted in 1894.[17] Written chattel mortgages by individuals, partnerships and other unincorporated associations remain governed by the Bills of Sale Acts 1878 to 1891, which are among the most arcane and unintelligible pieces of legislation ever to grace (or more accurately, to disgrace) the statute book. Our Bills of Exchange Act—which does not cover negotiable instruments generally, only bills of exchange and notes—goes back to 1882. Dealings by factors and mercantile agents are the subject of the Factors Act 1889. In short, most of our commercial law statutes are will over 100 years old and we are moving into the 21st century with legislation enacted in the 19th century. Secondly, in contrast to the Americans, we are seriously backward in regard to the coverage of our legislation. We lack integrated and comprehensive statutory regimes for documents of title, payment systems, dealings in investment securities and security interests in personal property. Most of our commercial law remains judge-based; and while our judges have done an excellent job, there are limits to their powers, and, in adjudicating on individual cases, they are not well placed to lay down an overall structure, still less to reform the law so as to bring it into line with modern commercial developments. In relation to personal property security we continue to treat conditional sale and hire-purchase as outside the purview of security law and to allow title reservation, which is intended as security, to remain invisible to the outside world and to be enforced against third parties without any registration requirement. Moreover, our priority rules are antiquated and ill-suited to the needs of the time.

---

[17]Sale of Goods Act 1893.

(2) Scots law

I am scarcely competent to evaluate Scots law and can offer only the impressions of an outsider to your legal system. Much of it seems to work perfectly well, particularly in the field of obligations, where, as I have remarked earlier, Scots law can fairly claim to be superior to English law in certain significant respects. The major difficulty, at any rate if Scottish law is to be able to compete with English law to attract business, lies in its property law, which is still geared to the concept of possession or, in the case of debts, its equivalent, intimation of assignation, and is antipathetic to the acquisition of real rights in future property. True, Scots law now possesses the floating charge. I am bound to say that the method of incorporation of this concept into Scots law was not the happiest, and has persuaded me that there may after all be force in the wry comment by the late Professor Gow to the effect that the Scottish law of conditional sale would have been in much better shape if the purity and realism of its mercantile principles as adumbrated by Lord President Inglis had not become sullied by the infusion of ill-conceived concepts of English hire-purchase law.[18] The legislation was engrafted by statute on to a legal regime which is inherently opposed to the concept, and has been so engrafted without any attempt to define or even describe in the legislation a number of the key features of the English floating charge. The outcome, which is not entirely the fault of the courts, is cases such as *Sharp v. Woolwich Building Society*,[19] a decision of the House of Lords on an appeal from the First Division of the Inner House of the Court of Session.

The facts in *Sharp* were that Albyn Construction Ltd. had granted a floating charge in 1984 in favour of the Bank of Scotland over "the whole of the property (including uncalled capital) which is or may be from time to time, while this instrument is in force, comprised in our property and undertaking." This charge was duly registered with the Registrar of Companies. In 1989 Albyn agreed to sell a flat which it owned to the first defenders, the price being advanced by the

---

[18]In his preface to the first edition of his work *The Law of Hire-Purchase in Scotland*.

[19][1997] SC (HL) 66.

second defenders against a standard (fixed) security of the flat. The Bank of Scotland had earlier agreed not to deprive Albyn of its right to make the sale provided that the disposition was recorded within 21 days. This was not done and no other waiver or letter of non-crystallisation was obtained from the Bank. The first defenders took occupation in June 1989 but the formal disposition was not delivered by Albyn to the first defender's solicitors until 9th August 1990. The following day the Bank appointed the appellants joint receivers of Albyn, and the floating charge thereupon crystallised. On 21st August the disposition was registered in the Register of Sasines. The question for decision was whether the floating charge, having crystallised, had priority over the standard security so as to enable the receivers to take possession of the flat and sell it. The Lord Ordinary had held that the floating charge did have priority and his decision had been upheld by the Inner House. It was reversed by the House of Lords.

What is interesting to an English lawyer is not so much the outcome of the case as the reasoning of the decision. An English court would have approached the matter as follows. Subject to any contrary provision in the charge instrument, a floating charge leaves the debtor company at liberty to deal with its assets in the ordinary course of business free from the charge. The court adopts a liberal approach to the question what constitutes a dealing in the ordinary course of business, and it certainly includes the grant of a fixed security. It follows that in principle a floating charge is subordinate to a subsequent fixed security and is overreached altogether by an outright sale. However, it is common practice in England for a debenture creating a floating charge to contain restrictions on the debtor company's dealing powers. Typically these take the form of a negative pledge clause precluding the company, without prior written consent of the debenture holder, from granting any subsequent charge purporting to rank in priority to or *pari passu* with the floating charge. Certain outright dispositions may also be prohibited, for example, by a provision in a charge over book debts that their sale to a factoring company will not be deemed a disposal in the ordinary course of business. It has long been accepted that a subsequent chargee or purchaser is bound by such a prohibition if he

has notice of it,[20] reflecting the fact that a floating charge, though not attaching to specific property prior to crystallisation, is nevertheless an a present security,[21] not a mere contract right, with the result that restrictions on disposition in the floating charge constitute an equity which is binding on those who have notice of them.[22]

That, however. was not the approach taken by the Scottish courts or by the House of Lords. Indeed, we cannot tell from the law reports of the case at any of its stages whether the floating charge did in fact contain a restriction on sale. If it did not and the sale was in the ordinary course of business, or alternatively if the purchasers were unaware of the restriction, they would get a good title free from the floating charge; otherwise they would be bound by it. This question was never discussed. Instead the argument turned on an intricate question of Scots law, and one the subject of much controversy, as to whether a sale of heritable property divested the seller of ownership even prior to its registration in the Register of Sasines or whether, on the other hand, this divestment was dependent on such registration, so that until then the buyers' rights were merely personal. If the latter was the case, as held by the courts below, then at the time of crystallisation of the floating charge the flat still formed part of the "property" of the debtor company susceptible to the grant of a floating charge under section 462(1) of the Companies Act 1985. But the House of Lords held that registration was not a prerequisite of the transfer of ownership, and that in consequence at the time of

---

[20]See *English & Scottish Mercantile Investment Co. Ltd. v. Brunton* [1892] 2 QB 700, *per* Lord Esher MR at p. 707; *Cox v. Dublin City Distillery Co.* [1906] IR 446. The decision of the High Court in *Griffiths v. Yorkshire Bank Plc* [1994] 1 WLR 1427 to the effect that a negative pledge clause is purely contractual and has no impact on priorities was given without reference to prior authority and is generally considered to be wrong.

[21]*Evans v. Rival Granite Quarries Ltd.* [1910] 2 KB 979, *per* Buckley LJ at p, 999.

[22]R.M. Goode, *Legal Problems of Credit and Security* (2nd edn.), p. p. 85.

crystallisation the debtor company no longer had an interest in the flat capable of being given in security under the floating charge.

It will be evident that this reflects a conception of the floating charge quite different from that established in English law. It assumes that until crystallisation the chargee has no real right of any kind, merely a contractual right, so that in deciding whether the company has an interest capable of being given in security the question is taken to be whether it held that interest at the time of crystallisation, whereas an English court would look to the time of granting of the floating charge but would then go on to consider whether there were any relevant restrictions on sale of which the purchasers had notice. Yet it is clear that the courts considered themselves to be according the floating charge the effect it has in English law.[23]

If I have spent what you may consider a disproportionate amount of time on one case it is for two reasons. The first is that it has attracted a huge debate in Scotland, academic opinion being equally divided, and I thought it might be of interest to hear an English lawyer's perception of the case. Secondly, and rather more importantly, the decision has implications for the future shape of commercial law in the United Kingdom, since it shows the immense difficulty in transplanting legal concepts from a jurisdiction that has developed them over a period of more than 100 years, and has a liberal attitude towards security over future property, into a jurisdiction with a quite different legal culture and philosophy towards non-possessory security. I shall return to this point shortly.

Codification

How should we tackle these deficiencies in English and Scots law. In my view, it is time for a complete overhaul of both our common law rules and our legislation. There is a desperate need for a modern commercial code, by which I mean a corpus of principles and rules which do not simply reproduce the existing law but modernise and integrate the relevant legal rules. The preparation of a code possesses many advantages. In the first place, the preparatory work will help us to identify more clearly the strengths and weaknesses of the

---

[23]See, for example, the speech of Lord Clyde 82 E-F.

present law in both jurisdictions. Secondly, a code will simplify, clarify and integrate the law governing commercial transactions, and will be designed to produce outcomes that are commercially fair and workable in the typical case. Thirdly, a code will make our commercial law accessible, which can hardly be said to be the case at present, and thus save a good deal of time and money. Fourthly, it will put our commercial law into exportable form and thereby strengthen the influence of the United Kingdom in developing countries and newly-market-oriented economies, and help us to regain the leadership which we have lost to other countries which do possess such a code.

We should not underestimate the work involved in the preparation of a commercial code, which will involve a painstaking study of existing law and practice both in this country and elsewhere, particularly North America, and the active involvement of, and consultation with, a diversity of interest groups and expertise. But the American experience, which now spans nearly half a century, shows the immense benefits that such a codification can bring.

