1

Scotland

Union and Devolution

The United Kingdom of Great Britain[1] came into being on 1 May 1707 after separate Acts of Union were adopted and given royal assent by both the Scottish and English Parliaments. Therefore, this Union is not an ancient creation, but a construction of just over 300 years.[2] Before that, Scotland and England were independent States. However, the structure and status of the 1707 Union is somewhat ambiguous, not least in legal terms, and the earlier part of this chapter considers its rather elusive nature.

1.1 Background and Context

The 1707 Union was not the first Union achieved between Scotland and England. A Union of Crowns had been in existence since 1603, when James VI of Scotland came to the throne of England on the death of the childless Queen Elizabeth, thus becoming England's first King James.

James was, however, ambitious for closer relations between the two countries, seeking a more formal union of Parliaments as well as of the Crowns, suggesting this as a 'consummation' of a marriage. He even set up a Commission in 1604 to consider a deeper union between the two State but this project failed.[3] The objections came principally (but not only) from the English, who did not want to share their economic benefits with the Scots, and could generally only countenance a subjugation of Scots law to English law. Indeed, James had already delivered a speech to the English Parliament in 1607, lauding the common law of England as 'the best of any Law in the world'.[4] But a union of laws was not acceptable in Scotland. Nonetheless, the idea of further union was in motion, and was supported by Francis Bacon,[5] whose writings were to reappear later in the century, when union was being taken more seriously.

[1] This is how the Articles of Union refer to Britain.

[2] Linda Colley, *Britons: Forging the Nation* (Yale University Press, 1992).

[3] Alain Wijffels, 'A British *ius commune*? A Debate on the Union of the Laws of Scotland and England during the First Years of James VI/I's English Reign' (2002) 6 Edinburgh LR 315.

[4] I James, *The Workes of the Most High and Mighty Prince, James* (London, 1616) 511–514 and 553.

[5] See e.g. Bacon's 1603 memorandum, *A Brief Discourse Touching the Happy Union of the Kingdoms of England and Scotland*.

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Under the Union of the Crowns, England and Scotland remained separate kingdoms, each with separate legal systems and political structures. There was virtually no statute law regulating it. What Union there was, came about by Proclamation, an instance of the royal prerogative, such as when James styled himself King of 'Great Britain' rather than of England and Scotland separately.[6] The status of Scots in England and English in Scotland (known as 'postnati') was not settled by any Act of Parliament but by the English courts in *Calvin's case* in 1608,[7] in which Chief Justice Coke ruled that a child born in Scotland, after the King's accession to the English throne, being the King's subject, had the same rights as Englishmen.

Scotland and England retained their own separate courts, legal systems and administrations. However, the King resided in London, rarely if at all visiting Scotland, and this situation favoured English concerns and interests. Nonetheless, the Union of the Crowns managed to function until Charles I alienated the Scots by interfering with the Scottish Church, imposing an Anglican book of common prayer on them. Scots reacted to Charles' attempt to impose religious homogeneity by drawing up a national Covenant in 1638, which reaffirmed the Presbyterian faith. In 1643, the covenanters formed an alliance with the English Parliament, which strengthened the parliamentary side in the Civil War. In fact, Union of Scotland and England subsequently came about from 1652, but it was a Cromwellian one, imposed by conquest, whereby Scotland's Parliament and sovereignty were both extinguished, when Scotland was incorporated by Cromwell into a British republic, the Commonwealth.

Nor was the Restoration under Charles II from 1660 particularly beneficial for Scotland, even although Scotland regained her Parliament, independent statehood and sovereignty. For brevity's sake, we will only note here that the adoption of the English Navigation Acts in 1660, which restricted trade to and from the colonies to *English* ships, provided no exception for Scotland, and thus excluded her from benefits of such trade. The Glorious Revolution of 1688 ousted the Stuart King James VII/II – a convert to Roman Catholicism who had succeeded Charles II – from both countries, replacing him with William of Orange and Mary his wife (and James VII/II's Protestant daughter). A national Convention in Edinburgh voted a Claim of Right[8] of 1689, just as the English Parliament had adopted a Bill of Rights in 1688. Both documents set out a catalogue of abuses committed by James VII/II. However, whereas the English Bill of Rights used the fiction of 'abdication' as justification for offering the throne to William, the Scottish Claim of Right declared that James had by virtue of

[6] B Galloway, *The Union of England and Scotland 1603–1608* (Edinburgh: John Donald, 1986) at 20–22 and 60–61.

[7] *Calvin's Case*, 6 James I [1608].

[8] David Edward ('Scotland's Magna Carta: The Claim of Right and the Common Law' (2015) 6 UK SC Yearbook, 8) also notes that the Claim of Right is 'significantly different from the English Bill of Rights'.

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his 'violation of the lawes and liberties of the kingdome', '*forfeited* the right to the crown' (emphasis added). The Claim of Right is considered to reflect the philosophy of sixteenth-century George Buchanan[9] which asserted that all political power derived from the people, and that the monarch is obligated by the conditions under which they assumed the throne. William and Mary, when offered the Crown of Scotland in 1689, were obliged to accept it on the terms of the Claim of Right, including that the monarch's prerogatives be subject to the rule of law.

1.1.1 Constitutional Reasons

Many of the roots of the Acts of Union lay in the constitutional changes of the Glorious Revolution. Scottish historian, McKechnie, endorsed Macaulay's[10] account of how the monarchy's powers were gradually eviscerated by the English Parliament, and of how the King was forced to appoint a ministry to satisfy parliamentarians. Yet, if the King was more constrained by his ministers in London, he was also less able to satisfy his Scottish subjects. Indeed, McKechnie contended that, in the reign of William and Mary, Scotland, 'while still nominally free and independent, was practically in a worse position than any British self-governing colony at the present day.'[11] For unlike colonial dominion parliaments that could call colonial governments to account, this was not the case with pre-1707 Scotland, which was largely governed from London. Even where the Scottish Privy Council itself exercised governing powers, it had little responsibility to the Scottish Parliament.

Nonetheless, the Scottish Parliament also began to show its weight, and in 1690 abolished the 'Lords of the Articles'. This was a committee of the Scottish Parliament, appointed by the King and under executive control, with prime responsibility for framing and initiating legislation. Its abolition thus removed a dominant executive control over Scottish legislation.

1.1.2 Famine, Betrayal, Darien, and the Succession

However, factors other than constitutional changes were also relevant. The 1690s were hard years in Scotland. Catastrophic harvest failures caused widespread famine. There were other ruinous events. The Scottish Darien venture of 1699–1701, an attempt to find a trading settlement in Darien, at the isthmus of Panama, proved a complete failure, beset by financial mismanagement and tropical disease. There was a huge loss of life and perhaps as much as

[9] Buchanan's *De Jure Regni apud Scotos* 1579 was considered so dangerous that it was burned by Oxford University in 1683.

[10] TB Macaulay, *The History of England from the Accession of James II, vol iii*, (Cambridge Library collection, first published 1849).

[11] The 'present day' being 1907 when McKechnie wrote the article; W McKechnie, 'The Constitutional Necessity for the Union of 1707' (1907) 5 Scottish Historical Review 56.

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one quarter of Scotland's wealth was lost in this venture.[12] However, it could not escape notice that the Darien company had received no help from King William, who in 1699 issued a proclamation banning English subjects from dealing with the Darien colony in any way. Whatever the causes of the Darien calamity, it was perceived by many Scots as exacerbated by the shortcomings of the Union of the Crowns, whereby the King would place English concerns ahead of Scottish ones.

More generally, Scottish trade was not flourishing under the Union of the Crowns. There was very little free trade between England and Scotland, and the Navigation Acts were enforced against the Scots, leaving only an illicit trade with American colonies. Debate continues[13] whether economics sparked Scotland's desire for union, but there was clearly a hope in Scotland for an opening of English markets to them.

Trade was not the only thorny problem, however. There was also the issue of succession to the throne. England and Scotland shared a common monarch and Anne, Mary's (Protestant) younger sister and daughter of James VII/II, had failed to produce an heir. The fear was that, on Anne's death, the throne might devolve to the Catholic son of deposed James VII/II (by his second marriage), thus putting the Protestant line at risk. So, in 1700, the English Parliament adopted the Act of Settlement,[14] whereby, should Anne die without heir, then her successor would not be Catholic James or his son – 'the Old Pretender' – but the next Protestant in line, Sophia Electress of Hannover (or her heirs), who was then the elderly grandchild of James VI by his daughter Elizabeth. This English Act of Settlement had no force in Scotland, nor were the Scots consulted about it. However, when Scotland failed to act similarly and define a successor, the English feared a possible succession in Scotland of the 'Old Pretender', aided by French support (England was at war with France in the 1690s and 1700s). This, as much as anything, turned English minds in favour of a greater union in Scotland, as a means to secure a Hanoverian succession.

The Jacobite cause in Scotland, however, was complicated. Both James VII/II and his son were Catholic. Scotland was heavily Presbyterian. But Jacobite support, while threatening the Protestant ascendancy, did not derive only from Catholics. It was also supported by Episcopalians (part of the Anglican Communion), who had been alienated by both the establishment of radical Presbyterianism in Scotland, and by the abolition of bishops there. Jacobitism also had an undoubtedly romantic element, benefiting from the fable of 'the lost cause', the notion that 'the king shall enjoy his own again'.[15]

[12] See Douglas Watt, *The Price of Scotland: Darien, Union and the Wealth of Nations* (Edinburgh: Luath Press, 2007).

[13] TC Smout, *Scottish Trade on the Eve of the Union, 1660–1707* (Edinburgh: Edinburgh University Press, 1963); CA Whatley with D Patrick, *The Scots and the Union* (Edinburgh: Edinburgh University Press, 2006) 11.

[14] Act of Settlement 1700, 13 Will 3.

[15] A traditional ballad, originally a Cavalier song from the English Civil War, that became a popular Jacobite song.

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Another attempt was made at union between the two nations in 1702 but nothing came of it. So, the succession was still a problem, and the English began to realize that, in order to settle that issue, some sweetener must be offered Scotland, most likely admitting Scots into England's trading system.

1.1.3 Legislation of the Scottish Parliament in 1703 and 1704

But relations were to get worse before union could be achieved. Some provocative legislation took place on both sides of the border, which helps explain the direction Union ultimately took. In 1703, the Scottish Parliament adopted *An Act anent* [concerning] *Peace and War*. This asserted the Scottish Parliament's right to declare war and make peace, abolishing the monarch's royal prerogative in this area, ensuring Scotland would not be forced into foreign wars on England's account. In effect, it was a move towards a more federal model of organization.

In 1704, the Scottish Parliament then adopted an *Act of Security for the Kingdom*,[16] asserting Scotland's right to determine succession to the Scottish Crown. This Act mandated that the Claim of Right be read to any new monarch before administration of the coronation oath (and also provided that free trade between England and Scotland was a condition of Scotland agreeing any Hanoverian succession). Without agreeing these limitations, any succeeding monarch might forfeit the Crown. Much influence on this Act is attributed to Andrew Fletcher of Saltoun,[17] now revered as a Scottish patriot. Nonetheless, the Queen (somewhat reluctantly) gave her royal assent to the Act, although the clause on free trade was omitted (although had been approved by the Scottish Parliament).

The Scottish Parliament also passed the Wine and Wool Acts, in 1704. The Wine Act permitted trade with France during the war (between England and France) and the Wool Act permitted the export of wool from Scotland but not its import. Both were seen by the English as hostile legislation. And, in the meantime, Scotland had not agreed the Hanoverian succession. Perhaps, relations between Scotland and England reached their lowest point in 1705, when an English ship, the *Worcester*, was seized in Leith on charges of piracy of a Darien ship, and its captain and two of its crew, were publicly executed in Leith, although quite possibly innocent.

1.1.4 The English 'Aliens Act'

It was felt that these aggressive (to English eyes) Scottish statutes needed some response. In 1705, Westminster legislated an *Act for the effectual securing of the Kingdom of England from the apparent dangers that might arise from several*

[16] Act of Security, Parl. Scot., xi, 1

[17] See A Fletcher, *Account of a Conversation Concerning the Right Regulation of Government* (Edinburgh, 1703).

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acts lately passed by the Parliament of Scotland (aka 'Aliens Act'). This Bill in its Preamble called for 'a nearer and more complete union'. But it also contained a threatening follow up, warning that, if Scotland had not appointed commissioners, or accepted the Hanoverian succession, by Christmas Day 1705, then it would suffer severe economic penalties, and Scots in England (unless domiciled there) would be treated as aliens. Notably, this threat, that Scots might be declared aliens in England, conflicted with *Calvin's case.* According to Devine, this Act was 'a naked piece of economic blackmail'.[18]

However, by 1705, a treaty of Union was becoming a more attractive prospect to Scotland, (mainly due to perceived economic benefits rather than agreement on Hanoverian succession). And thus, the Scots agreed to start negotiations, and the threatening sections in the Aliens Act were repealed.

1.2 Negotiating and Drafting the Articles and Acts of Union

The Union of 1707 took place against a background of European war, economic crisis, and worries over the succession. Devine describes the 1707 union as 'a marriage of convenience founded on pragmatism, realpolitik, competing national patriotisms.'[19] But the parties achieved two major goals – for the 2nd Article of Union secured the British Union on the Hanoverian succession, and the 4th Article provided Scots with freedom of trade with England and its colonies.

The process started, however, with the surprising 1705 motion in the Scottish Parliament that Queen Anne select the thirty-one commissioners to represent Scotland in negotiations for Union. This ensured the likeliness of their approving a treaty according to the English goal of incorporating Scotland and unifying the two Parliaments. Why this motion was approved is unclear, although some suggest that the Duke of Hamilton, a Jacobite and leader of the anti-unionist cause in the Scottish Parliament, was bribed by the English.[20] George Lockhart of Carnwarth, a Jacobite, and thus a somewhat isolated Scottish commissioner in 1706, later dated Scotland's 'ruine' from this point.[21] In February 1706, Anne named thirty-one commissioners for Scotland, nearly all in favour of union and allies of Lord Queensberry (a major 'court' or royalist, in the Edinburgh Parliament, who was to steer through the Act of Union there). In April 1706, the thirty-one English commissioners were appointed, mostly Whigs intent on securing a Hanoverian succession, Lord Godolphin (English Treasurer, credited with steering the Act of Union through Westminster) prominent among them. Daniel Defoe was sent to Edinburgh as an agent and generally promoted the unionist cause, publishing

[18] T Devine, *Independence or Union: Scotland's Past and Scotland's Present* (Penguin, 2017) at 19.
[19] Devine, *Independence or Union*, 3.
[20] M Fry, *The Union: England, Scotland and the Treaty of 1707* (Birlinn, 2013) 179.
[21] D Szechi (ed.), *'Scotland's Ruine:' Lockhart of Carnwath's Memoirs of the Union* (Aberdeen: Association for Scottish Literary Studies, 1995) 172.

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The History of the Union of Great Britain in 1709, 10 years before *Robinson Crusoe*, for which he is now more widely known.

A procedure for the negotiations was agreed, whereby Scottish and English commissioners debated separately, maintaining secrecy and communicating only in writing. If necessary, all commissioners could meet around an enormous table in the Westminster 'cockpit.' The session began on 22 April 1706.

1.2.1 Main Points of Negotiation

1.2.1.1 A United British Kingdom (Articles I–III)

A federal union was initially proposed by the Scottish commissioners. This had already been mooted in Scotland (i.e. by William Seton of Pitmeddon in the Scottish Parliament) although in the early eighteenth century there was no great precision in the use of this term. However, there was no appetite for a federal union in England, where federalism was seen as perpetuating weak and divisive government. The English instead focussed on an 'incorporating' union, unifying the Parliaments, coupled with securing the succession. And this was what was ultimately achieved (in Articles I–III Articles of Union.)

1.2.1.2 Trade (Article IV)

The Scottish commissioners insisted on free trade, not only with England, but with all its colonies, and also the protection of the Navigation Acts. Article IV settled this. Perhaps one of the most significant clauses in the Union treaty was that abolishing internal customs barriers, given that such barriers were retained by other European countries until much later (Austria until 1775 and France until 1790).[22] The British Government in London, and Westminster Parliament, would in future regulate trade.

1.2.1.3 'The Equivalent' (Article XV)

Finance was an issue. The burden of tax was higher in England, which had imposed additional taxes to fund its European wars, but also collected its taxes more effectively than Scotland. A homogenized system under Union would therefore raise Scotland's tax burden. To render this more bearable, commissioners agreed that a sum known as the 'Equivalent' would be transferred to Scotland to compensate for financial loss caused by Union. Opinions on the 'Equivalent' differ, but it was described by Lockhart as a 'mighty bait, a swingeing bribe'.[23]

1.2.1.4 Preservation of Distinct Legal Systems (Articles XVIII–XX)

James VI/I had suggested a Union whereby the English common law might replace the Scottish legal system. This was not on the table now. The two

[22] Colley, *Britons,* 38.

[23] G. Lockhart, *Letters of George Lockhart of Carnwath 1698-1732* (printed for Scottish History Society, 1989) volume I.