What form should a code take? One way is to enact it into law at the outset, on the basis that it will not be perfect but will (as it should) be kept under regular review. An alternative is to proceed step by step (or perhaps in this gathering I should say Stair by Stair), with the code initially taking the form of a restatement that the courts could be authorised or required to take into account but would not of itself have legislative force. This approach would provide an opportunity for the code to be tried out and for serious deficiencies to be rectified. But in due course—and in my view sooner rather than later—the code should be embodied in legislation., in much the same way as the American Uniform Commercial Code, which has now been successfully used throughout the United States for several decades.

Should we produce a separate code for Scotland or a code for the United Kingdom? If we could achieve it, the latter would be preferable. But the difficulties would be formidable. The legal and cultural differences in the approach to property rights are so fundamental that Scotland would really have to decide whether the benefits of assimilation justified the price of achieving it. But if not, there is now, happily, one ray of light. Whilst company law is in general a reserved area beyond the competence of the Scottish

Assembly, there is an express exception for floating charges, except as regards preferential debts. So Scotland is free, as I see it, to reverse the effect of *Sharp* or even, perhaps, to abolish the floating charge altogether! And that may be a suitable note on which to conclude!

*Emeritus Professor of Law in the University of Oxford and Emeritus Fellow of St. John's College, Oxford. This is a revised and slightly expanded version of a lecture given at The David Hume Institute, Edinburgh on 25 November 1998, in the series *Agenda for the Scottish Parliament*.

Education

Lindsay Paterson

Introduction

Democracy and education have grown together. Throughout Europe and North America this century, one of the first acts of the new institutions of mass democracy was to expand education. Scotland has shared in these tendencies, and in some respects has been in the vanguard of them. Its secondary school system expanded more rapidly than in most of Europe between the 1920s and the 1940s, it has continued to have higher rates of successful participation in higher education than in nearly all European countries, and, to some extent, the expansion of secondary and higher education in Scotland has been more egalitarian than in England.

As democracy and mass education have matured, however, the newly educated citizens have demanded more from their democracy. In the words of Paul Hirst (*Political Quarterly*, 1995), modern publics have become more demanding, better educated, and less deferential. Their attitude to public services has changed from one of gratitude to a consumer consciousness. They demand higher quality and also more diverse services of greater complexity.

This critical attitude has now produced three irrevocable changes in attitudes to public education in Scotland. First, the appetite for further expansion is now insatiable. Second, people now expect public services—including education—to be responsive to their varied needs at the point of delivery, and not merely through some vaguely accountable bureaucracy. But also, third, it is that same pressure for democracy that has finally produced a clear endorsement of the principle of Scottish home rule. The new Parliament will have to find ways to respond to the often contradictory imperatives of these three sets of pressures.

This paper discusses the prospects for Scottish education when the Parliament comes. First, though, it analyses briefly the effects on society and democracy of educational expansion this century, and especially in the last thirty years. The paper is not a menu of policy options, although some of these are mentioned. Nor does it claim to

provide the only way in which the role of education could be understood in the new era that is opening up. The purpose is to stimulate debate about the significance which the Parliament and the education system will have for each other—both their capacity to be mutually supportive, and the likelihood that each will cause the other some difficulty.

The Parliament's Inheritance

The scale of expansion in Scotland in the last three decades can be illustrated by one graphic comparison. In 1961, the proportion of the age group which had entered full-time higher education by the age of 21 was 9%. In 1981, it was 18%. In 1996, it was 47%. Moreover, research has shown that the expansion has not been accompanied by any fall in standards. And popular faith in standards remains high.

But the expansion has never been just for its own sake. In most European countries, the reason why it has proceeded almost unaffected by political regime is that it has been justified in two quite different ways. On the one hand, arguments based on promoting national economic effectiveness have appealed to modernisers across the centre of politics (even though the empirical evidence that education does achieve this is distinctly sparse). On the other hand, an accompanying idealism has aimed to develop the rights and capacities of citizens in a democracy.

The intellectual energy for the expansion and for what happens in the classroom has drawn on this idealism, even though it has depended on the first argument for resources and political sanction. The distinctiveness of any country's educational debate is partly a matter of the balance between the two strands. Most European countries have had both strands, but some have valued the idealism rather more than average. Scotland was one of these. Thus Scottish educational culture in the last half century has been distinctive in its enthusiasm for the comprehensive ideal, even though that ideal was not absent in other places.

In Scotland, the phase of educational expansion in the 1960s had three important effects. Comprehensive secondary schools were introduced efficiently and with little controversy, so that they quickly commanded widespread popular support. Second, primary

schools moved away from their rigidly didactic methods—with children sitting in silent rows all doing the same obedient thing at the same time—to an approach that aimed to allow each individual to progress at an individual rate. This became known as 'child-centred education', and, by the late 1970s, began to have an effect on secondary education through the growth of guidance, and through a more careful attention to the needs both of children who have difficulties in learning and (more recently) of children who learn much more rapidly than the average. And, third, higher education expanded, first slowly, and then, by the late 1980s, very quickly.

In the motives of the idealists who instigated all this reform there is an apparent paradox, which points in turn to the complexity of the reforms' effects and legacy. On the one hand, the barriers to learning that each wave of reform has sought to diminish have been collective. Thus, in the 1950s, proponents of comprehensive education saw social class as condemning whole groups of children to an inferior education. Later, the categories of gender and ethnicity were, likewise, seen as shaping the chances which children had of making educational progress. So the purposes of reforms were to deal with these structural inequalities in society. And in many respects the reforms have succeeded: barriers associated with gender, class and ethnicity have shrunk.

And yet the long-term consequence of these reforms to tackle collective disadvantage has been a growth of educational individualism. The outcome is thus a transformation of popular expectations, as illustrated in the quotation from Paul Hirst given in the introduction.

The implications for democracy are equally ambiguous. On the one hand, the non-selective and public basis of the school system has been entrenched in popular attitudes. Comprehensive education is popular in Scotland, as is the principle that educational institutions should be under public control. On the other hand, the same processes of educational expansion have also made people quite open to the kinds of reforms of the welfare state which the Conservative government introduced between 1979 and 1997 – for example, parental choice of school for their child, and greater autonomy to individual educational institutions.

In deciding what direction further reform of education should take, all positions on the political spectrum have to acknowledge these changes—both the greater consumer responsiveness and the parallel deepening of faith in the system's public character. The left needs to see that successful collective action earlier this century has helped to create a more individualised world in which collective action is now much more difficult. The victorious supporters of home rule have to accept that, although Scots have shown their enthusiasm for a parliament, they will be critical of it just as much as they have been critical of Westminster and of local government (and in the same way as the citizens of all Western democracies are critical of their elected assemblies). And the right has to see that their reforms of the governance of the welfare state were popular for broadly the same reasons as explain the outcome of the referendum on the Parliament—a disrespect for established hierarchies of government.

Educational Reform and the Scottish Parliament

So what should the Parliament do? Although it will have to work with the grain of irreversible social trends, there are ways in which it could do that which would open up radical opportunities.

Renewing the comprehensive principle

Further expansion is now built into the system—a consequence of the first legacy summarised above. Because comprehensive education in Scotland has, on the whole, been a success, and because higher education itself has been expanding steadily now for thirty years, today's school leavers have acquired high expectations about education from their parents. This is the main reason why the Higher grade examination had to be reformed (in the Higher Still programme) and why higher education is expanding and changing its character: more, and more diverse, students are staying on beyond the minimum leaving age.

Managing the sheer numbers staying on, or passing examinations, or entering higher education will itself be difficult. The task would be given coherence if the Parliament built on the comprehensive principle that is now deeply entrenched in Scottish attitudes and educational practices. But, to do that effectively, it will have to take

account of fundamental social and educational changes which require that the comprehensive principle be renovated.

Probably the most basic reason for renewal is social polarisation. Neighbourhood schools were always a bit of a problem in the cities anyway: even in the late 1970s and early 1980s, social segregation among schools was far higher there than in small town and rural Scotland, essentially because of residential segregation. But at least that was at a time when some jobs were available in these areas, and when unemployment was more often short-term than it became later. By the late 1980s and 1990s, the gulf between the big city housing schemes and the other parts of Scotland had started to widen alarmingly. With such growing residential segregation, neighbourhood comprehensives can reinforce educational divisions instead of healing them.

Renewal of comprehensive education is needed also because the key point of selection is now not age 12 but age 16. However imperfectly, that is what the reform of the Highers is all about. As a result, the *principle* of comprehensive education is no longer solely within the province of schools. Higher Still is bound to involve much more partnership than Standard Grade ever did, and what happens after sixth year—in further or higher education—takes the issue of social inclusion right out of the hands of the school sector altogether.

If we accept this need to renew the principle, then two clear and immediate consequences for policy emerge. The first is to do with the character and organisation of secondary schools. To continue to be truly comprehensive, each school will have to be able to offer the full range of new courses after age 16. But that probably requires large schools or some more imaginative uses of electronic technology, along with consortia of schools or schools and further education colleges.