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countries possessed, and continue to possess, distinct systems of law. Whereas the English 'common law' was largely precedent based, Scots law was notably influenced by Roman law, and much of it organized in the 1681 *Institutes* of Lord Stair (President of the Scottish Court of Session). Scots law also drew a distinction between public and private right – a distinction preserved under Union, with Scottish public law much more amenable to change by the Great Britain Parliament than private law.

In general, Scottish laws, with the exception of those on trade and customs, would remain in force, unless contrary to the Union treaty. Additionally, English courts were barred from reviewing decisions of the Scottish courts. However, this last stipulation was ambiguous, in that it omitted to rule out any appeal from the Court of Session to the House of Lords. And indeed, such a right did in fact develop within a few years of Union.

1.2.1.5 Parliamentary Representation (Article XXII)

This presented the commissioners with a knotty problem. How could an integration of parliaments be achieved between two nations so disparate and unequal in nature? How many Scots should sit in the Westminster Parliament? Should the composition of this Parliament for Great Britain be determined anew, or should Westminster simply absorb new Scottish members? This issue motivated the only joint session of commissioners, on 12 June 1706.

The English opening proposal was very low – it would have added only 13 Scots to the existing 513 English MPs in Westminster. Eventually a compromise was reached, with a total of 45 Scottish MPs to be added to the House of Commons and 16 Scottish peers to the House of Lords. In this way, the total of Scottish constituencies was reduced by 2/3 and 90 per cent of Scottish nobleman were excluded from Westminster. English representation in both Houses was left untouched.

1.2.1.6 Agreement

A final draft of the Articles of Union was adopted on 22 July 1706, only three months after negotiations had opened – very speedy for what in effect has been described as 'a Constitution' for a new State.[24] The draft was signed by all commissioners with the exception of Lockhart, for Scotland, and the Archbishop of York, for England. Notably, however, nothing had been agreed at this stage about the Scottish Kirk or Church, and we will return to this. But what had been achieved was a framework document that would effectuate the existence of a new State, the United Kingdom of Great Britain.

But the agreed Articles left many questions unanswered. The nature of this united Parliament had not been set out in the Articles (was it sovereign?), nor indeed the legal nature of the United Kingdom of Great Britain itself. Was it

[24] N MacCormick, 'Does the United Kingdom Have a Constitution? (1978) 29 N. Ir. Legal Q. 1.

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truly an 'incorporating' union, and if so, what did that mean? These questions will be considered below.

1.2.2 Ratification

The draft Articles might have been adopted by the commissioners, but until they had been ratified by both Parliaments, there could be no Union. The process of ratification began in the Scottish Parliament, which was seen as presenting the greater obstacle. Notably, however, a text of the Bill was only provided to that Parliament in October 1707, leaving no time for scrutiny before the session began. It has been said by historians that there was much opposition to Union in Scotland generally.[25] There is also the suggestion that bribery played its part in Scottish ratification – with nobles 'bought and sold with English gold' as the Burns poem recites.[26] Nonetheless, several amendments were achieved by the Scottish Parliament, not the least important concerning the Presbyterian kirk.

1.2.2.1 Act of Security for the Kirk

Notably, the Presbyterian Kirk had been excluded from the text of the Articles of Union. This did not satisfy Scots, and quite possibly Union might never have been achieved if it had not provided security for the kirk – Dicey and Rait certainly expressed this view.[27] The kirk occupied a singularly important place in Scotland. But by 1706, the Presbyterian church in Scotland felt under threat from a prospective Jacobite restoration. Although Union might seem attractive to Presbyterians because of England's Protestant church, it was felt that the Church of England and secular State were too interfused, with bishops sitting in the House of Lords, and the monarch as Head of the Church. In contrast, the Presbyterian church, although it is the national Church of Scotland, is not established and there are no bishops. Scotland adhered to a constitutional doctrine of two swords, one wielded by the State, and the other by the kirk, with ultimate supremacy vested in neither.[28] Indeed, the Scottish Parliament had in the 1690s guaranteed Presbyterian governance of the Church, giving the Church of Scotland the ability to adopt its own legal Acts.

Reverend William Carstares,[29] moderator of the Church of Scotland in 1706, pushed the case for an Act of Security for the Kirk, in order to guarantee its

[25] E.g. Fry, *The Union*, chapters 5 & 6; Devine, *Independence or Union*, chapters 1–3.

[26] Robert Burns' 1791 poem *Such a Parcel of Rogues in a Nation.*

[27] AV Dicey and RS Rait, *Thoughts on the Union between England and Scoltland* (London, 1920) 247, 252–254.

[28] See G Cowie, 'Establishment, Schism and the Kirk: Assessing the Relationship between Scots Law and the Presbyterian Churches in Scotland', LLB dissertation at https://glasgow.academia.edu/GraemeCowie; and DM Walker, *A Legal History of Scotland* (Edinburgh: T&T Clark, 1995) iii at 248. This concept of the two swords, representing two kingdoms, one spiritual, one temporal, was earlier expressed in the papal bull of Pope Boniface VIII in 1302: the *Unam Sanctam*.

[29] Fry: 'no man did more to make Edinburgh a cradle of the Enlightenment' (Fry, *The Union*, 238).

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status. And so, an 'Act for Securing the Protestant Religion and Presbyterian Church Government in Scotland' was adopted by the Scottish Parliament in January 1707. This Act was incorporated into the Acts of the Scottish and English Parliaments by which the Treaty of Union was ratified. A similar Act securing the status of the Church of England was adopted for England.[30]

Therefore, two independent churches were to be secured in one State. This was undoubtedly unusual in the Europe of its time, in which Statehood was linked to religious identity. Admittedly both churches were Protestant, which has been identified as a unifying feature of British identity.[31] However, Fry describes 'a sort of creeping federalism in having two different rival Churches', suggesting this as one reason 'why Union never produced one nation'.[32] Perpetual security for the Kirk also appeared to be drafted as a fundamental provision of Union legislation: to 'be held and observed in all time comeing as a fundamental and essential condition of any Treaty or Union to be concluded betwixt the two Kingdoms without any alteration thereof or derogation thereto in any sort forever'. And so, although the Scottish Parliament was to end, the role of the Church of Scotland's General Assembly was intended to continue forever, and to operate as a constitutional check or balance.

1.2.2.2 Ratification

Aside from provision for security of the Scottish Kirk, the other Articles of Union had to be ratified by the Scottish Parliament. Article IV on trade was easily passed, but other provisions proved more contentious. Regarding Article III, on the Union of Parliaments, Andrew Fletcher had queried how Scottish interests might be protected when Scottish representatives were to be such a small minority in Westminster. Hamilton (who proved so weak in advocating the antiunion cause) had argued that Scottish MPs at Westminster should be able to exercise a veto on matters fundamental to Union, but this came to nothing, with the pro-unionist, governing party returning that there must simply be trust in the English, as there was no possibility of a Scottish veto.[33]

And with that, the Scottish Parliament adopted the *Act Ratifying and Approving the Treaty of Union of the Two Kingdoms of Scotland and England*.[34] After the Scottish Parliament had legislated, the matter came before the English Parliament, where legislation for an Act of Union was quickly adopted,[35] and all Scots amendments accepted.

[30] 'An Act for securing the Church of England as by Law established' (The Act of 6 Anne 1706).

[31] Colley, *Britons*, chapter 1. [32] Fry, *The Union*, chapter 6.

[33] See e.g. Sir John Clerk of Penicuik, *History of the Union of Scotland and England*, D Duncan (ed.) (Edinburgh, 1993).

[34] Union with England Act 1706, APS XI, 406, c 7.

[35] Union with Scotland Act 1706, c. 11 (Regnal. 6_Ann).

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1.2.3 Why Did Scotland Agree to Union?

How did it happen that the independent Scottish Parliament of 1703 voted itself out of existence three years later by a clear majority?[36] Indeed, in the autumn of 1706, when debates began in the Scottish Parliament over ratification, there was still so much rioting and opposition to Union that the Marquess of Queensberry, steering the debates for the Scottish Government, had needed a military escort to Parliament House.

One reason why opposition to Union failed is that it was ill-organized and disunited, encompassing both Jacobite members, and also Presbyterians such as Andrew Fletcher, who inclined to republicanism, and certainly did not want the return of a Catholic Stuart. They could not agree over the succession. Economic matters were also pressing, and, according to McKechnie, 'The status quo had become intolerable, and the only question at the commencement of Queen Anne's reign was as to the form the inevitable change should take.'[37]

Indeed, there seemed little alternative to union. Sir Alexander Seton of Pitmedden, a Lord Justiciary and commissioner, in a well-known speech of 1706, had considered possible alternatives: 'That we continue under the same sovereign with England, with limitations on his prerogative as king of Scotland; that the two kingdoms be incorporated into one; or that they be entirely separated'.[38]

Seton's first alternative – that both countries continue but with limitations on the sovereign's prerogative (as countenanced in the Scottish Act of Security) – would in effect have been a 'divided sovereignty', whereby a central authority in London could not dictate terms to Scotland. But would it have been possible to agree such an arrangement? It was the Scottish Act of Security, which contained such limitations, which had after all worried the English and led to the Aliens Act. Seton's third alternative of a complete separation also carried risks. Continued Jacobite activity, with French support, was not something the English were happy to contemplate. A failure to agree the Hanoverian succession looked likely to provoke war a 'war of the British succession' with England. The possible outcome would have been conquest of Scotland by England, or a very unfavourable forced union.

Not all agree that the 1707 union was inevitable, but counterfactual history is a hard business (and perhaps not best adopted by lawyers). In Scotland the last word fell to Chancellor Seafield*: 'now there's ane end of ane auld sang'*.[39]

[36] Devine, *Independence or Union*, 20.

[37] McKechnie, 'The Constitutional Necessity for the Union of 1707', 60.

[38] Quoted in Daniel Defoe, *A History of the Union between England and Scotland* (London, 1786) 232.

[39] Quoted e.g. in R Watson, *The Literature of Scotland* (Macmillan, 2006) at 161.

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1.3 Legal Effect

> Pierre Trudeau … said that for Canada to share a continent with the United States was like a man having to share a bed with an elephant.[40]

1.3.1 Introduction

The meaning, effects and consequences of that Union, most particularly the legal ones, now fall to be considered.

This new Union of 1707 was a complex arrangement. Neil MacCormick[41] usefully summarized the Articles of Union. *Firstly*, provisions setting out what was common to the whole of Great Britain, which included the Crown, the flag, the Executive and the bicameral Westminster Parliament. The Union would encompass a single market, customs union (the largest then in existence) and common currency. *Secondly*, equally important is what would remain separate. There would continue to be separate and distinct legal systems and national churches, as well as civic institutions and local government. Unless incompatible with Union, all pre-existing Scots law would remain, although the Great Britain Parliament could amend Scots law in future. However, the Parliament would, under Article XVIII, have no capacity to amend those Scots laws concerning private right 'except for evident utility of the subjects within Scotland'. *Thirdly*, there were transitional provisions, including those implementing a new tax regime for Scotland, as well as those compensating Scotland for incurring some of the English national debt. And *finally*, Article XXV underlined the fundamental status and supremacy of the Articles of the new Union: 'That all Laws and Statutes in either Kingdom so far as they are contrary to or inconsistent with the Terms of these Articles or any of them shall from and after the Union cease and become void.'[42]

1.3.2 How Best to Define the Anglo-Scottish *Union*?

Walker described it as 'complicated', and for Colin Kidd it is 'a somewhat mysterious entity'.[43] Three distinct questions arise. First, by what legal documents was the Union constituted; second, what was the status of this Union; and third, should it be referred to as a *Treaty* or *Acts* of Union?

[40] Quoted in, e.g., Paul Henderson Scott, *Still in Bed with an Elephant* (Saltire, 1998) at 1.

[41] N MacCormick, *The English Constitution, the British State, and the Scottish Anomaly* (British Academy Lecture, 1997).

[42] This might appear to be an attempt at entrenchment – see further below.

[43] D Walker, 'The Union and the Law' (2007) Journal of the Law Society of Scotland; Colin Kidd, *The Union and the Constitution* (History and Policy Papers, September 2012).

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1.3.2.1 By What Legal Documents Was the Union Constituted?

Properly speaking, the Union agreement comprises three distinct documents:

1. The Articles (or Treaty) of Union agreed between Commissioners appointed to negotiate the Union
2. The Union with England Act 1707 passed by the Scottish Parliament *and*
3. The Union with Scotland Act 1706 passed by the English Parliament.[44]

But there is disagreement among lawyers as to whether it was the Articles of Union, or Acts of Parliament, that defined the Union. This will be further considered below.

1.3.2.2 What Was the Status of the Union?

Was the Union a merger, or completely new State? Dicey[45] stressed that this was an 'incorporating' union, arguing that, although a new State had in name been created, what in substance took place was the absorption of the smaller (Scotland) into the larger (England). However, Scottish legal academic, TB Smith, argued that what occurred was in fact the incorporation of two existing States into a third which had no prior existence – an unusual occurrence.[46] However, this raises an interesting question. What would happen if Scotland were to become independent? Would Great Britain thereby cease to exist? This issue was raised in the run up to the Scottish independence referendum in 2014 and most, but not all, commentators agreed that England and Wales would still constitute the state of Great Britain.[47]

1.3.2.3 International Aspects of Union

This leads to the third question. Should we refer to the Union as the Treaty of Union, rather than the Act or Acts of Union? For there to be a treaty, there must be an international agreement between sovereign powers. This does seem to have been the case. Prior to Union, both England and Scotland were independent, sovereign States. The agreement satisfied international law requirements for a treaty.[48] Both Parliaments purported to have ratified a 'treaty.'[49]

[44] The dates are a bit confusing. The Scottish Act of Union preceded the English one, but is dated 1707, because the two countries were using different calendars.

[45] AV Dicey and RS Rait, *Thoughts on the Union between England and Scotland* (London, 1920).

[46] TB Smith, 'The Union of 1707 as Fundamental Law' [1957] Public Law 99; also E Wicks, 'A New Constitution for a New State? The 1707 Union of England and Scotland', (2001) LQR 117, 109–126.

[47] See A Boyle and J Cameron, *Annex A: Opinion: Referendum on the Independence of Scotland – International Law Aspects Part IV* (Scotland Analysis, UK Government, 2013).

[48] See now Vienna Convention 1969, Article 2(1)(a); also Lord McNair, *Law of Treaties* (Oxford University Press, 1961) 40.

[49] See Defoe's description of Queen Anne twice visiting the negotiations and enquiring after the progress of 'the Treaty' (*History of the Union* (1709), Part 2, at 47).

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The Articles themselves refer to 'this Treaty', and 'Article' is the technical term for a provision in a treaty, rather than 'section' which is used in statutes. However, although Smith concluded there had been a treaty, he believed that such treaty as an obligation *jure gentium* subsisted only until May 1, 1707, when 'by merger the parties to the treaty ceased to exist.'[50] And, thereafter, for Smith, a new State came into being. For Walker, the Union was an agreement made in 1706–1707, not by the Parliaments, but by the commissioners. On the other hand, Mitchell considered only the two Acts of Parliament to be determinative because 'not merely were the Articles of Union amended, but those Articles were of no effect unless absorbed in this legislative compact.'[51]

1.3.2.4 The Status of the Union

In summarizing this short survey of diverse views, one might describe the Union as an aggregate of the Articles of Association, both Acts of Union (and the incorporated Acts for the Security of the Church of Scotland and Church of England). We could accurately state that a treaty on union was signed and ratified, although the situation thereafter becomes complex because the two independent signing States ceased to exist when the Union came into existence. But it has to be acknowledged that this is not a very promising beginning – the legal status of the Union between Scotland and England is somewhat mysterious and unclear.

1.3.3 A Revolution, by Consent or Not?

According to Smith, 'the British Parliament was the creation of the terms of Union – by what was in effect a revolution by consent.'[52] What might this mean, and was there really a revolution (whether by consent or other means) in 1707?

In common parlance, we might understand a revolution as a fundamental change in political organization, encompassing the overthrow, or renunciation, of one government or ruler and the substitution of another.[53] The Union of 1707 certainly appears outside the usual course of legal events because it terminated the existence of two independent States, thus occasioning a decisive break with the past. But was this a revolution? The problem is that its lead up does not look revolutionary. The Union had been provided for by law, from the provisions for the parliamentary commissioners negotiating the Articles of Union, to the Acts of Union that ratified those Articles.

According to Kelsen, a legal order will be revolutionary if its Constitution cannot be derived from, or authorized by, the previous legal order. However, because the United Kingdom of Great Britain was brought into being by

[50] Smith, 'The Union of 1707 as Fundamental Law', 99.
[51] JDB Mitchell, *Constitutional Law* (2nd ed., 1968) at 72.
[52] Smith, 'The Union of 1707 as Fundamental Law', 99, 111.
[53] *Merriam-Webster* online dictionary.