Large schools in areas of acute social deprivation could also move in the direction of what are called 'full-service' schools in the USA, and with which the Scottish Office has been experimenting under the title of 'new community schools'. These combine a range of welfare services with education—notably, community health, family planning, public libraries, and being a general community centre. They are a way both of freeing the teachers to be educators (rather

than surrogate social workers) and of dealing with many of the social reasons why young people find it difficult to learn. As the novelist William McIlvanney has put it, teachers at present simply cannot deal with all these issues at once:

> Teachers are obliged to deal with so many social problems today that I sometimes think the actual business of teaching must often seem like a luxury they can indulge in intermittently.
> (*The Herald*, 30 January 1999)

Furthermore, creating large and successful schools in areas of social deprivation is ultimately the only way of overcoming the harmful effects of parental choice of school. There is further evidence from the USA that one way of achieving that success is for such schools to become specialised: 'magnet' schools attract new pupils, and are both more effective and more egalitarian than either unspecialised comprehensive schools or most private selective schools. But large schools are not without disadvantages, for example for discipline and a sense of belonging. So careful thought has to be given to avoiding these, and that is one reason why consortia or technology might be more attractive. In rural areas, neither large schools nor consortia are feasible, and so new technology will be essential.

The second consequence of a renewed comprehensive principle is in breaking down barriers in access to higher education. Although social class differences have narrowed, they remain wide. So the Parliament will be under political pressure to require higher education institutions to encourage broader access. The newer universities have a better record than the older ones of doing this already, partly through links with local further education colleges. Indeed, Scotland has a much larger proportion of higher education students at FE colleges than does the rest of the UK (about one third compared with about one in twelve). The FE colleges are better at encouraging wide access than any of the universities. So the Parliament might want to use the FE colleges as an important route to further reduction in class inequalities. It might want a net shift of resources from higher education institutions to higher education courses in further education colleges. It is likely also to favour the Scottish Higher Education Funding Council's recent policy in which

some of the income of higher education institutions is tied to their success in broadening access.

Beyond this expansion and renewal for the age range 16-21, there are two further ways in which the application of the comprehensive principle could encourage further expansion.

The pressure for early-years education is already having a large effect, and responding to it now commands political consensus. Not only is there evidence that good-quality nursery education benefits children later. There are also specific reasons to believe that early intervention is an effective and efficient way of counteracting social inequalities.

Expansion of lifelong learning is a way of extending the comprehensive principle over the life course. The agencies involved would not only be schools (by attracting more adults to attend classes), but also an expanded community education service, a growth of part-time further and higher education, and—again—a more imaginative use of educational technology. Learning in the work place and 'learning accounts' might have a contribution here. That would be a way of involving business in partly funding lifelong learning. In return for contributing towards the fees which their employees would have to pay for educational courses, they would benefit from the enhanced skills which the employee would acquire. (Indeed, some companies—such as Stagecoach—already have such schemes.) The Parliament could promote these arrangements even though having no legislative capacity to force employers to do this. It could also lead by example, supporting public-sector employees in courses which they attended. And it could subsidise the fees of people who could not get access to employer support—for example, people who are self-employed, or people who are not gainfully employed but who would like to return to the workforce. In that latter sense, the scheme might resemble aspects of the current New Deal, although at a higher level of educational achievement.

The Parliament could, further, set up a lifelong learning fund into which broadcasters and others would bid. To receive money from it, broadcasters would have to demonstrate that they were working in partnership with community education, schools or colleges, and

would have to develop Internet access as well as access through conventional viewing and listening.

Educational governance and the making of educational policy.

The Conservatives' changes to the way in which education is governed were a first step in the necessary response to the popular desire for greater influence that we noted earlier. But these changes have left many flaws. For example, the school boards are made up of representatives of staff and parents of current pupils, the latter in a majority; there is no formal role for the wider community except through the rather inscrutable processes of co-option. So the first set of reforms to governance that the Parliament might want to make would be to broaden the membership of such bodies, especially to include, as of right, representatives of elected local government. It should also do the same for longer-established governing bodies, for example university courts.

The Parliament should also set an example, by radically reforming the ways in which educational policy is made nationally. The discussions within the schools inspectorate should become far more open than at present, as should the deliberations of the various national quangos (for example, the Scottish Qualifications Authority). This example of open decision making should become a requirement for other governing bodies—local authorities, school boards, or the governing councils of colleges and universities.

That would begin to ensure that the public interest is guaranteed in sectors that are mainly voluntary or private, or where the Conservatives had started to reduce the public presence. But it would just be a start. The current pressures towards democratisation imply much more radical reform of the governing structures of the welfare state than was ever attempted by the previous UK government—reforms as radical as that embodied in the setting up of the Parliament itself. A truly plural and self-governing society would have a large part of its welfare services delivered either by the voluntary and private sectors, or by partnerships between them and the public sector.

In education, this principle could produce some interesting changes. For example, the current expansion of nursery education is being

undertaken as a partnership of the public, voluntary, and private sectors. The reason so far is short term: in the time available after the Labour government moved to abolish the Conservatives' system of vouchers, the public sector could not provide enough places to meet demand. But the voluntary and private sectors have shown themselves to be willing to experiment, and to be flexible in meeting the needs of working parents. So this partnership might in fact be permanently desirable, as a guarantee that the development of nursery education did not become needlessly standardised and rigid. The monitoring of the quality of voluntary and private provision could allow local authorities to take the lead without having a monopoly.

But, although force of circumstances has left us with the beginnings of such a partnership at the pre-school stage, we have almost nothing analogous at primary or secondary level. So the Parliament itself could start to experiment. It could, for example, learn from Denmark that voluntary provision is possible without jeopardising the public interest. There are also lessons from Northern Ireland, from the small integrated schools movement (teaching across the sectarian divide). As in both these places, funds could be made available to groups of parents who wanted to set up their own schools. The motive in Scotland might be to pursue particular educational styles (whether more or less formal than the current dominant practice), or to teach partly in the medium of particular languages (notably Gaelic, but why not also, say, Punjabi?).

Before any of this could happen, there would need to be much public debate—led by the Parliament and its committees—on what the minimum standards and principles should be that such voluntary schools would be expected to meet. For example, it would probably be concluded in Scotland that schools in receipt of public money (or of tax concessions) should not be allowed to select pupils by ability. But would a growing voluntary sector be an acceptable way in which religious schools could continue to receive appropriate public subsidy while also relying on contributions from the communities they serve? Muslim and other religious schools could then be in the same position as a reconstituted Roman Catholic sector, even while the education authority sector remained non-denominational. However, accepting that basis for giving public subsidy to religious

schools might then conflict with other principles (for example with a general resistance to single-sex education).

It has to be acknowledged, though, that partnerships and decentralisation raise difficulties of accountability and transparency which have not yet been solved in practice. For example, who is to be held accountable by the electorate if a provider from the voluntary sector fails to meet the quality standards that have been specified in its contract with the elected local authority? Just how much educational policy should continue to made centrally? A diverse society, overseen by a pluralistic parliament, should be able to debate these matters freely and openly. It should be able to accept that deciding on the balance between national and local control, or working out the principles which should govern the allocation of public grants, could never be matters of easy consensus, and would have to be revisited frequently. Sometimes, despite hopes of a less confrontational style to Scottish politics, these debates would be very heated indeed.

Education and citizenship.

These further changes to governing structures, significant though they would be, nevertheless depend for their most democratic effect on deeper changes in the character of citizenship. The Conservatives responded to some of the individual assertiveness that a more educated population had developed, but the market principles that informed their policies paid little explicit attention to the social context in which individual assertion takes place. They responded to the individualistic consequences of educational expansion without doing much to renew the sense of a common social project.

The idea of comprehensive education always placed as much emphasis on developing a common citizenship as on promoting national economic effectiveness. One long-lasting legacy in Scotland is Modern Studies, the most advanced programme of civics education in the UK. The question now, however, is whether these features of education for common citizenship need to be renewed just as much as the structural aspects of comprehensive schooling. What should citizenship education try to do as Scottish democracy is renewed over the next decade?

A natural starting point for a discussion of citizenship education would be a definition of citizenship. But—perhaps more than for any area of the curriculum—the consensus of writers on this subject seems to be that an agreed definition is unattainable, and so that what matters is process not outcome. The students who go through a programme of citizenship education should therefore acquire certain capacities rather than merely knowledge of a set of facts, although they would have to know the facts of democracy in order to have had an opportunity to exercise the capacities. For example, it seems much more relevant to a person's citizenship that she knows how to engage in democratic argument than that she knows (say) the exact distribution of powers between the Scottish Parliament and Westminster, although clearly such knowledge is necessary for her being able to argue effectively.

Writers on this topic have suggested that there are three important aspects of education for citizenship:

- The first is the facts of democratic life, and also some understanding of what to do with these facts.
- The second is general education. This is a very old Scottish principle—that education can help us to understand and to co-operate with each other in society.
- The third is that the process of learning should itself give students the experience of being independent. This has become firmly established in Scottish education (as elsewhere) since the 1960s.

These principles also seem to be the best way of preparing young people at school or university to be effective workers when they enter the labour market. Team-working, communication skills and inventiveness are much more relevant to promoting economic success than narrowly defined vocational skills, which are better learnt during on-the-job training.

However, if citizenship is a contested concept, then the Parliament should allow for significant variation in what counts as citizenship. Here are just some examples of what that could imply for education:

- Part of the meaning of citizenship is defining who is a member of which political community. The question of which

community is likely to be quite controversial in Scotland. Although all areas voted clearly in favour of the Parliament in the referendum, there are undoubtedly some suspicions of it based on the long-standing sense that Scotland is a nation of strong regional communities. The school curriculum should allow for these varying loyalties to be expressed.