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two quite separate sets of legal acts –both of Scotland and England – there is, in Kelsonian terms, no 'single chain of validity' to 'a historically first Constitution'.[54] But in that case, there was a fresh start, the creation of a new State of Great Britain, even if not a forcible overthrow of the old regimes, then at least a 'revolution by consent', as characterized by Smith. And in Kelsonian terms, it would mean that the historically first Constitution of Great Britain was indeed that established by the Anglo-Scottish Treaty and Acts of Union of 1707. And indeed, according to de Smith, the Articles of Union 'provided a rudimentary framework of a written constitution.'[55]

1.3.4 Are (Some of) the Articles/Acts of Union 'Fundamental' in Status?

Are some provisions fundamental law, that is possessing some sort of entrenched status, making them hard to override? Certainly, it has been argued that Parliament was 'born unfree', created and bound by a higher law (namely provisions of Union).[56]

Parliamentary sovereignty has overshadowed discussions of British constitutional law, but, in the early eighteenth century, the concept of a 'fundamental law' was not unheard of.[57] The words of Union legislation itself suggest that at least some of it was intended to be 'fundamental'. Provisions of the Acts securing the Protestant religion are expressed as 'a fundamentall and essentiall Condition of the said Treaty or Union', and, together with the Articles of Union themselves ordained 'to be and continue in all time coming the sure and perpetuall foundation of ane compleat and intire Union.' Even Dicey had to acknowledge that, 'The legislators who passed these Acts assuredly intended to give to certain provisions of them more than the ordinary effect of statutes.'[58] Moreover, in *MacCormick*, the Lord Advocate, defending the UK Government's case, conceded that Parliament had no lawful power to amend or repeal fundamental terms of the Union, such as those protecting Scotland's independent legal system[59] – quite a concession to make.

[54] H Kelsen, *General Theory of Law and State* (tr. A. Wedberg, 1945).

[55] De Smith, *Constitutional and Administrative Law* (2nd ed., 1973) at 74. But see Wicks, 'A New Constitution for a New State?', at 117, who argues that they are not sufficiently detailed to form a Constitution.

[56] JDB Mitchell, *Constitutional Law* (2nd ed., 1968) 69. See further, on the fundamental status of some Articles: Smith, 'The Union of 1707 as Fundamental Law', 99; N MacCormick, 'Does the United Kingdom Have a Constitution?' (1978) 29 NILQ 1; M Upton, 'Marriage Vows of the Elephant: The Constitution of 1707' (1989) 105 LQR 79; A O'Neill, 'A Tale of Two Constitutions' (1997) 26 SLT 205; JD Ford, 'The Legal Provisions in the Acts of Union' (2007) 66 CLJ 140. Defoe, *History of the Union*, pt 2, 73–74, 246.

[57] On use of 'fundamental law' in Scotland, see J Goodare, *State and Society in Early Modern Scotland* (Oxford, 1999) 19–22; For England, see J Gough, *Fundamental Law in English Constitutional History* (1961); also Robert Wylie, *A Letter Concerning the Union, with Sir George Mackenzie's Observations and Sir John Nisbet's Opinion upon the Same Subject* (1706).

[58] A-V Dicey, *The Law of the Constitution* (Macmillan, 9th ed., 1950) 88–91.

[59] *MacCormick* v. *Lord Advocate* 1953 SC 396, at 411.

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1.3.4.1 Have Provisions in Practice Been Treated as Fundamental?

Nonetheless, there is disagreement over how much of the Union agreement has been violated or repealed. Legislation was adopted post-Union early in the early eighteenth century, namely the 1708 Treason Act, 1711 Toleration Act, 1711 Patronage Act and 1713 Malt Tax Act, all of which allegedly violated the terms of Union.[60] At one end of the spectrum of opinions is Munro, who claims that 'almost all of the articles and sections of the legislation have been repealed in whole or in part.[61] This may seem an extreme claim, but undoubtedly those provisions which required professors of Scottish universities to be recognized Presbyterians (Article XXV) were repealed by the Universities (Scotland) Acts 1853 and 1932. However, Middleton argued that just because Parliament had repealed provisions of Union it did that follow that Parliament had the legal power to do so. Smith on the other hand argued this as an example of reform by consent. And it is the case that, under international law, consent to a breach of a treaty allows the treaty to remain in force.[62] At the other end is Mitchell who argues that it is 'doubtful if there has as yet been any breach.'[63]

However, it is also undeniable that the Articles of Union differ in nature, depending on the extent to which they permit repeal or amendment. As Smith argues, with reference to Lord Cooper's opinion in *MacCormick* v. *Lord Advocate*, there exist three main types of provision. First, some Articles, (such as Article XVIII: 'no alteration be made in Laws which concern private Right, except for evident utility of the subjects within Scotland') made provision for subsequent amendment. A second group was drafted to exclude subsequent modification, for example by using the terms 'forever after' or 'in all time coming.' The remaining provisions (i.e. XX and XXI) are inconclusively drafted.

1.3.4.2 Challenging the Classic View of Parliamentary Sovereignty

If some terms in the Union agreement are truly fundamental, this threatens the Diceyan view of parliamentary sovereignty. However, although Dicey acknowledged the intention of the drafters of the Acts of Union to give some special status to their terms, he personally viewed the Union Acts as like any other legislation: 'neither the Act of Union with Scotland, nor the Dentists Act, 1878 has more claim than the other to be considered a supreme law.'[64] For Dicey, continuing parliamentary sovereignty was a matter of logic: 'a sovereign power cannot, while retaining its sovereign character, restrict its own powers

[60] Upton ('Marriage Vows of the Elephant', at 93) provides a list of statutes accused of violating the terms of the Union, although concludes that only the Universities (Scotland) Acts 1853 and 1932 in fact constitute breaches.

[61] C Munro, *Studies in Constitutional Law* (2nd ed., 1999) 67.

[62] KWB Middleton, 'New Thoughts on the Union' (1954) 66 JR 37, 43; Smith, 'The Union of 1707 as Fundamental Law', 113; also Article 60(1) Vienna Convention.

[63] Mitchell, *Constitutional Law* (2nd ed., 1968) 73.

[64] AV Dicey, *An Introduction to the Study of the Law of the Constitution* (London: Macmillan, 10th ed., 1959) 145.

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by particular enactment …. "Limited Sovereignty" in short, is, in the case of a Parliamentary as of every other sovereign, a contradiction in terms.'[65] But why must sovereignty be understood only as unlimited and indivisible in nature? Many other commentaries understand it very differently.[66] Dicey's answer was that sovereignty had always been understood in this way in England: 'The historical reason why Parliament has never succeeded in passing immutable laws … lies deep in the history of the English people and in the peculiar development of the English constitution.'[67] But this, even if true, this is a different claim, and can only be a contingent fact, distinguishable from Dicey's claim for logical truth.

In any case, it is unclear that the English Parliament (or the Scottish Parliament[68]) was sovereign in the sense of absolute and illimitable in 1707. With the Glorious Revolution came a recognition that statute law should take priority over the royal prerogative, as the supreme form of law in England. Yet we search in vain in the 1689 Bill of Rights, or the Acts of Union, for a recognition that the English Parliament was sovereign as understood by Dicey, namely illimitable. It was Dicey, writing almost two centuries later, who argued that Parliament was sovereign and illimitable. But judicial precedents for Dicey's view are somewhat sparse.[69]

Furthermore, an important challenge to the Diceyan view was posed by Lord Cooper (the Lord President of the Court of Session) in *MacCormick*: why should the new Parliament bear only English characteristics? According to Lord Cooper,

> I have difficulty seeing why it should have been supposed that the new parliament of Great Britain must inherit all the peculiar characteristics of the English parliament but none of the Scottish parliament, as if all that happened in 1707 was that Scottish representatives were admitted to the parliament of England.[70]

Lord Cooper was giving judgment in the case of *MacCormick* v. *Lord Advocate*. In 1953 John MacCormick, a well-known Scottish Nationalist (operating outside of the SNP) brought an action against the Crown adopting the title of Elizabeth II, arguing that although she was the second Queen Elizabeth of England, she was the *first* Queen Elizabeth of the United Kingdom. The Court of Session dismissed the case, on the basis that the Queen's title was derived from her prerogative powers and not therefore justiciable. However,

65 Ibid., 68.

66 Divisible sovereignty was well understood by the Framers of the US Federal Constitution. *See The Federalist* No. 39 (J. Madison).

67 Dicey, *An Introduction to the Study of the Law of the Constitution*, at 91.

68 On Scottish constitutional law pre-union, David Walker, *A Legal History of Scotland Vol. III* (T&T Clark 1997) chapter 2.

69 These include: *Edinburgh & Dalkeith Ry.* v. *Wauchope* [1842] 1 Bell App. Cas. 252; *Vauxhall Estates Ltd.* v. *Liverpool Corporation* [1932] 1 KB 733; *Pickin* v. *British Railways Board* [1974] A.C. 765.

70 *MacCormick* v. *Lord Advocate* [1953] SC 396, at 411.

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in giving judgment, Lord Cooper (who was also an eminent legal historian and former Unionist (i.e. Conservative) politician) stated that: 'The principle of the unlimited sovereignty of Parliament is a distinctively English principle'. This stimulated a different, non Diceyan interpretation of the British Constitution, especially among Scottish jurists, such as TB Smith, and Neil MacCormick,[71] who was John MacCormick's son.

Lord Cooper's view was not unanimously shared south of the border. For example, Wade, in the editorial introduction to post-1953 editions of Dicey's *Law of the Constitution* was somewhat dismissive of Lord Cooper's remarks:

> All this means only that Lord Cooper regarded the Act of Union as a fundamental part of constitutional law and that he regretted that the state of the law was such that even a fundamental provision was subject to alteration by Act of Parliament which the courts were bound to accept. It is indeed somewhat surprising that an understandable expression of patriotism on the part of a great Scottish judge should have been erected into a serious challenge to the doctrine of parliamentary sovereignty in the United Kingdom.[72]

A further, different, argument was added by supporters of the orthodox view, who contended that, even if the Acts of Union were intended as fundamental law, things have since changed, and unqualified parliamentary sovereignty has now become the fundamental principle of British constitutional law. For Wade it is 'too late' to invoke Articles of Union as binding on the Westminster Parliament.[73] [But why is it 'too late'? Who decides this?]

In any event, there is at least a case to be made that England's former constitutional law was no longer uniquely controlling after 1707. JDB Mitchell famously contended that the British Parliament, as a product of Union, was 'born unfree'.[74] And Smith wrote that he found himself 'unable to accept the view of those English constitutional lawyers who hold that the terms of Union have no more force than an ordinary Act of Parliament'[75] Smith argued that contrary claims derived from the assumption that the British Parliament is the English Parliament with some additional Scottish members, but the same powers as the former English Parliament.[76] Neil MacCormick agreed, arguing that 'Those who treated Britain as England writ large … override moral and legal commitments in the Treaty.'[77]

There are, nonetheless, contrary views. For Munro, the Union Parliament continued to depend on prior English custom. For Scott, all that remained was

[71] Professor Sir Neil MacCormick (1941–2009), Regius Professor of Public Law at Edinburgh, also became an SNP Member of the European Parliament.

[72] Wade, *Introduction to the Study of the Law of the Constitution*, at Lxvi.

[73] HWR Wade, *Constitutional Fundamentals* (1980) at 33.

[74] JDB Mitchell *Constitutional Law* (2nd ed., 1968).

[75] Smith, 'The Union of 1707 as Fundamental Law', at 110.

[76] Smith notes: 'Article III clearly contemplates a new Parliament, as does Article XXII' (Smith, 'The Union of 1707 as Fundamental Law', 111).

[77] N MacCormick, 'Does the United Kingdom Have a Constitution?' (1978) 29 NILQ 1, at 2.

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the English Parliament 'unchanged, apart from its new name and the addition of the Scottish members.'[78] Smith's response was that 'The fact that the internal organization of Parliament is based on pre-Union English practice … cannot justify the assumption that its legislative powers extend beyond those conferred by the constituent agreement of 1707.'[79]

In conclusion, opinions differ as to whether any provisions of the Act of Union have fundamental status. Smith was clearly of the view that some were such. And indeed, it should be stressed that most of the crucial provisions have in substance been respected.[80]

1.3.5 The Role of the Courts

But what should the courts do if faced with an Act of Parliament that appears to violate fundamental terms of the Union? Should they refuse to apply it? The problem is that the Articles and Acts of Union (rather like the now defunct 1972 European Communities Act) contain no specific provisions detailing what courts should do in such situations. There is no easy answer and in any case no caselaw in which courts have explicitly refused to give effect to legislation on the grounds that it violated the terms of Union.[81]

In *MacCormick*, Lord President Cooper reserved opinion as to whether the Court of Session might review legislation on ground of its violation of Articles of Union, and in 1975, Lord Keith reached a similar conclusion in *Gibson* v. *Lord Advocate*. *Gibson* concerned fishing rights and EEC law. The issue was whether s 2(1) ECA violated laws 'which concern private right' under Article XVIII in Scotland, because it impliedly derogated from exclusive rights to fish within Scottish waters, thus altering the law other than 'for the evident utility of subjects within Scotland.' The action failed, because the right at issue was deemed a public not a private law right. However, Lord Keith also stated that: 'Like Lord President Cooper, I prefer to reserve my opinion on what the question would be if the United Kingdom Parliament passed an Act purporting to abolish the Court of Session or the Church of Scotland or to substitute English law for the whole body of Scots private law …'[82]

More recently, in 1991, in *Pringle, Petitioner*,[83] the issue of the constitutional effect of fundamental provisions in the Act of Union again arose. *Pringle* concerned payment of the hugely unpopular 'poll tax', a charge introduced

[78] C Munro, *Studies in Constitutional Law* (2nd ed., Oxford: Oxford University Press, 1999) 65–66; PH Scott, *1707 – The Union of Scotland and England* (Edinburgh: Chambers, 1979) 52.

[79] Smith, 'The Union of 1707 as Fundamental Law', 111.

[80] C Turpin and A Tomkins, *British Government and the Constitution* (Cambridge University Press, 2012) at 227.

[81] In earlier cases, such issues were aired but not determined – e.g *Minister of Prestonkirk* v. *Earl of Wemyss* [1808]; *Earl of Kinnoul* v. *Presbytery of Auchterarder* [1838] 16 D. 661; *Laughland* v. *Wansbrough Paper Co.* [1921] SLT 341.

[82] *Gibson* v. *Lord Advocate* [1975] SC 136, at 144.

[83] *Pringle, Petitioner*, [1991] SLT 330.

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under the 1987 Abolition of Domestic Rates Etc. (Scotland) Act, (a piece of Westminster legislation opposed by Scottish MPs and only adopted on the votes of English MPs, the year before[84] it was introduced in England[85]). *Pringle* used the *nobile officium*[86] remedy of the Court of Session to seek relief from liability to pay the poll tax. The argument was that its imposition contravened Article IV Act of Union because Scots would be at a disadvantage to the rest of the UK. This failed, because the court found no disadvantage for Scots (given that, unlike England, they no longer had to pay domestic rates) but once again, the court did not completely reject the argument that a UK Act of Parliament might be invalid for violating a term in the Act of Union. Lastly, in *Lord Gray's Motion*, Lord Hope stated that 'the argument that the legislative powers of the new Parliament of Great Britain were subject to restrictions expressed in the Union agreement cannot be dismissed as entirely fanciful.'[87]

The caselaw, therefore, is inconclusive. The problem is that the issue has never been squarely faced. In *MacCormick*, the issue was held non-justiciable, and in *Gibson*, not a matter of private right. Yet, just as one should not rule out the possibility that British courts might refuse recognition to a statute that, for example, abolished judicial review altogether,[88] so in an equivalent extreme case – that is, one attempting to abolish the separate Scottish legal system – might courts deny constitutionality to legislation that contravened the most fundamental principles of Union? But these would be very extreme cases.

1.3.6 Separate Legal Systems

Article XVIV of the Treaty of Union ensured that Scotland's legal system would continue as a separate jurisdiction, with separate courts (but not separate legislatures, at least until 1999). Clashes have inevitably arisen with English law, and although these separate legal systems exist within one State, (distinct) private international law systems have had to govern these conflicts.

In the Scottish case of *Orr Ewing's Trustees,* Lord President Inglis held, 'The judicatories of Scotland and England are as independent of each other within their respective territories, as if they were the judicatories of two foreign states.'[89]

[84] Legislation was often introduced in Scotland a year earlier than England, creating a perception that Scotland was a test subject.

[85] Where it was also to prove highly unpopular, sparking riots. The measure was soon repealed for the whole UK and the council tax introduced instead.

[86] The *nobile officium* concerns the court's equitable jurisdiction to provide exceptional remedies in cases of necessity. It was notably used in 2019 to challenge the prorogation of Parliament in *Cherry QC MP and others* v. *Advocate General for Scotland* [2019] CSIH 49.

[87] [2000] SC (HL) 46, 59.

[88] See e.g. Lord Hope (obiter) in *AXA General Insurance Limited* v. *The Lord Advocate* [2012] 1 A.C. 868.

[89] *Orr Ewing* v. *Orr Ewing's Trs* [1884] 11 R 600, at 629. The same position is adopted in England, see e.g. *Stuart* v. *Bute* [1861] 4 Macq 1, at 49, per Lord Campbell LC: '[A]s to judicial

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1.4 After 1707

1.4.1 The Aftermath

On 1 May 1707, there was rejoicing and church bell ringing in London when the Union came into being. In Scotland, spirits were not so high, and the story is that the bells of St Giles in Edinburgh rang 'why should I be sad on my wedding day?' There was no immediate economic miracle in Scotland, and the English were slow to pay the 'Equivalent'. But customs and excise began to be enforced with an increased efficacy in Scotland, so that many felt worse off than before Union. The independent Scottish State had been extinguished. Even if Andrew Fletcher of Saltoun had famously said, 'If man may make all the ballads he should not care who should make the laws of a nation?', Fletcher himself left Scotland after the Union came into being, going first to London. (Indeed, many Scots began moving to London to further their careers.) Fletcher's last words were supposedly and famously, 'Lord have mercy upon my poor countrey that is so barbarously oppressed!'[90]

In early years following the Union, discontent and opposition increased in Scotland. A Tory government had replaced the Whig coalition in London in 1710, and from 1712, several provocative laws were passed in Parliament. The 1712 Toleration Act permitted more freedom to the Episcopalian minority in Scotland, if they agreed to pray for the (future) Hanoverian king. The 1712 Patronage Act re-established the right of Scottish landowners, instead of the local congregation, to nominate parish ministers. This seemed to conflict with the self-understanding of Presbyterianism and to be an intrusion of the State on the privileges of the Scottish Kirk.[91] This conflict eventually led to the 'Great Disruption' of 1843 which formed the Free Church of Scotland. Furthermore, the Christmas Observance Act of 1712 removed the ban on Christmas celebrations in Scotland (banned since 1575) to the great displeasure of the Scottish Church. All this legislation led to criticism that the Church of Scotland lacked sufficient protections in the Treaty of Union. These aggravating measures appeared to risk the very continued existence of Union.

jurisdiction, Scotland and England, although politically under the same Crown, and under the supreme sway of one legislature, are to be considered as independent foreign countries, unconnected with each other.'

[90] 'Letters of Andrew Fletcher of Saltoun and his Family 1717–16', vol. X (Scottish History Society, 1965).

[91] See further the 1838 *Auchterarder case* which concerned the 1838 Court of Session judgement that the Presbyterian Kirk, itself having been established by statute, was the creature of the State. As Harold Laski wrote of this, 'The real head and centre of the whole problem was thus the theory of parliamentary sovereignty .... For the courts there could not be such a thing as a fundamental law. They could not … announce that lay patronage was an ecclesiastical question, and therefore within the competence of the general assembly, for so to do would be not only to question the sovereignty of parliament, but also, implicitly, to admit that the general assembly was a coordinate legislature with parliament.' H Laski, 'The Political Theory of the Disruption' (1916) 10 American Political Science Review 437, 459. Also, Lord Rodger of Earlsferry, *The Courts, The Church and The Constitution: Aspects of the Disruption of 1843* (Edinburgh, 2008).

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This dissatisfaction only increased with the Malt Tax Act in 1713, which considerably increased the price of ale in Scotland, appearing to breach Article XIV Treaty of Union. In response, Scottish parliamentarians introduced their own attempt to dissolve the Union. But this failed, lost by only a small number of proxy votes.[92]

However, a new threat presented itself in the 1715 Jacobite rebellion of the 'Old Pretender'. This was potentially the most threatening of all Jacobite rebellions. Whereas, previously, support for the Stuarts had been religious and dynastic, now Jacobites sought to present themselves as championing Scottish freedom and independence. However, the rising failed to defeat the (smaller) Crown forces at the battle of Sheriffmuir, and the initiative was lost, partly due to incompetent leadership, and so the putative James VIII/III was forced back to France.

1.4.2 'Britons'?

Nonetheless, the failure of both the attempted dissolution of Union, and the 1715 Jacobite rebellion, should not be attributed to any strong feeling of 'Britishness'. As Linda Colley writes, 'this was a union of policy and not of affection.' Colley also describes the Great Britain of this time as 'like the Christian doctrine of the Trinity, both three and one and altogether something of a mystery.'[93]

Colley's argument is that[94] a sense of Britishness came to be developed as a result of a sense of *dissimilarity* from those beyond Britain, especially the French. France had for long been England's main enemy and rival, although Thomas Carlyle commented that Scottish culture up to the date of the Union had been essentially French.[95] This gradually changed after 1707, as Britons (including Scots) came to identify with the Protestant faith, against Catholicism. Indeed, Colley highlights the extent to which this identification and division of religion was formalized in law.[96] Up to 1829, British Catholics were not permitted to vote and were banned from all state offices and Parliament. For most of the eighteenth century, Catholics suffered from punitive taxation, were prohibited from possessing arms, and suffered great prejudice in access to education, the right to property and religious freedom. This anti-Catholicism was also embraced by a driven group of Scottish Presbyterians, who understood Union as a means of eradicating Catholic influence. Furthermore, a Stuart restoration was perceived as not only threatening a Catholic religious revival, but also freedom itself. For liberty, and the British Constitution, were also viewed as linked to Protestantism, and the Constitution was, as Colley writes, perceived to be

[92] See further https://thehistoryofparliament.wordpress.com/2013/05/31/there-has-been-all-along-something-odd-in-this-affair-the-malt-tax-and-the-1713-attempt-to-repeal-the-union/

[93] Colley, *Britons*, at 15. [94] Ibid., at 17.

[95] *Works of Thomas Carlyle*, vol. 6: 'Miscellanies', at 27. [96] Colley, *Britons*, at 19.

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'unique, splendid and sovereign, the hard-won prerogative of a free Protestant people.'[97]

Ultimately, the Jacobite Catholic cause was seen to threaten not only the stability of the constitutional order, but also the country more generally, through the risk of violence, civil war, and destruction of trade. For another important element of Britishness was the embrace of commerce and trade, the growth of what Napoleon came to refer to as 'a nation of shopkeepers'.

And so, little by little, in the course of the eighteenth century, perceptions in Scotland of the benefits of Union changed.[98] For the most part, Scotland was left semi-independent, sufficiently distant, but benefiting from Union in commerce and foreign affairs, even if the tax burden weighed more heavily. The Union started to gain a greater stability. The Scottish Parliament no longer existed, but Edinburgh maintained its role as a centre of law and administration. Scotland enjoyed a great deal of legal, religious, and administrative autonomy, and to be sure, the Enlightenment did much to increase Scotland's standing in cultural matters. On the other hand, talented Scots gained access to important official positions in England, often at the expense of English, quite a few of whom (e.g. John Wilkes) came to resent Scottish influence. Scotland was increasing in prosperity, and often faring better than England. Aside from the Scottish Enlightenment, Scotland could claim superiority over England in universities (five to England's two), education generally, and the medical professions. Scots also played a significant role in Empire, which after all, became well-known as the 'British' and not 'English' empire. Many Scotsmen joined the army, especially working in India, with the East India company, and making their fortune there.

1.4.3 Scottish Governance up to Devolution in 1998

Following the 1707 Union, Scottish administration was absorbed into that of Great Britain and based in London. Scotland's independent legal system and Church remained and there was also administrative decentralization for matters such as health, education and prisons, and local government boards were established in Scotland in the nineteenth century. A new system was introduced in 1885 with a Secretary for Scotland appointed as head of the new Scottish Office in Whitehall. However, for many, the notion of a Scottish Office in London appeared a contradiction in terms, and, in 1939 the Scottish Office moved to Edinburgh (although continued to maintain a branch in London).[99]

In 1883, the Scottish Home Rule Association was founded, and in 1913 a Home Rule Bill for Scotland was introduced into Parliament by Scottish Liberal

[97] Ibid., at 49.

[98] On Unionism in general, see Colin Kidd, *Union and Unionisms* (Cambridge University Press, 2008).

[99] See further David Milne, *The Scottish Office* (George Allan and Unwin, 1957).

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MP, William Cowan. Cowan stated that, 'At nineteen out of twenty General Elections since 1832 Scotland has returned a Liberal majority to Parliament, and … that body advocates without reserve Scottish Home Rule', concluding that, 'Is it any wonder Scotland is tired and demands a parliament of her own?'[100] The Scottish Home Rule Bill was designed along similar lines to Irish Home Rule and would revive the Scottish Parliament, although the principle of Westminster parliamentary sovereignty would be maintained. However, the Bill was not adopted due to the onset of the First World War, and although it returned in the 1920s, the impetus was lost and Scottish nationalism was a diminished force until the SNP gained its first seat in Westminster in 1945. In 1978, the UK Labour Government introduced the Scotland Bill, with provision for a referendum on a Scottish Assembly.[101] However, this Bill contained a provision (in s.85)[102] requiring 40 per cent of the Scottish electorate to vote for devolution for it to be implemented. In the event, although a majority voted for an Assembly, the 40 per cent threshold was not reached, and so devolution did not take place.

By 1998, the Scottish Secretary of State had many responsibilities, encompassing a wide range of Scottish affairs, and the Scottish Office employed about 10,000 civil servants. During the twentieth century, the House of Commons developed special procedures for legislation relating only to Scotland, Northern Ireland, and Wales. A Scottish Grand Committee was established in the House of Commons, comprising all MPs representing Scottish constituencies, to debate bills relating exclusively to Scotland, as well as a Select Committee on Scottish Affairs. Nonetheless, these special procedures were embedded in the Westminster Parliament, within the centralized blueprint of the unitary State.

1.5 A Distinct Constitutional Tradition?

1.5.1 Changing Views of Union

By 1907, on the 200th anniversary of the 1707 Union, it seems that Scots generally took a positive view of Union.[103] However, by half a century or so later, views were changing. Union was more likely to be seen as a corrupt bargain, achieved by politicians and other figures in pursuit of their own self-interest, and a victory of English managerial politics and control. Nationalism was on the rise in Scotland.

[100] See further Government of Scotland Bill 1913.

[101] This roughly followed the recommendations of the 1973 Kilbrandon report (The Royal Commission on the Constitution 1969–1973) (Cmnd 5460, 1973).

[102] Sometimes called a 'wrecking amendment', this provision (opposed by the Government) was inserted as a result of pressure by backbench Labour MP George Cunningham (of Scottish origin, but opposed to devolution).

[103] See e.g. Peter Hume Brown (ed.), *The Union of 1707* (Glasgow, 1907).

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1.5.2 A Scottish Tradition of Popular Sovereignty?

Many in England seem unaware of the claim to a distinct Scottish constitutional tradition, considerably different from the English doctrine of parliamentary sovereignty. The Scottish tradition looks to *popular* sovereignty, and traces its origins back in history: to the Declaration of Arbroath in 1320; the doctrines of early modern theorists such as George Buchanan; and Claim of Right of 1689. The interchange between the English and Scottish traditions is unclear, but it is unlikely that the British Constitution can simply be interpreted as the English tradition writ large.

The Declaration of Arbroath of 1320 is often referenced,[104] especially since its 700th anniversary in April 2020. This Declaration was written in Latin by Scottish barons to Pope John XXII, requesting that he recognize Scotland's independence from England, and also recognize Robert Bruce (excommunicated in 1319) as Scotland's lawful king. The document is often credited as the origin of concepts of popular sovereignty because it declared that Bruce was '*King, not only by right of succession according to our laws and customs, but also with the due consent of us all.'* Nonetheless, one might question the extent to which popular sovereignty and 'the people' are validated by this document. As with the English Magna Carta, this was a document signed by wealthy nobles, not by all the people. It was eight years before the Pope responded and reversed Bruce's excommunication, and the Declaration enjoyed near obscurity for a couple of centuries, while in contrast, the theory of divine right of kings enjoyed a resurgence under the Stuarts.

George Buchanan (described by Neil MacCormick as 'the greatest of the Scottish contributors to the European renaissance … and perhaps our first articulate theorist of sovereignty'[105]) had been principle tutor to the young King James VI in Scotland. Buchanan's 1578 *De lure Regni Apud Scotos* ('The Law of Kingship Among the Scots'[106]) was a short treatise explaining the Scottish Constitution. In this treatise, Buchanan sanctioned the assassination of a tyrant, and he included Mary Queen of Scots in this definition, seeing her as ruling only in her own interest. His thesis was that the law was above the monarch, and that Scotland had not behaved egregiously in deposing Mary. Buchanan declared that 'The judge has his authority from the law, not the law from the judge.'[107] Neil MacCormick argued that, prior to Union, Scotland had

[104] This document had an interesting influence in the US. Many of the signatories to the American Declaration of Independence were of Scottish descent. Thomas Jefferson claimed Robert Bruce as an ancestor, and encountered the Declaration of Arbroath during his education at the college of William and Mary under William Small, who was a Scotsman.

[105] N MacCormick, 'Stands Scotland Where She Did?: New Unions for Old in These Islands' (2000) 35 Irish Jurist 1–16, 9.

[106] RA Mason and MS Smith, *A Dialogue on the Law of Kingship amongst the Scots: A Critical Edition and Translation of George Buchanan's De Jure Regni apud Scotos Dialogus* (Ashgate, 2004).

[107] Ibid., at 33, 143.

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been sufficiently influenced by Buchanan to embrace a constitutional commitment to some type of popular sovereignty, contending that:

> The old Scottish constitution, as Scots authorities like George Buchanan were very insistent, was never a constitution based on conquest. Hence the Ius Regni, the law of the kingdom, could never be interpreted as constituting an absolute monarchy, but only as authorizing a limited one dependent on popular assent.[108]

After Union, it was unclear to what extent the older Scottish tradition of popular sovereignty had been overtaken by English conceptions of parliamentary sovereignty. However, by the late twentieth century, this older tradition of popular sovereignty was recognized more clearly. The Campaign for a Scottish Assembly was formed in 1980, and in 1988, produced *A Claim of Right for Scotland*. This took its name from the 1689 Claim of Right, stating that 'parliamentary government under the present British constitution had failed Scotland'.[109] This report was produced at a time of increasing political dissonance between England and Scotland. Since 1979, conservative majorities had formed governments in London, but conservative representation had been greatly reduced in Scotland (so that by 1997, no conservative MPs were returned for Scotland) leading to a perception of a lack of legitimacy of UK governments over Scotland. A Convention was established in 1989 to draw up plans for a Scottish Parliament with Canon Kenyon Wright as its executive chairman, declaring 'the sovereign right of the Scottish people to determine the form of government best suited to their needs'.[110] Members of the Scottish Constitutional Convention included most political parties, as well as STUC, churches, business and grass roots organizations. However, the SNP withdrew, after expressing concern that the Convention would not consider Scottish independence. The Conservative Party also took no part, being opposed to a devolved Parliament for Scotland. The Constitutional Convention's 1990 interim report claimed that parliamentary sovereignty was 'a constitutional fiction which cloaks the effective exercise of sovereign power by the governing political party'.[111] The Convention's 1995 report, *Scotland's Parliament, Scotland's Right,* formed the basis of the UK Government's White Paper proposals, *Scotland's Parliament*, in 1997. (Indeed, many members of the 1997 UK Labour Government had been signatories to the Claim of Right.)

One may summarize the above by noting distinct constitutional principles in England and Scotland. However, it would be a mistake to ascribe adherence

[108] N MacCormick, *Questioning Sovereignty* (Oxford University Press, 1999) 55. But MacCormick's interpretation of Buchanan has been criticized as a selective interpretation. Colin Kidd, *Subverting Scotland's Past: Scottish Whig Historians and the Creation of an Anglo-Scottish Identity: 1689–1830* (Cambridge University Press, 2003) 19–20.

[109] *Report of the Constitutional Steering Committee of the Campaign for a Scottish Assembly* (Edinburgh, 1988) at 1.1

[110] Scottish Constitutional Convention: *Towards Scotland's Parliament* (1990) 10.

[111] *Towards Scotland's Parliament,* 16.

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to popular sovereignty and the Claim of Right only to Scottish nationalist politicians. As noted, many politicians of the Labour, Liberal and other political parties subscribed to these principles, and they were embraced by the 1997 Labour Government as the foundation for the new Devolution settlement – an event that might even be seen in the words of US constitutional law theorist, Bruce Ackerman, as a 'constitutional moment'.[112] The Scottish Constitutional Convention should also be considered in tandem with other campaigns and demonstrations against the UK Government in Scotland, such as poll tax revolts. These have collectively been characterized as organized rejections of the UK Government's legitimacy in Scotland, comparable to the rebellions in the American colonies in 1773 after the Tea Act, whereby 'the act of imposing an unpopular tax where there was defective representation in the context of questionable legitimacy is similar'.[113]

1.5.3 Britain as a 'Union' Rather Than 'Unitary' State?

An important question is whether the UK should be described as a 'Union State' rather than unitary in nature. Aileen McHarg describes the 'union' State as 'one in which, because of the way the state emerged historically, heterogeneity of governance arrangements between constituent regions or nations has become a normal and persistent feature.'[114] Although the concept of union is widely used in constitutional studies to refer to the consolidation of existing units into one, it is not the same as a unitary State, a term which implies a constitutional order with a single, unrivalled, legal competence, which places a central agency in a position of unequivocal authority. In contrast, within a union State, different parts of that State may understand the Constitution in different ways.