- Defining the terms on which people are members of the Scottish political community will also be controversial. For example, just how much cultural autonomy is the Scottish majority prepared to allow to Muslims? Does this extend to there being a distinct Islamic curriculum or separate Islamic schools?
- Are children members of the political community? In terms of formal rights to vote or hold office, our society has, mostly, decided that they are not. But attention to children's rights has grown recently, and the Liberal Democrats—supported by the SNP—unsuccessfully moved an amendment to the Scotland Bill at Westminster to lower the voting age to 16 for elections to the Parliament.
- Most fundamentally of all, if we take citizenship seriously, then there is likely to emerge a tension between so-called positive and negative conceptions of liberty. Negative freedom is freedom from constraints; positive freedom is being genuinely in a position to exercise certain rights, aided by the intervention of the state. The majority Scottish view is likely to continue to favour the promotion of positive freedom, and therefore is likely to favour welfare redistribution to help secure that for most people. Comprehensive education is itself such a measure of redistribution (of resources, but almost certainly also of outcomes, insofar as it has encouraged social mobility that probably would not have happened otherwise).

But what if some parts of Scotland prefer a less interventionist view? This does not necessarily have to take the form of a shift unambiguously to the political right. For example, what if the political preferences of one area were for voluntary types of redistribution, through credit unions, community enterprise, and (as suggested earlier) voluntary schools? The meaning of citizenship would be different in an area which followed that course: there

would be greater emphasis on active involvement, and thus on the negative view of liberty, and less on the positive view. Would that kind of deviation from the national norm be acceptable? In other words, could the meaning of a good citizen be defined locally, at least in part?

Conclusions

The Scottish Parliament could achieve a great deal in education if it builds on the success of the last three decades, encouraging expansion, basing that on the comprehensive principle, and stimulating education to develop a sense of critical citizenship. Because education has been at the heart of Scottish identity, it will be seen as one of the most important parts of the Parliament's remit. Because earlier expansion has created an irresistible pressure for further expansion, the Parliament will be expected to extend the benefits of education to social groups which have traditionally been partly excluded. Because education is a route to full citizenship, the Parliament will want to use education to renew Scottish democracy. But, finally, because that democratic renewal will help to create an even more critical and demanding society than previous expansion has provoked, the Parliament and the other governing structures which it creates will be tested to the full.

Acknowledgement

A longer version of this paper, with full bibliography, is available from the author. Versions of parts of the argument have appeared in *Scottish Educational Review* (1998) and in *Education, Democracy and the Scottish Parliament*, published by the Scottish Local Government Information Unit.

Marketing Scotland and Scottish products

Hugh Morison

Scotland is at a crossroads, and we are facing, constitutionally, the most exciting time in our history for 293 years. Lord Belhaven, addressing the Scottish Parliament in 1706, spoke thus:

> 'When I consider this matter of a Union betwixt the two nations, as it is expressed in the several Articles thereof, and now the subject of our deliberations at this time; I find my mind crowded with a variety of very melancholy thoughts, and I think it my duty to disburden myself of some of them, by laying them before, and exposing them to the serious consideration of this honourable House.'

We, almost three centuries later, can view current developments very much more positively; but it is also our duty to lay before the Parliament our own thoughts about how it should operate, what its priorities should be—in short, what should be its agenda.

The theme of *marketing Scotland and Scottish products* is however particularly challenging. For it is companies and individuals who market products; and companies and individuals who both benefit from the image of their country on the international stage, and who, with the media, help to shape it. Politicians and Parliaments do not market products—though they do play a part in determining how their country is perceived and this can affect the success of the marketers. They do moreover contribute to, and in some senses shape, the environment—economic and social—in which products are produced and marketed; and they can help or hinder the success of marketing through their approach to industrial and economic policy, trade promotion, trade barriers, infrastructure, education and the like.

But there is a second problem with this theme. Many of the issues handled by government which affect the success or otherwise of marketing efforts—most particularly taxation and international trade negotiations—are reserved to Westminster, and in the case of international trade are handled by the European Commission on behalf of the Member States.

So what kind of Agenda can we ask the Scottish Parliament to adopt to support this vital task of marketing Scotland and Scotland's products? I wish to tease this out with particular reference to the Scotch Whisky industry. But first, I should say what I mean by marketing, and say something about the Scotch Whisky industry and its approach.

> First, marketing. A recently published American encyclopaedia describes marketing thus:
>
> Early marketing techniques followed production and were responsible only for moving goods from the manufacturer to the point of final sale. Now, however, marketing is much more pervasive. In large corporations the marketing functions precede the manufacture of a product. They involve market research and product development, design, and testing.
>
> Marketing concentrates primarily on the buyers, or consumers, determining their needs and desires, educating them with regard to the availability of products and to important product features, developing strategies to persuade them to buy, and, finally, enhancing their satisfaction with a purchase.
>
> [*Encarta*]

The key point here is concentration on the consumer. However good a product is, it will not sell it if consumers do not want it at a price which they can afford—or at least think reasonable. And it will not sell if other competing products, for whatever reason, are seen as more attractive—whether on price, quality, or increasingly, environmental and ecological grounds. A second key point is educating the consumer. Consumers will not buy unless they know about the product and are persuaded that, for whatever reason, they need it, whether to meet a basic human need, like food or shelter, or to enhance their self image, like buying trainers or Gucci shoes, or to enhance their lifestyle, like Scotch Whisky. Another point to stress is that consumer tastes are changing rapidly, and becoming increasingly fragmented, so past success cannot necessarily be relied upon as a guide to marketing strategy, and it may be appropriate to segment a product line into niches.

Turning to the Scotch whisky industry, on any measure Scotch whisky has been a remarkable success. Its products are exported to over 200 markets world-wide, ranging from the USA to Vatican City. Exports have grown every year since the War, bar three, and in each of the last five years have exceed £2 billion, making Scotch Britain's fifth largest manufactured export and Scotland's first net export. (Electronics and office machinery exports are higher by value, but they have a far higher input of imported components.) Scotch Whisky has become an image of Scotland and of Scottish quality, and has achieved the reputation of being the world's finest spirit drink Indeed, a bottle of Scotch and the reputation of Scotch Whisky are vital tools in the armoury of those who attract inward investment to Scotland, particularly from the Far East. As markets have matured and perhaps slowed, as in the UK and the US, new markets have been opened up in continental Europe and Asia.

What are the key elements of this success? First, Scotch Whisky is a quality product backed by a quality definition which is enshrined in UK and EU law. Secondly, the brand owners can draw on a range of powerful images of Scotland, internationally recognised, such as the thistle, tartan and Scottish castle architecture, and names particularly evocative of Scotland, such as Ben and Glen, Mac and Loch. Indeed, so powerful are these images that the Scotch Whisky Association has regularly to sue producers of products which they seek to pass off as Scotch Whisky by using them. Scotch also benefit from Scotland's reputation for quality, diligence and attention to detail. Thirdly, the Scotch whisky industry is perceived as 'green', producing a natural product from natural ingredients in an unspoilt environment. Fourthly, the globalisation of world trade, with the concomitant opening up of world markets and reductions in trade barriers, have opened up new opportunities to us. Fifthly, there is a great variety in the product, enabling companies to develop and exploit niche markets—indeed, the fastest growing segment of the industry is currently single malts. And sixthly, and crucially important, companies have gone out there and sold the product.

This is not to say that the industry has no problems. Because of the need to mature Scotch whisky for a minimum of three years, but in practice often far longer, it is more expensive to produce Scotch than most competing spirits. There are still considerable trade barriers in

many potential markets—the Scotch Whisky Association has recently won cases against Japan and Korea involving tax discrimination in favour of their locally produced spirits, but many such instances remain. Thirdly, the industry faces considerable tax discrimination in the European Union in favour of wine and beer. Fourthly, it face similar discrimination in the home market—and this discrimination is often cited by those who discriminate against Scotch whisky overseas. And fifthly, in certain markets—and particularly in the UK—Scotch is perceived as an old man's drink.

Will the creation of the Scottish Parliament help the Scotch whisky industry—and indeed the whole of Scottish industry—with any of these problems, and what kind of Agenda should it adopt to help tackle them?

We must distinguish between those issues where the Scottish Parliament will have its own devolved powers, and those where the powers are exercised by Westminster or the European Commission, where it is to be hoped that the Scottish Parliament and Executive to press the interests of Scottish industry.

But first, the very creation of the Parliament will create a major opportunity. There is already world interest in the creation of the Parliament, and it will consolidate Scotland's position on the world map. Those who market Scottish products can only profit by this. And if the Parliament is truly one adapted to the needs of the 21st century, it will reinforce Scotland's reputation as a country which produces high quality and high tech products.

Turning to devolved matters, Scottish exporters, and particularly SME's need support. The trade figures show that Scotland exports more per head not only than the UK as a whole, but also than Japan. But if electronics and Scotch Whisky are stripped out, Scotland's performance is at best average. In discussing marketing, I mentioned the importance of educating the consumer—which means seeing them on their own ground, or finding agents who can do that for you. Trade Missions and Scottish Trade International, which fall within the remit of the Parliament and the Executive, have an important role to play here—and there is also a role for Scottish Enterprise and the Local Enterprise Companies in educating SMEs in what opportunities may be available. I myself would like to see an

enhanced role for STI, and possibly more flexible means of support for exporters: certainly I hope that the Parliament will establish a Committee to look at such issues, such as the International Investment, Trade and Tourism Committee proposed by the Scottish Council Development and Industry. I hope, though, that they would not be too directive or prescriptive—there is an important role here for the Scottish Council Development and Industry, and for Chambers of Commerce.