Britain might better be described as a 'Union' State, as there is a strong argument that it lacks an unequivocal, unitary sovereignty.[115] This is a significant contention, as it challenges the argument that sovereignty rests entirely with the Westminster Parliament. Lord Steyn's obiter comment in *Jackson* v. *Attorney General*[116] that 'the settlement contained in the Scotland Act 1998 … point[s] to

[112] B Ackerman, *We the People Vol. I: Foundations* (Harvard University Press, 1993) arguing that Constitutional moments deviate from ordinary politics and involve decisions of 'the People' overthrowing preceding ruling arrangements.

[113] P Speirs, *Scotland's Challenge to Parliamentary Sovereignty: Can Westminster Abolish the Scottish Parliament Unilaterally?* (University of Glasgow, LL.M(R) thesis, 2015) at 50.

[114] A McHarg, 'Public Law in Scotland: Difference and Distinction', in A McHarg and T Mullen (eds.), *Public Law in Scotland* (Avizandum Publishing Ltd, 2006) 1–22, 16. See also N Walker, 'Beyond the Unitary Conception of the United Kingdom Constitution?' (2000) *PL* 384; S Rokkan and D Urwin, *Economy, Territory, Identity: Politics of West European Territories* (SAGE Publications, 1983).

[115] But the Devolution Acts 1998 assert parliamentary sovereignty. s28(7) Scotland 1998 Act provides: 'This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.'

[116] *Jackson* v. *Attorney General* [2005] UKHL 56, Lord Steyn, at para. 102.

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a divided sovereignty' bolsters this view (although many traditionalists would contest this point). There exist different constitutional settlements in the different parts of the UK. Indeed, James Mitchell described the UK since devolved government as 'a state of unions.'[117] Michael Keating argues that the UK is better conceived as a 'plurinational' rather than a 'multinational' State, because its people have plural national identities.[118] The continuation of separate civic institutions, legal system and cultural heritage in Scotland, along with the historical tradition of a right of the Scottish people to self-determination, and the recognition of the UK as a Union State, point towards the Union as a continuing agreement between two independent nations, Scotland and England. This, in turn, suggests that, should one of these nations no longer wish to continue the Union, then it has a right to terminate the agreement, and revert to its former status as an independent State.

1.6 Devolution

Devolution came to Scotland with the Scotland Act 1998. At the same time, devolution was also introduced in Wales and Northern Ireland (Government of Wales Act 1998, Northern Ireland Act 1998). The 1998 Scotland Act was preceded by a 1997 UK Government White Paper, *Scotland's Parliament*,[119] and gave effect to that White Paper with no great changes. A referendum was held in Scotland on 11 September 1997, in which 74 per cent of those voting supported the creation of a Scottish Parliament.

The Scotland Act 1998 sets out the main provisions of Scottish devolution and has been described as 'on any view a monumental piece of constitutional legislation.'[120] This Act devolved primary legislative power, as well as executive functions, to the Scottish Parliament and Scottish Government.[121] Although since the Acts of Union, Scotland had retained a certain amount of autonomy (notably in its church, legal, and education systems) it lacked its own legislative autonomy (in contrast to Quebec, e.g., which had gained this in the British North America Act 1867).

The purpose of devolution was to give further powers to Scotland. Yet devolution falls short of a federal system of governance, in which separate spheres of sovereignty exist. All the leading UK political parties accepted devolution, some more willingly than others. The Scottish National Party (SNP) continued to campaign for independence, while working with devolution, and since 2007, has been either in government, or in minority government, in Scotland. In

[117] J Mitchell, 'The Westminster Model and the State of Unions' (2010) 63 Parliamentary Affairs, 85–88.

[118] M. Keating, *Plurinational Democracy: Stateless Nations in a Post-Sovereignty Era* (Oxford University Press, 2001) 26–27.

[119] *Scotland's Parliament*, Cm 3658, 24 July 1997.

[120] *Martin* v. *HM Advocate* [2010] UKSC 10, 2010 SC (UKSC) 40, at 44 per Lord Walker.

[121] From 2007, previously Scottish 'Executive'.

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June 2009, the Calman Commission report, *Serving Scotland Better: Scotland and the United Kingdom in the 21st Century*, concluded that devolution had generally functioned successfully, and recommended increasing fiscal autonomy for Scotland, and much of its report was implemented by the Scotland Act 2012. However, more substantial changes were introduced by the Scotland Act 2016, implemented after the 2014 Scottish independence referendum resulted in a 55/45 per cent split for remaining in the UK. Since then, with Brexit, there have been calls for another independence referendum in Scotland. All of this will be discussed further below.

The Scotland Act 1998 (s37) provides that: 'The Union with Scotland Act 1706 and the Union with England Act 1707 have effect subject to this Act.' This does not mean the Acts of Union became irrelevant since devolution. The Acts are still on the statute book, and much of them continue to be relevant law.[122] The Scotland Act does not appear to infringe any fundamental provisions in the Acts of Union. Indeed, the argument that the UK is a union, based on consent of its parties, continues to be made, most notably in arguments for a second independence referendum. On the other hand, it might be asked whether provisions, such as the 'eternal' ones in the Act of Union, create problems for independence? For example, it might seem that devolution has become a pathway to independence in Scotland. If the UK Union itself were to terminate, and Scotland withdraw, what then of arguments deriving from the 'fundamental' and eternal status of Union legislation? So, devolution and its law may be replacing the older and different nature of the 1707 settlement.

1.6.1 The Scottish Parliament and Government

The Scottish unicameral Parliament sits at Holyrood in Edinburgh and met for the first time on 12 May 1999. However, opinions vary as to whether this Parliament is totally new. At its first session, SNP member Winnie Ewing, stated, 'the Scottish Parliament, adjourned on 25th day of March in the year 1707, is hereby reconvened'.[123]

The Scottish Parliament presently has 129 members (MSPs) now elected for a fixed term of five years. Part I Scotland Act 1998 sets out the process by which they are elected, which is through a mixed, or additional, member system (AMS), whereby each voter has two different votes, comprising a 'First Past the Post' and proportional representation element. This AMS system has often resulted in a coalition, or minority government, and also often produced a different political administration from that in London for the UK overall. The Scottish Parliament devises its own procedures and much of its work is done through committees, which, among other things,

[122] They were pleaded, e.g., by the Scottish intervention in the *Miller* case.
[123] '12 May 1999: Winnie Ewing Reconvenes the Scottish Parliament'. *BBC News.*

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scrutinize legislation and the Scottish Government. Under s28(2) Scotland Act a Bill is adopted as an Act of the Scottish Parliament (ASP) 'when it has been passed by the Parliament and has received Royal Assent.' Roughly speaking, the stages in the Scottish Parliament's legislative procedure tally with the second reading, committee stage and third reading of Westminster Bills. But there is of course, no equivalent to the House of Lords' function as a revising Chamber. The Scottish Parliament has only limited legislative powers and may not legislate incompatibly with EU law (while the UK was an EU member) and ECHR rights, nor may it legislate on matters reserved to Westminster.

Power was also devolved to a separate Scottish Government by s53 Scotland Act 1998, so the powers of UK Whitehall ministers have been decreased. The Scottish Government follows a 'Cabinet style', comprising the First Minister (nominated by the Parliament), other ministers, and Scottish law officers (Lord Advocate and Solicitor General for Scotland). However, a Secretary of State for Scotland continues to exist in the UK Cabinet, albeit with reduced responsibilities. Further, s87 Scotland Act created a new office, that of Advocate General for Scotland (a member of the UK Government), who advises the UK Government on Scots law.

Some of the funding for the Scottish Government comes from the 'block grant' transferred from the UK Treasury to the Scottish Ministers. This block grant is calculated according to the 'Barnett formula'[124] first devised in 1978, which equalizes funding across the UK and aims to give each devolved nation the same per person change in funding as that agreed for comparable government services in England. Therefore, this block grant is not actually based on the needs of Scotland. There have been many calls for change or removal of the Barnett formula, but deciding what to replace it with has not been easy. In any event, over the past 10 years, the funding system has changed due to increased devolution of tax raising powers to Scotland, with block grant funding commensurately reduced – but the Barnett formula itself remains.

1.7 A Reserved Powers Model

UK devolution generally now operates on a 'reserved powers' model.[125] This has the effect that everything not specifically set out in statute as 'reserved' to Westminster is assumed to be devolved. Schedule 5 Scotland Act 1998 specifies the 'reserved matters' outside the competence of the Scottish Parliament. 'General reservations' under Part I of Schedule 5 include: under s1 the Constitution

[124] See further, M Keep, 'The Barnett Formula', House of Commons Briefing Paper 7386, 23 January 2020.

[125] Welsh devolution has followed this model since the Wales Act 2017. Northern Ireland devolution also has some variations.

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(including the Crown and UK Union); under s7 foreign affairs (including EU and other international organizations, regulation of international trade and international development aid); under s8 the Civil Service; under s9 defence and armed forces; under s10 Treason. Under Part II of Schedule 5, 'specific reservations' are made for financial and economic matters; immigration and nationality; national security, official secrets and terrorism; competition; insolvency; consumer protection; energy; coal, oil and gas; nuclear energy; social security; employment; broadcasting. However, exceptions to reserved areas have been created. For example, Scotland has fiscal powers that have been devolved under the 2012 and 2016 Scotland Acts, allowing the Scottish Parliament to set all income tax rates and bands (except the personal allowance, which remains reserved).

As Lord Hope stated in the *Imperial Tobacco* case, there exists a common theme in reserved matters:

> It is that matters in which the UK as a whole has an interest should continue to be the responsibility of the UK Parliament at Westminster. They include matters which are affected by its treaty obligations and matters that are designed to ensure that there is a single market within the United Kingdom for the free movement of goods and services.[126]

As a corollary, matters not reserved to the UK and so devolved to Scotland, include Scots private law and criminal law; the prosecution service, police and prisons; the judiciary and the court system; agriculture, forestry and fisheries; economic development, tourism, roads and transport; planning and environmental protection; education and training; health; local government, social work and housing; and sport and the arts. The 2012 and 2016 Scotland Acts devolved sone further areas including tax, stamp duty, abortion law and air passenger duty.

The list of reserved matters may be altered by transferring additional powers to the Scottish Parliament by Order in Council under s30 Scotland Act 1998, if both the Scottish and UK Parliaments agree. This is what happened regarding the holding of the first Scottish independence referendum in 2014.

The reserved powers model, whereby it is those powers reserved to the centre that are specified, is also found in federal and confederal jurisdictions. For example, the US federal Constitution 10th Amendment states: 'powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' This model was also to be found in the practices of the British Empire, although a division of powers between the 'imperial' Parliament in London and colonial legislatures in London was never clearly set out.[127]

[126] *Imperial Tobacco Ltd* v. *Lord Advocate* [2012] UKSC 61, para. 29.

[127] See David Torrance, 'Reserved Matters in the United Kingdom' (House of Commons briefing paper CBP 8544, 2019) 7.

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1.7.1 Restrictions on Competence of the Scottish Parliament

According to s29(1), 'An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament.' And notably, s28(7) Scotland Act 1998 explicitly upholds the power of the UK Parliament to legislate for Scotland, so preserving the notion of unlimited UK parliamentary sovereignty.

The Scottish Parliament is therefore a legislature of limited competence. It must not legislate on reserved matters nor in breach of ECHR rights, nor formerly EU law. s31(1) Scotland Act 1998 requires the Scottish minister promoting a Bill to state that its provisions are within legislative competence, and s31(2) imposes the same duty on the Presiding Officer of the Parliament (who functions in a similar way to the Speaker of the House of Commons). UK ministers also possess a veto power under s35 Scotland Act 1998 where they have reasonable grounds to believe a Bill incompatible with international obligations, or defence or national security, or modifies the law on reserved matters so as to have an adverse effect. ASPs may, in the final instance, be struck down by the courts. Under s33(1) Scotland Act, the Advocate General, Lord Advocate or the Attorney General may refer the question of whether a Bill would be within legislative competence to the Supreme Court.

1.7.2 The Sewel Convention

From the outset, it was agreed that it might at times be expedient if the UK Parliament could legislate on a devolved matter (e.g. if homogeneous legislation were needed for the whole UK.) And so, Lord Sewel made the now famous statement at the time of the Scotland Act's debate in the House of Lords: 'we would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament'.[128]

Thus the 'Sewel Motion', or Legislative Consent Motion (LCM) was born. In the earlier days of devolution, such motions were quite frequently used, and consent given. In 2016, the convention was given a statutory basis by the Scotland Act 2016. The weakness of this statutory provision was shown up when the Supreme Court judged that it was still only a convention in status,[129] and after that, when the EUWA 2018, and WAA 2020, were both adopted by Westminster in the absence of legislative consent from the Scottish Parliament. This is discussed further below.

1.8 The 2014 Independence Referendum

Initially, the Scottish Parliament was controlled by pro-union parties, usually Labour and Liberal Democrat, in coalition. However, the SNP gained a historic victory in the 2011 Scottish Parliament elections, giving them the

[128] HL Deb vol. 592, col 791, 21 July 1998.

[129] *R (Miller)* v. *Secretary of State for Exiting the European Union* [2017] UKSC 5.

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majority to request a referendum on independence, which had been a pledge in their manifesto. (Although, at that time, there was also strong public support for 'devo max', namely, much greater devolution stopping short of complete independence, but the UK Government refused to allow this on the referendum ballot.)

By 2011, the Scottish Government was presenting the case for Scottish independence in terms of democratic self-determination, legitimacy, and sovereignty. Arguments based on any notion of ethnic or cultural essence were eschewed, the focus instead being on civic nationalism and independence derived from the sovereign will of people living and working in Scotland. Given that England has 84 per cent of the total UK population it was hard to see how Scottish voters could have any meaningful influence on UK elections. Devolution had not made sufficient inroads into this situation because many significant policies – such as foreign policy and finance – were still reserved matters.

1.8.1 The Section 30 Order

(Then) UK Prime Minister, David Cameron, acknowledged the SNP's victory in 2011, and publicly accepted that it was for the Scottish people to decide on Scotland's future. Nonetheless, the UK Government contested the Scottish Parliament's competence to legislate for an independence referendum.[130] In contrast, the Scottish Government maintained that the Scottish Parliament did possess the relevant legislative competence.[131]

In the event, neither view was conclusively adopted, and the issue was settled in another way when the UK and Scottish Governments signed the Edinburgh Agreement in 2012. Under that Agreement, the UK Government drafted an Order in Council (a 'section 30 order') granting the Scottish Parliament the necessary powers to hold an independence referendum, on or before 31 December 2014.

1.8.2 The Referendum

The competence issue being settled, the Scottish Parliament then adopted two pieces of legislation making possible a referendum on Scottish Independence: the Scottish Independence Referendum (Franchise) Act 2013 and the Scottish Independence Referendum Act 2013. The Franchise Act provided that all persons entitled to vote in local government and Scottish Parliament elections could vote in the referendum, along with 16- and 17-year olds. This proved relatively uncontroversial and the only disagreement concerned the Act's bar

[130] UK Government: *Scotland's Constitutional Future*, available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/39248/Scotlands_Constitutional_Future.pdf

[131] *Your Scotland, Your Referendum*, paras. 1.5–1.9.

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on prisoner voting.[132] The Scottish Independence Referendum Act 2013 set out other substantive terms of the referendum. It confirmed the date of the referendum (18 September 2014) and the specific question to be asked ('Should Scotland be an independent country?') and also set out the rules for official campaigns to follow.

On 26 November 2013, the Scottish Government published *Scotland's Future,* its guide to an independent Scotland. In the event of a 'yes' vote, the Scottish Government planned for an 'Independence Day' on 24 March 2016, with elections for an independent Scottish Parliament in May 2016. Some Scottish Government proposals which proved particularly controversial included: the continued use of sterling via a formal currency union with rUK (namely, England, Wales and Northern Ireland); maintaining NATO membership; and negotiating membership of the EU on the same terms as the UK then had.[133] These proposals were dependent on securing agreement with rUK, the EU and other international organizations, for which the Scottish Government set the target of negotiating and implementing the arrangements within a proposed 18-month transition period to March 2016.[134]

A key issue was the institutional changes to be introduced following independence. The Scottish Government proposed an interim Constitution, to be followed by an 'inclusive and participative' process for replacing it with a permanent written Constitution. The Bill for the interim Constitution proclaimed popular sovereignty.[135] As well as the above, a transfer of power from Westminster to Holyrood was also foreseen as necessary to empower the Scottish Parliament to officially enact independence and adopt legislation on all policy areas formerly reserved to Westminster.

The Scottish Independence Referendum took place on 18 September 2014, and the turnout of 84.6 per cent was the highest recorded for a UK election or referendum since the January 1910 general election (which preceded the introduction of universal suffrage). The proposition 'Should Scotland be an independent country?' was rejected by a margin of 10.6 per cent.

1.9 Scotland Act 2016

On 7 September 2014, shortly before the independence referendum, a YouGov poll had suggested 51 per cent of Scots favoured independence. In reaction, on 16 September 2014, immediately before the referendum vote, the leaders

[132] In *Moohan* v. *Lord Advocate* UKSC 2014 the UK Supreme Court upheld the Court of Session decision that the ban on prisoner voting was lawful (because ECtHR caselaw – *Hirst* v. *UK (No2)* [2005] – applied only to elections and not referendums).

[133] See further S Douglas-Scott, 'Scotland, Secession, and the European Union', in A McHarg, T Mullen, A Page, and N Walker (eds.), *The Scottish Independence Referendum: Constitutional and Political Implications* (Oxford University Press, 2016).

[134] *Scotland's Future,* 'Preface', at x.

[135] Scottish Government, *The Scottish Independence Bill: A Consultation on an interim Constitution for Scotland* (2014) clause 3.

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of the three largest unionist parties (Conservative, Labour, Liberal Democrat) gave a 'Vow' to the Scottish electorate,[136] that in the event of a 'No' vote there would be further devolution of power to Scotland, including a guarantee that the Scottish Parliament would be permanent.

However, when he stood outside 10 Downing street, the morning after the referendum vote, David Cameron clarified that further Scottish devolution would only come after the next general election, and linked it to changes for England, saying, 'We have heard the voice of Scotland and now the millions of voices of England must be heard'.[137] This suggested further powers for Scotland were dependent not only on the next election, but also a broader constitutional settlement preventing Scottish MPs voting on England only issues. (Unlike the other three nations, England lacks its own dedicated Parliament.) So the stubborn 'West Lothian' question re-emerged.[138]

In October 2015, the UK House of Commons adopted new parliamentary procedures[139] enabling 'English Votes for English Laws' (or EVEL) supposedly to mitigate the 'West Lothian' problem. However, these were quietly abandoned in July 2021. There is no obvious solution to the asymmetric patterns of devolution in the UK, an element which has caused ill-feeling and may have contributed to the rise of English nationalism. And notably, both EVEL and the Brexit referendum were Conservative election manifesto pledges in 2015 – both unsatisfactory remedies for rising English nationalism. There has been no attempt to find a comprehensive constitutional settlement for the UK.

1.9.1 An Overview of the Scotland Act 2016

A Commission was set up in late 2014, shortly after the referendum vote, headed by Lord Smith of Kelvin, to oversee the further devolution commitments such as those in the 'Vow'. A little later, the Smith Commission produced a report recommending some areas for further devolution, and that 'UK legislation will state that the Scottish Parliament and Scottish Government are permanent institutions.'[140] The fear that Westminster might seek to abolish a Scottish Parliament predated 1998 devolution. And the fear was not without reason, for the Greater London Council had been abolished by Margaret Thatcher by the UK Local Government Act 1985.

[136] Published on the front page of the *Daily Record* (Scotland's highest circulating newspaper).

[137] 'David Cameron raises West Lothian question after Scotland vote: 'English votes for English laws', *The Guardian*, 19 September 2014.

[138] Named after Labour MP for West Lothian, Tam Dalyell, who in the 1970s protested that, post any devolution, Scottish MPs in the UK Parliament might have a decisive voice in legislation on matters concerning England only, whereas English MPs would no longer participate in devolved legislation. (A similar argument surfaced during home rule debates for Ireland.) See further, R Hazell (ed.), *The English Question* (Manchester University Press, 2006).

[139] House of Commons Standing Orders 83J–83X.

[140] *Report of the Smith Commission for further devolution of powers to the Scottish Parliament* (27 November 2014).

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Many of the Smith Commission recommendations were incorporated into the Scotland Act 2016. These new powers would, in the view of the UK Government, transform Holyrood into a 'powerhouse Parliament'.[141] Some additional powers were devolved, giving the Scottish government greater powers to raise income tax. Perhaps most notably, the 2016 Act provided in s1 that, 'The Scottish Parliament and the Scottish Government are a permanent part of the United Kingdom's constitutional arrangements' and in s2 put the Sewel Convention on a statutory basis.

1.9.2 The 'Constitutional Clauses'

1.9.2.1 Section 1 Scotland Act 2016

This reads:

> *Permanence of the Scottish Parliament and Scottish Government*
>
> (1) The Scottish Parliament and the Scottish Government are a permanent part of the United Kingdom's constitutional arrangements.
>
> (2) The purpose of this section is, with due regard to the other provisions of this Act, to signify the commitment of the Parliament and Government of the United Kingdom to the Scottish Parliament and the Scottish Government.
>
> (3) In view of that commitment it is declared that the Scottish Parliament and the Scottish Government are not to be abolished except on the basis of a decision of the people of Scotland voting in a referendum.

Notably however, this crucial section of the Scotland Act 2016 is only located in section 63A of the now amended Scotland Act 1998, where it might easily be missed. Most significantly perhaps, this new section is also only a declaration of political intent ('to signify the commitment of the Parliament and Government of the United Kingdom'). Indeed, it is hard to attribute any other constitutional effect to the section, given the UK Government's adherence to parliamentary sovereignty which might seem to rule out any entrenchment of the sort necessary to ensure a permanent devolved Parliament in the UK.[142]

Furthermore, two notable statements were made about parliamentary sovereignty during its legislative passage. The Advocate General (Richard Keen QC) in closing the third reading of the Bill in the House of Lords, claimed that no restriction had been placed on Parliament's sovereignty.[143] Also, Lord Hope, (who had given a key opinion in *R (Jackson)* v. *Attorney General* – albeit obiter – appearing to place some qualifications on parliamentary sovereignty)

[141] 'Cameron: Holyrood Can Become a Powerhouse Parliament', *BBC News Online*, 2 October 2015.

[142] E.g. M Elliott, 'The Draft Scotland Bill and the Sovereignty of the UK Parliament', *Public Law for Everyone blog*, 22 January 2015; C Himsworth, 'Legislating for Permanence and a Statutory Footing' (2016) 20 Edinburgh LR 361. Although see K Campbell, 'The Draft Scotland Bill and Limits in Constitutional Statutes' (30 January 2015) UK Const. L. Blog.

[143] HL Deb, 21 March 2016, col 2071.

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affirmed his loyalty to the principle of parliamentary sovereignty.[144] So it is questionable just what section 1 actually achieved legally.

1.9.2.2 Section 2 Scotland Act 2016

Section 2 put the 'Sewel convention' on some sort of[145] statutory basis. As a constitutional convention it was previously seen as being politically, as opposed to legally binding. However, s2 Scotland Act 2016 inserts a new subsection (8) into s28 Scotland Act 1998, which now reads: 'But it is recognized that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament', although s28(7) still states that 'This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland'.

However, it seems that s2 Scotland Act 2016 does not transform the convention into a statutory obligation. The Supreme Court held in *Miller* that the Sewel Convention has no *legal* force, ruling that s2 Scotland Act 2016 was not intended to convert Sewel into a justiciable legal rule, but rather to 'entrench it as a convention.'[146] But an 'entrenched convention' is a puzzling notion in the absence of any method of enforcing compliance with it, and a controversial decision in the context of the delicate state of UK-Scottish constitutional politics, which provided the context for the enactment of the Scotland Act 2016. The Supreme Court explained that its finding was compelled by the wording in the Scotland Act itself, because 'We would have expected Westminster to have used other words if it were seeking to convert a convention into a legal rule justiciable by the courts.'[147] But it does seem strange to include a provision in legislation that is not intended to create any legal effect. So once again, it was questionable that anything had been achieved legally.

But there are other problems with the wording of s2 Scotland Act. First, what is meant by the term 'normally'? This word was described by the House of Lords Constitution Committee as 'unusual in legislation', but 'seems to make clear that Parliament will still have the legal power to legislate for Scotland, even on devolved matters, without the consent of the Scottish Parliament'.[148] But surely, if 'normally' just means what the UK Government interprets it as, then it is unhelpful or redundant? And so it proved. Substantial pieces of Brexit legislation, the EUWA 2018, and the EU WAA 2020, were passed without the legislative consent of the Scottish Parliament. A second complaint was that the

[144] Although, elsewhere, Lord Hope stated (of Article XIX Act of Union 1707) that: 'As a student at Edinburgh University many years ago, I was taught that the provision in those terms was fundamental law and in that respect the UK Parliament did not have absolute sovereignty.' HL Deb, 24 November 2015, col 617.

[145] The term 'some sort of' is used advisedly, given disagreements over the status of s 2, and the finding in *Miller*.

[146] *Miller*, judgement of the majority, at para. 149.

[147] Ibid., at para. 148.

[148] House of Lords Constitution committee, *Proposals for the Devolution of Further Powers to Scotland* (n. 3) para. 72.

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new statutory provision referred only to 'devolved matters.' This was felt to misrepresent the scope of the Sewel convention, which had evolved to cover both devolved policy areas and situations where the UK Parliament varied the legislative competence of the Scottish Parliament or Government.[149] This latter use was not included in s2 Scotland Act 2016. So, the scope of the UK government obligation in s28(8) is in any case unclear.

And thus concludes this discussion of the Scotland Act 2016. Notwithstanding the 2014 referendum, there was no far-reaching attempt to get to grips with both devolution and diversity, nor to think through and support counterbalancing, central elements that might bind the UK together. The combination of the ad hoc response in the 2016 Scotland Act, along with EVEL, was a partial, poorly thought out approach, stoking up future problems.

1.10 Judicial Review and Devolution

1.10.1 Introduction

How have the courts addressed questions of the Scottish Parliament's competence? 'Hard' judicial review (namely that in which a court can invalidate primary legislation) of Westminster statutes has not traditionally been possible under 'classic' interpretations of Britain's Constitution, in which the doctrine of parliamentary sovereignty prevails. However, this has not applied in the case of subordinate legislatures. For example, judicial review of legislation of the former Northern Ireland Parliament (1922–1972) was possible, although rare.[150] Since then, judicial review of legislation on certain grounds has been possible in the post 1998 devolution settlements. This availability of more searching judicial review tells us something about how devolution has changed the nature of law in the UK.

By the late 1990s, the idea that democratically enacted statutes might be reviewable no longer seemed so controversial in the UK. Even Westminster statutes could be set aside if they conflicted with EU law, as the *Factortame* case had shown.[151] Further, the 1988 Claim of Right for Scotland had declared the popular sovereignty of the Scottish people, thus circulating the notion that the power to legislate is limited and derives from the people. Constitutional review by the courts has since then become an important aspect of the devolution settlement in Scotland.

One early question[152] was that of the *status* of Acts of the Scottish Parliament. Should they be treated as primary legislation, because they are the output of an

[149] UK Government Devolution Guidance Note 10 (DGN10) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/60985/post-devolution-primary-scotland.pdf

[150] For an example of a successful challenge see *Ulster Transport Authority* v. *James Brown & Sons Ltd* [1953] NI 79.

[151] *R* v. *Secretary of State for Transport, ex parte Factortame (no. 2)* [1991] 1 All ER 70.

[152] E.g. *Adams* v. *Scottish Ministers* [2004] SC 665 and *Whaley* v. *Watson* [2000] SC 340.

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elected, democratic Parliament, or, alternatively, as analogous to local authority decisions, because devolved Parliaments are subordinate in status? In *AXA General Insurance Ltd,* the UK Supreme Court held that ASPs cannot be challenged as if they were decisions of a subordinate public body, and so they could not be reviewed on common law grounds of irrationality or unreasonableness. However, because the Scottish Parliament does not enjoy the sovereignty of the Crown in Parliament, its legislation could be amenable to some common law supervision'[153] – but only in the most exceptional circumstances.[154] In this way, common law conditions for judicial review of ASPs are not so far from those some judges have suggested might apply to Westminster primary legislation. (An exceptional rule of law review of Westminster statutes was suggested in the dicta of Baroness Hale, Lord Steyn and Lord Hope in *Jackson* v. *Attorney General*.[155]) So, while the Scottish Parliament can be distinguished from Westminster, courts have stressed what the Scottish Parliament has *in common* with the Westminster Parliament, namely its status as a democratic legislature with the legitimacy that follows from that.

But what of the Scotland Act itself, the legislation that established the Scottish Parliament? In 2002, in the Northern Ireland *Robinson* case, the House of Lords (judicial Chamber) held that the Devolution Acts were in effect Constitutions, to be interpreted 'generously and purposively'.[156] This looked like a rather radical departure. However, both the Court of Session and UK Supreme Court later rejected this approach. Although the Supreme Court held in *H* v. *Lord Advocate*,[157] that the Scotland Act, as a constitutional statute,[158] could not be impliedly repealed, in *Imperial Tobacco* Lord Reed stated:

> The Scotland Act is not a constitution, but an Act of Parliament. There are material differences. The context of the devolution of legislative and executive power within the United Kingdom is evidently different from that of establishing a constitution for an independent state such as Jamaica or Barbados, or a British overseas territory such as Bermuda.[159]

1.10.2 Statutory Grounds of Review

The Scottish Parliament may be a democratically elected body but it is constrained by statute, mainly under ss 28 and 29 Scotland Act.

[153] *AXA General Insurance Ltd* v. *HM Advocate* [2011] UKSC 46 per Lord Hope, at para. 47.
[154] This approach was carried forward in *Imperial Tobacco Ltd* [2012] SLT 749 at para. 58.
[155] *Jackson* v. *Attorney General* [2005] UKHL 56.
[156] *Robinson* v. *Secretary of State for Northern Ireland* [2002] UKHL 32, 11, especially the opinion of Lord Hoffmann.
[157] [2013] 1 AC 413.
[158] Following Lord Justice Laws' obiter dictum in *Thoburn* [2002] EWHC 195 (Admin).
[159] *Imperial Tobacco Ltd* v. *Lord Advocate* [2012] CSIH 9 2012 SC 297 at [71], per Lord Reed.

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s29(2)d provides that ASPs must not be incompatible with the ECHR nor (while the UK was an EU member) with EU law. Although the democratic credentials of the Scottish Parliament were stressed by the Supreme Court in *AXA*, it is nonetheless constrained far more strongly by ECHR rights than Westminster. This means that any ASP incompatible with ECHR rights is 'not law', whereas statutes enacted by Westminster may only declared 'incompatible' with the ECHR by the courts under s4 HRA and cannot be invalidated by the courts for violation of the Human Rights Act 1998. Section 29(2)(d) also stated that the Scottish Parliament could not act incompatibly with EU law. Since 1 February 2020, the UK has left the EU, but under EUWA 2018, devolved legislatures are still bound by 'retained EU law', although the UK Parliament, and UK ministers, are free to amend it. The opposition of the Scottish government to Brexit legislation is considered further below.

Secondly, what have been termed 'federal'[160] (although this may be a bit of a misnomer, given the UK is not a federal State) restrictions apply, namely those which determine the division of competences between the UK and Scottish levels of government. S29(2)(b) provides that Scottish Parliament legislation will be outside competence if it relates to a reserved matter. Although most earlier challenges to ASPs were based on ECHR rights, there has been increasing litigation alleging that Scottish legislation trespassed on matters reserved to Westminster. But the line between reserved and devolved matters can be rather difficult to draw. When considering whether a provision relates to a reserved matter the courts must determine this 'by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances' (s29(3) SA). Further, s 101(2) Scotland Act provides that ASPs are to be 'read as narrowly as is required for it to be within competence, if such a reading is possible.'

Some federal jurisdictions, especially Canada, have taken a 'pith and substance' approach to competence, seeking out the essential character of the law, and its true meaning and purpose,[161] looking at the statute as a whole. However this approach was not followed wholeheartedly by the UK Supreme Court.[162] *In Imperial Tobacco*, Lord Hope said that the 'pith and substance' test was unnecessary because the Devolution Acts did not use that phrase and provided their own rubric for interpretation, thus suggesting that the UK test for division of powers should not be compared to those in a federal jurisdiction. Generally, the Supreme Court has held that a provision will be outside competence if it has a 'more than a loose or consequential connection to a reserved matter' – a phrase that was used in 2010 in *Martin*,[163] and repeated in other cases since.

160 C McCorkindale, A McHarg, and PF Scott, 'The Courts, Devolution, and Constitutional Review' (2017) 36 Univ. of Queensland LJ 289–310.

161 *General Motors of Canada Ltd* v. *City National Leasing* [1989] 1 SCR 641 Supreme Court of Canada.

162 Lord Hope in *Martin* v. *HM Advocate* [2010] UKSC 10, para. 15, and in *Imperial Tobacco*, para. 13.

163 Lord Walker in *Martin* v. *HM Advocate* [2010] UKSC 10, para. 49, endorsed by L Hope in *Imperial Tobacco*, also *Christian Institute* v. *Lord Advocate* [2016] UKSC 51.

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In March 2018, the Scottish Parliament adopted the *UK Withdrawal from the European Union (Legal Continuity) (Scotland) Act 2018* by 95 votes to 32. This Bill shared its structure and approach with the UK EUWA 2018,[164] seeking to complement it. However, it diverged from the EUWA in some areas, for example, it did not exclude the EU Charter of Fundamental Rights, and allowed Scotland to keep pace with EU developments in future. It also, in its s17 (in contrast to the UK EUWA), required consent of Scottish ministers should UK Ministers wish to alter or repeal retained EU law within devolved areas. This Bill was challenged by the UK government and the lawsuit made constitutional history – being the first ASP referred to the UK Supreme Court by the Attorney General under s33 Scotland Act 1998, a procedure that constitutes a type of 'abstract', rather than 'concrete' review. Later in 2018, the Supreme Court, applying the familiar test of whether a provision had 'more than a loose or consequential connection to a reserved matter' found only s17 outside of the Scottish Parliament's competence,[165] due to enactments in the EUWA (subsequent to the adoption of the Scottish Continuity legislation), which prohibited the EUWA's own modification. However, it is hard not to conclude that the Continuity Bill was competent when adopted by the Scottish Parliament. If so, surely it follows that the UK Government may challenge any devolved legislation it dislikes, thus suspending its application while the matter is *sub judice*, and in the meantime adopt its own 'protected legislation', which by coming into force automatically trumps the devolved legislation.