In discussing marketing I also mentioned price—and here is another area where the Scottish Parliament and Executive will have a key role. For at the end of the day, price decisions are constrained by costs; and government regulation of for example the environment and health and safety issues can crucially affect costs of production and hence competitiveness. I am not arguing that there should be no regulation—as I have already said, Scotch Whisky is marketed partly on the back of a clear legal definition and on the grounds that we are a green product produced in a green environment. What we don't need, however, is over-regulation. Regulation must be proportionate to the problems which it addresses and must not impose unwarranted additional costs on industry. In its links with European institutions developing the basic European Directives on such matters, and in implementing Directives in Scottish law, I hope that the Scottish administration will keep this point firmly in mind. The proposed requirements for pre-legislative scrutiny and statement of compliance costs should help.

One vital area affecting costs which is devolved to the Parliament is that of local government finance. Industry in Scotland fought long and hard for the introduction of a Uniform Business Rate; and despite the temptation I hope that the Scottish administration will go no further in devolving responsibility for setting Business Rates to local authorities than has been proposed for England and Wales, where Local Authorities will have the power to vary rates at the margin from a nationally set rate.

So much for matters devolved to the Parliament. Turning to reserved matters, the Scottish Parliament has the potential to become a crucial new voice in Westminster and Brussels in support of Scottish industry, and of course Scotch Whisky. Fiscal policy is of vital importance; and I would hope that the Scottish Parliament and

Executive will make representations to the Chancellor—as the Secretary of State does at present—both on general fiscal issues, and on the tax regimes applying to industries of particular importance to Scotland. Specifically, I would hope that the Scottish administration will vigorously support our efforts to secure a fairer tax system for the treatment of alcoholic drinks than that which prevails at present; and that both in their links with the European Union and their discussions with the British Government they will press for the same in Europe.

Likewise, I hope that they will support efforts to persuade the Commission to continue their sterling work on the abolition of trade barriers wherever they occur. And they will no doubt wish to take up other trade issues which impact on the success of Scottish industry.

Finally, I should like to say a word or two about the all important question of image. What kind of image or images are most appropriate for marketing Scotland as a location for inward investment and a tourist destination, and for supporting the marketing efforts of Scottish companies?

When you think about Scotland, a multitude of images are conjured up, and many of them are mutually exclusive. To highlight a few, there is the land of the enlightenment—of David Hume and Adam Smith; the land of innovation, of Fleming, Dunlop, the telephone, the NMR Scanner, the Liquid Crystal Display panel; the land of Burns, with its emphasis on bawdry and drunkenness; the land of Sir Walter Scott, with its emphasis on romance and tradition; the land of the mountain and the flood, the last great wilderness in Western Europe. There is the image of a country with one of the best educational systems in Europe; a country with one of the worst; the land of Sir Harry Lauder, with its haggis, tartan, sporrans, kilts and Tam o' Shanter hats; the land of Rab C Nesbitt; and the land of Irvine Welsh.

What this list says is that Scotland, like any other country, has a complex range of imagery with a multitude of facets; and in my view rather than trying to seek a single image or group of images which meet all circumstances, appropriate images have to be chosen to suit specific objectives. In marketing Scotland as a location for inward

investment you might stress innovation, the environment, and the educational system—with perhaps a little help from Scotch Whisky. In marketing Scotland as a tourist destination you might stress the environment and the tradition, not forgetting the Scotch Whisky trails. You might find it helpful to sell high tech products against a background which stressed quality and innovation. In marketing Scotland as a location for film production you might wish, depending on the film, to refer to the work of Irvine Welsh. And in selling Scotch Whisky companies, as I have said rely heavily on history and tradition.

What role the Parliament will have in all of this it is difficult to predict. But I hope that in their procedures and their actions they will reinforce Scotland's image for quality and modernity; and that at the same time they will not forget our history and traditions.

Scotland the Brand

Professor Russel Griggs

I was delighted to have been invited to participate in this evening as our move into the new Parliament challenges us all with new issues and opportunities which we must grasp if we are to move forward as a country.

Towards the end of Hugh Morison's presentation he mentioned image and it is Scotland's image, and then why the Parliament might have an effect and could contribute to that which will be the subject of my own remarks this evening. But first let me tell you a little bit about Scotland the Brand for those who do not know us. Several years ago a number of leading business leaders under the Chairmanship of Lord MacFarlane looked at how Scotland might sell itself better, which in turn would help them all sell their own products as well. The meeting agreed that because there was not unity amongst businesses or any other organisation on what Scotland's image should be, it was fragmented and therefore undervalued, so it would be useful if some unity could be achieved.

Two parallel paths were set in place after that meeting. The first was the developing and marketing of the Country of Origin device for use by companies visibly on their products. That part is well underway and we have now over 100 companies licensed to use it. However, it was always accepted that not everyone could ever use this device so a wider proposition on Scotland was needed that everyone could buy into, but to achieve that would take time and also we should first discover what the world thinks of Scotland as a useful place to start, and it is this track that I am here to talk about tonight.

Branding and image of countries as well as products have only become popular in the last few decades but there is real relevance to a country having its own identity. Michael Porter, the well known guru and writer said in *The Competitive Advantage of Nations* that,

> The role of the home nation seems to be stronger than ever. While globalisation might appear to make the nations less important, instead it seems to make them more so.

Simon Anholt, Managing Director of World Writers and a writer on brands says,

> Throughout the 20th Century most of the real successful brands have come from countries that are successful brands in their own right, and substantial transfer of imagery and brand equity can often be seen to occur between the two.

How we as a nation are seen is therefore critical to how Scottish products are seen abroad. Here is some work carried out on countries throughout the world for the UK which highlights the difference people see from nation to nation. As you can see from this there are great differences and some similarities with the UK being at the "softer" rather than the "harder" end of perception, which means in product association that the UK ended up as theatres and culture and Japan and the US ended up as computers. My own Chairman at Scotland the Brand—Sir Alistair Grant—freely admits with his banking hat on that introducing himself as the Governor of the Bank of Scotland conjures up a totally different impression than Governor of the Bank of Mexico.

So what is it about Scotland that makes it different and distinct in the eyes of the world? And it is in the eyes of the world we must look, as our own can be either rose coloured or jaundiced and contain imagery that the rest of the world does not see, or want to see. Scotland the Brand has just completed one of the largest exercises ever in asking the world what it thinks of Scotland, and before I share some of that with you, let me take you through the process as that in itself is interesting as is the template under which all brand research is done.

First, you conduct a desk review of everything that has ever been written and research on the country or product and come up with a hypothesis that may or may not be true but gives you a straw man to talk to people about. This we did last year and came out with these four key values which appeared to be at the heart of it all for Scotland. These values were spirit, integrity, tenacity, and inventiveness. These values also appear to cover time as well and apply to the commercial as well as the cultural part of Scotland.

Next, in order to give the consumers who will form part of your research panels and interviews something to discuss, you prepare some concepts that try to illustrate the values or impressions that we were trying to get over. These are the concept Boards we used and I will pass some round as well as let you look at the ones on the screen. Once again these are only concepts to stimulate discussion, not advertisements, and they were used with collages of various aspects of contemporary Scottish life, music, and press at various points in the research to stimulate discussion on differing things.

Our research was carried out in what could be argued as Scotland's main markets, namely England, France, Germany, Spain, US, and Japan. Of course, we conducted research in Scotland itself to see what challenges and differences there may be between the two views. In each of the countries we have focused on consumers who fall into the category of decision-makers and influencers, or in the modern parlance "Successful Idealists"—well-off, well-travelled opinion leaders, and "Comfortable Belongers"—comfortably off, less well-travelled, mainstream. To an old market researcher like me—ABC1s.

In each country we carried out eight two hour discussion groups and eight one hour in-depth

interviews which overall means that over 600 people internationally will have been part of this research. The research, and indeed the initial stages of the process described above, was carried out by a company called CLK who are experts in this field and was sponsored, not only by ourselves, but by four private companies.

All I can do tonight is share with you some of the very top line results from the world looking on us as we are still in the process of digesting and thinking about the rest and what it might imply. To illustrate some of these let me use what Hugh Morison said in his remarks. He mentioned things he would tell the world if he was talking to them from various standpoints and it would be worthwhile looking at what the world might think of those.

For inward investment he said he would stress innovation, the environment and the educational system. Two of these the world would recognise—environment and education—but from an historic

context, and innovation or inventiveness they would not recognise at all, as their image is still very much of Scotland in the past. Tradition yes, but not the modernity Hugh hoped for.

For tourism Hugh said he would stress the environment and the traditions which would resonate strongly with the world. In selling high tech products he said he would stress quality and innovation. Innovation as I have just said is not recognised currently with Scotland and quality relates primarily to our premium priced products and not too high tech which the world does not know we have anyway. Finally, he said he would sell Scotch Whisky heavily on history and tradition which is obviously why whisky does so well as these are strong and recognised elements of Scotland.

So how Scotland is seen can provide a real emphasis or hindrance for a product and provide it with a context that makes selling it easier, and that is what we must strive to do for all our products as successfully as it works for whisky. And in that is a great dilemma as the world fears that all the strong traditional values that are associated with Scotland might be lost—which would upset them—if we suddenly became a first world technology country and left some of those traditions behind.