In 2021, the UK Supreme Court upheld the UK Government's challenge to two Bills adopted by the Scottish Parliament on grounds they exceeded the Scottish Parliament's powers. Both Bills implemented treaties into Scots law, one incorporating the UN Convention on the Rights of the Child, the other the European Charter of local self-government. Although both Bills were unanimously approved by MSPs and certified by the Presiding Officer as within the Scottish Parliament's powers, the Court held that both Bills placed obligations on UK ministers that exceeded devolved powers.[166] Significantly, the Supreme Court found that provisions in the Bills would modify s28(7) SA in what Elliott describes as 'a highly unconvincing judgement that reads the Scottish Devolution settlement unnecessarily narrowly.'[167] This significant judgement on legislative competence was perhaps a harbinger of how the Supreme Court would determine the competence of a future Scottish independence referendum Bill.

[164] The EUWA is discussed further below.

[165] *A Reference by the Attorney General and the Advocate General for Scotland* [2018] UKSC 64. The term 'Bill' is used because, although it was adopted by the Parliament, royal assent had been suspended until litigation was concluded.

[166] *Reference by the Attorney General and the Advocate General for Scotland* [2021] UKSC 42

[167] M Elliott and N Kilford, 'Devolution in the Supreme Court: Legislative Supremacy, Parliament's 'Unqualified' Power, and 'Modifying' the Scotland Act', U.K. Const. L. Blog (15 October 2021).

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1.10.3 Role of the UK Supreme Court

These judgements prompt questions as to the Supreme Court's growing role in devolution jurisprudence. The UK Supreme Court has been the final court of appeal for devolution disputes since 2009.[168] When it hears devolution issues, the Supreme Court sits as a UK court, rather than a Scottish (or English and Welsh, or Northern Irish) court. Yet, Scots law is different to English law, and each of the three devolution settlements is in turn different from each other, perhaps undermining the concept of a uniform devolution jurisprudence,[169] let alone a uniform constitutional law. Since 2017, the UK Supreme Court has sometimes sat in Edinburgh, Belfast and Cardiff, perhaps in an attempt to counteract a perception that the Court might be too London centred and England dominated.

Originally it was the Judicial Committee of the Privy Council (JCPC) that determined devolution disputes. The JCPC was thought to be well placed for this role, having been a court of last resort for many Commonwealth jurisdictions in the past, and having served this function under the Government of Ireland Act 1920. However, both the SNP and the Liberal Democrats were unhappy with this arrangement,[170] seeking to amend the 1998 Scotland Bill to provide for a constitutional court whose judges would be institutionally independent from the House of Lords and English domination. As this chapter has explored, a different Scottish constitutional tradition has evolved, which is sometimes difficult to square with orthodox English theories of parliamentary sovereignty. And so, a dominance of English judges[171] determining devolution cases might seem problematic.

1.10.4 Conclusions

Therefore, ASPs are reviewable by the courts which may declare their provisions ultra vires, thus distinguishing them from Acts of the Westminster Parliament. Notably, in a 2018 lecture, Lady Hale stated that 'the only conclusion I can draw is that devolution of legislative – as opposed to executive – power turns the United Kingdom Supreme Court into a genuinely constitutional court.'[172] Nonetheless, the caselaw on constitutional review of ASPs is somewhat equivocal. Sometimes, the approach seems to be a constitutional one, approaching the Scottish Parliament as a democratically elected primary legislator, established

[168] Constitutional Reform Act 2005, s. 40.

[169] See David Feldman, 'None, One or Several: Perspectives on the UK's Constitution(s)' (2005) 64.

[170] See HC Deb vol. 312, cols 203–215, 12 May 1998 (SNP).

[171] Section 28(8) Constitutional Reform Act provides that: 'In making selections for the appointment of judges of the Court the commission must ensure that between them the judges will have knowledge of, and experience of practice in, the law of each part of the United Kingdom.' In practice, there have usually been two Scottish members of the Court.

[172] 'Devolution and The Supreme Court – 20 Years On', Scottish Public Law Group 14 June 2018.

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by a constitutional statute. On the other hand, the Supreme Court seems to have also rejected the federal ‘pith and substance’ test, and cleaved to an absolutist view of Westminster parliamentary sovereignty in its more recent judgements.

If Scotland had voted for independence in 2014, a Constitutional Convention would have been assembled to draft a written Constitution which limited the sovereignty of legislative acts.[173] The role of judges to determine constitutional meaning, and if necessary invalidate ‘ordinary’ legislative acts for non-compliance with the Constitution, tends to become augmented with written Constitutions, as it has been in the US, since the decision of *Marbury* v. *Madison*. The outlier is the Westminster Parliament.

1.11 Devolution and Parliamentary Sovereignty

How then does devolution interact with parliamentary sovereignty? According to Dicey, parliamentary sovereignty prevents the Scotland Act (or Acts of Union) having any special entrenched status. They are for Dicey, ordinary Acts, open to implied or express repeal just like any other Act of Parliament. Diceyan doctrine holds that Westminster parliamentary sovereignty has been unqualified by devolution. Section 28(7) Scotland Act asserts the power of the UK Parliament to make laws for Scotland. Thus, is certainly not federalism, and denies full sovereignty to Scotland, even within the sphere of devolved matters.

However, not all have taken the view that Westminster parliamentary sovereignty has been left untouched. In 1998, Vernon Bogdanor suggested that, following devolution, Parliamentary supremacy ‘will become merely a nebulous right to supervise the Scottish Parliament, together with the right under pathological circumstances, to abolish it.’[174] The apparent devolution challenge to parliamentary sovereignty is enlarged by competing claims of the popular sovereignty of the Scottish people, asserted to have the right to determine their political setup. This is enhanced by the idea, also prevalent in Scotland, of the UK as a voluntary union, dissolvable at will by either party.

Yet in practice, things are more complicated. Neither legal doctrine nor political practice have been particularly clear. This was illustrated by the apparent failure to translate the Sewel convention into a legislative obligation. For a long time, the British Constitution has celebrated its uncodified, apparently ‘flexible’ nature, one composed a much of political practices, conventions and usages as hard legal rules. Yet, legally unenforceable conventions depend on trust, willing compliance and good faith if the Constitution is to work effectively. There is less of that trust in operation now we are witnessing the demise

[173] See *Scotland’s Future: Your Guide to an Independent Scotland* (2013) 332, 334–335.

[174] V Bogdanor, ‘Devolution: The Constitutional Aspects’, in *Constitutional Reform in the United Kingdom* (University of Cambridge Centre for Public Law, 1998) at 12.

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of what Hennessey describes as the 'good chaps'[175] account of government. But equally, if constitutional conventions are vague and nebulous, so are the legal rules. What is the status of Westminster parliamentary sovereignty? As explained in Chapter 6, its basis is somewhat mysterious.

1.12 Brexit

1.12.1 Background

This unsettled constitutional situation was further complicated by Brexit, which hit the UK like a 'lightning bolt'.[176] During the Scottish independence referendum campaign, the pro-UK, 'Better Together' side notably raised the issue of EU membership. They suggested that the only way Scotland's EU membership would be assured was by remaining in the UK, and that an independent Scotland's application for EU membership could take years, with no guarantee of success. Thus, in voting against independence, many Scots might have thought they were securing EU membership. This proved not to be the case.

In the 2016 EU referendum, in which overall the UK voted by 51.9 per cent to leave the EU, Scotland voted by 62 per cent to remain. (This was a bigger margin than the 55 per cent of voting Scots voting to remain in the UK in 2014.) The EU Single Market was the main destination for Scotland's international exports, and, according to a 2016 report by the Fraser of Allander Institute, Brexit will have a significant negative impact on the Scottish economy, resulting in a GDP lower by 2–5 per cent, and employment lower by 1–3 per cent, than if the UK remained in the EU.[177] The Scottish government argued that it was undemocratic for Scotland to be driven out of the EU against its will. Yet, within the constraints of Britain's constitutional arrangements, it has been difficult for Scotland to forge a different relationship with the EU from the rest of the UK. The current devolution settlement treats EU negotiations as 'reserved' matters, giving Scotland few legal rights in the EU withdrawal process. Nonetheless, efforts were made within Scotland to explore whether it could remain in the EU Single Market. The Scottish Government published *Scotland's Place in Europe*[178] in December 2016, well before the UK Government had concretized its position, stating a desire to maintain the benefits of EU membership for Scotland.

1.12.2 A UK 'Union' Approach

Although foreign policy, which includes relations with the EU, is reserved to the UK government, it is too simplistic to state that devolved administrations

[175] See e.g. 'Good Chaps No More? Safeguarding the Constitution in Stressful Times' by Andrew Blick and Peter Hennessy (2019) Constitution Society. Maybe Hennessey somewhere includes chapesses – I haven't been able to confirm.

[176] Peter Hennessey, House of Lords, Hansard 5 July 2016, Volume 773, column 1963.

[177] Fraser of Allander Institute: 'Long-Term Economic Implications of Brexit: A Report for the Scottish Parliament' (October 2016).

[178] Available at www.gov.scot/publications/scotlands-place-europe/

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have no interest in EU matters. A large part of EU law relates to devolved competences – as a result, devolved governments had an important role in implementing and applying EU law. Additionally, many areas of EU law straddle devolved and reserved competences.[179]

However, notwithstanding Scottish aspirations, in her Lancaster House speech[180] in January 2017 (then Prime Minister) Theresa May stated that the UK would leave both the Single Market and the Customs Union. No mention was made in the UK Government's letter triggering Article 50 TEU[181] of any particular arrangements for Scotland (although Northern Ireland was singled out as a special case), so it seemed that the UK Government rejected the Scottish Government's proposals. Nor were the contents of the Article 50 notification shared with the Scottish Government prior to its publication. This left little space for Scotland to protect its interests in the withdrawal process, where it was the UK Government that did the negotiating, embracing a unitary and top-down approach, excluding devolved governments from the negotiation process.[182] However, the archetype of 'unitary' State has been undermined by two decades of devolution in the UK.[183]

1.12.2.1 The UK Internal Market

In the past, EU law constrained its member States to legislate in compliance with the EU Internal Market. Yet, in the absence of EU common principles, barriers to trade within the UK may materialize. Federal States have had to make provision to ensure policy harmonization. For example, the US commerce clause states that the US Congress shall have power 'To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.'[184] How would Britain manage its Internal Market post Brexit?

An earlier UK Government Brexit White Paper argued for national 'common frameworks'.[185] But the 2020 UK Internal Market Act is the main vehicle to provide a basic framework for the UK Internal Market and to prevent trade barriers within it. The Act relies on two major principles – mutual recognition and non-discrimination. Although devolveds may set their own regulations in devolved areas, the mutual recognition provision prevents them from applying these to goods and services already marketed in other parts of the UK (also extending to goods imported into the UK from third countries). The

[179] E.g. immigration, which is reserved, may impact on health policy, which is devolved.

[180] *The Government's Negotiating Objectives for Exiting the EU: PM Speech,* 17 January 2017.

[181] *Prime Minister's letter to Donald Tusk triggering Article 50,* 29 March 2017.

[182] Such intra-UK government machinery as exists, including the EU formation of the Joint Ministerial Committee, JMC(E) were perceived by the devolveds as weak, sidelined, and as functioning inadequately.

[183] See e.g. R Hazell and R Rawlings, *Devolution, Law Making and the Constitution* (Imprint Academic, 2005).

[184] United States Constitution (Article I, Section 8, Clause 3).

[185] UK Government: 'Legislating for the United Kingdom's Withdrawal from the European Union' at 27, para. 4.4.

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non-discrimination principle prohibits devolved governments from discriminating against goods and services from other parts of the UK.

Overall, devolved Governments view the Act as weakening their ability to legislate in devolved areas, and, according to Michael Russell MSP, 'radically undermining the powers and democratic ability of the Scottish Parliament.'[186] Furthermore, the 2020 Internal Market Act provides the UK Government with spending powers in many devolved areas, thus compromising their ability to take credit for funding policy innovations within their territories.

1.12.3 The *Miller* Litigation and the Sewel Convention

In *Miller*, the UK Supreme Court determined that the UK Government may not trigger Article 50 by use of the prerogative alone. The devolution aspects of this case have been, however, somewhat under-analysed.

The Scottish Government intervened in *Miller*, arguing that any Parliamentary legislation authorizing the UK Government to trigger Article 50 would require the consent of the Scottish Parliament as it would necessitate amending the Devolution Statutes. So, the status of the Sewel convention was at issue. However, the Supreme Court in *Miller* held that, notwithstanding its incorporation in the Scotland Act 2016, the measure remains a convention, not a legally enforceable obligation, and in fact the European Union (Notification of Withdrawal) Act 2017 was adopted without any legislative consent motion(s) having been requested or adopted.

The Scottish Government also argued in *Miller* that triggering Article 50 by unilateral act of the Crown would be contrary to the Claim of Right 1689 and Act of Union 1706. The Claim of Right argument contended that government only has such powers as expressly granted to it by the people in representative assembly. The Scottish Government also argued that the UK's withdrawal from the EU would result in modifications to Scots private law (e.g. employment and consumer rights derived directly from EU law) not for the evident utility of the Scottish people (and so contrary to Article XVIII Act of Union) – especially given that 62 per cent of the Scottish Referendum vote was for Remain. Both of these arguments failed, but nonetheless, drawing on these statutes illustrates that Scotland and England have different constitutional traditions, and historically different views of the Crown's privileges. The Supreme Court's judgement in *Miller* has been criticized for assuming 'that the 19th century English constitutional tradition as formulated/invented by Dicey – is the fount and only origin of the contemporary United Kingdom constitution.'[187]

[186] M Russell, *After Brexit: The UK Internal Market Act and Devolution* (Scottish Government, 8 March 2021).

[187] A O'Neill, 'The Miller Decision: Legal Constitutionalism Ends Not with a Bang, but a Whimper' (2017/2/03) VerfBlog.

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1.12.4 The EU Withdrawal Act 2018 and the EU Withdrawal Agreement Act 2020

As if to press home the impact of the *Miller* ruling, Westminster also adopted the 2018 EUWA without the consent of the Scottish Parliament. The EUWA provides the apparatus for the huge revision of the UK legal system necessary as a consequence of the UK's exit from the EU. This is 'a legal undertaking of a type and scale that is unique and unprecedented.'[188] The EUWA provides for continuity by preserving EU law as it exists immediately before Brexit, converting it into domestic (or 'retained EU') law, and then, where necessary, granting UK Government ministers huge law-making powers to repeal or amend it. It also provided for repeal of the ECA 1972.

Importantly for this chapter, the EUWA set out important and controversial provisions – sections 10, 11 & 12, along with schedules 2 & 3 – regarding devolution. Most controversial is s12 EUWA, which, to summarize a convoluted provision, enables the UK Government unilaterally to limit devolved powers in areas of retained EU law. And so, the Scottish Parliament refused to grant its consent to the relevant sections of the EUWA, which was nonetheless adopted in Westminster.

A Withdrawal Agreement[189] was agreed between the EU and the UK government on 17 October 2019 and entered into force on 1 February 2020, after the UK Parliament had adopted the EU WAA 2020 and the EU had approved it. From that date, the UK was no longer an EU member, although there was a transition period until 31 December 2020, during which most EU law continued to apply in the UK. The WAA was notably adopted without the consent of any of the devolved legislatures. According to Ian Blackford, MP, and SNP leader at Westminster: 'We are faced with a situation which is completely unprecedented when the government in Edinburgh, Belfast and in Cardiff has not given consent to this act of parliament. That completely contravenes the devolution settlement.'[190]

1.13 Conclusions

1.13.1 A Second Scottish Independence Referendum?

At time of writing, much is uncertain. But Brexit has, to date, involved a forceful centralization. Given that England is so much larger that Scotland,

[188] Per House of Lords Constitution Committee, *European Union (Withdrawal) Bill*, 29 January 2018, HL 69 2017–19, p. 3.

[189] *Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community*, 2019/C 384 OJ C 384, 12 November 2019.

[190] 'Boris Johnson's Brexit Bill Becomes Law', *The Guardian*, 23 January 2020.