It is therefore important that we create an image or proposition for Scotland that allows the world to see us for what we were and what we are at the same time and that in our case may come back to some basic values. One of the strengths that Scotland has—and which reflects on its products—is its integrity which we believe we have more than most and which others admire in us, as many countries in the world believe that they have lost theirs. Integrity demonstrates itself in many ways but one clear demonstration is in the area of high technology companies.

Cadence who you will have seen moved its R&D centre to Scotland last year, did so partly because Scotland is seen as having a serious legal system with integrity, who does not deal in frivolous claims in terms of intellectual property rights (IPR), as many other countries do. The ability to live in an environment that does not always have you looking over your shoulder on IPR issues is a strong draw to these types of companies, and in biotechnology as well and is rooted in our own, and the world's view of our integrity. So integrity is a

strong value that supports both a traditional and modern view of Scotland and is one we should preserve but in itself would probably not be sufficient to take us forward.

The traditional view is very important to our tourist industry and is principally the view the world has of us today, which tends to be landscape and heritage intact, rural spacious, unspoilt, a slow pace of life but with real quality. An honest self-assured people may well show how successful their advertising and promotion has been but does not pull us into the 21st century in terms of our modern industries which must be global to survive. So we must build a parallel image alongside as it would be wrong and negative from the world's perspective to do away with the values that heritage, tradition, and all those other things entail.

Now how can and will the Parliament affect or alter this? Let me not give my opinion but hopefully take the words of someone who should know what effect it can have, namely Donald Dewar.

> The international publicity and higher public profile that devolution will provide for Scotland can be capitalised on and used to help us to create or reinforce favourable images of Scottish products and of Scotland as a desirable place to invest.

In what he says he is absolutely correct in, as a country, we have one of these unique little moments in time when the world will be looking at us, and where we will be visible way past our size in the eyes of the world. If we miss it and it passes us by then it may not come this way again and we probably have up to two years to take advantage and exploit the arrival of the Parliament.

Now before you ask 'is the world interested anyway?', let me say that it is. Be it only in the concept. From my own time in the US over the last two years, the major broadsheets have all followed the referendum, and now the Parliament, with interest. Our research shows that people out there do know about it and are following it with interest and hoping it is being driven by an internal momentum within the country.

Like currency, a Parliament is a vehicle or symbol that people out there in the world use to identify a country as a nation and also to

corroborate its values. Therefore, how the Parliament behaves as much as how it operates, and the policies resulting from it, can affect how we are seen which is why the government and the Parliament need to buy into the idea of a proposition or view on Scotland and behave in that manner.

If they are insular and parochial they can drive our image one way, but if they are outward looking and expansive using the strong values we have, then they can help in the consolidation and expansion of the positive aspects of what we have, and let me say that Scotland does have a strong positive image in the world but like any image there are parts that we need to update and develop in order to make us as much 21st Century as 18th or 19th century.

Also, many people throughout the world will visit the Parliament and therefore it is important that it is seen in a way that builds on our image as well as help develop our products. On that subject if I may be a little controversial as I bring my remarks to a close. Surely—even given all the vagaries of competitive and European tendering—the Parliament in Edinburgh must use and highlight Scottish products to the world.

Those of you who have visited Washington and the Capital building come away with a sense of the great values that the USA is about, and surely that should be the same for us. The new Parliament gives us a unique opportunity to create the international image for Scotland we need—and that is nothing to do with politics—only that if your customers are looking at you—and they will be—we need to show them our best face and image, looking at them not away from them.

Land reform: agenda for the Scottish Parliament

Jeremy Rowan Robinson

Introduction

I am grateful to the Institute for the invitation to speak on the subject of "Land Reform". Its a topical subject. In the Fifth John McEwan Memorial Lecture entitled "Land reform for the 21st Century" in September last year, the Secretary of State for Scotland stated that "we can move forward from talking about land reform to doing something about it. At last it is time for action not just words". Although there has, as yet, been little action, there have certainly been a lot of words on the subject over the last twelve months; and there seems no doubt that land reform will occupy an important place on the agenda for the Scottish Parliament.

My brief is to speak in a stimulating and provocative way about this topic, allowing as many as possible of my personal prejudices to appear. I should say that I have not found this an easy brief to fulfil. As a lawyer I have tended to spend part of my life as a 'mouth for hire' pedalling other people's prejudices; and, as an academic, I try to be objective and pedal everyone's prejudices. I am not accustomed to wearing my own prejudices on my sleeve and I hope what follows will not be regarded as too tentative. I would stress that they are my prejudices and although I share some of them with others I am presenting my view, not theirs.

There is an immediate definitional problem with my subject. "Land Reform" is something of a protean term. To a lawyer, land reform is probably epitomised by the Scottish Law Commission's two recent papers: *Report of the Abolition of the Feudal System* and *Discussion Paper on Real Burdens.*

However, many people would regard this as a unduly narrow, albeit important, focus on the subject. I don't mean to be critical of the Law Commission in saying that. I suspect the residents of Knoydart, if asked what they understood by land reform, would focus on the opportunity to buy the land on which they live and work and on the opportunity to be masters of their own fate. Ask a Munro basher what it means and s/he might want to talk about the importance of

the freedom to roam in Scotland's hills and mountains. On the other hand, if you were to ask Mr Van Hoogstraten, an outspoken landowner from Sussex, he would probably want to tell you about the sanctity of private property rights and the importance of effective means for keeping the 'scumbags' off his land. Mr Van Hoogstraten was described by Auberon Waugh as "not the sort of person one would wish to ask to tea" but "ideal as champion against the Ramblers' Association".

Mr Denega, if asked, might be aggrieved that he was punished for damaging his own property which happened to be one of the nation's heritage of *interesting buildings*, when Mr Cameron was rewarded for agreeing not to damage his own property which happened to be some of the nation's heritage of *interesting land*. Mr Denega, incidentally, had bought a redundant chapel which he planned to demolish and redevelop. However, it was a listed building and in order to persuade the planning authority that it was past saving and only fit for demolition he hired a quarryman to quietly blow a crack in the building. Unfortunately, his accomplice bungled the job and blew the whole building sky high. Mr Denega was jailed for damaging the nation's heritage. The point of relevance to the question of land reform is the very different legislative approaches to achieving the same end: protecting the nation's heritage.

Planning control has a major impact on land use and development and is likely to occupy an important place on any land reform agenda. If you ask Redlands Aggregates, they may comment that there is something seriously wrong with our decision making processes on major land uses when it has so far taken more than eight years to reach a decision on their proposal to create a superquarry on Harris. If you are competing with other superstore developers for a single development opportunity, you may ask how it can possibly be right that the planning authority should be able to grant planning permission to a competitor who happens to have applied to put a superstore on the planning authority's own land (and in which the authority therefore have a clear financial interest). If you were to ask one of the small businesses who were dispossessed of their property to make way for the city centre redevelopment in Aberdeen about land reform, they might have

some suggestions to make about what a recent research report described as the 'long nightmare' of our system of compulsory purchase and compensation.

These can all be regarded as aspects of 'land reform' and they point up the definitional problem to which I referred. I am reminded of Humpty Dumpty in *Through the Looking Glass.* "When I use a word", Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean—neither more nor less". In the time available to me this evening, I propose to take a wide rather than a narrow view of 'land reform' in putting forward my agenda for the Scottish Parliament.

There are five matters I would wish to put on the Agenda. They are:

- stewardship
- community involvement in land
- access to the countryside
- planning gain
- compulsory purchase and compensation

I will now consider these in turn.

Stewardship

The first item I would like to see on the agenda is the question of stewardship. Landownership is generally regarded as being about rights. Professor Gordon in his book on *Land Law* identifies two main substantive rights which are implied in ownership. The first is the right to the exclusive use of the land. The consequence of this is that the owner may exclude others from the land on the basis that their actions constitute either encroachment or trespass. I want to say more about this right later. The second is the right to the use and enjoyment of the land. This means that, subject to what is said below, choices about the use, development and management of land rest with the owner. Of course, these choices may be constrained by any real burdens or third part rights which have been created over the land, such as leases or servitudes, and by any regulation imposed by the state. Nonetheless, ownership is generally perceived as being

about rights and the abolition of the feudal system will give emphasis to this.

In making choices about the use development and management of land an owner will, of course, be heavily influenced by its economic value. The problem is that we have been slow to attach a value to our environment. The result has been that, at times, the environment has been traded for economic value through over-grazing, wetlands drainage, afforestation and intensive farming practices. I do not want to overstate the problem because there are many examples of good as well as bad practice and I acknowledge that in some instances the environmental consequences of land management practices may not have been well-understood until after the event. But our present array of incentives and regulations have not always resulted in good stewardship and there is no general stewardship obligation on owners to fall back on; in other words, no obligation to recognise that land and water can be important assets of the nation as well as private assets.

What I want to suggest is that ownership should be understood to be about responsibilities as well as rights. This is not a novel proposition. The Scottish Landowners' Federation in a Draft Code of Practice for Responsible Land Management (Jan 1999) acknowledge as guiding principles for the ownership and management of land:

- that there are responsibilities associated with the ownership and management of land;
- that the community needs and public interest in how land is managed should be recognised; and
- that there should be proper regard for nature and nature's processes.

Although the Code of Practice is still a draft, I think the question is not really about whether these responsibilities should be recognised but about whether they can be left on a voluntary basis or whether this is something the Scottish Parliament should consider. The Land Reform Policy Group, set up by the Government last year to identify and assess proposals for land reform in rural Scotland, in their *Recommendations for Action* (Jan 1999), favour the voluntary approach supported by a Code of Good Practice on rural land use. This, it is suggested, might set standards for land uses such as agriculture,

forestry, sporting and conservation. Compliance with the Code might be made a condition of public assistance. The Group go on to suggest that a Code pitched at a more strategic level might usefully examine issues of integration of social, economic and environmental aspects, recommending what they refer to as a 'joined-up' approach towards rural land use.

My own view is that a voluntary approach will be helpful but it will not be enough. What I think is required is some over-arching general statement of responsibility expressed in statute which will provide the context for this 'joined-up' approach. The statement should recognise the public interest in land and water as assets of the nation. The implications of the responsibility could then be unpacked in various different ways including through the use of codes of practice so that owners would know what it meant for them. I would not expect that this will require of owners more than is already envisaged in the SLF draft code or than is envisaged in the LRPG code of practice. It is just that the code would be under-pinned by statute.

I would also hope that this increased recognition of the value of land and water as a national asset might be given greater recognition in the range of financial incentives made available to encourage particular land uses. At present the majority of the £450 million support for Scottish farmers under CAP is in the form of support for production, some of which becomes surplus. Slightly less than £20 million is available to support agri-environmental measures. I think we have got the balance wrong.

Community involvement with land

I mentioned the Land Reform Policy Group a moment ago. The Group's conclusion was that the principal objective of land reform in rural Scotland should be the removal of land-based barriers to the sustainable development of rural communities. 'Sustainable development' is one of those very convenient terms which everyone can sign up to because, in Humpty Dumpty's terms, it can mean what you choose it to mean. The Group's definition is development which is planned with appropriate regard for local communities, local employment and the environment. With this in mind they go on in their *Recommendations for Action* to advocate increased diversity

in the way in which land is owned and used and increased community involvement in this. More specifically, they recommended legislation should be introduced:

- to allow time to assess the public interest when major properties change hands;
- to give duly constituted bodies in the more remote fragile rural communities the right to buy land on behalf of the community;
- to confer on Ministers a new compulsory purchase power to step in, in certain cases, to acquire land for transfer to the community.

These proposals are generally encapsulated in the phrase 'community ownership' of land. The proposals are no surprise. They reflect the earlier statement by the Secretary of State for Scotland in his McEwan Lecture that he was "determined to find the most effective way of giving communities a right to buy the land where they live, and time to put together the necessary bid". It also reflects the setting up of the Highlands and Islands Enterprise's Community Land Unit and the establishment by HIE of a Land Purchase Fund to which the Government is contributing a million pounds annually over the next three years. Scottish Enterprise is to follow this lead by supporting community land involvement outside the Highlands and Islands area.

I have no problem with the commitment of public funds to support the community ownership of land. We have supported property acquisition by other sectors of the community whether through subsidising the purchase by tenants of council houses or through tax relief on mortgage interest payments for owner/occupiers of houses. I think community ownership can be a force for the good in terms of the use and management of land and in terms of revitalising communities.

What concerns me a little is the focus of interest on community *ownership* almost to the exclusion of other initiatives. The debate about land reform in rural areas is in danger of being high-jacked by community ownership. Although one can understand the media interest, this is only one solution to the goal of sustainable rural communities. But I suspect it will remain exceptional—Eigg, Assynt, Orbost and Knoydart are the most obvious examples at present.

Some communities will not want to buy; this has been the position with the Department of Agriculture lands in the Highlands and Islands; and land acquisition is certainly not an easy solution—local communities will need to access to land management skills and to capital. And the extent to which community development will be consistent with sustainable development remains to be seen.

Underlying the proposal for community ownership is a concern, not so much with who owns land, although the problem is often portrayed in these terms, but with how it is managed. In this context, it is important to recognise that those who own and manage land are or could be, in many cases, the *solution* to the sustainable development of rural communities rather than the *problem*. I think the Land Reform Policy Group's suggestion that landowners and land managers (and I include public sector landowners as well as private) should take more positive steps to be accessible to local communities, to keep them informed of what they have in mind, to consult with them about significant change, and perhaps to involve them in aspects of land management could do much more to promote sustainable development than community ownership. In other words, because the way in which land is managed in rural areas has such significance for local communities, it is argued, and I think quite rightly, that the communities should have a greater opportunity to have their voice heard on this. Of course, this is not something that can happen overnight. It will take time and some resources to prepare local communities for this role. It is provision for this that I would like to see on the Agenda of the Scottish Parliament. If the stewardship were to be given statutory expression, then greater opportunity for community involvement might be one of the matters that could be picked up in a code of practice.

Access to the countryside

The third item I should like to see on the Agenda is legislation for a public right of access to the countryside. Access is important to our economy. In the early 1990s it was estimated that informal recreation generated over £300 million in income and supported 29,000 FTE jobs. However, the present arrangements for access are unsatisfactory. Because of shortcomings in the law, well-documented by the Scottish Rights of Way Society, our network of public rights of

way has been the subject of an alarming rate of attrition in recent years and is being replaced by a system of permissive routes. Area access, which relies heavily on implied consent or tolerance, is insecure and uncertain. Legislation, designed to safeguard access on the one hand and to make additional provision on the other, has had no more than limited effect; and this at a time when the demand for access has been growing. Although the voluntary approach has served us well, I do not believe it is sufficient. It gives those seeking access little confidence and, at times, it simply cannot deliver. And the problem is not just one-sided. Those who manage land have few workable remedies against trespass or irresponsible use.

The problems have been recognised. In October 1997 the Government, in pursuit of its manifesto commitment to create greater freedom for the public to enjoy the countryside, asked Scottish Natural Heritage to review the legal arrangements for access over land and inland water. SNH asked the Access Forum to assist in this task. The Forum is a voluntary body comprising representatives of the 'umbrella' organisations involved in one way or another with access. It was established in 1994 on the initiative of SNH in an effort to bring greater consensus to the solution of access issues. Its initial focus was on access to the hills and it was successful in mediating the Concordat on Access to Scotland's Hills and Mountains published in 1996. The Concordat does not establish new rights. It is about responsibilities rather than rights. It is a voluntary approach, a statement of intent by the signatories on behalf of their members. It acknowledges and undertakes to promote freedom of access exercised responsibly.

In order to look more generally at access to land and water, the Forum enlarged its membership to include representation from lower ground interests. In a remarkable display of the value of involving those most closely interested in the matter in working out proposals, and in marked contrast to what is happening south of the border, the Forum reached consensus that there should be a general *right* of access to land and water in Scotland for informal recreation and passage. I think the representatives for the Scottish Landowners' Federation, the National Farmers' Union of Scotland and the Scottish Crofters' Union on the Forum deserve recognition for the break through here. The Forum emphasised very strongly, however, that

the right had to be part of a wider package and that this package had to go forward as a whole. Other key elements of the package were that:

- the right should be dependent on responsible behaviour on the part of those exercising it;
- adequate safeguards should be provided to protect the privacy of those who live in the countryside, the operational needs of land managers and conservation interests;
- additional resources should be provided to support the inescapable additional costs that will arise.

SNH, in its advice to the Government in January this year, endorsed the recommendations of the Forum and emphasised the totality of the package. Lord Sewell, in a speech at Balmaha in February, adopted the advice and indicated that the Government would now proceed to draft legislation so that a draft Bill would be available for early consideration by the Scottish Parliament. In other words, it looks as though this item on my list will, indeed, be on the Agenda.

This, of course, is only the first step, albeit a very important one. The devil is likely to be in the detail of what is proposed. It will be necessary to tackle such issues as what land will be covered by the right, what recreational activity is to be encompassed by the right, how will such a right interact with land management practices, how is privacy to be safeguarded and what will happen to public rights of way. Nobody underestimates the difficulty of turning the proposal into a reality. The Forum has agreed to continue what it has started to see how far agreement can be reached on how the new right should be implemented in practice.

Planning gain

I suggested earlier that the most comprehensive system of control over the use and development of urban land (to a lesser extent rural land) is to be found in the planning legislation. It is a sophisticated system of control and one which has survived largely intact for some fifty years. Its day to day operation nonetheless gives rise to quite a lot of dissatisfaction. A land reform agenda for the Scottish Parliament would be incomplete without some reference to reform of the planning system.

Although a number of aspects of the system are candidates for reform, the one I want to consider is the use of planning agreements. Planning authorities have power to negotiate an agreement with anyone with an interest in land in their area with a view to restricting or regulating the development or use of that land. If recorded, the agreement may be enforced by the planning authority against singular successors.

Such agreements are quite commonly employed by planning authorities to strengthen their position in the development control process. A grant of planning permission is often made dependent on the applicant assuming certain obligations in an agreement. There is a broad consensus that such agreements can be useful in oiling the wheels of the development control process. The agreement removes what might otherwise might be an obstacle to a grant of planning permission.