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Wales and Northern Ireland, and English Government is merged into UK Government, this seems to empower England over the devolved nations. In late 2019, the Scottish Government published *Scotland's Right to Choose: Putting Scotland's Future in Scotland's Hands*, stating its commitment to 'an agreed, legal process … which will be accepted as legitimate in Scotland, the UK as a whole, and by the international community.' This document cited as grounds for an independence referendum: Scots' sovereign right to determine their own constitutional future; a material change in circumstances since the 2014 referendum, (namely Brexit, despite the desire of majority of Scottish voters to remain, and effects of Brexit on Scotland); and the existence of a mandate for a referendum derived from electoral victories at the 2016 Holyrood election, and 2017 and 2019 Westminster elections. After the SNP won forty-eight of Scotland's fifty-nine seats in the UK General Election in December 2019, Nicola Sturgeon claimed there was a 'renewed, refreshed and strengthened mandate' for another referendum, and requested a 'section 30 order' from the UK Government for the power to hold an independence referendum. This was, however, rejected in January 2020 by Prime Minister Boris Johnson.[191]

Although the Covid pandemic meant that moves towards independence were on hold for a while, nonetheless, opinion polls in 2020 consistently showed support for Scottish independence at around or over 50 per cent, with one poll showing a record high of 58 per cent. The Scottish Parliament adopted referendum legislation in 2020,[192] setting out the general rules and applicable franchise for all referendums in Scotland. In January 2021, the SNP produced a 'routemap' to independence, followed by a draft independence referendum Bill in March 2021, which it committed to enact if an SNP Government were re-elected with a majority to do so. In the May 2021 Scottish Parliament elections, the SNP fell one seat short of an overall majority, although together with the Green party MSPs, an overall majority for independence exists in the Scottish Parliament. But the UK Government continued to state that it would refuse to grant a s30 order – a refusal that seems somewhat ironic, given that the UK Government has often cast the 'will of the people' as crucial (necessitating the honouring of the Brexit non-binding referendum). Nicola Sturgeon has also stressed the importance of popular consent. In an SNP conference speech, Sturgeon stated that Brexit had included

> a process to allow Northern Ireland to decide if and for how long it will stay aligned to the single market and customs union … Wales will have voted to leave. England will have voted to leave. Northern Ireland will be given a say over its future. Scotland will be the only country in the UK to be taken out

[191] Boris Johnson's rejection, 14 January 2020: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/857586/Nicola_Sturgeon_20200114.pdf

[192] The Referendums (Scotland) Act 2020 and The Scottish Elections (Franchise & Representation) Act 2020.

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> of the EU against our will and with no say over our future relationship with Europe.[193]

However, after deadlock and UK Government rejection of the s30 route, in June 2022, the Scottish Government launched new steps in the campaign for independence.[194] It started by issuing a series of papers, under the umbrella of *Building a New Scotland*,[195] intended to increase popular support for independence. The centrepiece, however, was an independence referendum Bill, issued on 28 June 2022, but not then introduced into the Scottish Parliament, because the Scottish Lord Advocate, Dorothy Bain, immediately referred[196] the Bill to the UK Supreme Court under Schedule 6 Scotland Act 1998 with the question:

> Does the provision of the proposed Scottish Independence Referendum Bill that provides that the question to be asked in a referendum would be 'Should Scotland be an independent country?' relate to reserved matters? In particular, does it relate to: (i) the Union of the Kingdoms of Scotland England (Para 1b Sched. 5); and/or (ii) the Parliament of the United Kingdom (para 1c. Sched 5).

Although it is somewhat unusual to refer a Bill that is not yet law, the Supreme Court rejected the UK Government's contention that the action was 'premature'[197] (because the Bill had not yet been passed by the Scottish Parliament) and the action was scheduled for hearing on 11 and 12 October 2022. The First Minister also announced that if the Bill were found within legislative competence, then the Scottish Government would immediately introduce the Bill so that the referendum could proceed on 19 October 2023.

1.13.1.1 Scottish Independence in the UK Supreme Court

On 23 November 2022, the UK Supreme Court gave judgement on the legal viability of a second Scottish independence referendum.[198] The Supreme Court held that the Scottish Parliament lacked the legal competence to adopt legislation for a second independence referendum, because such legislation would relate to matters reserved to the UK under schedule 5 Scotland Act 1998

[193] Available at www.snp.org/nicola-sturgeons-address-to-snp19/

[194] 'Next steps in independence referendum set out', 28 June 2022, at www.gov.scot/news/next-steps-in-independence-referendum-set-out/

[195] See further www.gov.scot/newscotland/

[196] Reference by the Lord Advocate to the Supreme Court – available at www.gov.scot/binaries/content/documents/govscot/publications/strategy-plan/2022/07

[197] In *Keatings* v. *Advocate-General* [2021] CSIH 25, the Scottish Court of Session refused a declaration that the Scottish Parliament had the power to hold a referendum on Scottish independence, stating that the application was 'premature, hypothetical and academic', given that no referendum Bill had been introduced to the Scottish Parliament.

[198] *Reference by the Lord Advocate of Devolution Issues under Paragraph 34 of Schedule 6 to the Scotland Act 1998.*

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(namely, the Union of the Kingdoms of Scotland and England and/or the UK Parliament).

The core of the case came with the Court's determination that a referendum Bill would relate to reserved matters. Well-known caselaw, such as the 2010 *Martin* v. *Her Majesty's Advocate*, established that a statutory provision relates to a reserved matter if it has something more than 'a loose or consequential connection' with it. Under section 29(3) Scotland Act 1998, this should be determined by reference to the purpose of the provision (i.e. the proposed referendum) having regard to its effect in all the circumstances. The Lord Advocate argued that the draft Bill was a 'consultative referendum' whose 'purpose' was, in the very words of the draft Bill itself, 'to make provision for ascertaining the views of the people of Scotland on whether Scotland should be an independent country'.[199] In this way, the Lord Advocate argued that a consultative referendum would not 'relate to' the reserved matter of the Union, in more than the 'loose or consequential' sense required by caselaw. However, the Court disagreed, finding that, even if the referendum had no immediate legal consequences, it would still have important political consequences, and more than a loose or consequential connection with the reserved matters of the Union of Scotland and England and the sovereignty of the UK Parliament.

Overall, perhaps the Supreme Court's decision was not very surprising. For a start, only five Supreme Court judges (Lord Reed, Lady Rose, Lord Lloyd-Jones, Lord Sales, and Lord Stephens) sat to hear it – not the full Court of 11 who heard the *Miller I* and *Miller/Cherry* Brexit cases. Therefore, although this case was noted as important by Lord Reed, it was not seen as meriting a hearing by a full Supreme Court. Further, although the Supreme Court found against the UK Government in both *Miller* cases –which might have appeared encouraging to the Scottish Government – those cases can be distinguished. Lord Reed, himself Scottish in origin and legal training, is now President of the UK Supreme Court, which was not the case in the *Miller* disputes, and the 'Reed Court' appears to take a somewhat different judicial approach from preceding Supreme Court configurations. As Conor Gearty has argued,[200] the Reed Court is more formalist in approach, adopting a close reading of legal texts in preference to broader arguments (such as those of relevance to Scottish independence which rest on the principle of democracy, or on unincorporated human rights such as self-determination). Furthermore, in both *Miller* cases, the beneficiary was the UK Parliament, and parliamentary sovereignty – a doctrine that the Supreme Court, and particularly Lord Reed, is unlikely to apply to the Scottish Parliament.

[199] *Reference by the Lord Advocate to the Supreme Court – available at www.gov.scot/binaries/content/documents/govscot/publications/strategy-plan/2022/07*

[200] C Gearty, 'In the Shallow End', LRB, 27 January 2022.

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Furthermore, the Supreme Court has tended to view the devolution settlement narrowly, which does not favour the Scottish Government's arguments for independence. In *Miller I*, the Court found the Sewel Convention (that the UK Parliament 'will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament') to be only a political convention and thus legally unenforceable, despite its having been legislated in section 2 2016 Scotland Act. In the 2018 *Scottish Continuity Bill* case and 2021 *UN Rights of the Child* case (decided unanimously by the Supreme Court, and in which four out of the five judges in the 2022 referendum case sat), the Court also approached Scottish devolution narrowly (not 'generously and purposively', as it had devolution legislation in the much earlier *Robinson* case[201]) – finding that the Scotland Act 'must be interpreted in the same way as any other statute'. Therefore, they concluded that it could not be applied in a way that undermined the sovereignty of the Westminster Parliament.

And finally, in *Miller I,* the Supreme Court took a broad approach to the 'effect' of actions – finding the prerogative could not be used to trigger Article 50 TEU to start the process of leaving the EU, because its practical effect would lead to the repeal of the ECA 1972, and only Parliament could repeal legislation, not the Government. Therefore, it is unsurprising that the Court considered that even a consultative referendum could have wide effects, even if not legal ones, because it might ultimately lead to the breakup of the UK.

1.13.1.2 What Follows?

The Supreme Court's judgement is not startling. However, it does leave Scotland in a potentially frustrating constitutional position. The UK Union has been recognized as voluntary,[202] and Scotland's right to self-determination stressed, including by UK Government ministers. Nonetheless, Scotland's First Minister, Nicola Sturgeon, suggested that losing in the Supreme Court 'will clarify that any notion of the UK as a voluntary union of nations is a fiction and that that the UK is a partnership of equals is false.'[203] And absent UK political support, it is hard to see how Scotland's rights can be exercised in a way that would garner legal recognition from the international community.

Nicola Sturgeon had already declared that, if the Supreme Court were to find a draft Bill outside Holyrood powers, then the SNP would fight the next

[201] *Robinson* v. *Secretary of State for Northern Ireland and Others*, [2002] UKHL 32.

[202] For example, 'as a nation, [the Scots] have an undoubted right to national self-determination; thus far they have exercised that right by joining and remaining in the Union. Should they determine on independence no English party or politician would stand in their way.' Margaret Thatcher, *The Downing Street Years* (Harper Collins, 1993) at 624.

[203] Scottish Government, 'Next Steps in Independence Referendum Set Out', 28 June 2022

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UK General Election as a 'de facto' referendum on the 'single question' of whether Scotland should be independent. Although such a strategy has had some past uses (such as when Sinn Fein regarded its overwhelming 1918 General Election victory as providing a mandate to issue its Declaration of Independence) its efficacy has also been doubted by some, including SNP members, and future SNP independence strategy appeared itself clouded, when Nicola Sturgeon herself resigned, in February 2023, to the surprise of many, and Hamza Yousaf was elected SNP leader, and Scottish First Minister.

It has also been argued that, absent any s30 order, the Scottish Government might make a unilateral declaration of independence. Such declarations are not illegal under international law, as was recognized by the 2010 *Advisory Opinion* of the ICJ in the case of Kosovo.[204] However, there is no absolute guarantee a UDI would receive recognition by international community, and indeed, Kosovo did not receive recognition by all countries. The consequences of proclaiming independence in a context viewed as illegal by the central State have been painfully obvious, given the custodial sentences of key Catalonian politicians who proclaimed independence. A further argument has been that SNP members in Westminster might use organized parliamentary obstruction – that is, filibusters, countless amendments, challenges to chairs, and nominations to committees – to hold up matters in the House of Commons. Such tactics were used by Charles Stewart Parnell in the late nineteenth century when arguing for Irish Home Rule,[205] although did not achieve Home Rule, which was successively blocked at Westminster.

However, and more broadly, as Joanna Cherry KC MP has suggested, there are clear advantages to taking the 'wider constitutional context'[206] of Scotland–England relations into account, rather than focussing solely on the issue of whether the Scottish Parliament has the power to hold an independence referendum under a devolution settlement barely 25 years old. The constitutional relationship between England and Scotland was founded on the Treaty of Union, a consensual Union concluded between two sovereign States, which established the United Kingdom of Great Britain. Under this Union, Scotland continued with its own separate civic institutions, legal system, church and cultural heritage. This indicates that Union is a continuing agreement between two independent nations.

Indeed, a separate intervenor brief[207] was submitted by the SNP to the Supreme Court case, which made additional arguments based on the right

[204] 'Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo', 22 July 2010, ICJ 141.

[205] M Keating, 'Parnell's Lessons for Scottish Nationalism in Westminster and Beyond', 25 July 2018, available at www.centreonconstitutionalchange.ac.uk/opinions/parnells-lessons-scottish-nationalism-westminster-and-beyond

[206] J Cherry, 'Here's the Facts on the Scottish Independence Case at the UK Supreme Court', *The National*, 13 October 2022.

[207] Available here: www.snp.org/the-snps-supreme-court-submission-on-the-independence-referendum/

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of the Scottish people to self-determination, and to democracy. These arguments were dismissed by the Supreme Court, which held that the right to self-determination was not at issue. However, the right to self-determination should not be dismissed so quickly. It is a fundamental and inalienable right, located in Article 1 UN Covenant, and, although this Covenant has not been incorporated into domestic law, the SNP brief argued that UK statutes (such as the 1998 Scotland Act) should be interpreted compatibly with the UK's international law commitments. Many UK Prime Ministers and politicians, including Margaret Thatcher, have acknowledged that the Union is a voluntary one, and that Scotland has a right to self-determination. Therefore, through its own conduct over many years, the UK Government has generated an expectation allowing for independence in principle. This situation clearly distinguishes the UK from States such as Spain, Article 2 of whose Constitution declares 'the indissoluble unity of the Spanish nation', or the US, whose Supreme Court in 1868, in *Texas* v. *White,* held that there was no right to state secession.[208]

Furthermore, as the UK Supreme Court itself acknowledged in *Miller/Cherry* 'The legal principles of the constitution are not confined to statutory rules, but include constitutional principles developed by the common law'. Democracy is a key constitutional principle, and yet the UK Government has undermined democracy by ignoring the SNP's 2021 manifesto pledge and its endorsement by the Scottish people, as well as the January 2020 Scottish Parliament vote for an independence referendum.

These points based on self-determination and democracy may be supplemented by legal arguments based on consent, change of circumstances and the requirement to negotiate in good faith. Together, these arguments make a case that the UK Government's refusal to negotiate the independence issue with Scotland is unreasonable. To be sure, such arguments must be supported by evidence that the Scottish people desire to exercise their right to self-determination and leave the Union. If this were not so, the Scottish Government would itself be violating the principle of democracy. The clearest way to demonstrate this would be by a referendum on independence, and that is why referendums have been the focus of so much discussion to date. But its existence could be demonstrated in other ways, such as at a General Election.

Indeed, Scotland is in a constitutionally frustrating and somewhat anomalous position. The Union is acknowledged to be voluntary and not forced, and Scotland's right to self-determination has been stressed, including by UK Government ministers. And yet, without UK political support, it is difficult to see how Scotland's rights can be exercised. And so, the issue of Scottish independence is not dead, just as the issue of Irish independence was not forgotten when successive Irish Home Rule Bills failed in Westminster in the nineteenth

[208] *Texas* v. *White*, 74 U.S. 700 [1868].

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century. But the issue perhaps moves to a broader legal, political and constitutional stage, one with a longer history than the Devolution Acts.

1.14 Contrasting Views

This chapter has revealed different understandings of British Constitutional law to be at issue. One unitary view, that of the UK Government, argues that parliamentary sovereignty requires that final authority remains with Westminster, leaving Scottish claims a moral and political, but not legal force. A contrasting view interprets the Acts of Union as a pact between two States, dependent on consent. It identifies a conception of popular, rather than parliamentary, sovereignty that applies in Scotland. It might however be questioned whether the claim to popular sovereignty is actually an enforceable claim? If so, Scotland should be able to exercise that right and should not depend on the permission of the UK Parliament to do so. But it is harder to identify a legally recognized right of Scotland to self-determination in the UK Constitution, although there exists no UK prohibition on secession, nor unlike Article 2 Spanish Constitution, any stipulation of the unity of the State.

For all the talk in 2014, of the potential for the Scottish Parliament to become 'the most powerful devolved parliament in the world', the UK is not a federal State in the sense of having legally guaranteed powers granted to the devolved authorities. It also has no legally guaranteed shared powers, as is the case in many federal States (and given the disparity in size between England and the other devolved nations, conceiving how shared powers might function is problematic). This concentration of sovereignty in Westminster presents a problem when a devolved nation takes a different view on Brexit, as Scotland has done, and cannot then protect its interests. Brexit has brought these issues into sharp focus, without however suggesting any solution.

Indeed, Brexit has been allowed to compress parliamentary sovereignty into an executive sovereignty that, by imposing a uniform approach, threatens the UK Union. There is little evidence that Brexit will provide a 'constitutional moment' in which a common solution will be found to these constitutional conundrums. It seems unlikely that a federal UK or written Constitution will emerge, however much new constitutional arrangements are needed. Advocates of Scottish independence, or a united Ireland, have little enthusiasm for an arrangement that would entrench them in the UK, even if it provided authoritative procedures protecting different national communities within the State. And those satisfied with Brexit are unlikely to desire a written Constitution or federal option, given that a desire for strong parliamentary sovereignty motivated their Euroscepticism in the first place.

However, even if Scotland were to become independent, then what remained of the UK Union (rUK) would be an irregular assemblage of England, Wales and Northern Ireland (if Northern Ireland remained in the Union). What

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would be the basis of that Union? A study of Scotland has revealed that the somewhat adventitious approach to Union reaches its limits when it is revealed to be detrimental to the interest of one of the parties (usually the weaker one). Given the somewhat ad hoc way in which devolution has developed to date, there has been no attempt to address Britain's constitutional status in a more principled way. Whether Scotland remains in the Union or not, there is an urgent need for a constitutional rethink and restructure.

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