Such agreements have, however, given rise to continuing controversy over the last twenty years. There are several reasons for this; but the point I want to consider, and the point I would like the Scottish Parliament to consider, is how far these agreements can be used by planning authorities as a sort of local betterment levy. This is what is generally referred to as the pursuit of 'planning gain'. Most developers accept that they should meet the cost of providing infrastructure, the need for which is generated by their development proposal. If an office development will generate traffic which cannot be accommodated in safety on the public road network, the developer should meet the cost of upgrading the road network to the necessary standard. Scottish Office policy advice in Circular 12/96 is to this effect; obligations in such agreements should be reasonably related to and in proportion to the problems created by the proposed development.

In fact applicants for planning permission quite often find that they are now expected to assume obligations which are only tenuously related to their development proposal. For example, a housing scheme may generate a need for additional classroom space in the secondary school. The planning authority, however, may expect the applicant to fund the provision of a whole new school. A superstore proposal may trigger the need for some improvement to the road

network. The developer may find that he is expected to substantially fund the construction of a new by-pass.

There seems to be nothing unlawful in the planning authorities' actions. The recent House of Lords decision in *Tesco Stores Ltd. v Secretary of State for the Environment* [1995] JPL 581 shows that providing there is at least a tenuous link between the obligation in the agreement and the subject matter of the application, that is all that is required; and there are indications that the courts are willing to be imaginative in searching out this tenuous link. The weight to be attached to the link is entirely a matter for the decision-maker.

With the *Tesco* case behind them, the approach of planning authorities is understandable. With relentless control over local authority spending, authorities are looking for other ways of funding the provision of local infrastructure. Planning agreements offer a legitimate means of levying what is in effect a local betterment tax. The approach is nonetheless a cause for concern for several reasons. First of all, the distribution of the levy is entirely opportunistic and this raises a question of equity between developers. Secondly, it could mean that where there are competing schemes, planning permission is granted to the highest bidder. Thirdly, with the prospect of an attractive package of community benefits, planning authorities may be tempted to compromise on planning standards. Fourthly, as a means of funding local infrastructure it favours growth areas where there is a buoyant demand for development land and where a grant of planning permission will unlock substantial development value. Yet local infrastructure is often most needed in areas of economic decline. Finally, it requires an understanding and an evaluation by the planning authority of the financial structure of a development proposal, otherwise there is a risk that the pursuit of planning gain will stifle development. It is not at all clear that planning authorities are well placed to make this evaluation and I am aware of cases where development has, indeed, been stifled.

For all these reasons, I suggest the trend towards the pursuit of this form of planning gain requires scrutiny and I would hope that this might find a place on the agenda of the Scottish Parliament and that it be reined back in line with the Scottish Office circular.

Compulsory purchase and compensation

For the last item on the agenda, I want to shift attention to another area of land reform which is a focus of interest at the moment and that is compulsory purchase and compensation. The power to acquire land compulsorily is an important mechanism for ensuring that public policy goals, whether urban regeneration or acquisition by rural communities, are achieved. However, the exercise of the power is one of the harshest impositions by the state upon its citizens. It is not surprising, therefore, that the nature of the arrangements for compulsory purchase and compensation should be the subject of scrutiny from time to time.

The catalyst for the scrutiny on this occasion was the proposal to construct a high speed rail link from the Channel Tunnel to London. Vocal concern about the consequences of blight and perceived inadequacies in the compensation arrangements prompted a number of piecemeal reforms. However, the disquiet has given rise to a more general questioning of the continuing appropriateness of the arrangements for compulsory purchase and compensation which still owe much to their formulation in the climate of national emergency in the aftermaths of the First and Second World Wars. In June last year the Government announced a wide ranging review of the law and practice of compulsory purchase and compensation. To aid that process the DETR set up an Advisory Group with Scottish representation. A separate but parallel Scottish review is underway. It remains to be seen what comes of these reviews. In the meantime, there a three matters which I would hope might appear on the agenda of the Scottish Parliament.

First of all, the whole process of compulsory purchase and compensation can take years to carry through. A recent DETR research report found that for those on the receiving end, the process was stressful and for many it was one long nightmare. Just how long can be seen from several pieces of research which show that the period from the making of the order to settling compensation at its fastest will be about three years and at its slowest ten years with most cases falling somewhere between the two. During this time, those on the receiving end are experiencing anxiety and uncertainty, first of all, about whether they are to be dispossessed and secondly about how much they will get. There is no doubt it is in everyone's

interest (claimants and acquiring authorities) that the process should be substantially speeded up. Streamlining dispute resolution, fast tracking orders where objections are withdrawn, combining the CPO confirmation and compensation settlement procedures, and speeding up the confirmation decision have all been suggested.

Secondly, a number of reports show that the compensation at the end of the day too often fails to provide claimants with their full loss. For example, why should commercial claimants be unable to recover the cost of borrowing forced on them by poor trading conditions resulting from the running down of an area due to the acquiring authority's scheme? Why is reimbursement of professional fees linked to a scale rather than to the actual fees—which are quite often somewhat higher than the scale? Why is compensation arising from severance always linked to the effect on the market value of the remaining land when the costs of re-establishing an enterprise (industrial, commercial or agricultural) can be considerably higher? Why is simple interest rather than compound interest paid on the compensation where entry is taken before payment? Why is no value placed on the anxiety and stress which claimants (other than householders) face as a result of the compulsory nature of the sale? What can be done about claimants who find themselves in a negative equity trap and who stand to get no compensation beyond disturbance? Would it help if acquiring authorities were required to focus less on the application of detailed rules and more on achieving the principle of equivalence which is said to underlie the measure of compensation?

I recognise that there is a need to strike a balance. It is important that much needed schemes of public works are not impeded by over-generous compensation. But I am not suggesting a major change in the level of compensation; simply a more realistic appraisal of the actual losses faced by a claimant. A better deal for claimants could have benefits for acquiring authorities in terms of reducing the time taken to secure a confirmed compulsory purchase order and to settle the compensation.

Thirdly, we are dealing with some pretty elderly legislation here. The Lands Clauses Consolidation (Scotland) Act 1845 still governs some of the compulsory purchase procedure and the compensation claim. Consolidation of the various pieces of legislation over the last

150 years is overdue, as is codification to reflect the interpretation of the legislation over the intervening years by the courts.

Conclusion

In putting forward my Agenda, I feel as though I have just taken part in 'Desert Island Discs'. These are the five records I would like to take with me if I was cast away in the Scottish Parliament. It may seem having listened to the records that my proposed Agenda lacks coherence. That is true up to a point; the items are discrete. However, underlying all of them is a desire to adjust the balance between private rights and the public interest. With some of the items the balance is tipped too heavily in favour of the public interest. In my opinion that is the position with planning gain and with compulsory purchase and compensation. With others, I think the public interest is not sufficiently reflected. That is the position with stewardship, with community involvement in land, and with access to the countryside.

It may seem that my Agenda is, in part, anti-landowner. It is not intended to be. I recognise that landowners are in most cases the solution to the land reform issues in the countryside. Only occasionally are they the problem. Certainly, my Agenda supports an adjustment of the balance between the landowner and the public interest. However, I am conscious in advancing this Agenda that agriculture covers some 74% of the total land area of Scotland and is therefore a major influence over the countryside. I am also aware that the total income from farming in the UK declined during 1998 by something of the order of 30%. This is clearly not the time to be advocating the imposition of major new burdens on landowners. I am not advocating that. I think in part what is required is a change of attitude and the draft Code of Practice issued by the SLF seems implicitly to acknowledge that. It is a change of attitude which is required to achieve greater community involvement. In part, it is also important that any change is taken forward as a complete package. That is the position with access and with stewardship. The state should be willing to put resources into achieving an adjustment of the balance in favour of the public interest.

The David Hume Institute

The David Hume Institute was registered in January 1985 as a company limited by guarantee: its registration number in Scotland is 91239. It is recognised as a Charity by the Inland Revenue.

The objects of the Institute are to promote discourse and research on economic and legal aspects of public policy questions. It has no political affiliations.

The Institute regularly publishes two series of papers. In the **Hume Paper** series, now published by Edinburgh University Press, the results of original research by commissioned authors are presented in plain language. **The Hume Occasional Paper** series presents shorter pieces by members of the Institute, by those who have lectured to it and by those who have contributed to 'in-house' research projects. From time to time, important papers which might otherwise become generally inaccessible are presented in the **Hume Reprint Series.** A selected list of the Occasional Paper Series follows.

49 Paying for Devolution *Hector L. MacQueen*

50 The Device of Devolution *Alan Peacock*

51 More or Less Competitive? A Case Study of the Scottish Economy *Professor Sir Donald MacKay*

52 Causation in Economic Affairs *Samuel Brittan*

53 A Cool Look at the Euro *Samuel Brittan*

54 Working with the Scottish Parliament: Judicial Aspects of Devolution *Lord Hope of Craighead*

55 The Start of a New Song *Vernon Bogdanor*

56 Report on Economic Aspects *David Simpson, Brian GM Main, Alan Peacock, Fabian Zuleeg*

Further details of publications may be obtained from:

The Secretary, The David Hume Institute, 21 George Square, Edinburgh EH8 9LD, Tel 0131-650 4633: Fax 0131-667 9111.

REGISTERED OFFICE
21 George Square, Edinburgh EH8 9LD
(Registered in Scotland No. 91239)
Tel: 0131-650 4633. Fax: 0131-667 9111
Enquiries should be addressed to The Secretary